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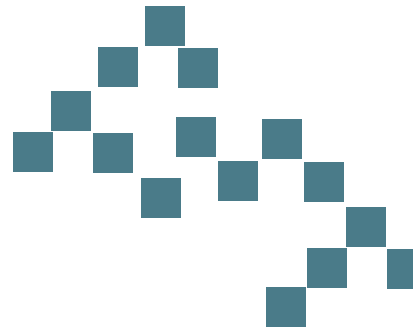

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TABLE OF CONTENTS

REVIEW OF EUROPEAN AND COMPARATIVE LAW
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APPLICATION OF THE GENERAL CLAUSE OF REASONABLENESS AND CRITERION OF RATIONALITY IN POLISH TAX LAW

*Monika Münnich**

ABSTRACT

This paper's objective is to present two methods of introducing elements of the civil general clause of reasonableness into tax law. One of them is the lawmaking process, the other is the application of law, i.e. the decisions of tax authorities and the jurisprudence of national administrative courts.

Keywords: general clause reasonableness, rationality, tax avoidance, tax deductible costs

1. INTRODUCTION

In some areas of legal norms of European law a new clause of reasonableness has been frequently encoded since the early eighties of the twentieth century. This clause is derived from traditional equity general clauses developed in the common law system[1]. A characteristic feature of the clause of reasonableness or, in other words, of practical rationality

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[1] Vide: Ewa Rott-Pietrzyk, "Holenderska klauzula rozsądku i słuszności na tle innych uregulowań prawnych (wzór dla polskiego ustawodawcy?)," *Przegląd Prawa Prywat-*

is the lack of direct reference to the universal moral and ethical criteria and values typical of *bona fides*, such as honesty and mutual trust, diligence, truth and equity[2]. This clause refers to ethically coloured rationality, or more precisely to the measure, which is the most effective conduct according to the current state of knowledge, aimed to achieve specific results, considering moral values, and thus what is fair in certain circumstances. According to some representatives of Polish civil literature in case of clauses of reasonableness, as opposed to traditional equity clauses, the reasonableness criterion allows for an objective assessment of contractual integrity, especially with regard to the objective reconstruction of the catalogue of obligations incumbent on the parties, enabling them to balance mutual interests[3]. It is also asserted in this literature that the clause of reasonableness can be said to be a "place and time" clause understood socially, because reason is what everyone believes to have to an appropriate degree[4].

It seems that the first legal act in which the general clause of reasonableness was applied was the Vienna Convention of 1980 on contracts for the international sale of goods[5]. However, it should be noted that the criterion of reasonableness had already appeared in the Hague Convention of 1964[5]. This clause is also reflected in the Principles of European Contract Law,

nego, no. 3 (2006): 57–101; Andrzej Bierć, *Zarys prawa prywatnego. Część ogólna* (Warsaw: Wolters Kluwer 2018), 44, 50 and 71.

[2] C.f.: Krzysztof Amielańczyk, "W poszukiwaniu antycznej genezy klauzul generalnych, czyli o wartościach i wartościowaniu w prawie rzymskim," *Annales Universitatis Mariae Curie-Sklodowska Lublin-Polonia*, no. 2 (2016): 32.

[3] The possibility of dichotomous recognition of good faith in an objective and subjective aspect is raised as a defect in national literature. Vide: Kazimierz Piasecki, *Kodeks cywilny. Księga pierwsza. Część ogólna. Komentarz* (Warsaw: Wolters Kluwer, 2003); Małgorzata Pyziak-Szafnicka, "Komentarz do art. 7," in *Kodeks cywilny. Komentarz. Część ogólna*, eds. Małgorzata Pyziak-Szafnicka, and Paweł Księżak (Warsaw: Wolters Kluwer, Lex 2014).

[4] Andrzej Bierć, *Zarys prawa prywatnego. Część ogólna*, 105–106.

[5] This convention uses the term a reasonable person, vide: Ewa Rott-Pietrzyk, "Pojęcie rozsądku w projekcie Europejskiego Kodeksu Cywilnego," in *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, eds. Wojciech Popiołek, Leszek Ogiegła, Maciej Szpunar (Cracow: Zakamycze, 2005), 706.

which constitute the stem of the European Civil Code[6] and in the Rules of International Trade Agreements, UNIDROIT[7]. All these documents contain the key phrases characteristic of reasonable clauses: reason, reasonable time or a reasonable person[8]. Definitely the biggest supporters of introducing general clauses based on the criterion of reasonableness and equity into the European Union legal system are the Dutch – the creators of the Dutch Code of Civil Law, from which in 1992 they definitively deleted the general clause good faith. As a result of these legislative changes in Dutch contract law, in case of interpretation of declarations of will, the basic evaluation standard is currently the model of a reasonable and honest man (reasonably prudent person) whose conduct should be protected (reasonable person test)[9]. The new general clause is closely connected with the so-called New

[6] The Principles Of European Contract Law 2002 (Parts I, II, and III) European Union, (PECL), https://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/ (access date: 3.07.2019). See more widely: Ewa Rott-Pietrzyk, "Pojęcie rozsądku w projekcie Europejskiego Kodeksu Cywilnego," 701–718.

[7] Interpretation of Statements and Other Conduct z 1994. See more widely e.g.: Monika Pacocha,"Zastosowanie zasad międzynarodowych kontraktów handlowych UNDROIT jako ogólnych zasad prawa oraz lex mercatoria," https://repozytorium.amu.edu.pl/bitstream/10593/13559/1/14_PACOCHA.pdf (access date: 3.07.2019).

[8] Vide: art. 4.2. Interpretation of Statements and Other Conduct, 1994: 1. The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention. 2. If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances. Similarly, see: 1:302 PECL: Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account.

[9] Cf.: Ewa Rott-Pietrzyk, "Wzorzec rozsądnej osoby w świetle Konwencji wiedeńskiej o umowach międzynarodowej sprzedaży towarów," *Rejent*, no. 9 (2005): 202–222; Ewa Rott-Pietrzyk, "Pojęcie rozsądku w projekcie Europejskiego Kodeksu Cywilnego", 705; Andrzej Bierć, *Zarys prawa prywatnego. Część ogólna*, 106; Natalia Bukowska, "Klauzula rozsądku w anglosaskim prawie ubezpieczeniowym oraz Restatement of European Insurance Contracts", https://docplayer.pl/7021643-Klauzula-rozsadku-w-anglosaskim-prawie-ubezpieczeniowym-oraz-restatement-of-european-insurance-contracts.html (access date: 4.07.2019).

European Legal Culture, whose main characteristics is to deny the legitimacy of contemporary reference not only to the values associated with Europe's Judeo-Christian roots, but above all to the tradition and culture of the *ius romanum*[10].

In Polish private law, the general clause of reasonableness has been regulated so far in several provisions of the Civil Code[11]. According to some representatives of the literature, the introduction of clauses based on a reasonable criterion to international, European and national provisions is part of the humanisation of contractual civil law, as it has unduly restricted the favored principle of safety of trade at the expense of its participants' interests[12].

2. REASON - STRUCTURAL COMPONENTIN THE PROVISIONS OF GENERAL TAX LAW

In current Polish tax law regulations, the typical assessment criteria for the clause of reasonableness, such as reason and rationality, are included in

[10] See more widely on reducing the influence of Roman law on new codifications and institutions in civil law: Stephanie Law, "From Multiple Legal Cultures to One Legal Culture Thinking About Culture Tradition and Identity in European Private Law Development," *Utrecht Journal of International and European Law*, no. 31 (2015): 68–89, http://doi.org/10.5334/ujiel.dg (access date: 4.07.2019); Martijn W. Hesslink, *The New European Private Law* (Deventer: Wolters Kluwer, 2001); Pier Giuseppe Monateri, Tomasz Giaro, Alessandro Somma, *Le radici comuni del diritto europeo. Un cambiamento di prospettiva* (Rome: Carroci Editore, 2005). See also: Wojciech Dajczak, *Dobra wiara jako symbol europejskiej tożsamości prawa* (Poznań: Wydawnictwo Świętego Wojciech, 2006).

[11] In Polish regulations, the criterion of reasonableness was normalized impersonally using such legal phrases as: reasonable time, reasonable assessment, reasonable kontent in art. 561 § 2; art. 7602 § 2; art. 7602 § 3; art. 761 § 2 i art. 7611; art. 948 § 2 of the Act on the Civil Code of 23 April 1964, Journal of Laws 2019, item 1145, as amended. These provisions regulate the interpretation of a will that allows the testator's orders to be upheld and give them reasonable content. In the personal form, however, the reasonableness clause was also regulated in art. 84 § 2 of the Civil Code, i.e. in the provisions regarding the determination of the significance of an error as a defect in a declaration of intent in which the expression occurs, assessed the case reasonably.

[12] C.f.: Ewa Rott-Pietrzyk, "Pojęcie rozsądku w projekcie Europejskiego Kodeksu Cywilnego," 707.

the provisions of the Tax Ordinance. The first one (reason) was introduced into this Act along with the so-called anti-tax avoidance clause[13], and it can be found in the following provisions:

1. an appropriate conduct is one that an entity could under certain circumstances be engaged in, if it was conducted reasonably and was guided by lawful purposes other than gaining tax advantage contrary to the object or purpose of the Tax Act or its provision, and the mode of conduct would not be artificial[14],
2. the mode of conduct is not artificial, if on the basis of existing circumstances it should be assumed that an entity, acting reasonably and legally, would use this mode of conduct predominantly for clearly justified economic reasons[15];
3. the assessment that the mode of conduct was artificial may be provided in particular by the occurrence of:… economic risk exceeding the expected non-tax benefits to such an extent that it should be considered that this conduct would not have been chosen by a reasonably operating entity[16].

It should be added that the normative model on which the Polish legislator relied directly was the British anti avoidance general clause, referring to the notion of reasonableness[17].

Apart from the provisions applicable since 2016, the expression of reasonableness (referring to circumstances and conditions) was used in regulations added to the new tax provisions governing so–called additional liability. Under these provisions: the assessment that the taxpayers acted in good faith can be proved by the fact that they did not run any business

[13] Vide: Section IIIa The Act on the Tax Ordinance of 29 August 1997, Journal of Laws 2019, item 900 as amended. The section was introduced by the Act on the amending the Act – Tax Oridnance and some other acts of 13 May 2016 Journal of Laws 2016, item 846 as amended.

[14] Vide: art. 119a § 3 of the Tax Ordinance.

[15] Vide: art. 119c § 1 of the Tax Ordinance.

[16] Vide: art. 119c § 2 pkt 5 of the Tax Ordinance.

[17] Vide: Monika Münnich, "Eelemnty cywilistycznej klauzuli generalnej rozsadku w polskim prawie podatkowym," in *Prawo podatkowe w systemie prawa. Międzygałęziowe związki norm i instytucji prawnych*, eds. Aneta Kaźmierczyk, and Agnieszka Franczak (Warsaw: Wolters Kluwer, 2019), 137–138.

at all, or in a limited scale. Therefore, it could not be reasonably expected that in relation to the conduct the decision concerned, which is referred to in section 1 of this paper, the taxpayer will need any professional advice on tax consequences. Additionally, the criterion of reason has also been found in the provisions regulating the institution of tax schemes[18] since 2018, it reads:

1. (...) on the basis of existing circumstances, it should be assumed that a reasonably functioning promoter or beneficiary to whom the obligations provided for in the provisions of this chapter would not apply, would like at least one of the obligations set out in separate provisions of this Act to be actually respected[19],
2. the main benefit criterion is considered to be met if, on the basis of existing circumstances and facts, it should be assumed that an entity acting reasonably and with lawful purposes other than achieving tax benefit could legitimately choose other rules of conduct which would not involve a reasonable tax benefit expected or resulting from the implementation of the agreement, and the tax benefit is the main or one of the main benefits that the entity expects to receive in connection with the implementation of the agreement[20].

In all provisions of the Tax Ordinance, a characteristic of the clause of reasonableness, evaluative and indeterminate expression – reason – was used primarily in relation to a reasonable person, with the focus on the aforementioned basic evaluation standard, i.e. the model of a reasonable and honest man. Undoubtedly, the judgment criterion of reason used in the provisions creates for the legal interpreters, who construct the operative interpretation (i.e. tax authorities and administrative courts), a platform for dynamic interpretation. This is even more important because the common feature of these provisions is their anti-abusive nature.

[18] Vide: Sectio III, Chapter 11a of the Tax Ordinance.
[19] Vide: art. 86a § 1 pkt 6 letters a-c and letter k of the Tax Ordinance.
[20] Vide: art. 86a § 2 of the Tax Ordinance.

3. CRITERION OF RATIONALITY AND REASON IN THE INTERPRETATION OF PROVISIONS REGULATING TAX DEDUCTIBLE COSTS

The criterion of reasonable or rational conduct of the taxpayer is a completely different issue related to the legal structure, that is to tax deductible costs. This institution is normalized in two acts regulating both *individual* and *corporate income tax*. According to their content, tax deductible costs are the costs incurred to receive revenue from a revenue source or to maintain or secure a source of revenue, except for the costs listed in separate regulations[21].

The language interpretation of the provisions cited leads to the conclusion that the condition for recognizing a certain expense as tax-deductible is the existence of two combined circumstances, in which:

– expenditure incurred should be made in order to generate and maintain or secure a source of revenue, and
– the expenditure incurred cannot be included in the negative catalogue, comprising non-deductible expenses[22].

Unfortunately, provisions regulating the legal definition of tax deductible costs are not correctly and unequivocally formulated, which contributes to the fact that taxpayers who have the basic and widest scope of responsibility for their correct interpretation have had (from the moment this institution started to function in tax law, i.e. in 1991 and 1992) numerous problems with their observance and correct application[23].The range of tax-

[21] Vide: art. 15 point 1 the Act on Corporate Income Tax of 15 February 1992, Journal of Laws 2017, item 2343 as assesmend and art. 22 point 1 the Act on Personal Income Tax of 26 July 1991, Journal of Laws 2018, item 200 as assesmend.

[22] This interpretation is confirmed by judicial decisions vide, e.g.: Provincial Administrative Court in Lublin, Judgment of 21 November 2018, Ref. No. I SA/Lu 534/18, reported in: LEX No. 2597373; Supreme Administrative Court, Judgment of 13 November 2018, Ref. No. II FSK 3366/16, reported in: LEX No. 2595528.

[23] As a legal definition, the normative construction of tax deductible costs is also considered by: Magdalena Kowalska, and Paweł Borszowski, "Podejmowanie działalności gospodarczej a definicja kosztów podatkowych," *Prawo i Podatki*, no. 2 (2009): 7–12; Magdalena Kowalska, and Paweł Borszowski, "Racjonalność a pozorność w definicji kosztów podatkowych," *Prawo i Podatki*, no. 10 (2008): 7–10; Paweł Borszowski, "Racjonalność i celowość w nowej definicji kosztów podatkowych – glosa do wyroku Naczelnego Sądu Administracyjnego z 18.11.2005 r. (II FSK 182/2005)", *Glosa*, no. 2 (2008): 118–124; Pa-

payer's liability in determining tax deductible costs is all the more difficult to clarify that the analysis of case law and literature indicates at least three directions for interpreting the title legal concept. First of all, both in jurisprudence and individual tax interpretations, and also in literature, the institution of tax-deductible costs is recognized as a general clause[24].

weł Borsdzowski, *Określenia nieostre i klauzule generalne w prawie podatkowym*, (Warszawa, Wolters Kluwer: 2017), 27; Paweł Borszowski, "Koszty uzyskania przychodów - pomiędzy elastycznością a definiowaniem," in *Dny práva 2016 - Days of law 2016. Část 2, Rekodifikace daní z příjmů: (90 let od Englišovy danové reformy)*, eds. Petr Mrkývka, Damian Czudek, Jiří Valdhans, (Brno: Masarykova univerzita, 2017), 71–80; C.f. judgments e.g.: Provincial Administrative Court in Poznań, Judgment of 26 Juny 2012, Ref. No SA/Po 216/12, reported in: CBOSA; Supreme Administrative Court in Warsaw, Judgment of 13 November 2018, Ref. No. II FSK 3194/16, reported in: LEX No. 2588096; Provincial Administrative Court in Warsaw, Judgment of 21 December 2014, Ref. No. SA/Wa 695/14, reported in: CBOSA and see tax interpretations: individual interpretation of the Director of the Tax Chamber in Warsaw of 14 December 2015, No. IPPB1/4511-1035/15-2/AM, changed by individual interpretation of 13 December 2016, No. DD9.8220.2.204.2016.JPQ, https://sip.mf.gov.pl (access date 19.03.2019); see also e.g. individual interpretation of the Director of the National Treasury Information of 2 December 2018, No. 0111-KDIB2-3.4010.348.2018.1.APA, https://interpretacje-podatkowe.org/koszty-uzyskania-przychodow/0111-kdib2-3-4010-348-2018-1-apa (access date: 19.03.2019).

[24] C.f. Supreme Administrative Court, Judgment of 12 May 2016, Ref. No. II FSK 837/14, reported in: CBOSA; Provincial Administrative Court in Poznań, Judgment of 26 June 2012, Ref. No. SA/Po 216/12, reported in: CBSOA; Provincial Administrative Court in Wrocław, Judgment of 16 August 2010, Ref. No. I SA/Wr 678/10, reprted in: CBOSA. See also: individual interpretation of the Director of the National Treasury Information of 2 May 2015, No. 0113-KDIPT2-1.4011.258.2018.1.KO, https://sip.mf.gov.pl (access date: 19.03.2019); individual interpretation of the Director of the Tax Chamber in Warszawa of 27 January 2009, No. IPPB1/415-1312/08-2/EC, https://www.ifirma.pl/blog/interpretacja-podatkowa-czy-zakup-okularow-korekcyjnych-jest-kosztem-firmy.html (access date: 8.02.2019). C.f.: Paweł Borszowski, *Działalność gospodarcza w konstrukcji prawnej podatku* (Warsaw: Wolters Kluwer , 2010), 171, 206, 263–263, 284, 288, 301; Dawid Michalak,"Pojęcie kosztu uzyskania przychodu w orzecznictwie sądów administracyjnych," June 30, 2020, http://www.money.pl/podatki/ip/cit/pojecie-kosztu-uzyskania-przychodu-w-orzecznictwie-sadow-administracyjnych/ (access date: 8.02.2019); Magdalena Jastrowicz,"Ciężar dowodu w zakresie kosztów uzyskania przychodów w podatku dochodowym od osób prawnych," in *Podatnik versus organ podatkowy*, ed. Paweł Borszowski, *Studia Finansowoprawne*, no. 2 (2011): 59; Robert Zieliński, "Koszty uzyskania przychodów z działalności gospodarczej osób fizycznych jako bariera rozwoju przedsiębiorców w Polsce – wybrane problemy," *Krytyka Prawa*, no. 5 (2014): 284; Leszek Klecz-kowski, "Definicja

Such extremely different qualifications of one legal structure by interpreters in the course of applying the law is not only a dogmatic problem. It concerns the effects and limits of the interpretation of law. The law interpreter may use different interpretative directives in case of legal material definition, and in case of provisions in the general clause referring to non-legal assessments and values. Such a dichotomous vision of the legal structure in question is contrary to the positivist concept of the rational legislator.

Referring to the definition of tax-deductible costs, it should be noted that, according to the intention of the legislator, in the current definition of the legal institution of tax-deductible costs, clear emphasis was placed on the fact that tax costs are only these costs the taxpayer incured in order to:

– generate revenue or
– maintain or secure the source of revenue

as long as they do not belong to the catalogue of negative expenses not qualified as tax deductible costs.

In both jurisprudence and tax publications, the following circumstances are most often indicated as conditions fulfilling the semantic scope of the normative expression "in order to":

1. the costs incurred by the taxpayer shall be related to the gained revenue and shall be definitive[25];

kosztów uzyskania przychodów jako klauzula generalna," *Kwartalnik Prawa Podatkowego*, no. 4 (2012): 23–36; Paweł Mikuła, "Zagraniczny podatek od towarów i usług jako przychód i koszt podatkowy," June 30, 2020, https://www.russellbedford.pl/o-nas/rb-biuletyn/item/1061-zagraniczny-podatek-od-towarow-i-uslug-jako-przychod-i-koszt-podatkowy.html (access date: 12.03.2019).

[25] Włodzimierz Nykiel, and Michał Wilk, "Komentarz do art. 15," in Monika Bogucka-Felczak, Tomasz Kardach, Edyta Klimek, Joanna Kordal, Ziemowit Kukulski, Adam Mariański, Tomasz Miłek, Włodzimierz Nykiel, Dariusz Strzelec, Mikołaj Turzyński, Michał Wilk, *Komentarz do ustawy o podatku dochodowym od osób prawnych*, eds. Włodzimierz Nykiel, and Adam Mariański, (Warsaw: ODDK, 2014), 344. See also: Provincial Administrative Court in Białymstok, Judgment of 19 May 2004, Ref. No. I SA/Bk 77/04, reported in: CBOSA.

2. there shall be a direct or indirect 'cause and effect' relationship between expences and revenue[26];
3. this relationship shall be properly (reliably) documented[27].

When assessing the relationship between expenditure and business activity, the taxpayer should assume that a potential cost may objectively contribute to generating revenue. In addition, it should be remembered that the taxpayer recognizing expenses as tax deductible costs has obvious benefits, because the tax base is reduced by this cost. Therefore, the taxpayer bears the material burden of proving that a certain expense is tax deductible. The taxpayer makes economic decisions, taking into account the economic risk and financial resources at his disposal to generate revenues.

This purposefulness of incurring tax costs is usually supplemented with other vague phrases, such as rationality or reasonableness, both in jurisdiction and in literature. It should be emphasized that such an assessment criterion referring to the economic area is not a new interpretative phenomenon. The identification of the taxpayer's purposeful performance

[26] C.f.: Adam Mariański, "Brak podstaw do stosowania cywilnoprawnego pojęcia związku przyczynowo-skutkowego jako przesłanki uznania kosztu podatkowego," *Przegląd Podatkowy*, no. 6 (2006): 13; Włodzimierz Nykiel, Michał Wilk, "Komentarz do art. 15," 344–346; Andrzej Gomułowicz, *Prawna formuła kosztu podatkowego* (Warsaw: Wolters Kluwer, 2016), 34–35. See also: Supreme Administrative Court, Judgment of 13 November 2018, Ref. No. II FSK 3194/16, reported in: LEX No. 2588096 and similar jurisprudence in the Supreme Administrative Court judgments in cases: II FSK 571/16, II FSK 911/16, II FSK 2609/15, II FSK 1438/06, II FSK 1755/06, II FSK 1405/07, II FSK 418/09, II FSK 462/11, II FSK 1484/15, reported in: CBOSA and Provincial Administrative Court in Białystok, Judgment of 14 November 2018, Ref. No. I SA/Bk 300/18, reported in: LEX No. 2585060; Provincial Administrative Court in Poznań, Judgment of 26 June 2012, Ref. No. SA/Po 216/12, reported in: CBOSA; Provincial Administrative Court in Lublin, Judgment of 21 November 2018, Ref. No. I SA/Lu 534/18, reported in: LEX nr 2597373.

[27] Vide: Włodzimierz Nykiel, and Michał Wilk, "Komentarz do art. 15," 354 and Supreme Administrative Court, Judgment of 2 December 1993, Ref. No. SA/Po 2020/93, reported in: CBOSA; Supreme Administrative Court, Judgment of 9 September 1994, Ref. No. III SA 30/94, reported in: CBOSA; Provincial Administrative Court in Rzeszów, Judment of 26 August 2014, Ref. No. I SA/Rz 521/14, reported in: CBOSA; Provinial Administrative Court in Lublin, Judgment of 21 November 2018, Ref. No. I SA/Lu 534/18, reported in: LEX nr 2597373. C.f. also Supreme Administrative Court, Judgment of 13 November 2018, Ref. No. II FSK 3194/16, reported in: LEX nr 2588096.

with rationality was already evident in court judgments in the second half of the nineties. Without doubt, both in judicial decisions and interpretations of tax authorities, as well as in literature, this interpretative trend is gaining momentum and, instead of examining the "purposefulness" of expenditure, courts and authorities more often analyse circumstances indicating, for example:

- rational[28] or irrational conduct of the taxpayer[29],
- rationality of conduct to generate revenue[30],
- rationality in incurring expenses[31],
- irrationality of conduct from an economic perspective[32],
- compliance with the principles of rational reasoning[33],
- using reason in deducting expenses[34],

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[28] C.f Supreme Administrative Court, Judgment of 9 September 1994, Ref. No. III SA 30/94, reported in: *Monitor Podatkowy*, no. 1 (1995): 18; Provincial Administrative Court in Poznaniu, Judgment of 26 June 2012, Ref. No. SA/Po 216/12, reported in: CBOSA.

[29] C.f. Supreme Administrative Court, Judgment of 3 December 2009, Ref. No. III FSJ 1019/08, reported in: CBOSA; indiwidual tax interpreation of the Director of the Tax Chamber in Warszawa of 12 April 2012, No IPPB3/423-35/12-2/GJ, https://www.rp.pl/Podatek-dochodowy/303239998-Koszty-uzyskania-przychodu-fiskus-nie-moze-kwestionowac-racjonalnosci-wydatkow.html (access date 15.03.2019).

[30] Vide: Provincial Administrative Court in Wrocław, Judgment of 28 January 2011, Ref. No. I SA/Wr 229/10, reported in: CBOSA.

[31] Vide: Provincial Administrative Court in Warszawa, Judgment of 23 July 2004, Ref. No. III 949/03, reported in: CBOSA; Provincial Administrative Court in Olsztyn, Judgment of 21 August 2008, Ref. No. I SA/Ol 273/08, reported in: CBOSA; individual tax interpretaion of the Director of the National Treasury Information of 13 August 2018, No. 0114-KDIP2-2.4010.257.2018.1.SO, https://sip.mf.gov.pl/faces/views/szczegoly/szczegoly-interpretacji-indywidualnej.xhtml?dokumentId=537837&poziomDostepu=PUB&indexAccordionPanel=-1#tresc (access date: 15.05.2019).

[32] Vide: Provincial Administrative Court in Lublin, Judgment of 29 November 2004, Ref. No. I SA/Lu 234/04, reported in: CBOSA.

[33] C.F.: Supreme Administrative Court, Judgments of: 3 December 2009, Ref. No. III FSJ 1019/08; 7 June 2011, Ref. No. II FSK 462/11; 23 October 2012, Ref. No. II FSK 946/11; 27 February 2013, Ref. No. II FSK 1391/11; 19 August 2016, Ref. No. II FSK 1923/14, reported in: CBOSA.

[34] Vide i.g.: Supreme Administrative Court, Judgments of: 9 February 2001, Ref. No. I SA/Gd 1367/98 and 17 June 2003, Ref. No SA/Bd 1818/01, reported in: CBOSA.

- rationality and economic justification of expenses related to business operations[35].

It should be noted that both concepts of rationality and reason are not standardised in provisions regulating the content of tax-deductible costs. These are typical expressions in literature, so called estimated returns of economic provenance, the purpose of which is to enable an individual assessment of the taxpayer's operation in a particular situation. Both in judicial decisions and in tax interpretations, these semantic evaluation criteria used in various configurations: rational/ irrational expenditure, conduct or reason are generally not explained, so in consequence the interpreters are limited to their basic linguistic meaning.

As a rule, court judgments indicate that the rational conduct of an entrepreneur is understood as an activity performed on the basis of the state of knowledge the taxpayer had at the time of incurring the expenditure, taking into account the high probability of revenue[36]. Both tax authorities and courts, very often interpreting tax deductible costs as justified, consider only rationally and economically justified expenses and expenses related to the economic activity of the taxpayer who, by incurring them ("in order to") aims to gain revenue from this source. In the jurisdiction, it is asserted that the taxpayer should demonstrate this purposefulness of incurring expenditure, and above all, that the expenditure was incurred rationally, i.e. that the taxpayer in return for this expenditure, has actually

[35] Vide: individual tax interpretation of the Director of the Tax Chamber in Warszawa of 27 October 2010, No. IPPB3/423-500/10-2/JG, https://e-prawnik.pl/interpretacje-podatkowe/ippb3423-50010-2jg.html (access date 15.05.2019); individual tax interpretaion of the Director of the National Treasury Information of 13 September 2018, No. 0114-KDIP2-2.4010.257.2018.1.SO., https://www.podatki.biz/artykuly/koszty-uzyskania-przychodow-wydatki-refakturowane-przez-podmoty-wspolpracujace_14_39372.htm (access date: 15.05.2019). C.f. Provincial Administrative Court in Lublin, Judgment of 10 August 2017, Ref. No. I SA/Lu 380/17, reported in: CBOSA.

[36] Vide: Provincial Administrative Court in Warsaw, Judgment of 23 June 2009, Ref. No. III SA/Wa 460/09; Supreme Administrative Court, Judgment of 14 August 2003, Ref. No. SA/Bd 1627/03, both avilable on: CBOSA; Provincial Administrative Court in Olsztyn, Judgment of 21 December 2007, Ref. No. I SA/Ol 534/07, reported in: LEX No. 39954.

obtained certain goods and that they could rationally or at least hypothetically generate revenue[37].

The analysis of cited legal judgements clearly indicates that the judgemental and vague rationality criterion of conduct or reason, in incurring expenses, is interpreted by the courts through the prism of praxeology, i.e. the science of conscious and intentional human activity. This way of understanding the rationality of taxpayer's conduct actually directs the interpreting entity to an objective method of assessing taxpayer's conduct. In other words, the rationality of taxpayer's conduct is understood technically by national administrative courts. Rational conduct is the one, that takes into account the objective possibility of generating revenue or maintaining or securing the source of revenue.

Consequently, the question arises why in recent years tax authorities and courts, when assessing taxpayers' conduct and determining the scope of their responsibility regarding the amount and legitimacy of costs incurred, place such a considerable emphasis on issues related to the rationality of taxpayer's conduct and reasonableness in going to expenses.

It seems that there are several reasons that can be compressed to one conclusion, dangerous for the taxpayer and justified on fiscal grounds. The economic reality is becoming more and more complex and eluding traditional normative constructions containing a limited number of vague phrases, such as the definition of tax-deductible costs, which is quite hermetic and casuistic in comparison with other recent tax solutions. In consequence, it seems to be less and less applicable to the emerging new forms and economic correlations enabling the taxpayers to make progressive economic turnover.

Therefore, the entities making interpretations recognise that this literal content of the provisions indicates that the expense incurred "in order to achieve, maintain and secure…", should be made more flexible and should

[37] Zob.: individual tax interpretation of the Director of the Tax Chamber in Poznań of 22 November 2011, No. ILPB3/423-401/11-2/EK; individual tax interpretation of the Director of the National Treasury Information of 13 August 2018, No. 0114-KDIP2-2.4010.257.2018.1.SO; Voivodship Administrative Court in Lublin, Judgment of 10 August 2017, Ref. No. I SA/Lu 380/17, reported in: CBOSA.

be interpreted by means of more open meaningful terms referring to the area of rational, reasonable and economically justified taxpayer's conduct.

4. CONCLUSIONS

All things considered, it must be noted that the excessive use of the estimated returns with strictly economic origin in the interpretation of the legal definition of deductible costs can have far-reaching consequences for taxpayers. Without doubt, traditional normative constructions of tax law, typical of public law, have been undergoing fundamental transformation lately. This process involves absorbing and using autonomously solutions typical of private law. This phenomenon occurs bipolarly. Firstly, it takes place, as indicated in this paper, in a traditional way, i.e. in the process of tax law-making. Secondly, however, certain solutions typical of both private law norms and its legislation are transplanted into tax law in the course of its application. The best example of this procedure is the introduction of the civil law clause of good faith into the European VAT system by CJEU case – law.

It is predictable that in the near future it may turn out that the application of both judicial and administrative practice will contribute to the desirable legislative solution for purely pragmatic reasons. There may be such a change in the content of the regulations on tax costs, that the present legal definition will be replaced with a new normative construction based on the general clause of reasonableness. Under the existing jurisprudence doctrines, it can be assumed that the content of the new provisions could read as follows: tax deductible costs are reasonable and economically justified costs incurred to generate revenue from the source of revenue or to preserve, or secure the source of revenue. Undoubtedly, the proposed technical and legislative change would allow taxpayers or tax authorities, and courts to assess expenditure on the basis of purposeful or rather economic interpretation of the two essential expressions, i.e. reasonable and economic justification of the expenses incurred. However, such a change should be preceded by in-depth theoretical and legal research on the directions of interpretation of the clause of reasonableness, which is barely known in Poland.

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SCOPE AND EXERCISE OF THE EXCLUSIVE COMPETENCES OF THE MEMBER STATES OF THE EUROPEAN UNION

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ABSTRACT

The process of European integration has introduced the Member States into a new legal reality. The existing exclusivity in the area of competence implementation has been replaced by a two-stage model of their exercise. The Member States, when conferring part of their supervisory powers, did not specify the scope of their own competences. The so-called European clauses were analysed in the Constitutions of selected Member States, which showed that they define the recipient of the conferral and, in a non-uniform manner, specify the subject of the conferral. The analysis of the indicated provisions clearly shows that the Constitutions of the Member States exclude full conferral of competences on the European Union. There is no specification of the scope of competences that may be conferred. However, this issue was addressed by Constitutional Courts of the Member States. The article refers to the judgements of the German Federal Constitutional Court and the Polish Constitutional Court. It has been shown that they equate exclusive competences of the Member States with the scope of the concept of constitutional identity reduced to basic principles of the state. The Court of Justice of the European Union analysed the scope of competences of both entities. The article presents the analysis of judgements on: entries in Civil Registry regarding transcription of surnames, the issue of recognition of same-sex marriages, reform of the judiciary system in Poland, and the application of the Charter of Fundamen-

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tal Rights in the areas that do not fall under EU competence. Regardless of the division of competences, the EU is bound by the principle of respect for national identity of the Member States, including constitutional identity. It both obligates the EU to respect the exclusive competences of the Member States and is a premise restricting the achievement of EU objectives.

Keywords: European Union, exclusive competences, European clause, homogeneity clause, serious inconvenience

1. INTRODUCTION

The process of European integration is based on a special method of cooperation between the Member States and an international organisation, i.e. the European Union. The Member States that demonstrated their will to jointly achieve their goals, initially only economic, at a supranational level, delegated, in accordance with their constitutional order, a part of sovereign powers to the Communities, and ultimately to the European Union. The consequence of integration processes is the two-level exercise of the Member States' competences. The first level covers exclusive competences of the Member States that have not been conferred on the European Union. They are at the sole disposal of the Member States. The second refers to competences exercised jointly with other Member States at a supranational level, where the European Union institutions have their specific powers.

The subject of the analysis undertaken in this article is the scope and the exercise of the exclusive competences of the Member States. The issue of competence has been the subject of many scientific studies, however, they focus primarily on the scope of conferred competences and the manner in which they are exercised. The development of integration processes, in particular the activity of EU institutions (European Commission) and the sanctioning of such practice by the Court of Justice, shift the direction of interest towards analysis of the scope of exclusive competences of the Member States. Consequently, several issues will be discussed here.

Firstly, the author will address constitutional foundations of the conferral of competences to the European Union and the attempt to determine the scope of exclusive competences of the Member States from the perspective of the Constitutional Courts of the Member States.

Secondly, the rules for exercising the exclusive competences of the Member States from the perspective of European Union law will be discussed. The considerations will cover the issue of the principle of conferral and the discussion of selected judgements of the Court of Justice related to the analysed problem. In addition, the issue of the exercise of the exclusive competences of the Member States and the implementation of EU values will be considered.

2. THE BASIS FOR CONFERRAL OF COMPETENCES ON THE EUROPEAN UNION IN LEGAL REGULATIONS OF THE MEMBER STATES

Conferral of competences is a secondary act that is a consequence of the accession of the Member States to the European Union. The States expressed their will to accede, which meant that a specific scope of competences would be conferred on/entrusted to an international organisation.

2.1. The basis for conferral of competences of the Member States on the European Union

The basis for the accession of the Member States to the European Union are the so-called European clauses that are contained in the Constitutions of the Member States. They do not have a uniform wording and were introduced in different conditions. Basically there are two types of powers: general and specific. The first model, which also appears in the Constitution of the Republic of Poland[1], contains a general delegation to confer abstractly defined competences on an international organisation or an international body, without indicating a specific entity or scope of competence[2]. Similar solutions exist in the Constitution of the Czech Re-

[1] The Constitution of the Republic of Poland of 2 April 1997, Journal of Law 1997, No 78, item 483, as amended, Art. 90 „*The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters*."

[2] Krzysztof Wojtyczek, *Przekazanie kompetencji państwa organizacjom międzynarodowym, Wybrane zagadnienia konstytucyjn*e (Cracow: Wydawnictwo Uniwersytetu Jagiellońskiego, 2007), 121 ff.

public of 2001[3]. The founding countries, i.e. France, Germany, Italy and the Netherlands also acceded to the European Communities on the basis of a general authorisation relating to broadly understood international organisations. However, the Basic Law for the Federal Republic of Germany additionally introduced the condition that such organisation should work for the maintenance of peace and security.[4]

The second method refers to the Constitutions of the Member States that precisely indicated the European Union or the European Communities as the beneficiary of the conferred competences. As an example, it is worth referring to the provisions of the Constitution of the Slovak Republic. According to Art. 7 para. 2 „*The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Art. 120, para. 2*"[5].

A more extensive formula was adopted in Germany, France, Lithuania and Portugal.[6] Firstly, these countries amended their Constitutions by in-

[3] The Constitutional Act of the Czech National Council of 16 December 1992, The Constitution of the Czech Republic, Sbírka Zákonů České Republiky 1993 No. 1. Art. 10a (1) „*Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution*".

[4] Art. 24 of the Basic Law for the Federal Republic of Germany, as amended, December 28, 2019 https://www.btg-bestellservice.de/pdf/80201000.pdf .

[5] Art. 7 para. 2 of the Constitution of the Slovak Republic of 1 September 1992, Zbierka zákonov Slovenskej republiky 1998, No. 244, as amended, December 28, 2019 https://www.prezident.sk/upload-files/46422.pdf.

[6] Art. 7 para. 6 of the Constitution of the Portuguese Republic – „*Subject to reciprocity and with respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiarity, and with a view to the achievement of the economic, social and territorial cohesion of an area of freedom, security and justice and the definition and implementation of a common external, security and defence policy, Portugal may agree to the joint exercise, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union*". December 28, 2019 https://www.wipo.int/edocs/lexdocs/laws/en/pt/pt045en.pdf .

troducing detailed solutions regarding EU membership. The amendment to the Constitution of the Portuguese Republic, dictated by the opening of this country to integration processes, was related to the introduction of the provisions of Art. 7 para. 5 and 6 of the Constitution.[7] The first of these commits Portugal to „*reinforcing the European identity and to strengthening the European states' actions in favour of democracy, peace, economic progress and justice in the relations between peoples*".[8] Paragraph 6, on the other hand, refers directly to the issue of conferral of powers and stipulates that „*Subject to reciprocity and with respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiarity, and with a view to the achievement of the economic, social and territorial cohesion of an area of freedom, security and justice and the definition and implementation of a common external, security and defence policy, Portugal may agree to the joint exercise, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union*".[9]

As indicated above, Germany acceded to the European Communities by virtue of the general authorisation contained in Art. 24 of the Basic Law for the Federal Republic of Germany, according to which „*the Federation may, by a law, transfer sovereign powers to international organisations*". Then, in 1992, the provisions of Art. 23 of the Basic Law were added. They emphasise that the Republic of Germany cooperates in European integration and creates the European Union with other countries and, at the same time, they specify the political features to which the Union itself is subject, e.g. respect for the principle of democracy, the rule of law, social rule, federation, subsidiarity and ensuring fundamental rights at the level comparable to those contained in the Basic Law[10].

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[7] Anna Łabno, "Europeizacja Konstytucji Portugalii z 1979 r.," in *Europeizacja konstytucji państw Unii Europejskiej* (*Europeanisation of the Constitutions of the States of the European Union*), ed. Katarzyna Kubuj, Jan Wawrzyniak (Warsaw: Wydawnictwo Naukowe SCHOLAR, 2011), 241 ff.

[8] Art. 7 para 5 of the Constitution of the Portuguese Republic.

[9] Art. 7 para. 6 of the Constitution of the Portuguese Republic.

[10] „*With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To*

In France, under the amendment of 1992, Chapter XV "On European Communities and the European Union" was added. It stipulates in Art. 88 – 1 that „*The Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen by virtue of the treaties which established them to exercise some of their powers in common*".[11]

A very interesting solution was adopted in Lithuania. The prospect of joining the European Union resulted in the need to amend the Constitution in areas concerning the possibility and the scope of conferring powers on the European Union. After several years of work, it was decided to supplement the Constitution of the Republic of Lithuania with a Constitutional Act that, pursuant to Art. 150, is its integral part.[12] The indicated Act stipulates in point 1 that „*The Republic of Lithuania as a Member State of the European Union shall share with or confer on the European Union the competences of its State institutions in the areas provided for in the founding Treaties of the European Union and to the extent it would, together with the other Member States of the European Union, jointly meet its membership commitments in those areas as well as enjoy the membership rights*".[13]

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this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.", Art. 23 para. 1 of the "*Basic Law for the Federal Republic of Germany*". For more: Magdalena Bainczyk, *Polski i Niemiecki Trybunał Konstytucyjny wobec członkostwa państwa w Unii Europejskiej* (Wroclaw: E – Wydawnictwo Uniwersytetu Wrocławskiego, 2017), 51 ff.

[11] Art. 88-1 of the Constitution of the French Fifth Republic, December 28, 2019 https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constitution_anglais_oct2009.pdf. For more on the Europeanisation of the French Constitution, see: Katarzyna Kubuj, „Europeizacja konstytucji w świetle zmian Konstytucji V Republiki Francuskiej," in *Europeizacja konstytucji państw Unii Europejskiej* (*Europeanisation of the Constitutions of the States of the European Union*), ed. Katarzyna Kubuj, and Jan Wawrzyniak (Warsaw: Wydawnictwo Naukowe SCHOLAR, 2011), 99.

[12] Krzysztof Budziło, „Europeizacja Konstytucji Republiki Litewskiej," in *Europeizacja konstytucji państw Unii Europejskiej*, ed. Katarzyna Kubuj, and Jan Wawrzyniak (Warsaw: Wydawnictwo Naukowe SCHOLAR, 2011), 168–169.

[13] The Constitutional Act of the Republic of Lithuania on Membership of the Republic of Lithuania in the European Union of 13 July 2004, December 29, 2019

In conclusion, the Constitutions of the Member States contain different methods of conferral of competences on the European Union. First, the Constitution is the basis for conferral of some of the competences on an international organisation (Poland); second, the conferral of competences on the European Union (Slovakia) or third, joint exercise of some sovereign powers at the EU level, e.g. France, and fourth, conferral of sovereign powers with the obligation to implement certain principles at the EU level, e.g. Germany. The analysis of the indicated provisions clearly shows that the Constitutions of the Member States exclude full conferral of competence on the European Union, yet there is no specification of the scope of competences that may be conferred. However, this issue was addressed by Constitutional Courts of the Member States.

2.2. The scope of conferred competences from the perspective of Constitutional Courts of the Member States.

The analysis of the judgements of Constitutional Courts of the Member States indicates two periods. The first is related to defining the principles of application of EU law in national legal orders, and the second is devoted to the interaction between EU and national law, including in particular the issue of exclusive competences of the Member States.[14] Consistently, the considerations of the Courts focused on the scope of cooperation in the area of economic integration, which gradually expanded to areas belonging to the traditional exclusive prerogatives of the state. It is worth emphasizing that the broadening of EU competences has caused greater activity of Constitutional Courts in the sphere of protection of the exclusive competences of the Member States.

The analysis of the indicated issue should begin with the position of the German Federal Constitutional Court in the Maastricht judgement. The basic issue addressed in the case law was the scope of EU competences

https://www.lrs.lt/upl_files/Lietuvos_pirmininkavimas_ES/dokumentai/CONSTITUTIONAL_ACT.pdf.

[14] The author has broadly analyzed the indicated issue in: Edyta Krzysztofik, "Charakter prawa unijnego w orzecznictwie Trybunału Sprawiedliwości i sądów konstytucyjnych państw członkowskich," *Roczniki Nauk Prawnych* 24, no. 2 (2014): 7–30.

and the way they are exercised. The Federal Constitutional Court emphasized that the EU does not have creative capacity to establish its own competences. Under the provisions of their Constitutions, the Member States have conferred part of their powers on the EU. Therefore, it is the holder of competences, the scope of which is determined by the Member States. Recognizing the competence of the Court of Justice in the sole lawful interpretation of EU law, the Federal Court emphasized that „*it is indeed possible for an individual provision which accords functions or powers to be interpreted in the context of the objectives of the Treaty; however, this objective does not by itself constitute sufficient grounds for the establishment or extension of functions or powers*"[15]. In addition, it noted the distinction between „conferring" and „transferring". This indicates a conditional character; the possibility of a reverse action involving its withdrawal. The Court emphasized that „*Germany is one of the "High contracting parties" which have given as the reason for their commitment to the Maastricht Treaty, concluded "for an unlimited period" (Art. Q [51] TEU), their desire to be members of the European Union for a lengthy period; such membership may, however, be terminated by means of an appropriate act being passed*"[16]. In conclusion, the Member States provide the EU with competences established in the Treaty that constitute the exclusive scope of its activity. Their catalogue cannot be extended by the EU itself because it has no creative capacity. The scope of EU competences and the time when they are exercised depends on the will of the Member States.

Another group of judgements of Constitutional Courts have already directly affected the scope of the exclusive competences of the Member States, namely the problem of non-conferrable competences with the obligation to respect constitutional identity of the Member States. Two positions should be indicated in this group of judgements.

The first emphasizes conferral of competences on the EU with the proviso that it is not absolute, but its limits are provided for. However,

[15] German Federal Constitutional Court, Judgement of 12 October 1993: 31, December 28, 2019 https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf .

[16] German Federal Constitutional Court, Judgement of 12 October 1993: 21, December 28, 2019 https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf.

the limits are not specified, but reference is made to the general characteristics of the relationship between the EU and national legal orders.[17] K. Wójtowicz stated that, e.g. the Constitutional Court of the Czech Republic emphasized that defining the limits of conferral of competences „*is a political issue, which is essentially decided by the legislator, who in this case has a wide margin of discretion [...]. It (CC) can, however, review these decisions after they are actually taken at the political level. [...] The Constitutional Court can verify whether an EU legal act goes beyond the powers that the Czech Republic has conferred on the EU*"[18].

The second approach illustrates, among others, the position of the Polish Constitutional Court and the German Federal Constitutional Court. The Polish Constitutional Court, in the case of the Treaty of Lisbon[19], focused on the concept of national and constitutional identity, which is also the scope of the non-conferrable competence of the Member States. The Polish Constitutional Court emphasized that the term constitutional identity should mean the values on which the Constitution is based.[20] Thereby this delimits the area of exclusion from the scope of conferred competences in those fields that constitute the foundation and the basis of the Polish system. Działocha emphasizes that constitutional identity sets limits to "*exclusion from the conferral of matters belonging to [...] the "core" of cardinal foundations of a given state's system*"[21]. On the other hand, the scope of the non-conferrable competences, according to the Constitutional Court, includes: „*the supreme principles of the Constitution, provisions regarding the rights of an individual that determine the identity of the State, protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the rule of law, the principle of social justice, the principle*

[17] Krzysztof Wójtowicz, "Poszanowanie tożsamości konstytucyjnej państw członkowskich Unii Europejskiej," *Przegląd Sejmowy* 99, no. 4 (2010): 16.

[18] Krzysztof Wójtowicz, "Poszanowanie tożsamości konstytucyjnej państw członkowskich Unii Europejskiej," 16.

[19] Constitutional Court of the Republic of Poland, Judgement of 24 November 2010, Ref. No. K 32/09, Journal of Law 2010, No 229, item 1506.

[20] Cf.: Lech Garlicki, "Normy konstytucyjne relatywnie niezmieniane," in *Charakter i struktura norm Konstytucji*, ed. Jan Trzciński (Warsaw: Wydawnictwo Sejmowe, 1997), 148.

[21] Krzysztof Działocha, "Uwagi do art. 8 Konstytucji RP," in *Konstytucja RP. Komentarz* Vol.5, ed. Lech Garlicki (Warsaw: Wolters Kluwers, 2007), 34.

of subsidiarity, and the requirement to ensure better implementation of constitutional values and a prohibition of the delegation of constitutional power and powers to create competences"[22].

A similar position was taken by the German Federal Constitutional Court which stated that „*This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop in public discourse in the party political and parliamentary sphere of public politics. Essential areas of democratic formative action comprise, inter alia, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realization of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law or placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology*".[23]

3. SCOPE OF EXCLUSIVE COMPETENCES OF THE MEMBER STATES FROM THE PERSPECTIVE OF EUROPEAN UNION LAW

The Court of Justice has repeatedly emphasized that Member States have at least partly limited their sovereignty by conferring some of their powers on the European Union.[24] Consequently, it has the capacity to take legislative action only within the competences conferred on it by

[22] Krzysztof Działocha, "Uwagi do art. 8 Konstytucji RP," 34.

[23] Federal Constitutional Court, Judgement of 30 June 2009, case No. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09", p. 249.

[24] For more see: e.g.: Roman Kwiecień, *Suwerenność państwa, rekonstrukacja i znaczenie idei w prawie międzynarodowym* (Cracow: Zakamycze, 2004), 143–144; Stanisław Biernat, „Zasada pierwszeństwa prawa unijnego po Traktacie z Lizbony," *Gdańskie Studia Prawnicze*, no. 25 (2011): 49–61.

the Member States. This thesis was confirmed by the provisions of Art. 5 para. 2 of the Treaty on European Union[25] which states that „*Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*"[26] The competences were further divided into exclusive, shared and coordinating.[27] Therefore, there is no doubt that such defining of the types of competences indicates how those conferred on the European Union by the Member States are exercised. The initial action is to limit the sovereignty and equip the European Union with specific competences, which are then exercised as exclusive, shared or coordinating competences.[28] Separation of the competences of the European Union from those of the Member States was also reflected in the provisions of Art. 6 (1) TEU that refer to the scope of application of the provisions of the Charter of Fundamental Rights. It states that „*The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties*", and in Art. 51 (1) of the Charter itself, which clearly indicates that „*The provisions of this Charter are addressed to [...] the Member States only when they are implementing Union law*". In addition, provisions of the Charter do not extend the scope of application of European Union law beyond EU competences, do not establish new competences or tasks, and do not change the competences and tasks specified in the Treaties.[29]

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[25] The Treaty on European Union, OJ EU C 202 of 7 June 2016 (consolidated version, hereinafter: TEU).

[26] For more on the principle of conferral see: Tomasz Tadeusz Koncewicz, *Zasada jurysdykcji powierzonej Trybunałowi Sprawiedliwości Wspólnot Europejskich* (Warsaw: Wolters Kluwers 2009), 83–91.

[27] Art. 2 of the „Treaty on the Functioning of the European Union", OJ EU 202/47 of 7 June 2016 (consolidated version, hereinafter: TFEU).

[28] For more on EU competences and the principles of their exercise see: Artur Kuś, *Kompetencje wyłączne Unii Europejskiej w zakresie Wspólnej Polityki Handlowej i Unii Celnej* (Lublin, Wydawnictwo KUL, 2012), 64–81.

[29] For more see: Mirosław Wróblewski, "Karta Praw Podstawowych w polskim sądownictwie – problemy i wyzwania," *Krajowa Rada Sądownicza*, no. 2 (2015): 18 ff.; Andrzej Wróbel, "Komentarz do art. 51 Karty Praw Podstawowych," in *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, ed. Andrzej Wróbel (Warsaw: C. H. Beck, 2013), 1312 ff.

3.1. The exercise of the exclusive competences of the Member States from the perspective of the case law of the Court of Justice

The question here is whether the division of competences established in the Treaty means total freedom in exercising the exclusive competences of the Member States. The analysis of the case law of the Court of Justice in this respect indicates different situations. One may use as an example the position of the Court of Justice expressed in its extensive case-law on marital status files, namely the problem of transcription or conferral of surnames of migrant citizens. In the analyzed judgements concerning the problem in question the Court of Justice clearly emphasized that „[...] *the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law [...], in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States* [...]."[30] Therefore, there is no doubt that the Member States issue decisions on conferral of surnames in accordance with their own laws. However, according to the thesis cited, the manner of exercise of a given competence should take EU law into account. While referring directly to the competences in the field of Civil Registry Offices and conferral of surnames, as emphasized by the Court of Justice, this is the competence of the Member States, but it should be exercised taking into account the special situation of migrant citizens. There is no doubt that the subject matter directly affects one of the fundamental freedoms of the Internal Market, i.e. free movement of persons.

The crucial question that arises in the context of the exercise of the Member States' competences in the field of Civil Registry relates to the moment when the State excludes or restricts the free movement of migrant citizens. In its judgements on the issue the Court of Justice emphasized that the application of national provisions governing the issue of conferral of surnames or their recognition constitute a restrictive measure if they cause „serious inconvenience" for the migrant citizen. In the Court's opinion „[...] *a discrepancy in surnames is liable to cause*

[30] Cf.: e.g.: CJEU Judgement of 2 October 2003, Garcia Avello v. Belgian State, Case C 148/02, ECLI:EU:C:2003:539.

serious inconvenience for those concerned at both professional and private levels resulting from, inter alia, difficulties in benefiting, in the Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognized in another Member State of which they are also nationals".[31] Thus, if the refusal to recognize a surname causes serious difficulties in the sphere of public and private law, it constitutes serious inconvenience, which is a premise of applying a different rule than that arising from national provisions. However, the Court of Justice also provided for derogations in this situation by referring to the doctrine of imperative requirements, which may be invoked by the State in order to protect important state interests.

Another example is related to the exercise of the exclusive competences of the Member States regarding the fundamental value of the concept of marriage. The Court considered this problem in the Coman judgement.[32] The subject matter of the case was the possibility of obtaining the right to stay on the territory of Romania of a spouse of a migrant citizen of that country who entered into a same-sex marriage under Belgian law. Romanian law explicitly prohibits such relationships and, which seems very important from the perspective of the exclusive competences of the Member States, had introduced a legal definition of marriage as a relationship between a man and a woman. The Court of Justice recalled the above arguments as grounds justifying the need for a derivative right of residence. It emphasized the exclusive competence of the State, but its absolute exercise caused serious inconvenience in the exercise of the freedom of movement. It should be emphasized, however, that in this case the Court indicated that the scope of the right granted was limited only to residence matters. The Court of Justice did not find that the national law was incompatible with EU law, nor did it obligate Romania to amend its legislation regarding the recognition of same-sex marriages. However, it limited the effect of the provisions in the aforementioned case, but only in

[31] Cf.: CJEU, Judgement of 14 October 2008, Stefan Grunkin, Dorothee Regina Paul, Case C 353/06 ECLI:EU:C:2008:559.

[32] CJEU, Judgement of 5 July 2018, Relu Adrian Coman, Robert Clabourn Hamilton v. Instpectoratul General pentru Imigrari (Romania)", Case C 673/16, ECLI:EU:C:2018:385.

the sphere of the right to legal residence of a spouse who is a third-country national with the status of a family member of a migrant citizen.[33] There is no doubt that this case is an example of the impact of the Court of Justice on the exclusive competences of the Member States.

The issue of the exercise of the exclusive competences of the Member States was analyzed by the Court of Justice in case C 618/19[34] as well as in joined cases C-585/18, C-624/18 and C-625/18[35] that addressed the controversial matter of the structure of a national judicial system in the context of the Polish judicial reform. In the first of these cases, C 619/18, the Court emphasized that the organization of justice systems falls within the competences of the Member States, yet when exercising them they are still required to comply with their obligations under the Treaties (in this particular case the provisions of the CFR regarding the right to a fair trial). The Court of Justice expressly stated that „*[...] the Member States are required to comply with their obligations deriving from EU law [...] and, in particular, from the second subparagraph of Article 19 (1) TEU [...]. Moreover, by requiring the Member States thus to comply with those obligations, the European Union is not in any way claiming to exercise that competence itself , nor is it [...] arrogating that competence*".[36] In exercising their competences, the Member States must accept that in such a situation the Union verifies compliance with the standards it has set. Consequently, „*the Union imposes effective restrictions on the Member States in exercising their competences, combines a material and legal standard with a coercive mechanism*".[37]

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[33] For more see: Edyta Krzysztofik, "Gloss to Judgement of the Court of Justice of the European Union in Case C 673/16 Relu Adrian Coman, Robert Clabourn Hamilton v. Instpectoratul General pentru Imigrari (Romania)," *Przegląd Prawa Konstytucyjnego* 51, no. 5 (2019): 438.

[34] CJEU Judgement of 24 June 2019, European Commission v Republic of Poland (Indépendance de la Cour suprême)", Case C 619/18, ECLI:EU:C:2019:531.

[35] CJEU, Judgement of 19 November, A. K. v Krajowa Rada Sądownictwa, Case C-585/18 and CP v. Sąd Najwyższy, Case C-624/18 and DO v. Sąd Najwyższy, Case C-625/18, ECLI:EU:C:2019:982.

[36] Case C 619/18, p. 52.

[37] Paweł Filipek, "Nieusuwalność sędziów i granice kompetencji państwa członkowskiego do regulowania krajowego wymiaru sprawiedliwości – uwagi na tle wyroku Trybu-

The next judgement referred directly to the issue of judicial independence and violation of Art. 47 CFR. As indicated above, the CFR is binding on the Member States when they take measures to implement EU law and only within the scope of EU competence. Premises justifying reference to Art. 47 CFR should be considered from the perspective of the position of national courts in the structure of the EU justice system, which is characterized by systemic dualism. On the one hand, it includes the Court of Justice of the European Union, which has a well-defined jurisdiction expressed in the Treaties. On the other hand, it relies on the courts of the Member States, which are obligated to guarantee direct application of EU law in their national legal orders. The problem that has been consistently analyzed should be considered in two dimensions. Firstly, as the exclusive competence of the Member States in the organization of the justice system in terms of the structural approach. Secondly, it cannot be overlooked that when ruling under EU law, the national court becomes an 'EU court' as part of the EU justice system. Then it must meet the conditions defined by the Court of Justice itself.[38] Following the interpretation indicated above, the organization of justice systems is an exclusive competence of the Member States, but it cannot violate EU standards. In the discussed case, the Member States, when defining the organizational structure of the judicial system, exercise their exclusive competences, while the solutions adopted cannot violate EU standards, including the standard of judicial independence established by the Court of Justice. It should also be emphasized that the Court did not independently assess Polish solutions, but indicated the criteria for reviewing

nału Sprawiedliwości z 24.06.2019 r. C 618/18, Komisja Europejska przeciwko Rzeczypospolita Polska," *Europejski Przegląd Sądowy*, no. 12 (2019): 8.

[38] The issue of the definition of a national court was widely discussed in the judgements of the Court of Justice in the context of requests submitted for preliminary ruling. Cf. E.g.: Andrzej Wasilewski, „Pojęcie sądu w prawie polskim i w świetle standardów europejskich," in *Sąd Najwyższy wobec prawa i praktyki Unii Europejskiej*, ed. Walerian Sanetra (Wroclaw: Wydawnictwo Uniwersytetu Wrocławskiego, 2003), 9–46; Edyta Krzysztofik, "Pytanie prejudycjalne a praktyka sądów w latach 2004 – 2013," in *Wpływ acquis communautaire i acquis Schengen na prawo polskie – doświadczenia i perspektywy* Vol. I, ed. Anna Szachoń-Pszenny, (Lublin: Wydawnictwo KUL, 2014), 109–122; Dagmara Kornobis-Romanowska, *Sąd krajowy jako sąd wspólnotowy* (Warsaw: Wolters Kluwers, 2007).

the condition of independence of the national court, leaving the final decision to domestic courts.

A separate matter is cases where the Court of Justice excluded its own jurisdiction on the basis of lack of competence of the European Union. As an example, reference should be made to decision C 28/14 regarding a request submitted for a preliminary ruling by the Częstochowa District Court[39] in connection with the so-called „UB-eks Removal Act"[40]. The Court of Justice left the request without further procedural steps arguing its decision by lack of competence. It recalled the rules governing the application of the CFR provisions and emphasized that the domestic court had not demonstrated the connection between the facts and the implementation of EU law by the Member States, or EU competence in this respect.

3.2 The doctrine of imperative requirements and the exercise of the exclusive competences of the Member States

When undertaking the analysis of the possibility for Member States to exercise their exclusive competences, reference should be made to the provisions of Art. 4 para. 2 TEU, which, in addition to the principle of equality of the Member States, introduces the principle of respect for national identity „inherent in their fundamental structures, political and constitutional". Reference to this principle was made for the first time in the provisions of the Maastricht Treaty.[41] As emphasized above, this principle was

[39] CJEU Order of 12 June 2014, Ryszard Pańczyk v. Dyrektor Zakładu Emerytalno Rentowego Ministerstwa Spraw Wewnętrznych i Administracji w Warszawie", Case C 28/14, ECLI:EU:C:2014:2003.

[40] Act on Retirement Benefit for Police Officers, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Border Guard, the State Protection Service, the State Fire Service, the Customs and Tax Service, Prison Service and their Families. OJ 2019 item 288.

[41] For more on the evolution of the principle of respect for national identity of the Member States see: Edyta Krzysztofik, "The Position of the Principle of Respect for Constitutional Identity in EU Law," *Przegląd Prawa Konstytucyjnego* 40, no. 6 (2017): 158 ff.; Marek Rzotkiewicz, "National Identity as a General Principle of EU Law and Its Impact on

normalized together with the principle of equality of the Member States. This solution is not accidental. The assumption that all countries have the same position from the perspective of integration processes also entails the commitment that as the process progresses, they do not lose their identity in both the national and constitutional contexts. On the other hand, the key issue seems to be the impact of this principle on the application of EU law in the national legal order and on the exercise of the exclusive competence of the Member States. At this point a distinction should be made between these two situations. First, reference to the principle in question as a premise restricting the application of EU law. In this aspect, the element that is de facto indicated is the theory of imperative requirements, which is already well-established in the case law of the Court of Justice. In the second case, reference should be made to the principle of respect for national identity, namely one of its aspects, i.e. constitutional identity, as an instrument for protecting the scope of the exclusive competence of the Member States.

The doctrine of imperative requirements was proposed by the Court of Justice in the Cassis de Dijon case.[42] Its primary purpose is to safeguard a specific good protected by the law of a Member State. It is important to emphasize the nature of the good that is individually identified at the level of each Member State. The analysis of the judgements of the Court of Justice shows that it has repeatedly referred to the principle of respect for national identity as a premise of restricting the application of EU law. In its judgements the Court indicated individual elements that shape the definition of national identity in both ethical and institutional aspects.[43] The Court assumed, inter alia, that protection of the national language[44],

the Obligation to Recover State Aid," *Yearbook of Antitrust and Regulatory Studies* 13, no. 9 (2016): 48 ff.

[42] CJEU Judgement of 20 February 1979, Rewe-Zentral AG v. Budesmonopolverwaltung für Branntwein (Cassis de Dijon), Case C 120/78, ECR 0649.

[43] Reinhard Arnold, "Tożsamość narodowa i ponadnarodowa w Traktacie z Lizbony," in *Quo Vadis Europo III?*, ed. Eugeniusz Piontek, Krzysztof Karasiewicz (Warsaw: UKIE, 2009), 56–58.

[44] CJEU Judgement of 28 November 1989, Anita Groener v. Minister for Education in the City of Dublin Vocational Education Committee, Case C 379/87, ECR (1989): 3967.

cultural goods[45], commercial customs[46], human dignity[47] and fundamental rights[48] constitute grounds justifying the restriction of the freedoms of the Internal Market, provided that the principles of proportionality and non-discrimination[49] are observed.

A separate and a controversial issue is the assumption that the principle of respect for national and constitutional identity is a premise justifying protection of the exclusive competence of the Member States. It has been indicated above that Constitutional Courts identify the scope of non-conferrable competences with the notion of constitutional identity.[50] Guided by this interpretation, one should assume that the European Union has a double obligation to respect the scope of competence of the Member States: on the basis of the principle of conferral and the principle of respect for national identity of the Member States. It is worth emphasizing, however, that the principle of conferral is of general nature because it regulates the scope of competences that the Member States conferred on the European Union in the Founding Treaties. Therefore, it should be a catalogue to which all Member States have agreed under specific provisions of their own legislative acts. However, it seems that the principle of respect for national identity, including constitutional identity, should be perceived differently. The responsibility lies with the European Union and that is beyond doubt. However, the scope of the concept of constitutional

[45] CJEU Judgement of 26 February 1991, Commission of the European Communities v French Republic, Case C 154/89, ECR 1991, p. I-3265; CJEU Judgement of 26 February 1991, Commission of the European Communities v Italian Republic, Case C 180/89, ECR 1991, I-709; CJEU Judgement of 26 February 1991, Commission of the European Communities v Hellenic Republic, Case C 198/89, ECR (1991): I-727.

[46] CJEU Judgement of 23 November 1989, Torfaen Borough Council v. B&Q", Case C145/88 ECR (1989): 3851.

[47] CJEU Judgement of 14 October 2004, Omega Spielhallen und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn 1, Case C-36/02, ECR (2004): I-9609.

[48] CJEU Judgement of 12 June 2003, Eugen Schmidberger, Internationale Transporte und Plan- züge v. Republika Austrii, Case C 112/00, ECR (2003): I-5659.

[49] For more see: Edyta Krzysztofik, "Poszanowanie wartości narodowych przesłanką uzasadniającą ograniczenie swobód rynku wewnętrznego," in *Europa, zjednoczeni w różnorodności*, ed. Cezary Mik, (Warsaw: Wydawnictwo Sejmowe, 2012), 434–452.

[50] Cf.: The Constitutional Court of the Republic of Poland.

national identity will be different. It will be individually defined in specific cases. The European Union emphasizes that its value is the diversity of the Member States, which is why its preservation is possible only while respecting the specificity and individuality of each State. In this regard, it should be assumed that the principle of respect for national identity in this context will be activated when the exclusive competences of the Member States are violated.[51]

A separate issue is the possibility of applying the doctrine of imperative requirements when, in exercising its own competence, a Member State causes „serious inconvenience". As indicated above, it occurs when the State's activity affects the implementation of the objectives of the Treaties. It this context it is worth referring to the judgement of the Court of Justice in case C 208/*09 Ilonka Sayn-Wittgenstein*[52], where it emphasized that „*public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society*". In addition, it indicated that „*the specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty*". Each Member State has its own culture, history, tradition and defines its own superior values. Their specificity may affect the content of the restrictive premise. The Court also indicated that „*it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely*

[51] Marek Safjan, "Prawo Unii Europejskiej w porządkach prawnych państw członkowskich" („European Union Law in Legal Orders of the Member States"), in *Zarys prawa Unii Europejskiej (An Outline of European Union Law)*, ed. Roberto Adam, Marek Safian, Antonio Tizzano, (Warsaw, Wolters Kluwers, 2014), 232.

[52] CJEU Judgement of 22 December 2010, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Case C-208/09, ECR: 2010, I – 13693. The requests submitted to the Court of Justice referred to the interpretation of Art. 21 TFEU in the context of the Austrian regulations of constitutional status that abolished the nobility, associated privileges, titles and honours granted solely for distinction, not related to office, profession or scientific or artistic merits. In the discussed case Austria referred to the concept of public policy.

because one Member State has chosen a system of protection different from that adopted by another State".

3.3 Exercise of the exclusive competences of the Member States and the values of the European Union

Another issue that needs to be highlighted is the importance of the homogeneity clause and its impact on the exercise of the exclusive competences by the Member States. According to Art. 2 TEU, it obligates the Member States to respect the values on which the European Union is founded. They include „*respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*". Moreover, Art. 2 indicates the premises of interpretation of these values, i.e. „*These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*". The homogeneity clause assumes the existence of common values that are the axiological basis of the European Union itself and of all Member States. It should also be noted that the indicated catalogue refers in its content to documents of public international law, primarily to the Charter of the United Nations and the European Convention for the Protection of Human Rights and Fundamental Freedoms, which bind the Member States.[53] It is based on the achievements of European constitutionalism, which has been evolving since the eighteenth century. From this perspective, it should be assumed that Art. 2 TEU contains a catalogue of values that are the constitutional basis of each Member State, form the foundation and the binder of the entire European Union. At the same time, it forms the basis and sets the criteria, a unique test, which is relevant from the perspective of new countries seeking accession with the European Union. The homogeneity clause binds the Member States and the European Union itself. Consequently, every activity of the European Union and its institutions is undertaken while respecting the catalogue of

[53] For more on the homogeneity clause see: Robert Krzysztof Tabaszewski, "Dopuszczalność egzekwowania klauzuli homogeniczności Unii Europejskiej w świetle zasady suwerenności państwa członkowskiego," *Journal of Modern Science* 41, no. 2 (2019): 141–156.

values specified in it. Therefore, it should be assumed that the homogeneity clause reinforces the importance of the principle of conferral.

Specific control instruments have been created for Member States to implement the values listed in the clause: the procedure under Art. 7 TEU that introduces the State's political responsibility for violation of values under Art. 2 TEU and „A New EU Framework to Strengthen the Rule of Law"[54]. When analyzing the meaning of Art. 2 TEU from the perspective of the exercise of the exclusive competences of the Member States, it should be emphasized that the values expressed in the indicated provisions are of fundamental importance for the legal systems of the Member States. Consequently, from the perspective of the Member States, they are implemented regardless of the nature of the States' competences, and their implementation is controlled constantly at the national level. Given that each of the Member States' legal systems is based on the joint acquis of European constitutionalism, the criteria for control are shared by European countries. Launching the control procedures indicated above would mean that the values that are fundamental to a given Member State have been violated there and that national control instruments are ineffective. Therefore, it seems that Art. 2 TEU is not a restriction for the Member States as regards the exercise of their exclusive competences, but an instrument that strengthens the freedom to exercise them. In implementing fundamental values, the European Union should not exceed the scope of the competences conferred and thus affect the scope of the competences of the Member States.

4. CONCLUSIONS

The process of European integration has introduced the Member States into a new legal reality. The existing exclusivity in the area of competence implementation has been replaced by a two-stage model of their

[54] „Communication from the Commission to the European Parliament and the Council, A New EU Framework to Strengthen the Rule of Law", COM(2014) 158 final. 11 March 2014, December 29, 2019 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158&from=PL.

exercise. The States retained part of their own competences – the exclusive competences of the Member States that are only exercised by them. The second group includes competences exercised jointly with other Member States at the European Union level. The division of competences is not definitive, despite the introduction of this division and the creation of a partial catalogue of EU competences after the Treaty of Lisbon. The Member States, when conferring part of their supervisory powers, did not specify the scope of their own competences. A general principle was adopted that competences not conferred on the EU are the exclusive competences of the Member States. However, this issue was addressed by Constitutional Courts of the Member States that equate the exclusive competences of the Member States with the scope of the concept of constitutional identity reduced to basic constitutional principles of the State. The Court of Justice, which monitors the correct implementation of EU law, analyses the scope of competences of both entities. As regards the exercise of the exclusive competences of the Member States, it has established general directives. First, The States exercise their exclusive competences in accordance with their own constitutional principles while respecting EU values that are shared by all Member States and constitute the achievements of European constitutionalism. However, the free exercise of the exclusive competences of the Member States is limited to the extent to which they affect EU objectives and activities. Regardless of the division of competences, the EU is bound by the principle of respect for national identity of the Member States, including constitutional identity. On the one hand, it obligates the EU to respect the exclusive competences of the Member States, while on the other it is a premise that restricts achievement of EU objectives. It should be emphasized, however, that protection of constitutional identity understood as a restrictive premise must be interpreted individually for each Member State.

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THE SCOPE OF REGULATION OF ACCESS TO ACTIVITIES IN THE FIELD OF ORGANIZING TOURIST EVENTS AND FACILITATING THE PURCHASE OF RELATED TOURIST SERVICES IN POLISH LAW. SELECTED ISSUES

*Łukasz Maszewski**

ABSTRACT

The considerations carried out in this article focus on the scope of regulation of undertaking (access to) activities in the field of organizing tourist events and facilitating the purchase of related tourist services in the part relating to the features of the activity covered by it. Entities operating in this area are subject to specific legal obligations, including requirement for obtaining an entry in the register. Business in question is no longer a regulated activity but the provisions regarding this activity apply to it. This study also deals with the consequences of this seemingly insignificant change in the nomenclature. These issues are presented against the background of EU regulations and selected EU Member States.

Keywords: Tourist entrepreneur, regulation of business activity, regulated activity

INTRODUCTION

In order to precisely outline the field of research, the results of which have been presented in this study, it is necessary to define at the outset the concept of regulation of economic activity, including the regulation of access to it. Unfortunately, these concepts have not been defined by the legislator. However, they are considered by representatives of legal sciences.

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As Kazimierz Strzyczkowski points out, in colloquial language, regulation means limiting, subjecting an activity to the principles established by law. An alternative to regulation understood in this way is deregulation, i.e. a space of economic activity free from legal regulations[1]. According to Cezary Kosikowski, the essence of the regulation of business activity is to limit the freedom of behavior of entrepreneurs. It occurs due to a collision with other values that the state protects (such regulation aims, among others, at consumer protection). Regulation understood in this way consists in establishing conditions in the form of orders and prohibitions, on the fulfillment of which depends the possibility of exercising public subjective rights by entrepreneurs[2]. It should be noted that this is, however, about subjecting a particular type of economic activity to the specific requirements associated with its taking up and running[3]. Therefore, general requirements addressed to all entrepreneurs are not considered to be the regulation of undertaking business activity, but specific requirements for entities undertaking certain types of activities[4].

It is emphasized in the literature that the regulation of economic activity is implemented on two levels, i.e. taking up and running a business[5]. The first of these is referred to as the regulation of access to economic activity, under which the law provides for bans on undertaking a specific type of business, orders to obtain permission to start it (in the form of concessions, permits and licenses) or notification to the competent authority about the intention to start business. On the other hand, the regulation of running economic activity is about limiting the manner of conducting it

[1] Kazimierz Strzyczkowski, *Prawo gospodarcze publiczne* (Warsaw: LexisNexis, 2011), 154–155.

[2] Cezary Kosikowski, *Publiczne prawo gospodarcze Polski i Unii Europejskiej* (Warsaw: LexisNexis, 2010), 179–180.

[3] Krzysztof Jaroszyński, „Funkcje administracji gospodarczej," in *Prawo gospodarcze. Zagadnienia administracyjnoprawne*, eds. Hanna Gronkiewicz-Waltz, and Marek Wierzbowski (Warsaw: LexisNexis, 2017), 198.

[4] Cezary Kosikowski, *Publiczne prawo gospodarcze Polski i Unii Europejskiej*, 181. Therefore, it is not about obligations related to undertaking any type of economic activity (e.g. registration in the business register, for VAT or social security purposes), but about obligations related to undertaking specific type of activity.

[5] Krzysztof Jaroszyński, „Funkcje administracji gospodarczej," 199.

which is not indifferent from the public interest perspective[6]. The considerations carried out in this article focus on the regulation of undertaking (access to) activities in the field of organizing tourist events and facilitating the purchase of related tourist services.

The regulation of business activity of tourist service organizers after the change of the socio-economic system in Poland that took place at the turn of the 1980s and 1990s has evolved. Initially, it was a so-called free activity, and therefore not subject to any of the forms of regulation of economic activity occurring in Polish law. Running it was then based on an entry in the municipal business register. Then this activity was subjected to the strictest form of regulation, which in Polish law was (and still is) concessioning. Since the entry into force of the Act on the freedom of economic activity (i.e. since 21 August 2004), business in question has become a regulated activity[7]. The possibility of undertaking it was dependent on the entrepreneur meeting specific conditions specified in the provisions of the Act and on obtaining an entry in the register of regulated activity[8]. These were conducted by voivodship marshals.

The further stage of changes in the subject matter was determined by the Act of 24 November 2017 on tourist events and related tourist services[9] (hereinafter referred to as Tourist Events Act [2017]), which transposed Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, 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[10] (in short Directive 2015/2302/EU). Entities under-

[6] Kazimierz Strzyczkowski, *Prawo gospodarcze publiczne*, 157.

[7] More on the evolution of forms of regulation of tourism activities see Jerzy Gospodarek, „Meandry wolności gospodarczej w polskiej turystyce w świetle regulacji prawnych minionego ćwierćwiecza (1989-2013)," in *25 lat fundamentów wolności działalności gospodarczej. Tendencje rozwojowe*, eds. Jan Grabowski, Katarzyna Pokryszka, and Anna Hołda-Wydrzyńska (Katowice: UŚ, GWSH im. W. Korfantego, 2013), 220 and next.

[8] „Justification to the draft Entrepreneurs' Law," 54, in *Sejm RP VIII kadencji. Druk nr 2051*, February 27, 2020, http://orka.sejm.gov.pl/Druki8ka.nsf/0/9E761CF9B6B-03CBCC12581E10059DD88/%24File/2051.pdf.

[9] Consolidated text: Journal of Laws of 2019, item 548.

[10] OJ UE L 326, 11 December, 2015, p. 1–33.

taking and conducting activities in the field of organizing tourist events and facilitating the purchase of related tourist services are still subject to specific legal obligations, including requirement for obtaining an entry in the register. Business in question is no longer a regulated activity but the provisions regarding this activity apply to it. This study also deals with the consequences of this seemingly insignificant change in the nomenclature.

It should be noted that the issue of the scope of the regulation of the activity in question will be only partially examined. In order to fully indicate this scope, it would be necessary to determine the specific meaning of concepts such as organizing tourist services and facilitating the purchase of related tourist services. Only the activities falling within their scope are covered by the analyzed regulation. However, the above would far exceed the framework of this study. At the same time, it should be emphasized that these issues are the subject of separate studies, to which one should be referred[11]. Therefore, they will not be analyzed in detail in this study. The subject of the analysis will be exclusively the scope of this regulation in the part relating to the features of the activity covered by it. These issues will be presented against the background of EU regulations and selected EU Member States.

2. TOURIST ENTREPRENEUR AS AN ENTITY CONDUCTING BUSINESS ACTIVITY

Polish law defines economic activity in over ten acts[12]. The definition with the widest scope of application is contained in Article 3 of the Act of 6 March 2018 – Entrepreneurs' Law[13] (hereinafter referred to as Entrepreneurs' Law), according to which economic activity is organized gainful

[11] See, e.g., the considerations led in this field by Piotr Cybula, „Aksjologia zmiany prawa konsumenckiego na przykładzie implementacji w Polsce dyrektywy 2015/2302 w sprawie imprez turystycznych i powiązanych usług turystycznych," *Folia Turistica. Akademia Wychowania Fizycznego im. B. Czecha w Krakowie*, no. 49 (2018): 130–133, https://doi.org/10.5604/01.3001.0013.0815.

[12] See more widely Maciej Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym* (Warsaw: Wolters Kluwer Polska, 2012), 275 and next.

[13] Consolidated text: Journal of Laws of 2019, item 1292 as amended.

activity, carried out on its own behalf and in a continuous manner[14]. Entities performing it have been defined by the legislature as entrepreneurs[15]. Interestingly, the legislator, however, abandoned the definition of a tourist entrepreneur for the purposes of the Tourist Events Act [2017] with a reference to the definition of an entrepreneur included in the Entrepreneurs' Law[16] and currently the Act states that whenever it mentions a tourist entrepreneur, it should be understood as a tourism organizer, an entrepreneur facilitating the purchase of related tourist services, a travel agent or a travel service provider who is an entrepreneur within the meaning of Article 43^1 of the Act of 23 April 1964 - Civil Code[17] (hereinafter as Civil Code) or conducting payable activity.

It should be noted that the Civil Code does not, however, contain a definition of economic activity, although, like the Entrepreneurs' Law, entities conducting it (or professional activity) are referred to as entrepreneurs[18]. A problem therefore arose as to understand the concept of economic activity for the purposes of the definition from the Civil Code (and thus also now from the Tourist Events Act [2017]). The doctrine proposes

[14] Maciej Etel even postulated the presumption that if the term „economic activity" or „entrepreneur" appears in the legal act, then it should be given the same meaning as in the Act on freedom of economic activity of 2 July 2004, Journal of Laws of 2017, item 2168 as amended, now Entrepreneurs' Law. See more Maciej Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym*, 317; Polish Supreme Court, Judgment of 2 February 2009, Ref. No. V KK 330/08, reported in: LEX nr 485044.

[15] In accordance with Article 4 clause 1 of the Entrepreneurs' Law an entrepreneur is a natural person, a legal person or an organizational unit which is not a legal person, the separate act of which grants legal capacity, pursuing economic activity.

[16] However, this was the case in the Act on tourist services of 29 August 1997, Journal of Laws of 2017, item 1553 as amended, according to which (Article 3 item 14) the term entrepreneur used in the Act should be understood as an entrepreneur within the meaning of the Entrepreneurs' Law and a foreign entrepreneur within the meaning of the Act on the rules of participation of foreign entrepreneurs and other foreign persons in business trading on the territory of the Republic of Poland of 6 March 2018, Journal of Laws of 2019, item 1079 as amended.

[17] Consolidated text: Journal of Laws of 2019, item 1145 as amended.

[18] In accordance with Article 43^1 of the Civil Code, an entrepreneur is a natural person, a legal person and an organizational unit referred to in Article 33^1 § 1 of the Civil Code, conducting business or professional activity on its own behalf.

to use the definition from public law for this aim (formerly Article 2 of the Act of 2 July 2004 on the freedom of economic activity[19], now Article 3 of the Entrepreneurs' Law)[20]. However, at the same time attention is drawn to the need for an auxiliary application of this definition[21] and flexible application of arising from it premises for recognizing the activity as an economic one[22]. It is also emphasised that there is a need of including the features not listed in the above-mentioned provision of the Entrepreneurs' Law that results from judicial decisions to define the concept of economic activity for the purposes of applying the provisions of the Civil Code[23]. The jurisprudence recognizes that activity in question may also be non-profitable, provided that it is subordinated to the principle of rational management[24]. According to Wojciech J. Katner such an immanent feature of a business activity, which is not explicitly referred to by law, is also its professional nature[25]. An entity performing this type of activity (or professional one as defined by the Civil Code) may therefore become a tourism entrepreneur within the meaning of the Tourist Events Act [2017], if, of course, it undertakes the activities of a tourism organizer, an entrepreneur

[19] Consolidated text: Journal of Laws of 2017, item 2168 as amended.

[20] Wojciech J. Katner, „Art. 43^1," in *Kodeks cywilny. Część ogólna*, eds. Małgorzata Pyziak-Szafnicka, and Paweł Księżak (Warsaw: Wolters Kluwer, 2014), 452–453, 456.

[21] Łukasz Żelechowski, „Art. 43^1," in *Tom I. Kodeks cywilny. Komentarz. Część ogólna. Przepisy wprowadzające Kc. Prawo o notariacie (art. 79-95 i 96-99)*, ed. Konrad Osajda (Warsaw: C.H.Beck, 2017), 290.

[22] Marian Kępiński, „Art. 43^1," in *Kodeks cywilny. Tom I. Komentarz. Art. 1-449[11]*, ed. Maciej Gutowski (Warsaw: C.H.Beck, 2016), 239–240. It should also be noted that Article 5 of the Entrepreneurs' Law contains a catalog of activities excluded from the application of the provisions of this Act. Pursuant to the subjective, objective and formal criteria, the types of activity indicated there are not considered to be economic activities under the Act. Therefore, this activity is not subject to registration or regulation. In these cases, there is therefore no need to obtain a permit, license, concession or entry in the register of regulated activity. See „Justification to the draft Entrepreneurs' Law," 21.

[23] Andrzej Janiak, „Art. 43^1," in *Kodeks cywilny. Komentarz LEX*, ed. Andrzej Kidyba (Warsaw: Wolters Kluwer, 2012), 211. See also Wojciech Popiołek, „Art. 43^1," in *Kodeks cywilny. Tom I. Komentarz. Art. 1 – 449[10]*, ed. Krzysztof Pietrzykowski (Warsaw: C.H.Beck, 2015), 192.

[24] „Justification to the draft Entrepreneurs' Law," 23.

[25] Wojciech J. Katner, „Art. 43^1," 455. See also Łukasz Żelechowski, „Art. 43^1," 293.

facilitating the purchase of related travel services, a travel agent or a travel service provider (as defined by the Tourist Events Act [2017]).

Before the above mentioned change of law it was argued in the literature that thanks to the criteria of economic activity contained in public law it was possible to make a distinction between the activity of so-called social tourism organizers (such as schools, associations, religious associations and church legal entities, as well as employers conducting social activities for the benefit of their employees) and the business activities of tourism entrepreneurs[26]. It was also considered that the organization of tourist events which were not of an economic nature and thus did not constitute a business activity was not subject to the obligation to enter into the register of regulated activity, or even to the provisions of the Act of 29 August 1997 on tourist services[27] (hereinafter as Tourist Services Act [1997])[28].

In the context of economic activity it should be also remembered that Polish law imposes a number of obligations on entities that undertake it. This also applies to tourist entrepreneurs. In simple terms it can be said that depending on the legal form of performing this activity, it is necessary to submit a notification to the Central Register and Information on Business Activity (in the case of natural persons) or to obtain an entry in the Register of Entrepreneurs of the National Court Register (in the case of commercial law companies). Additional obligations of entity undertaking business activity include, among others, making registration for tax, social security and official statistics purposes[29].

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[26] Jerzy J. Raciborski, „Komentarz do niektórych przepisów ustawy o usługach turystycznych," in Jerzy J. Raciborski, *Usługi turystyczne. Przepisy i komentarz*, chap. 1, (Warsaw: Wydawnictwo Prawnicze, 1999), LEX.

[27] Consolidated text: Journal of Laws of 2017, item 1553 as amended.

[28] Mirosław Nesterowicz, *Prawo turystyczne* (Warsaw: Wolters Kluwer, 2016), 27; Katarzyna Marak, „Administracyjnoprawne warunki podejmowania działalności gospodarczej w zakresie prowadzenia biur podróży w świetle projektu nowelizacji ustawy o usługach turystycznych z 25 marca 2009 r.," in *Transformacje prawa turystycznego*, ed. Piotr Cybula (Cracow: Proksenia, 2009), 81.

[29] See more Agnieszka Żywicka, *Rygory prawne podejmowania oraz prowadzenia działalności turystycznej w Polsce* (Warsaw: Difin, 2013), 47–53 and 62–72.

3. TOURIST ENTREPRENEUR AS AN ENTITY NOT CONDUCTING BUSINESS ACTIVITY

As indicated above, the situation in which a tourist entrepreneur could only be an entrepreneur within the meaning of the Entrepreneurs' Law changed on 1 July 2018, when the Tourist Events Act [2017] came into force. The wider subjective scope of this Act has already been indicated in the justification to its draft[30]. However, the need to regulate the activities of tourist organizers that did not conduct business was also noted in the Polish legal literature before 1 July 2018. Some of these entities often operated on a large scale, an example of which in Poland were pilgrimage organizers[31]. The doctrine emphasized the fact that participants of events not covered by the Act did not have legally guaranteed protection at the level of travel agency clients[32]. In the above context, it was also noticed that the Tourist Services Act [1997] gave a clearly narrower scope to the concept of a tourism organizer compared to the meaning that the directive gave to it[33].

The key elements of the Tourist Events Act [2017], which determined the above change, are the exclusion of the said activity from the catalog of regulated activity, the catalog of tourist events and related tourist services

[30] „Justification to the draft act on tourist events and related tourist services with draft implementing acts," 16 and „Regulatory Impact Assessment," 1, in *Sejm RP VIII kadencji. Druk nr 1784*, accessed February 27, 2020, http://orka.sejm.gov.pl/Druki8ka.nsf/0/2FBA876288E41327C125818C003DE061/%24File/1784.pdf.

[31] Mirosław Nesterowicz, „Dyrektywa Unii Europejskiej o imprezach turystycznych i powiązanych usługach turystycznych, jej implementacja do prawa polskiego i odpowiedzialność biur podróży," *Przegląd Sądowy*, no. 9 (2018), note 13, LEX.

[32] Mirosław Nesterowicz, „Dyrektywa Unii Europejskiej o imprezach turystycznych i powiązanych usługach turystycznych, jej implementacja do prawa polskiego i odpowiedzialność biur podróży," note 13; Piotr Cybula, *Usługi turystyczne. Komentarz* (Warsaw: Wolters Kluwer, 2012), 57; Katarzyna Marak, „Administracyjnoprawne warunki podejmowania działalności gospodarczej w zakresie prowadzenia biur podróży w świetle projektu nowelizacji ustawy o usługach turystycznych z 25 marca 2009 r.," 81.

[33] Piotr Cybula, *Usługi turystyczne. Komentarz*, 57; Katarzyna Marak, „Administracyjnoprawne warunki podejmowania działalności gospodarczej w zakresie prowadzenia biur podróży w świetle projektu nowelizacji ustawy o usługach turystycznych z 25 marca 2009 r.," 81.

to which the Act does not apply, and the definition of tourism entrepreneur adopted in this Act.

First of all, as it was noted above, in the legal status binding until 30 June 2018, only economic activity in the field of organizing tourist events and brokerage on behalf of clients in concluding contracts for the provision of tourist services was subject to the obligation to meet specific legal conditions and obtain entry in the register of regulated activity (register of tour operators and travel agents). The provision of Article 4 clause 1 of the Tourist Services Act [1997] explicitly defined it as a regulated activity within the meaning of the Entrepreneurs' Law, which was and still is a form of regulation of business activity[34]. Therefore, for a given activity to be covered by this form of regulation, it had to be characterized by organized and commercial character, and also had to be carried out on its own behalf and in a continuous manner (in accordance with Article 3 of the Entrepreneurs' Law)[35]. At present, therefore, the application of the analyzed provisions of the Tourist Events Act [2017] no longer applies only to economic activities and may therefore also be related to activities that do not have its characteristics.

In the analyzed scope, key importance should also be assigned to the exclusions of the application of the Tourist Events Act [2017] (and the Directive 2015/2302/EU). This Act does not apply, inter alia, to tourist events and related tourist services that are offered and whose ordering and delivery is facilitated occasionally, on a non-profit basis and only for a limited group of travelers (Article 3 point 1 of the Tourist Events Act [2017]). However, it is assumed that these conditions must be met jointly[36]. This

[34] Regulated activity falls under the concept of economic activity. See Michał Strzelbicki, „Wpis do rejestru działalności regulowanej," *Ruch Prawniczy Ekonomiczny i Socjologiczny*, no. 4 (2005): 67. As Katarzyna Mełgieś notes, the basic formal condition determining the entry in the register of regulated activity is the applicant's status of the entrepreneur, see Katarzyna Mełgieś, „Działalność regulowana jako forma reglamentacji wolności gospodarczej – uwagi konstrukcyjne," *Studia Gdańskie. Wizje i rzeczywistość*, no. VII (2010): 326.

[35] See e.g. Provincial Administrative Court in Warsaw, Judgment of 8 October 2007, Ref. No. VI SA/Wa 1007/07, reported in: LEX nr 384175.

[36] „Transposition of Directive (EU) No 2015/2302 on Package Travel and Linked Travel Arrangements Workshop with Member States 13 June 2016," 12, accessed February 27, 2020, http://ec.europa.eu/newsroom/document.cfm?doc_id=46056.

means that the Act (and the Directive 2015/2302/EU) should also apply to entities conducting the above activities on a non-profit basis, if it is also carried out occasionally or (and) in relation to an unlimited group of travelers. Therefore, it seems that entities providing this type of services should be considered as tourism entrepreneurs within the meaning of the Act.

The statutory definition of the tourist entrepreneur is also a key issue in the context of the scope of regulation of the analyzed activity. As it was stated above, in accordance with Article 4 point 7 of the Tourist Events Act [2017], whenever the act refers to a tourist entrepreneur, it should be understood as a tourism organizer, an entrepreneur facilitating the purchase of related tourist services, a tourist agent or a tourist service provider, being an entrepreneur within the meaning of Article 43^1 of the Act of 23 April 1964 - Civil Code or operating for a fee. Therefore, a tourist entrepreneur as an entity conducting paid activities is an alternative to entities conducting business or professional activity (within the meaning of the Civil Code), who will be included in the category of entities referred to in Article 43^1 of the Civil Code. Thus, the construction of a tourist entrepreneur created on the basis of the content of Article 4 point 7 of the Tourist Events Act [2017] in connection with Article 43^1 of the Civil Code shows that not only entities conducting business activity can be considered as tourism entrepreneurs within the meaning of the Tourist Events Act [2017], but also entities conducting professional or paid activity. The addition of payment as a feature of the activity of a tourist entrepreneur who is not an entrepreneur within the meaning of the Civil Code is considered an expression of the extension of the subjective scope of application of the analyzed Tourist Events Act [2017]. As Dominik Borek points out, the condition for payment included in the legal definition being discussed has been added in order to cover the widest possible range of cases with the regulatory scope[37].

However, the above construction should be considered controversial. It can be questioned whether this feature of the activity is significant from

[37] Dominik Borek, „Przedsiębiorca w ustawie o imprezach turystycznych i powiązanych usługach turystycznych – koncepcja przedmiotowego charakteru regulacji," *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, no. 4 (2018): 34, https://doi.org/10.7172/2299-5749.IKAR.4.7.2.

the perspective of the obligation to apply the Act by the entity performing it. On the one hand, payment may indicate the profit-making nature of a given activity (which is a constitutive feature of economic activity), although it does not prejudge this[38]. As pointed out by the representatives of the European Commission, „the <<not-for-profit>> criterion is likely to be fulfilled where the amount paid covers only the incurred expenses, as well as where the profit is marginal and serves charitable/humanitarian purposes[39]." On the other hand, however, according to Article 3 point 1 of the Tourist Events Act [2017] it may be that a given activity will be carried out free of charge (due to its non-profit nature), and yet it will fall within the scope of application of the Tourist Events Act [2017] and the Directive 2015/2302/EU (due to the unlimited number of clients or (and) constancy of service). In connection with this, there may be doubts that the legislator in the definition of a tourist entrepreneur, apart from entrepreneurs from the Civil Code, referred only to entities conducting paid activities.

4. PERSPECTIVE OF EU LAW AND THE LAW OF SELECTED EU MEMBER STATES

Considerations covering the scope of regulation of the analyzed activity in Polish law should also be referred to EU law. It should be emphasized that the Polish legislator created the above-mentioned definition of a tourist entrepreneur for the purposes of transposing Directive 2015/2302/EU into the Polish legal order. Therefore, the question should be asked – how widely the EU legislator regulated the scope of entities recognized as „traders" within the meaning of Directive 2015/2302/EU. Secondly, Polish normative solutions in this area can also be compared with those adopted

[38] Eliza Komierzyńska-Korlińska, „Art. 3," in *Konstytucja Biznesu. Komentarz*, ed. Marek Wierzbowski (Warsaw: Wolters Kluwer, 2019), 54.

[39] „Transposition of Directive (EU) No 2015/2302 on Package Travel and Linked Travel Arrangements Workshop with Member States 13 June 2016," 14. See also „Transposition of Directive (EU) No 2015/2302 on package travel and linked travel arrangements Workshop with Member States 25 February 2015," 3-4, accessed February 27, 2020, http://ec.europa.eu/newsroom/document.cfm?doc_id=46054; Komierzyńska-Korlińska, „Art. 3," 54.

in other EU Member States, which were also required to transpose the provisions of the above directive.

The EU legislator in Article 3 point 7 of Directive 2015/2302/EU indicated that „trader" is a person „acting for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive, whether acting in the capacity of organiser, retailer, trader facilitating a linked travel arrangement or as a travel service provider[40]." In that provision, the EU legislature did not therefore refer directly to the features of the activity, which would determine its economic nature (constant and continuous manner of its performance, focus on profit, independence etc.)[41]. This was also noted by the representatives of the European Commission, pointing out that from the analyzed Article 3 point 7 of the directive, it does not follow that the trader's activity must be characterized by profitability, and therefore it should be assumed that it may also include non-profit entities. However, these representatives also indicated that in their opinion, this provision implies (somewhat indirectly) that this activity should be characterized by stability and organization[42]. It can therefore be assumed that

[40] According to article 3 point 7 Directive 2015/2302/EU „trader" means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive, whether acting in the capacity of organiser, retailer, trader facilitating a linked travel arrangement or as a travel service provider.

[41] For example the Treaty on the Functioning of the European Union (OJ UE C 326, 26 October, 2012, p. 1–390) in Article 57 states that services shall be considered to be „services" within the meaning of the Treaties where they are normally provided for remuneration (…). „Services" shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions. Also Article 2 point 2 of the Council Directive of 13 June 1990 on organized travel, vacation and trips (90/314/EWG, OJ UE L 158, 23 June, 1990, p. 59-64) stated that for the purposes of this Directive, „organizer" means the person who professionally organizes and sells packages or offers for sale, both directly and through a retail outlet.

[42] As pointed out by the representatives of the European Commission „the definition of trader (see Article 3 (7)) does not explicitly require the intention of making a profit. One may consider that it is sufficient for a trade, business, craft or profession that a regular activity is carried out with a certain level of organisation," „Transposition of Directive (EU) No 2015/2302 on package travel and linked travel arrangements Workshop with Member States 25 February 2015," 3.

the analyzed provision of the directive does not require that the „trader" conduct activities deemed to be economic in the understanding of Polish law (since the gainful purpose of such activities is not required). It follows that Directive 2015/2302/EU does not focus on including its provisions on entities conducting business activity, but on how tourist events are being organized. Therefore, even if the entity does not conduct business activity, but organizes tourist events in a way other than occasional, non-profitable and only to a limited group of travelers, such events are covered by Directive 2015/2302/EU. Also, if the entity is an entrepreneur, but the specific event is being organized sporadically, not for profit and to a limited group of travelers, it will not be covered by the directive (e.g. an employer organizing it for its employees for recreational purposes)[43].

Even if we assume, however, that the trader's definition from Directive 2015/2302/EU refers to entities conducting economic activity within the meaning of EU law, it could still cover a wide range of entities, broader than in the case of the concept of entrepreneur under Polish law[44]. The concept of entrepreneur and business activity is autonomous in EU law and its interpretation is very liberal. These meanings are detached from the ones given to them by the internal regulations of the Member States. The key in this context is that a given entity performs business activity, while in EU law it is understood as performing entrepreneurship and providing services[45]. In the EU's understanding of these terms, however, the cross-border context is also key, but Directive 2015/2302/EU does not refer in this respect only to cross-border activities. All this means that the terms of an entrepreneur

[43] As pointed out by the representatives of the European Commission „however, if a trader organises packages without the intention of making a profit for the recreation of its employees and only occasionally, such trips would probably not be covered by the Directive on the basis of Article 2 (2) (b)," „Transposition of Directive (EU) No 2015/2302 on package travel and linked travel arrangements Workshop with Member States 25 February 2015," 3.

[44] The EU law assumes that entrepreneurs can be not only partnerships and capital companies, but also representatives of liberal professions, inventors, farmers, artists, athletes, civil law companies, trade unions, religious associations, budgetary units, public and private schools etc., as long as they carry out business activities. See more widely Maciej Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym*, 117, 129–130.

[45] Maciej Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym*, 128–130.

and business activity in the meaning of EU law cannot be equated with the meaning that Polish law gives to these terms. It should be emphasized here that in the case of a directive covered by the maximum harmonization, the scope of its regulation should be clear[46], which cannot be said about the discussed case (in view of the doubts raised above).

As already indicated, all EU Member States had to deal with the problem of transposing the above provisions. Some of these countries simply transferred to the national legal order the content of the above definition[47] or created a definition very close to it[48] (e.g. Romania, Portugal, Netherlands, Malta, Ireland, Italy, Hungary, Greece, France, Finland, Denmark, Cyprus and Belgium).

However, the solutions adopted by the Member States in this respect are varied. Some of them have adapted the trader's definition of Directive 2015/2302/EU to their national laws[49]. The legislature from Sweden and Slovakia refers „only" to the economic activity of a given entity, legislature from Estonia refers to economic and professional activities, and the Croatian law lists the categories of entities that are entitled to provide the services in question (among them listing companies, cooperatives, sole traders and traders, craftsmen, but also cultural institutions, schools, higher education institutions and other educational institutions, for purposes of performance of their activities, churches or religious communities etc.). In its definition, legislature from Austria refers to the concept of entrepreneur within the meaning of the Austrian Consumer Protection Act, and from

[46] Aleksandra Kunkiel-Kryńska, „Implementacja dyrektyw opartych na zasadzie harmonizacji pełnej na przykładzie dyrektywy o nieuczciwych praktykach handlowych," *Monitor Prawniczy*, no. 18 (2007): 989.

[47] This is called literal transposition (copying) of the text of the directive into national law, see Aleksandra Kunkiel-Kryńska, „Implementacja dyrektyw opartych na zasadzie harmonizacji pełnej na przykładzie dyrektywy o nieuczciwych praktykach handlowych," 990.

[48] The following are based on translations into English of the legislation of EU Member States transposing Directive 2015/2302/EU, posted on the European Commission's website, accessed February 27, 2020, https://ec.europa.eu/info/law/law-topic/consumers/travel-and-timeshare-law/national-transposition-measures-package-travel-directive_en.

[49] This is the translation of the content of the directive into the language of terms known in national law (actual implementation), see Aleksandra Kunkiel-Kryńska, „Implementacja dyrektyw opartych na zasadzie harmonizacji pełnej na przykładzie dyrektywy o nieuczciwych praktykach handlowych," 990.

Bulgaria to the Bulgarian commercial law („traders within the meaning of the Commercial Act or legal persons entitled to carry out economic activities pursuant to another Act").

It seems that the solution that deserves to be specified and which could also be used in Poland is the Slovenian concept, in which the legislator first referred to entrepreneurs, but in the next provision he indicated that the obligations that burden them also apply to other entities if they offer their services to consumers.

It follows from the above that the Polish definition of tourist entrepreneur in the Tourist Events Act [2017] is an adaptation of the definition of „trader" in Directive 2015/2302/EU to the provisions of Polish law (referring to the Polish provision of the Civil Code). Unfortunately, it may raise some doubts as to the correctness of solutions adopted in it (to the extent that it includes in the concept of tourism entrepreneur, apart from entrepreneurs from the Civil Code, only entities which conduct paid activity).

It should also be noted that although the Polish language version of Directive 2015/2302/EU uses the concept of entrepreneur (przedsiębiorca in Polish) in the context of the entity performing analized activity, only in some language versions of Directive 2015/2302/EU the EU legislator uses the word „entrepreneur". This is also the case for the German (Unternehmer), Spanish (empresario) and Estonian (ettevõtja) language versions. In the case of other versions, however, it is a professional (professionnel in French and professionista in Italian), operator (Operador in Portuguese), organizer (organizatorius in Lithuanian), salesman (trgovac in Croatian, obchodník in Slovak, kereskedő in Hungarian), merchant (търговец in Bulgarian, tirgotājs in Latvian, trgovec in Slovenian) and trader (in English, kummerċjant in Maltese, handelaar in Dutch, ἔμπορος in Greek, erhvervsdrivende in Dutch, comerciant in Romanian and obchodníkem in Czech). However, it would be difficult to find in the directive the application of concepts appropriate to Polish law or the law of any other Member State. Thus, the fact that the EU legislator used the term entrepreneur in the Polish language version of Directive 2015/2302/EU cannot lead to the conclusion that he meant entrepreneur within the meaning of Polish law.

It is also not the case that the law of each of the Member States uses the concept of entrepreneur in the scope of national acts transposing the analyzed directive, and if so, it should be remembered that in each of

these countries law the concept of economic activity and entrepreneur may be understood in other way[50], if any of these terms are used there[51]. In addition, in each country these concepts can be defined differently in individual normative acts. In Poland, many acts contain separate definitions of the concept of an entrepreneur (24 definitions in total) and economic activity (11 definitions in total), and in addition the legislator also uses 64 other concepts to define business and entrepreneur activities in Polish law[52]. The above also seems to indicate that the EU legislator does not require that the obligations imposed by Directive 2015/2302/EU on entities operating in the field of organizing tourist events apply only to entities conducting economic activity and having the status of entrepreneurs in a given Member State.

5. CONCLUSIONS

One of the objectives of changes made to the Polish legal order by the Tourist Events Act [2017] was to extend the subjective scope of application of its provisions on organizing tourist events and facilitating the purchase of related travel services to non-economic entities. This was to increase the scope of travelers protection. Not only an entrepreneur within the meaning of the Civil Code may become a tourist entrepreneur now, but also an entity carrying out the specified in the Act activity for a fee. The above resulted in the creation of *quasi*-regulated activity, under which the hitherto existing system of regulation of business activity covered also non-entrepreneurs.

[50] E.g., the Polish legislator in Article 43^1 of the Civil Code distinguishes economic activity from a professional activity, while in German law it is assumed that an entrepreneur participates in business transactions by undertaking commercial, business or professional activities. See Maciej Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym*, 131.

[51] E.g., in France the concept of trader and commercial transactions is used instead of the entrepreneur and business. See Maciej Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym*, 131–132.

[52] Maciej Etel, *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym*, 275 and next, 354.

However, the statutory scope of the definition of a tourist entrepreneur may raise some doubts in the context of the catalog of tourist events whose organization and facilitation of purchase have been excluded from the scope of application of the Tourist Events Act [2017]. Coverage of the concept of tourist entrepreneur, apart from entrepreneurs within the meaning of Article 43^1 of the Civil Code, only entities conducting paid activities seems to be in conflict with the definition of a trader within the meaning of Directive 2015/2302/EU. Ensuring compliance in this respect is particularly important in the present case, as above mentioned directive is subject to maximum harmonization.

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PROCEDURE FOR OUT OF COURT SETTLEMENT OF CONSUMER DISPUTES BEFORE THE PASSENGER OMBUDSMAN

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ABSTRACT

The adoption of Directive 2013/11/EU of the European Parliament and of the Council of 21.05.2013 on alternative dispute resolution methods for the settlement of consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21.05.2013 on the online system of consumer disputes resolution and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, was intended to enable consumers to resolve disputes with entrepreneurs using alternative dispute resolution methods. In order to ensure that consumers can exercise the rights granted to them by EU law, by way of implementation of the Regulations there has been an amendment of the Act of 3 July 2003 – Aviation law (i.e. Journal of Laws of 2019, item 1580), on the basis of which the institution of the Passenger Ombudsman at the Civil Aviation Office was established, which is an entity entitled to conduct proceedings for the out-of-court settlement of consumer disputes between a passenger and an air carrier, tour operator, or seller of air tickets, entered into the register of entitled entities. The purpose of this study is to present the legal regulation concerning proceedings before the Ombudsman, indicating the political position of the Passenger Ombudsman and his team using analytical and comparative research methods.

Keywords: Ombudsman, ADR, mediation, consumer, passenger

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1. INTRODUCTION

The resolution of Directive 2013/11/EU of the European Parliament and of the Council of 21.05.2013 on alternative dispute resolution of consumer disputes and amendments to Regulation (EC) No 2006/2004 and Directive 2009/22/EC[1] and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21.05.2013 on online dispute resolution for consumer disputes, and making amendments to Regulation (EC) No 2006/2004 and Directive 2009/22/EC[2] was aimed at enabling consumers to resolve disputes with entrepreneurs using alternative dispute resolution methods. These disputes would be resolved by independent and impartial bodies and the procedure would become effective and prompt[3]. According to Article 1 of the ADR Directive, "The objective of this Directive is, by achieving a high level of consumer protection, to contribute to the proper functioning of the internal market by ensuring that consumers may, on a voluntary basis, complain about the actions of entrepreneurs to entities offering independent, impartial, transparent, effective, prompt, and fair alternative dispute resolution (…)"[4]. The first Polish act implementing the ADR Directive was the Act of 23 September 2016 on the out-of-court settlement of consumer disputes (Journal of Laws of 2016, item 1823)[5]. The OSCD Act introduces a legal definition of the procedure for out-of-court resolution of consumer disputes. According to Article 3 of the said Act, the purpose of this procedure is to resolve a consumer dis-

[1] Directive 2013/11/EU of the European Parliament and of the Council of 21.05.2013 on alternative dispute resolution of consumer disputes and amendments to Regulation (EC) No 2006/2004 and Directive 2009/22/EC (O.J. E.U. L165, 18 June, 2013), (hereinafter: ADR Directive).

[2] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21.05.2013 on online dispute resolution for consumer disputes, and making amendments to Regulation (EC) No 2006/2004 and Directive 2009/22/EC (O.J.E.U. L165, 18 June, 2013), (hereafter: ODR Regulation).

[3] Justification of the draft act on out-of-court settlement of consumer disputes, parliamentary print 630, accessed December 1, 2019 http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=630.

[4] Art. 1 of the ADR Directive.

[5] Act on the out-of-court settlement of consumer disputes of 23 September 2016, Journal of Laws 2016, item 1823, hereinafter: OSCD act.

pute, which may take the form of mediation, conciliation, or arbitration[6]. Mediation would serve to bring the parties' positions closer together to have the dispute resolved by the parties themselves. The essence of conciliation would be to provide the parties with a proposal for the resolution of the dispute by the entity conducting the proceedings. Arbitration, on the other hand, would end with a solution imposed by the arbitrator who previously conducted ADR proceedings.

As mentioned earlier, the OSCD Act was the first act implementing the ADR Directive. "The adoption of the ADR Directive is linked to the European Union's desire to establish in all Member States a uniform system of out-of-court dispute resolution which will cover all disputes arising in the internal market between a consumer and an entrepreneur arising from contracts for the sale of goods or the provision of services, including contracts concluded via the Internet and cross-border contracts (…)"[7]. In the course of further legislative work, the Act of 14.12.2018 amending the Aviation Law and certain other acts (Journal of Laws of 2019, item 235) was amended. Pursuant to the aforementioned act, the following was introduced to the Act of 3 July 2003 – Aviation Law (i.e. Journal of Laws of 2019, item 1580)[8] Section Xa entitled: Protection of passenger rights.

In Chapter 1 of the above-mentioned Section, Article 205a regulates the proceedings in cases of out-of-court resolution of passenger disputes to be held before the Passenger Ombudsman. One may ask whether these changes in legal regulations have had the expected effect. The aim of this study is to present the legal regulation concerning proceedings before the Passenger Ombudsman, indicating the structural position of the Passenger Ombudsman and his/her team. The article also presents selected issues from legal regulations of other EU Member States.

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[6] Art. 3 of the OSCD act.

[7] Justification of the draft act of 14.12.2018. on amending the Act – Aviation Law and certain other acts (Journal of Laws of 2019, item 235), parliamentary print 2988, (hereinafter: justification 2988). December 1, 2019 https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=2988.

[8] Hereinafter: AL.

2. PASSENGER OMBUDSMAN AND HIS/HER TEAM

Since 1 April 2019, there has been a Passenger Ombudsman (hereinafter referred to as the PO) under the President of the Civil Aviation Office[9], acting as an entity entitled to conduct proceedings on the out-of-court settlement of consumer disputes between passengers and the air carrier, tour operator, or seller of air tickets, entered in the register of authorized entities kept by the President of the Office of Competition and Consumer Protection under No 11[10]. The President of the CAO appoints the Ombudsman from among the employees of the Civil Aviation Office for a five-year term. Detailed requirements for the PO can be found in art. 205a (3) of the Aviation Law. The Ombudsman may be a person who jointly meets the following requirements: is a member of the civil service corps[11], has higher education, knowledge in the field of passenger rights in public transport, and has at least one year's professional experience related to the protection of passenger or consumer rights[12]. If one of the four conditions listed enumerated in art. 205a (6) of the Aviation Law is met, the President of the CAO shall withdraw the appointment of the Ombudsman before the end of the term of office. The provision of the above-mentioned article does not give rise to any doubts as to the nature of the activity performed by the President of the CAO, as it is his/her duty, which means that the activity is obligatory. The premises which oblige the President of the CAO to undertake such actions are: a gross violation of law in the performance of the function of the PO, an illness which makes it permanently impossible to perform the tasks, a statement that the Ombudsman has not

[9] The legal position of the President of the Civil Aviation Office (hereinafter: President of the CAO) is governed by Articles 20-24 of the AL.

[10] Section 1 (10) of the Regulations of Out-of-Court Resolution of Consumer Disputes by the Passenger Ombudsman affiliated to the President of the Civil Aviation Office dated 8.04.2019. (hereinafter: Regulations).

[11] Issues concerning the competence and performance of duties by members of the civil service corps have been regulated in the Act of 21 November 2008 on civil service (i.e. Journal of Laws of 2018, item 1559).

[12] Art. 205a (3) of the AL.

fulfilled the obligations which allow him/her to perform this function, or the resignation of the PO[13].

The Ombudsman carries out his/her tasks with the help of a team. A member of the team can be an employee of the Civil Aviation Office, meeting the same criteria as the PO, who has been authorized in writing by the PO to conduct proceedings for the out-of-court resolution of passenger disputes[14]. The Regulations in section 8(1) clarify the requirements for team members by indicating that such a person should have the necessary knowledge and skills in the field of out-of-court or judicial resolution of consumer disputes, as well as general knowledge of the law.

The authorization shall cover a period not shorter than 3 years[15]. The Ombudsman withdraws authorization before the expiry of the period for which it was granted in four situations: in the case of a gross violation of the law in the performance of the office, or an illness which makes it permanently impossible to perform the tasks, a finding of non-fulfilment of the conditions for performing the office or resignation by a team member. In addition, section 8 (4) of the Regulations adds another condition, the fulfilment of which obliges the Ombudsman to deprive a team member of his/her function before the end of the term of office, namely a valid conviction for an intentional crime or fiscal offence. At this point it should be emphasized that the catalogue of conditions concerning the dismissal of a team member is wider than the catalogue of conditions allowing for the dismissal of the PO before the end of the term of office. Conviction of the Ombudsman by a final judgment for committing an intentional crime or fiscal offence does not allow the President of the CAO to remove the PO from office earlier.

From the announcement published on 22.11.2019 on the Ombudsman's website it follows that "In view of the very large number of applications submitted to the Ombudsman (counted in thousands) and the staffing constraints on the Ombudsman's team, we give notice that applications are considered in the order of receipt. At present, applications submitted in

13 Art. 205a (6) of the AL.
14 Art. 205a (5) of the AL.
15 Section 8 (3) of the Regulations.

May are being processed"[16]. The previous notice – published on 29.07.2019 on the PO's website – also read that "In view of the difficult HR and financial situation of the office, the Ombudsman does not have a team at the moment. We are making every effort to appoint such a team"[17]. In the last four months, it has at least been possible to set up a team and start processing the applications. Even before the establishment of the Passenger Ombudsman's institution, Poland was one of the EU countries with the highest number of complaints submitted to Civil Aviation Office. According to the ECC-Net Airline Pasline Rights 2015[18] survey, our country was in third place after Austria and Italy in the number of complaints submitted.

The analysis of the solutions of other EU Member States shows that there is no single ADR system. The French Mediator for Tourism and Travel is the closest model to the Polish Passenger Ombudsman[19]. In addition, these issues are dealt with, for example: the Agency for Passengers and Travelers (Austria – *Agentur für Passagier – und Fahrgastrechte*[20]), Consumer Mediation Service (Belgium – *Service de Médiation pour le Consommateur*[21]), Interdisciplinary Centre for Law, Alternative and Innovative Methods[22] (Cyprus) or The Aviation Conciliation Body at The Federal Justice Office (Germany – *Schlichtungsstelle Luftverkehr beim Bundesamt für Justiz*[23]).

3. PROCEEDINGS BEFORE THE PASSENGER OMBUDSMAN

The aim of out-of-court proceedings conducted by the PO is to resolve consumer disputes, and more specifically civil disputes concerning

[16] December 1, 2019 https://pasazerlotniczy.ulc.gov.pl/.

[17] Ibid.

[18] March 27, 2020 https://konsument.gov.pl/aktualnosci/pasazerowie-egzekwuja-swoje-prawa-prawa-pasazerow.

[19] More information: March 27, 2020 https://www.mtv.travel/en/mission-and-notification/.

[20] More information: March 27, 2020 https://www.apf.gv.at/de/.

[21] More information: March 27, 2020 https://mediationconsommateur.be/fr.

[22] More information: March 27, 2020 https://www.iclaimcentre.org/.

[23] More information: March 27, 2020. https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Luftverkehr/Schlichtungsstelle_node.html.

property claims resulting from two regulations: Regulation No. 261/2004 of the European Parliament and of the Council of 11.02.2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding, cancellation, or long delay of flights, repealing Regulation No. 295/91/EEC[24] and Regulation No. 2111/2005 of the European Parliament and of the Council of 14.12.2005 on the establishment of a community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC[25]. In the event of a claim under Regulation 261/2004, the parties to the dispute shall be the passenger and the air carrier. As regards Regulation 2111/2005, the parties to the dispute shall be the passenger and the air carrier, or tour operator, or ticket vendor. Section 1 of the Regulations introduces definitions of passenger and air carrier. According to section 1 (6) of the Regulations, the passenger is "a person to whom Regulation 261/2004/EC and Regulation 2111/2005/EC apply, whether travelling for private, business, or professional purposes", while paragraph 7 of the same section indicates who is to be understood by the term air carrier: "entity authorized to operate air services on the basis of an operating licence – in the case of a Polish air carrier, or on the basis of an act of the competent authority of a foreign country – in the case of a foreign air carrier. The Regulations also use the definition of a Community carrier, which is "an air carrier with a valid operating licence issued by a Member State in accordance with the provisions of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers"[26]. The property claims under Regulation 261/2004 concern flights located in the

[24] Regulation of the European Parliament and of the Council No. 261/2004 on the establishing common rules on compensation and assistance to passengers in the event of the denied boarding, cancellation, or long delay of flights, repealing Regulation No. 295/91/EEC (O.J. E.U. L46, 17 February, 2004, 10, (hereafter: Regulation 261/2004).

[25] Regulation of the European Parliament and of the Council No. 2111/2005 on the establishment of a community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC of 14 December, 2005 (O.J. E.U. L344, 27 December, .2005), 15, (hereafter: Regulation2111/2005).

[26] Section 1 (8) of the Regulations.

territory of the Republic of Poland and flights from third countries[27] to those airports operated by Community air carriers[28].

As is apparent from Article 205a (18), the subjective scope of proceedings before the Ombudsman covers not only disputes concerning consumers[29], but also disputes between entrepreneurs. "It follows that Regulation No 261/2004/EC and Regulation No 2111/2005/EC indicate the rights of the "passenger", who may also be a natural person conducting a business activity or a natural person taking a flight in connection with the exercise of an activity for other entities"[30]. Thus, a dispute may be conducted between entrepreneurs to the extent that the passenger takes a flight in connection with his or her business or professional activity.

The proceedings conducted by the Ombudsman are mediatory in nature, which means that they are intended to enable the parties to the proceedings to be brought closer together in order to resolve a dispute. The PO becomes a mediator who helps the parties to reach a mutually satisfactory resolution of the conflict. The PO will not impose his/her point of view; on the contrary, s/he will make sure that the resolution of the dispute is a jointly reached compromise[31]. The Ombudsman as a mediator "has no powers of authority and his role is limited to assisting the parties, supporting them in formulating their settlement proposals in order to reach an agreement"[32]. In all mediation proceedings, whatever they may be, the mediator plays a key role. It appears that the Ombudsman's primary role in this procedure will be to explain and to make the parties aware of the law, informing them of their rights and obligations[33].

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[27] Third countries are those that are not members of the European Union, as well as those other than Switzerland, Norway, and Iceland. December 2, 2019 https://eurlex.europa.eu/legalcontent/PL/TXT/PDF/?uri=CELEX:52016XC0615(01)&from=EL.

[28] Art. 205a (1) of the AL.

[29] The legal definition of consumer is laid down in Article 221 of the Act on the Civil Code of 23 April 1964 (Journal of Laws 2019, item 1145).

[30] Justification 2988, 62.

[31] Anna Tombek-Knigawka and Wojciech Kotowski, "Dlaczego kieruję sprawę do postępowania mediacyjnego?," *Prokuratura i Prawo*, no. 3 (2011), Legalis.

[32] Hanna Duszka-Jakimko, *Alternatywne rozwiązywanie sporów. Pomiędzy instrumentalnym a komunikacyjnym paradygmatem prawa* (Opole: Uniwersytet Opolski, 2016), 100.

[33] Joanna Wegner-Kowalska, "Mediacja (art. 13, art. 96a-96g)," in *Raport Zespołu Eksperckiego z prac w latach 2012-2016. Reforma prawa o postępowaniu administracyjnym*, ed.

Section 3 (4) of the Regulations lists and describes the rules relating to the proceedings before the Ombudsman. They include: voluntariness, confidentiality, acceptability, impartiality, and neutrality. The first three refer strictly to the rules of conduct before the PO, the last two in turn are directly connected with the person of the Ombudsman.

The proceedings before the Ombudsman are conducted at the request of a passenger, but can be submitted only after the complaint procedure has been exhausted with the carrier, tour operator, or ticket vendor. The complaint procedure shall be deemed to be exhausted if the air carrier, tour operator, or ticket vendor has considered the complaint or the time limit for considering it has expired. According to Article 7a (1) of the Act of 30 May 2014 on Consumer Rights (i.e. Journal of Laws of 2019, item 134), as a rule, an entrepreneur is obliged to respond to a consumer's complaint within 30 days of its receipt.

However, the time limit for the submission of a complaint by a passenger is limited in time, as it cannot be submitted later than before the end of the year in which the flight being the subject of the application was performed or was to be performed. This is one of the shorter limitation periods among regulations of other EU countries. Malta is the only country that has not introduced a limitation period. Respectively, the longest and the shortest limitations periods have been introduced by: Latvia, Lithuania and Luxemburg – 10 years, Cyprus and Ireland – 6 years, Bulgaria, Greece, Spain and Hungary – 5 years, Austria, Croatia, Czech Republic, Denmark, Estonia, Finland , Germany, Norway, Portugal, Romania and Sweden – 3 years, Italy 26 months, France, Iceland, the Netherlands, Slovakia and Slovenia – 2 years. As in Poland, an annual limitation period was set in Belgium. Sweden introduced the shortest one of only 2 months[34].

The issue of the limitation period was considered by the Court of Justice of the European Union (hereinafter: CJEU). In the judgment of November 22, 2012 C-139/11 in the case of Joan Cuadrench Moré v Koninklijke Luchtvaart Maatschappij NV, the CJEU stated that "it is not disputed that Regulation No 261/2004 contains no provision on the

Zbigniew Kmieciak (Warsaw: Naczelny Sąd Administracyjny, 2017), December 2, 2019, www.nsa.gov.pl/download.php?id=446&mod=m/11/pliki_edit.php.

[34] March 27, 2020 https://www.airhelp.com/pl/prawa-pasazera/.

time-limits for bringing actions before the national courts for compensation under Articles 5 and 7 of that regulation. It is settled case-law that, in the absence of provisions of EU law on the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided that those rules observe the principles of equivalence and effectiveness. It follows that the time-limits for bringing actions for compensation under Articles 5 and 7 of Regulation No 261/2004 are determined by the national law of each Member State, provided that those rules observe the principles of equivalence and effectiveness."[35]. The Supreme Court in Poland spoke in the same way in its resolution of March 17, 2017 III CZP 111/16 according to which "Claim for compensation provided for in Article 7 of Regulation (EU) No 261/2004 of the European Parliament and of the Council of February 11, 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding or of cancellation or long delay of flights, repealing Regulation (EEC) No 295/91, shall be barred by one year under Article 778 Civil Code"[36].

The application to initiate proceedings is a pleading and must therefore meet the legal requirements. The AL, referring to its elements, refers in part to the Act of 23 September 2016 on the out-of-court settlement of consumer disputes (Journal of Laws of 2016, item 1826), where in Article 33 (2) there is information on the minimum requirements to be met by a complaint. These include: identification of the parties to the dispute, precise identification of the claim, indication of the type of proceedings (in the situation described, this will be proceedings aimed at enabling the parties to the proceedings to approximate their positions with a view to resolving the dispute, i.e. mediation) and signature. Article 205a (10) and section 4 (3) of the Regulations contain a list of information which the passenger should attach to the application. The information may be divided into several groups. First, information relating to the parties

[35] March 27, 2020 http://curia.europa.eu/juris/document/document.jsf?text=&docid=130243&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1244103.

[36] March 27, 2020 http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20czp%20111-16.pdf.

to the proceedings: name and surname or business name of the parties to the dispute, place of residence or seat and mailing address, date of birth of the passenger, current telephone number of the parties and e-mail address, second, information relating to the circumstances of the flight: information whether the flight was directly related to the business or professional activity of the passenger, description of the circumstances justifying the request with supporting documents, e.g. a copy of the documentation concerning the complaints procedure, a copy of the booking confirmed for the flight in question, third, information related to the procedure: a statement that the case for the same claim between the same parties is not pending or has not already been considered by another competent entity or court, information as to whether the Ombudsman was not previously requested to consider the same case, information as to whether the applicant consents to the transmission of correspondence by e-mail, a statement that he has read and accepted the Regulations and complies with their provisions during the procedure.

When analyzing the various elements of the application, one of them may be particularly interesting. What draws the attention is the passenger's date of birth. Given that the Ombudsman's proceedings are conducted in electronic form, which will be discussed in more detail, this is the only way to determine whether a person has full legal capacity by virtue of his or her legal age[37]. It is also important to note that the passenger attaches copies of documents and not their originals, which is to be one of the aspects of the formalization of proceedings[38].

If a complaint does not contain the required elements, the Ombudsman may invite the passenger to complete it, setting a reasonable time limit for that purpose[39]. The Regulations indicate that the deadline for completing the missing elements cannot be longer than 14 days from the date of receiving the letter[40]. What is important, a complaint may be filed in Polish or in English[41].

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[37] Justification 2988, 64.

[38] December 27, 2019 https://pasazerlotniczy.ulc.gov.pl/postepowanie-polubowne-przed-rzecznikiem.

[39] Art. 205a (12) of the AL.

[40] Section 5 (2) Regulations.

[41] Art. 205a (11) of the AL.

A passenger wishing to initiate proceedings before the Ombudsman may submit a complaint in two ways: either on paper or in electronic form. In the first case, the complaint is sent to the address of the Civil Aviation Office, while in the second case the passenger can choose one of three options: submit the application via the electronic platform of public administration services (ePUAP), with a trusted profile, or use the contact form prepared by the CAO dedicated to submitting applications for initiation of proceedings, which is available on the website in the Ombudsman's subject tab and in the CAO Public Information Bulletin. The form is then submitted without a signature. The proceedings are conducted only in writing, which is a rule among EU Member States. An exception is Cyprus, where the proceedings are conducted in writing and orally, because in some cases the physical presence of the parties or their representatives is required[42].

The date of commencement of proceedings is the date of service on the Ombudsman of a complaint that meets the minimum formal requirements: identification of the parties, indication of the type of proceedings, precise specification of the request, and signature (subject to the absence of the requirement to sign when submitting a complaint using the contact form).

As a rule, proceedings before the Ombudsman are conducted in electronic form. Information is exchanged by electronic means of communication, in particular electronic mail. Where a party does not agree to conduct proceedings in electronic form, information exchange between that party and the Ombudsman is in paper form[43]. The proceedings shall be conducted in Polish with an unofficial translation of the letters in the case into English for a party to the proceedings who does not speak Polish[44]. Most countries have accepted the possibility of conducting proceedings not only in their mother tongue, but also in another language indicated

[42] Report from the Commission to the European Parliament, the Council on the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution methods for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes. March 27, 2020 https://eur-lex.europa.eu/legalcontent/PL/TXT/HTML/?uri=CELEX:52019DC0425&from=EN#footnoteref35.

[43] Section 4 (8-9)of the Regulations.

[44] Section 9 (3)of the Regulations.

in the regulations. The second language is usually English. Countries that have decided to conduct proceedings in their native language are: Bulgaria, the Czech Republic Denmark and Estonia[45].

When a passenger makes a request that meets all the formal requirements, the Ombudsman provides the parties with an acknowledgement of receipt without delay. Such confirmation shall indicate the passenger's claim and the rights of the parties. The rights of the parties in proceedings before the Ombudsman include the right of withdrawal from the proceedings at any time, the possibility of active participation in the course of the whole proceedings: the presentation of positions, documents, and evidence, the possibility of gaining access to positions, documents, and evidence presented by the other party and opinions issued by experts, and the possibility of commenting on them, the right to be assisted at any stage of the proceedings by third parties, including persons providing professional legal assistance[46].

The Ombudsman conducts the proceedings free of charge, which means that s/he does not charge any fees from the parties. This is not a special regulation compared to other Member States, however, some of them decided to introduce payment for proceedings. In Austria, the procedure is free for the consumer and not for the entrepreneur. The amount of fees in the mediation procedure is set in a regulation of the Austrian Federal Ministry of Transport, Innovation and Technology and is currently 78 EUR[47]. In Cyprus, consumer and entrepreneur pay variable fees[48]. In France, where solutions are closest to Polish solutions, the procedure is free for the consumer, and the fee for entrepreneur depends on membership in professional organizations. For members, the fee is 100 EUR, and for remaining 400 EUR[49].

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[45] March 27, 2020 https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2&lng=PL.

[46] Section 5 (4)of the Regulations.

[47] March 27, 2020 https://www.apf.gv.at/de/flug.html.

[48] March 27, 2020 http://www.mcit.gov.cy/mcit/cyco/cyconsumer.nsf/index_en/index_en?OpenDocument.

[49] March 27, 2020 20020 https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2&lng=PL.

As a rule, the case should be resolved within 90 days from the date of delivery of a complete application to the Ombudsman. In other countries, the average processing time is: 35 days in Austria, 75 days in Cyprus, 90 days in Belgium and France and 5 months in Denmark. In the case of a particularly complicated dispute, the PO may extend the time limit and, if he/she does so, shall notify the parties, indicating the new expected date of completion of the proceedings. The ninety-day deadline may also be extended upon the parties' consent[50]. By comparison, in Belgium, the legislation provides that the period may be extended only once, up to a maximum of 180 days; in Portugal, the period may be extended twice[51].

The Ombudsman shall forward the request to the other party and set a 14-day deadline for responding to the request. Participation of the parties in the proceedings is voluntary, so if the other party does not respond to the request within the deadline, or declares that it does not agree to participate in the proceedings, then the PO terminates the proceedings and immediately informs the parties thereof. The Ombudsman also terminates the proceedings if a passenger withdraws the application during the proceedings or if the proceedings have become impossible for other reasons[52]. Participation in the proceedings does not exclude the possibility of pursuing claims in court proceedings.

The provisions of the AL and the Regulations indicate situations in which the Ombudsman leaves the complaint unresolved. These include: the passenger's failure to complete the application for necessary information or documents within the prescribed time limit[53], the subject of the application concerns flights outside the Ombudsman's jurisdiction[54], in

[50] Section 6 of the Regulations.

[51] Report from the Commission to the European Parliament, the Council on the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution methods for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes. December 27, 2019 https://eur-lex.europa.eu/legalcontent/PL/TXT/HTML/?uri=CELEX:52019DC0425&-from=EN#footnoteref35.

[52] Section 5 (6) of the Regulations.

[53] Art. 205a (12) of the AL.

[54] Art. 205a (13) of the AL.

particular flights other than those operated from airports located on the territory of the Republic of Poland and flights from third countries to those airports, operated by Community air carriers. In such a situation, the PO is obliged to immediately inform the passenger about the body or entity competent to handle the complaint. The last possibility of leaving the complaint unprocessed is if the passenger failed to comply with the deadline for submitting the application, i.e. one year has elapsed since the date on which the flight which is the subject of the application was operated or was to be operated[55].

The Ombudsman informs the passenger that the application has been left unprocessed and, in the case of a paper complaint, also returns the application to the applicant[56].

The AL also provides for premises, the occurrence of which results in the obligatory refusal of the Ombudsman to consider a dispute. These include: the complaint procedure not being exhausted by the passenger, re-submission of a complaint by a passenger in the same case, a situation where a case for the same claim between the same parties is pending or has already been considered by an entity entitled to out-of-court settlement of consumer disputes, another competent entity or court, or where the complaint serves to cause a nuisance to the other party[57]. The last premise concerns, for example, the situation where Regulation 261/2004 does not provide for the possibility of seeking financial claims for failure to fulfil obligations by the air carrier, and the passenger would make another complaint to the Ombudsman in this regard. "This concerns, for example, failure to comply with the obligation to provide meals on delayed flights or information about the rights of passengers (...). In this case, no property claims can be made but the passenger may persistently seek them"[58]. Prerequisites for refusal to resolve the dispute in other EU countries are mostly the same. As a rule, the countries modify their number, for example in Bulgaria there are only three reasons for refusing to proceed. A premise unknown to Polish solutions is that the conduct of proceedings depends on the value of the subject of dis-

[55] Art. 205a (15) of the AL.
[56] Section 7 (5) of the Regulations.
[57] Section 7 (1) of the Regulations.
[58] Justification 2988, p. 65.

pute. Germany and Ireland are countries where the procedure cannot take place when the value of the subject of dispute is lower than the required financial threshold or exceeds the permissible ceiling[59].

The Regulations in section 7 (2) provide an optional premise for refusing to consider a civil law dispute between a passenger and the other party, if the consideration of the dispute would cause a serious disruption of the Ombudsman.

If the Ombudsman finds one of the prerequisites preventing the dispute from being conducted, the PO, within 21 days from the date of delivery of a complete application, shall refuse to initiate proceedings in writing, confirming the submission of the application and informing about the reason for the refusal. The Ombudsman shall return all copies of documents provided to him/her in paper form. Such a letter is also a protocol ending the proceedings.

However, once the parties reach an agreement, they conclude a settlement before the Ombudsman. Such a settlement is non-binding in nature, which means that it cannot be enforced in the same way as a court judgment. Belgium, Denmark and France have adopted similar solutions. The agreement developed in Germany or Austria is binding. An interesting regulation was introduced in Cyprus, where the proceedings may end with more solutions. Such result may by binding or non-binding for one or both parties in accordance with the agreement concluded with one or two parties[60].

The proceedings end with the drafting by the PO of a pleading, which is the minutes of the proceedings. The minutes should contain the minimum elements indicated in section 5 (8) of the Regulations: the date of drafting, the designated parties, a concise statement of the claim and the value of the subject matter of the dispute, the outcome of the proceedings and the Ombudsman's signature. The minutes shall be promptly delivered to the parties to the proceedings[61].

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[59] March 27, 2020 https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2&lng=PL.

[60] Ibid.

[61] Section 5 (7) of the Regulations.

4. CONCLUSIONS

Alternative ways of dispute resolution are becoming a response to the crisis of the wider judiciary. Mediation is one of the oldest conflict resolution methods[62]. In the literature there are many definitions of mediation, and in each of them, their authors emphasize various issues. *The Great Encyclopedia of Law* states that "mediation – (Latin: *mediatio* – intermediation) – is a procedure for mediating a dispute in order to bring the conflicting parties to an understanding. (...) The mediator's task is to reconcile the positions of the parties involved in a dispute, to ease the gap between them; s/he gives them advice, which may be accepted or rejected"[63] .

The institution of the Passenger Ombudsman may become an important institution for passengers as well as for air carriers. In the legal status prior to the amendment of the AL neither the President of the CAO nor the Commission for the Protection of Passengers' Rights brought the positions of the parties closer together, and the role of the President of the CAO was to examine whether the air carrier had infringed the provisions of Regulation 261/2004, and when the President found such an infringement, s/he imposed a fine for it.

When making a theoretical comparison of mediation with proceedings before a common court, mediation is cheaper and quicker. One does not have to wait for its outcome as long as for the judgment of a common court. However, at the moment it is difficult to say whether the institution of the Ombudsman will improve the situation of passengers. As mentioned above, it follows from the communication available on the PO's website, that the applications of May 2019 are only being considered, which means that the Passenger Ombudsman's activities are not effective yet. The global trend has become the amicable settlement of all possible disputes. As indicated in the study, EU Members States are introducing various solutions to provide consumers with the most convenient way to pursue their claims.

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[62] Wojciech Federczyk, *Mediacja w postępowaniu administracyjnym i sądowoadministracyjnym* (Warsaw: Wolters Kluwer, 2013), 32.

[63] Eugeniusz Smoktunowicz, *Wielka encyklopedia prawa* (Białystok-Warsaw: Wydawnictwo Prawo i Praktyka Gospodarcza, 2000), 440.

The French Mediator for Tourism and Travel is the closest body to the Polish Passenger Ombudsman.

The very idea and attempt to introduce ADR proceedings in property disputes between a passenger and an air carrier, ticket vendor, or tour operator should be assessed positively, but the practice of mediation in other proceedings, e.g. before common courts, administrative courts, or in administrative proceedings raises serious doubts as to its effectiveness. However, it is difficult to resist the conciliation processes, which cover ever wider areas of law. Every step to facilitate consumer redress should be affirmed.

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HARMONISING ACCESSIBILITY IN THE EU SINGLE MARKET: CHALLENGES FOR MAKING THE EUROPEAN ACCESSIBILITY ACT WORK

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ABSTRACT

In the last decade, accessibility has become a buzzword not only among actors of the civil society advocating for the rights of persons with disabilities but also among the legislators in the European Union. The EU has adopted a series of binding regulations aiming at approximating the common understanding of accessibility and Member States' approach to operationalising the right. Being part of EU harmonised law, the European Accessibility Act has already been considered a milestone in the process. The choice of an approach / approaches will decide about a success of its transposition into Member States legal systems.

Keywords: standardisation of products and services, EU disability law, CRPD, EU internal market, persons with disabilities

1. INTRODUCTION: TOWARDS EU ACCESSIBILITY 2.0

Accessibility brings harmony – this statement of an axiological nature has obtained a new dimension within the recent legislative and standardising works of the European Union. Indeed, the duty of effective enforce-

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ment of the right to accessibility provided by the United Nations Convention on the Rights of Persons with Disabilities (CRPD)[1], for many groups, including persons with disabilities, older people or other individuals with functional limitations, appears as a promise of restoration of the universally accessible order, where no one is excluded from or limited in use of spaces, products and services and everybody is able to equally enjoy all spheres of the common reality. In order to be realised, this promise requires the states parties to design and implement legal and policy constructs operationalising CRPD provisions in a way that are both wholesome and feasible.

As a result of ratifying the CRPD, since January 2011, the EU (now along with its all Member States) has been bound to fulfil the obligations of the Convention within the limits of its competence. The initial report on the implementation of the CRPD by the EU[2] showed a range of developments introduced and coordinated by the Union in promoting accessibility. By 2014, the EU had already adopted a number of legal acts harmonising accessibility requirements for goods and services to contribute to completing the EU internal market and opening up possibilities for economic operators to sell their products throughout the EU[3] and regulations on the rights of persons with reduced mobility in the area of transport[4]. Despite

[1] UN Convention on the Rights of Persons with Disabilities, 13 December 2006, in force 03 May 2008, UN Doc. A/RES/61/106, Annex I.

[2] Committee on the Rights of Persons with Disabilities. "Consideration of reports submitted by States parties under article 35 of the Convention. Initial report of States parties due in 2012 European Union", December 3, 2014, https://documents-dds-ny.un-.org/doc/UNDOC/GEN/G14/232/64/PDF/G1423264.pdf. (Access date: 30.04.2020).

[3] E.g. Regulation (EC) No. 661/2009 concerns type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor; Directive 95/16/EC on the approximation of the laws of the Member States relating to lifts refers to the accessibility of lifts, OJ L 200, 31.7.2009, p. 1; Directive 2004/27/EC on the Community code relating to medicinal products for human use requires that the packaging of medicinal products include a label in braille and that the package information leaflet be available, on special request, in formats accessible to visually impaired users, OJ L 213, 7.9.1995, p. 1–31; Directive 2009/45/EC on safety rules and standards for passenger ships obliges Member States to ensure that appropriate measures are taken to enable safe access to passenger ships, OJ L 163/1.

[4] See Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ L 315, 3.12.2007, p. 14–41; Regulation (EU) No 1177/2010 of the European Parliament and of the Council

the steps taken to implement the Convention with regard to accessibility creating broad grounds for its implementation, the *status quo* presented in the report was subject to criticism.[5]

Since then, the European Commission has continued to use mainly legislative but also other instruments, such as standardisation and public funding, to optimise and mainstream the accessibility of the physical environment, transport and ICT in particular. The legal work includes amendments and extensions to regulations on passenger transportation and built environments, as well as general provisions related to structural funds[6], as well as the revision of the Public Procurement Directives with reference to accessibility for persons with disabilities[7]. Solutions for greater accessibility are also introduced in specific measures in the fields of consumer protection, currency and transactions. Now work is also underway

of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004, OJ L 334, 17.12.2010, p. 1–16; Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004, OJ L 55, 28.2.2011, p. 1–12.

[5] Geert Freyhoff, "EU implementation of disability Convention 'comprehensive but conservative'", 2014, https://www.theparliamentmagazine.eu/articles/news/eu-implementation-disability-convention-comprehensive-conservative. (Access date: 30.04.2020).

[6] See CPR - Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument, COM/2018/375 final - 2018/0196 (COD).

[7] By 18 April 2016, EU Member States were obliged to transpose the following three directives into national law: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014: 65–242; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 094 28.3.2014: 243; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 094 28.3.2014: 1-64. The award criteria provided by them for the most advantageous economic tenders include specific references to accessibility for persons with disabilities and design for all users as part of the quality of a tender. The same requirements become an obligation when drawing up technical specifications for all goods and services intended to be used by the public or staff.

to promote e-accessibility and use ICT products, services, and applications among groups experiencing functional limitations[8]. Adopted in 2016 the Directive on the accessibility of websites and mobile applications of public sector bodies[9] supports the Digital Agenda for Europe[10] as well as the implementation of the CRPD in Member States. While the above-mentioned regulations are technical, importantly the key purpose of the directives and regulations is generally twofold; first, to ensure that all citizens can access products and services and participate in society, and to promote and facilitate accessible developments; and second, to obtain cohesion in the selected areas of production and services performed in Members States and, thus, to remove possible barriers to their cross-border mobility.

The adoption of the European Accessibility Act (EAA)[11] has marked, so far, the most ambitious of the EU legislative steps towards accessibility. The legal regulation which took over ten years to be shaped entered into force on 28 June 2019 after being delayed and burdened with diverse expectations by different groups of stakeholders[12], even though there are several ways in which the EAA fell short of expectations of the community of persons with disabilities.

The EAA covers products and services that have been identified as being most important for persons with disabilities while being most likely to

[8] More on this, e.g.: Laura Preud'homme, "Droit de l'Union européenne et handicap," *Revue de l'Union européenne*, no. 579 (2014): 336; Anna Lawson, Mark Priestley, "Potential, principle and pragmatism in concurrent multinational monitoring: disability rights in the European Union," *International Journal of Human Rights*, no. 17 (2013): 739–757.

[9] Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies, OJ L 327, 2.12.2016, p. 1–15.

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Agenda for Europe, COM/2010/0245. For updates on it see European Commission, Digital Agenda for Europe, available at https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market. (Access date: 30.04.2020).

[11] Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services, PE/81/2018/REV/1, OJ L 151, 7.6.2019, p. 70–115.

[12] See, e.g., the resources from the European Disability Forum campaign for adoption of the EAA and positions of disabled persons organisations (DPOs).

have diverging accessibility requirements across EU countries. The Commission consulted stakeholders and experts on accessibility and took into account the obligations deriving from the CRPD on persons with disabilities. The regulated products and services include: computers and operating systems, payment terminals and certain self-service terminals such as ATMs, ticketing and check-in machines, interactive self-service information terminals, smartphones and other equipment for accessing telecommunication services, TV equipment involving digital television services, e-readers, telephony services, services to access audio visual media services, certain elements of air, bus, rail and water transport services such as websites, mobile services, electronic tickets, information, consumer banking, e-books, e-commerce, answer to emergency calls to the single European number '112'. The EAA applies to products and services entering the market on or after 28 June 2025.[13]

The directive is to be transposed into national legal orders by 28 June 2022 and, with certain exceptions, Member States must apply the measures from 28 June 2025. As in case of any EU directive, a respective national implementation law will be decisive regarding the scope and methods of enforcing. The EAA obliges EU Member States to design and execute the most efficient legal developments in compliance with the objectives and minimum requirements set in the directive. The quality of this important regulation and the level of harmonisation to be obtained depend on the approaches adopted by each Member State. However, due to the matter of the legislation, there are other crucial factors that may influence the success indicators of the EAA implementation.

[13] The scope of services and products it covers is, however, considered very limited. Health care services, education, transport, housing, and household appliances were left out of the EAA and a number of exemptions are made even in case of products and services covered by the Act (e.g. when the service is related to urban, suburban and regional transport or is provided by a microenterprise). Furthermore, requirements concerning the built environment related to the services covered by the EAA are left to the decision of Member States. It is obvious that in the Member States where the need to improve is the greatest the readiness to introduce the obligations in the area will remain low. For more thorough analysis see European Disability Forum analysis of the European Accessibility Act, June 2019. Available at http://www.edf-feph.org/newsroom/news/our-analysis-european-accessibility-act. (Access date: 30.04.2020).

The objective of this paper is to show the possible challenges of harmonisation of EU law on enforcement of accessibility for people with disabilities whose ultimate achievement is the EAA and to analyse selected conditions for its proper implementation. It presents analysis made by scholars and opinions presented by the stakeholders involved in legislative and enforcement processes, including representatives of potential beneficiaries from the EAA provisions, on the topic and consequently answers the following questions:

1. What approach to accessibility – human rights or from the internal market perspective – may occur more effective within the implementation of the EAA?
2. What other measures may support the harmonisation of accessibility requirements for products and services in the EU?

However, first and foremost, I wish to inspire a multidimensional discussion on different aspects of the ongoing transposition of the EAA in Member States which, by engaging all groups of stakeholders, can have a positive impact on legislative works.

2. THE SINGLE MARKET PERSPECTIVE IN THE EAA

In 2013, the ANED analysis utilised by the European Commission in the law-making process for the EAA unveiled a variable picture of European accessibility[14]. The general obligations present in national laws (e.g. non-discrimination law or disability law) frequently place a broad duty of accessibility or reasonable adjustment, while there is greater specificity of accessibility requirements for certain goods and services than for others, and in some countries rather than others. Specific requirements are more likely to exist for services than for goods, for public sector provision than for private sector provision, and for those areas subject to existing EU regulation or standardisation. Another conclusion shows that technical standards are more likely to be voluntary than compulsory, or may refer loosely

[14] Academic Network of European Disability experts (ANED), "National accessibility requirements and standards for products and services in the European single market: overview and examples," compiled by M. Priestley, VT/2007/005, January 2013.

to international guidelines. This picture is further complicated by the existence of different accessibility specifications for similar products or services in different countries, with implications for purchases, sales or distribution across national borders within the EU. Generally, there is also lack of common reference points or guidelines for companies, potential customers or suppliers to identify what constitutes an "accessible" product or service.

Taking into account the state, in the Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards accessibility requirements for products and service, the European Commission indicated that the general objectives of this initiative were "to improve the functioning of the internal market of specific accessible goods and services, while facilitating the work for industry and serving the needs of consumers, as well as to contribute to the goals of the Europe 2020 Strategy and the European Disability Strategy 2010-2020" and specifically it was designed "to lower barriers to cross-border trade and increase competition in the selected goods and services and in the area of public procurement, as well as to facilitate access by consumers with disabilities to a wider range of competitively priced accessible goods and services".[15] The European Commission has emphasised that, due to the creation of a single set of accessibility requirements, businesses – in particular SMEs – will benefit from the elimination of barriers caused by a fragmented market enjoying easier cross-border trade. The market costs for companies and Member States due to divergent requirements are estimated at € 20 billion in 2020[16] and the proposed EU action was estimated to reduce it by 45% to 50%[17].

[15] European Commission, "Commission Staff Working Document. Impact Assessment. Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards accessibility requirements for products and services," SWD/2015/0264 final - 2015/0278 (COD): 5.

[16] European Commission, "European Accessibility Act. Improving the Accessibility of Products and Services in the Single Market," https://ec.europa.eu/social/main.jsp?catId=1202. (Access date: 30.04.2020).

[17] See European Commission, "Impact assessment accompanying Proposal for a Directive on the approximation of the laws, regulations and administrative provisions of the

According to the study on the socio-economic impact of new measures to improve accessibility of goods and services for people with disabilities performed in 2015, the potential benefits are expected to be higher than the potential accessibility-related costs for all economic operators[18].

As stated in the EAA's Preamble, the directive aims to improve the functioning of the internal market for accessible products and services, by removing barriers created by divergent regulations across Member States. Thus, the EAA serves one of the core tasks of the EU within the internal market context – harmonisation and legal convergence. With regard to the EAA's transposition, we deal with this term "harmonisation" understood broadly, encompassing both actual harmonisation, i.e. approximation of laws, and also unification or standardisation. In the context of the interplay between secondary law and free movement provisions, it has to be considered "harmonisation" in its functional sense[19]. The nature of the harmonising legal act usually implies one of the types: directive – actual harmonisation or approximation of laws and regulation – most often the unification or standardisation of laws. Historically, regarding harmonisation within EU consumer law, Member States had to agree on the level of consumer protection awarded through relevant directives. [20] Due to the fact, harmonisation as a policy technique took different shapes: starting out as a form of standardisation, it was turned into a minimum common denominator (minimum harmonisation), and in more recent times the bar was raised to align all Member States to the same standard (maximum

Member States as regards the accessibility requirements for products and services," Brussels, 2.12.2015, SWD(2015) 264 final.

[18] Deloitte, "Study on the socio-economic impact of new measures to improve accessibility of goods and services for people with disabilities. Final Report," 2015, https://ec.europa.eu/social/BlobServlet?docId=14842&langId=en. (Access date: 30.04.2020).

[19] More on inconsistencies of 'harmonisation': Eva J. Lohse, "The meaning of harmonisation in the context of European Union law – a process in need of definition," in *Theory and Practice of Harmonisation*, eds. Mads Andenas, and Camilla Baasch Andersen, (Cheltenham: Edward Elgar Publishing Ltd., 2011), 284 et seq.

[20] Norbert Reich, "From minimal to full to 'half' harmonisation," in *European Consumer Protection: Theory and Practice*, eds. James Devenney, and Mel Kenny (Cambridge: Cambridge University Press, 2012), 4, https://doi.org/10.1017/CBO9781139003452.003.

harmonisation)[21]. Lately, since about 2000, there is the tendency in EU consumer law towards full harmonisation, under which Member States can choose to increase the scope and intensity of consumer protection – which is also the case for the EAA.

Installing accessibility as an element of harmonised legal norms is the only effective way of implementing and enforcing it. However, it is worth considering diverse perspectives on the process of converging the EU internal market. Anthony Giannoumis presents an approach to achieving transnational convergence in the field of digital accessibility, diverging from the existing literature, demonstrating that via a bottom-up approach, public and private sector actors can contribute to convergence of procurement policy in the EU, referring to the international harmonisation or acceptance of common standards and norms, by participating in international policy networks. He states that a bottom-up perspective, emphasising the influence of policy networks on policy design, provides a useful approach for examining convergence and emphasises the crucial role of policy actors in the European Union that participated in the harmonisation of policies and the legal norms and instruments that give these policies their legal effect.[22]

The bottom-up perspective is indispensable in the EAA's transposition as the single market regulated by its provisions concerns a plethora of actors. Now the EU is entering a period where the European Commission will work with experts and the Member States will draft implementation acts and details in the legislation as well as run public consultations. At every stage of transposition and then implementation works all relevant stakeholders of the regulation should be present. The main sector fully in the scope of the EAA is the ICT industry and it appears obvious that ICT consultants should be informed and involved in the standardisation pro-

[21] Fernando Gomez, and Juan J. Ganuza, "An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?," *European Review of Contract Law*, no. 7(2) (2011): 275.

[22] Anthony Giannoumis, "Transnational convergence of public procurement policy: a 'bottom-up' analysis of policy networks and the international harmonisation of accessibility standards for information and communication technology," *International Review of Law, Computers & Technology*, no. 29 (2015): 2–3, 183–206, https://doi.org/10.1080/13600869.2015.1055662.

cess from the very beginning, to provide comments and input throughout the standardisation work, to resolve technical issues and minimise potential delays. The AEE is ambitious in its scope providing that it places demands on accessibility throughout the value chain: manufacturers, authorised representatives, importers and distributors of products and services are affected and insights in their specific perspectives in every Member State are crucial to proper understanding of the conditions of the regulation. Although European harmonised product and service legislation applies directly to manufacturers, importers, providers and suppliers and not directly to end users, it is of significance to the end user. Also, the EAA's provisions take into account needs of different groups of consumers (see in the next section) and it is highly welcome that the EAA directly stipulates that Disabled Persons' Organisations (DPOs) are to work with national authorities, other stakeholders, and the European Commission to advise them during the implementation of the Act and they will also be involved in future reviews of the Act. Other entities that should not be missed in the early preparatory works are national Market Surveillance Authorities with a prominent role in monitoring and controlling products and services provision, as well as NGOs, national authorities or other bodies whose competence in consumer or human rights or practice of accessibility will let them advocate and represent individuals in court under national laws.

At this point, it is worth indicating that the EAA sets provisions which deviate from the spirit of the New Legislative Framework (NLF)[23]. Adopted by the European Council in 2008, the NLF provided a framework serving as a template for future regulations based on the principle that presumption of conformity of products and services to the EU legislation which may be demonstrated through compliance with harmonised European standards. This is the most common and reliable approach to conformity assessment with NLF legislation which aims to improve market surveillance, clarify the use of CE marking and establish a common legal framework for industrial products. The EAA also includes the strong NLF elements: *inter alia* accessibility requirements for the products and

[23] European Commission, New legislative framework, https://ec.europa.eu/growth/single-market/european-standards/harmonised-standards/new-legislative-framework-and-emas_en. (Access date: 30.04.2020).

services included in the EAA are mandatory for public procurement; for products and services not included in the EAA, it provides a list of accessibility requirements that can help to demonstrate compliance with accessibility provisions laid down in present and future EU laws (e.g. EU funds regulations[24]); economic operators are obliged to take immediate corrective measures, or withdraw, if a product does not meet the accessibility requirements of the EAA and, if one Member State withdraws an inaccessible product from the market the others must follow suit. However, it sets provisions that may complicate or prevent the adoption of harmonised standards.

Compliant with Article 15 of the EAA, to receive a draft of harmonised standards, the European Commission issues a standardisation request ("mandate") to the European Standards Organisations (ESOs) to ensure that there is a harmonised EN standard that can serve as minimum requirements[25]. While recognising standardisation as means of compliance with the requirements, the EAA's provisions do not ensure that the standardisation process will be carried out effectively.[26] The Act allows the Commission to release a mandate up to 2 years after the entry into force of the

[24] CPR recital 5 stresses that the Union law harmonising accessibility requirements for products and services is applicable to EU co-funded investments, hence suggesting that the EAA is applicable when investing EU funds. The Commission's proposal for the Common Provisions Regulation for the period 2021-2027 has been amended by co-legislators with an article 6a explicitly stating in point 3 "Member States and the Commission shall take appropriate steps to prevent any discrimination based on gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the preparation, implementation, monitoring, reporting and evaluation of programmes. In particular, accessibility for persons with disabilities shall be taken into account throughout the preparation and implementation of programmes." The CPR proposal also includes the horizontal enabling conditions on the effective application and implementation of the EU Charter of Fundamental Rights and of the UNCRPD, which should be assessed throughout the implementation period of the 2021-2027 Funds.

[25] It is considered likely that the regulations will build on EN 301 549. See Standard - EN 301 549 "Accessibility requirements suitable for public procurement of ICT products and services in Europe". Available at https://www.etsi.org/deliver/etsi_en/301500_301599/301549/02.01.02_60/en_301549v020102p.pdf. (Access date: 30.04.2020).

[26] DIGITALEUROPE, "Standardisation is key to the success of the European Accessibility Act," https://www.digitaleurope.org/resources/standardisation-is-key-to-the-success-of-the-european-accessibility-act (Access date: 30.04.2020).

Directive, up until June 2021, which greatly reduces the time remaining for ESOs to draft the standards in collaboration with all Member States and stakeholders – which is especially important for legislation as complex as the EAA. According to announcements within the EAA National Contact Points' Ad Hoc Group, the Commission was supposed to release the mandate within 6 months after the publication of the EAA in the beginning of 2020 (none has been issued by May 2020), so standards would be available when the accessibility requirements enter into force in 2025. If the option to demonstrate compliance through the familiar route of harmonised standards was unavailable, it could disturb the implementation of the EAA as companies, authorities and consumers are hindered without the valuable reference point of a harmonised standard.

Moreover, the EAA states that in case of "undue delays" in the standardisation procedure, the European Commission may withdraw the mandate and draft mandatory technical specifications that meet the Annex II criteria of Regulation 1025/2012 on European standardisation[27], instead of harmonised standards. However, there is no process mentioned to identify such technical specifications and the Act waives the requirement that these technical specifications be developed by a non-profit organisation. it means that these technical specifications would be developed outside the well-established governance system set in place to develop European Standards and may be incompatible with the code of good practice for the preparation, adoption and application of standards within the World Trade Organisation Technical Barriers to Trade Agreement[28].

Additionally, the vagueness of the used term "undue delays" will lead to high uncertainty for ESOs and industry. In the EAA, a recital (n° 76) also states that an "undue delay" may happen if the Commission does

[27] Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, OJ L 316, 14.11.2012: 12–33.

[28] WTO, Agreement on Technical Barriers to Trade, 1995, https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm. (Access date: 30.04.2020).

not publish a reference to a harmonised standard because it considers that the draft standard does not satisfy the requirements which it was supposed to cover. This means that an "undue delay" may be two-fold: an unspecified lateness in the process or a lack of quality of the draft standard. This would be also the case if the Commission decides to withdraw the mandate and to draft technical specifications which would prove unfit for the industry due to a lack of concertation with all stakeholders - which, as underlined before, is of essential importance in the implementation of the EAA.

3. THE HUMAN RIGHTS PERSPECTIVE IN THE EAA

Within the European Disability Strategy 2010-2020, evoked in the EAA, the key commitment is to "Ensure accessibility to goods, services including public services and assistive devices for people with disabilities' and making progress on this issue at the European level is seen as a 'precondition for participation in society and in the economy'."[29] As a document prior to the ratification of the CRPD by the EU and to most of legal developments on accessibility in EU law, it did not refer to specific acts, however, it remains in line with the progress made later on in the area. The EAA refers to the CRPD in its preamble stating that the Act aims to facilitate the implementation of the Convention by establishing common Union rules. However, the EU actions go further - the EAA supports Member States' efforts to harmonise implementation of national obligations as well as accessibility obligations under the CRPD.[30]

In this context, it is worth emphasising that the right of accessibility is a complex construct of an unprecedented nature. In the entire text of the CRPD, there is no reference to an actual "right" to accessibility. During the negotiation sessions leading to the adoption of the CRPD, concerns were demonstrated regarding the fact that accessibility was framed as a general principle and a state obligation, and not as a right to accessible environ-

[29] "European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe," COM (2010) 636.

[30] Recital No 16 of the EAA's Preamble.

ments and services on an equal basis with others.[31] Supporting the latter, Ron McCallum, the former Chair of the CRPD Committee, expressed the significance of accessibility commenting that there is nothing "more crucial for persons with disabilities than accessibility"[32]. However, recently scholars recognise without questioning that Article 9 of the CRPD as an innovative provision formulates, for the first time in a UN human rights agreement, a right to accessibility[33] and it "adds considerable content" to the concept of accessibility[34]. Andrea Broderick argues that the CRPD has created self-standing rights, not previously seen in binding international human rights treaty law - among them the right to accessibility[35].

Such a situation has far-reaching implications in the scope of States Parties' domestic legal frameworks. In its General Comment 5 on persons with disabilities the UN Committee on Economic, Social and Cultural Rights has acknowledged: "The obligation in the case of such a vulnerable and disadvantaged group [as persons with disabilities]' is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities […]. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required"[36]. Nevertheless, the exact parameters of that right to accessibility,

[31] "7th Session of the Ad Hoc Committee", Volume 8(2), 17 January 2006.

[32] Janet Lord, *Accessibility and Human Rights Fusion in the CRPD: Assessing the Scope and Content of the Accessibility Principle and Duty under the CRPD*. Geneva: United Nations Committee on the Rights of Persons with Disabilities, 2010: 1.

[33] See, e.g., Marianne Schulze, *Understanding the UN Convention on the rights of persons with disabilities* (New York: Handicap International, Professional Publications Unit, 2010), 52; Frédéric Mégret, "The disabilities Convention: towards a holistic concept of rights," *International Journal of Human Rights*, no. 12 (2008): 261–278.

[34] Janet Lord, and Michael Stein, "Charting the Development of Human Rights Law through the CRPD," in *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, ed. Valentina Della Fina, Rachele Cera, and Giuseppe Palmisano (Cham: Springer, 2017), 732.

[35] Andrea Broderick, "Of rights and obligations: the birth of accessibility," *International Journal of Human Rights*, no. 4 (2019): 14, https://doi.org/10.1080/13642987.2019.1634556.

[36] Committee on Economic, Social and Cultural Rights, General comment 5 on persons with disabilities, E/1995/22, para. 9.

which should remain distinguished from the right to access, have not been clearly defined nor have they been properly tested to date.

At the same time, the inclusion of the principle of accessibility within a binding human rights treaty constitutes a novel addition to the international human rights law regime. DPOs and disability rights advocates used to present the need for ensuring accessibility from the human rights standpoint which became strengthened with the adoption of the CRPD and consolidated by its ratification by the EU and all Member States. Also the CRPD Committee's General Comment No. 2 suggests that and "accessibility should be viewed as a disability-specific reaffirmation of the social aspect of the right to access"[37], established by earlier adopted UN human rights treaties[38]. The approach reserving the right to accessibility to the group of persons with disabilities should be, however, challenged.

Accessibility is treated as a group right of a collective nature. The CRPD Committee has elaborated on the group dimension of accessibility, stating that it is "an ex ante duty" and indicating that: "Accessibility is related to groups, whereas reasonable accommodation is related to individuals". States Parties therefore "have the duty to provide accessibility before receiving an individual request to enter or use a place or service"[39]. In the context of the access to products and services the human right to accessibility in most cases fits in the sphere of consumer rights.[40] The EAA gives grounds

[37] Committee on the Rights of Persons with Disabilities (2014), General Comment 2 on Accessibility, CRPD/C/GC/2, para. 4.

[38] The CRPD Committee referred to Article 5(f) of the International Convention on the Elimination of All Forms of Racial Discrimination, which guarantees everyone equality before the law in the enjoyment of the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks, stating that "a precedent has been established in the international human rights legal framework for viewing the right to access as a right per se". See Committee on the Rights of Persons with Disabilities (2014), para. 3.

[39] *Ibidem*, para. 25.

[40] In academic circles, opinions on the appropriateness of elevating consumer rights to the level of human rights are divided. In the light of the complexities of products and services brought about by advancement in technology, globalisation and increasing roles of multinational corporations in trade, it is argued that there is need to elevate of consumer rights to human rights, nationally and internationally. See Festus Okechukwu Ukwueze, "Towards a new consumer rights paradigm: Elevating consumer rights to human rights in

to the concept as, despite referring to the CRPD and limitations resulting from disability, it points to persons with functional limitations as the provisions' beneficiaries. In sentence 2 in recital No 4 of the Preamble it explains: "The concept of 'persons with functional limitations', as referred to in this Directive, includes persons who have any physical, mental, intellectual or sensory impairments, age related impairments, or other human body performance related causes, permanent or temporary, which, in interaction with various barriers, result in their reduced access to products and services, leading to a situation that requires those products and services to be adapted to their particular needs." The scope of persons protected by the EAA is then wider, not restricted to persons with disabilities, and include anybody who could benefit from accessibility due to functional limitations. Still we talk here about occurrence of some objective "limitations" hindering the access, not preferences in using of products and services. However, the EAA accentuates particular needs of individuals, which may in further developments shift the nature of the right of accessibility. It brings it closer to human rights which an individual has for the sole reason of being a member of humankind and whose objects are of the greatest importance. Nonetheless, collective group rights are rights possessed by individuals belonging to a group distinguished by a characteristic and can be exercised in collective and individual form.[41] In the case of the right to accessibility provided in the EAA, such an approach is too limiting for interpretation of the EAA and seems recently under deconstruction in EU law.

Another interesting aspect of the right to accessibility concerns the scope of the duty bearers. Article 9 of the CRPD enshrines a broad concept of access that covers both public and private actors as it is applicable to all kinds of actors which make their services or products "open or provided to the public". Thus, its provision places a specific burden on private and public actors regarding information and communication technologies (ICT), including the Internet[42]. It shifts the emphasis from the public or

South Africa," *South African Journal on Human Rights*, Volume 32, Issue 2(2016): 248-271, DOI: 10.1080/02587203.2016.1215655.

[41] More in Wiktor Osiatyński, *Human Rights and Their Limits* (Cambridge and New York: Cambridge University Press, 2009).

[42] Marianne Schulze, *Understanding the UN Convention on the rights of persons with disabilities*, 52.

private nature of products, services and information and communication to the aimed scope of their recipients. As long as products and services are supplied to the public, they must be accessible to all, regardless of whether they are provided by a private company or a public authority. The elimination of this differentiation between public and private is unprecedented - earlier rules placed the requirements for accessible products and services only on government entities or publicly funded enterprises operating for the public good and, thus, obliged to be universally accessible to the public audience. The CRPD Committee indicates the need for "proactive engagement of the duty-bearers"[43] by stating that "the right to access for persons with disabilities is ensured through strict implementation of accessibility standards"[44]. Thus, its provision places a specific burden on private and public actors regarding information and communication technologies (ICT), including the Internet[45]. A similar approach is adopted in the EAA. However, whereas the scope is somewhat limited in relation to private entities in para. 2 (b) of Article 9, necessitating only "private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities", the EAA covers both public and private producers and service providers. Placing accessibility requirements on both public entities and private industry sets the tone for the accomplishment of such standards by the EU and Member States.

4. CONCLUSIONS

By defining in the EAA common EU accessibility requirements for selected goods and services and using the same requirements for public procurement, and by improving enforcement of accessibility requirements, the EU has been addressing both economic and social values. The

[43] Gian M. Greco, "On Accessibility as a Human Right, with an Application to Media Accessibility," in *Researching Audio Description. New Approaches*, eds. Anna Matamala, Pilar Orero (London: Palgrave Macmillan 2016), 22.

[44] Committee on the Rights of Persons with Disabilities (2014), para. 14.

[45] Marianne Schulze, *Understanding the UN Convention on the rights of persons with disabilities*, 52.

benefits from the EAA implementation mentioned in its Preamble refer to businesses by indicating their costs reduction, easier cross-border trading and more market opportunities for their accessible products and services, as well as to persons with disabilities and other persons who experience functional limitations by more accessible products and services in the market at more competitive prices, fewer barriers when accessing transport, education and the open labour market and more jobs available where accessibility expertise is needed.

Research on accessibility of products and services is often perceived as relating to the issue of disability rights, not more widely to consumer or human rights. In the transposition of the EAA, it can be beneficial to adopt the vast human rights basis to enable a better understanding of potential functional limitations in a variety of users' practices and behaviour. Using the concept of disability as a gauge of the success in providing accessibility of products and services is the first step to making the common market truly common and responding to basic human needs and realising fundamental rights. To achieve the effect, the involvement of disability movements (including DPOs and self-advocates), senior organisations, citizen movements and IT and service design experts – as well as human rights practitioners – is essential, as their participation in the law-making and policy-making process will ensure adequacy and efficiency of the envisaged change. Moreover, in such a way, acknowledgement of accessibility as a ready to be operationalised principle would let cover all consumers by the EAA's provisions.

I concur with Gian Maria Greco's view that such an approach could "bring it to the forefront of the global policy discussion on nearly all human rights, and in a more universal sense" and "it would also provide a decisive basis towards the full acknowledgement of accessibility studies as a unique and autonomous discipline, comprising its own specific topics, models and methods".[46]

At the same time, the human rights validation seems to be insufficient when it comes to enforcing domestic laws and policies. Introducing and ensuring accessibility in all the areas of socio-economic performance of a state, both in its public and private sectors, constitutes a huge workload

[46] Gian M. Greco, op. cit., 33.

consuming resources of all kinds - expertise, money, time and people's involvement and creativity (just to name the most basic ones). Horizontal, as well as specific amendments to be made in policies and legal regulations often touch and transform relations which have been traditionally designed as inaccessible for centuries. Combining the approach with the instruments available to the EU within the framework of harmonisation of law will contribute to strengthening the basis for as full as possible implementation of accessibility for all citizens of Member States.

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DIFFERENT FORMS OF VIOLENCE – SELECTED ISSUES

*Krzysztof Mikołajczuk**

ABSTRACT

Violence has been part of the human history since its very beginning. As some believe, it is "Cain's sin" that determines violent human behaviour. Though this belief is obviously simplified, it reflects the nature of man. We are eager to seek evil in others, in individuals and in social structures. It is not just the family that is oppressive. Violence is ubiquitous; it is inflicted by peer groups, social classes, organisations, and by the state. Violence is commonly defined as social behaviour against someone or something, the aggressor being on one side and the victim on the other. Usually, a narrow definition of violence is used; i.e., violence is understood as the use of force to obtain from others what they are not willing to give or what they do not want to do. However, violence is a more complex phenomenon. Some forms of violence are sophisticated and difficult to discern, not only in the behaviour of others but also in our own actions. Violence occurs on a micro-scale in the form of pressure, extortion, inducement, or restrictions, and on a macro-scale – as wars, crises, terroristic acts, or revolutions. Violence is not only physical and psychological; it may also be personal, structural, hidden, explicit, emotional, and rational. What follows, it takes place in a wide array of spaces: in culture, sport, politics, the media, in the public space and at home. Therefore, the narrow definition of violence fails to include many of its aspects, and as such it is

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not practical. Using such a definition, we are left with extreme cases, so in fact we define pathologies. A serious difficulty in defining violence is connected with defining human rights in a unified way. These vary from culture to culture and have been evolving throughout history. Violation of these rights constitutes the essence of what is referred to as violent behaviour. Each society defines and attempts to prevent violence differently, and also in its own way indicates those who judge the perpetrators of prohibited acts.

Keywords: Violence, definitions and forms of violence, social pathology, aggressor, victim

1. INTRODUCTION

Violence is an intentional act of using one's power and force against others. Violent behaviour infringes on the autonomy, individuality and dignity of another person or a group of people. Acts of violence usually occur between groups, communities, and nations. Violence may be a one-off incident or may be repeated many times. It is the use of physical (or other) force against others to inflict suffering and harm on "the soul and body." Violence encompasses all non-accidental, or even purposeful acts that deviate from the social norms of interpersonal relationships. Violent acts can be divided into physical, psychological (mental), sexual, economic, and so-called negligent treatment. Violence can occur in various social contexts: in the family, at school, among peers, in the media, and in the virtual space.[1]

> Violence is multi-faceted and multi-coloured. It is multidimensional. It may affect various categories of victims: children, women, men, but also the elderly, the disabled, foreigners, or animals. Unfortunately, it is often concealed in a "maze" of the family, environmental and social "collusion of silence." In the world of animals, violent behaviour is natural; otherwise, carnivores would not be able to survive. Hungry animals do not control their aggression, but when they are full, they are no longer aggressive, as in the animal world

[1] Cf. Iwona Ulfik-Jaworska, "Przemoc," in *Encyklopedia Katolicka* Vol. 16, ed. Edward Gigilewicz (Lublin: Towarzystwo Naukowe KUL, 2012), 649–652.

aggression is not an end in itself but rather a means of satisfying hunger and survival. Man, although superior to animals – not only due to his reason and the ability to control emotions, but also because he makes and observes norms that ban the use of violence – often resorts to violence and aggression against the weaker and those who are close to him.[2]

The article focuses on two types of violence: psychological (mental) and physical, which are examined especially in reference to children.

2. VIOLENCE – AN ATTEMPT AT DEFINITION

One might be tempted to say that 'evil' has always existed and it has always existed alongside 'good'. "According to Catholic Church teaching and Christian thought, evil arose when a creature with free will, and not as perfect as his Creator, went astray by rejecting God's love. This rejection of divine love, divine mercy and care has contributed to the eternal condemnation of man to suffering in which we must learn to exist. It seems, however, that it is only today, in the 21st century that evil has triumphed with all its brutal openness and wildness, increasing human suffering and making it necessary to redefine humanity, which now encompasses much more elements that contrast with good. It is increasingly difficult for man to develop his personality properly, as he must constantly choose what is right, contrast good and evil, and set axiologically proper goals."[3]

The Catechism of the Catholic Church develops and complements the above considerations and states clearly that: "The first man was not only created good, but was also established in friendship with his Creator and in harmony with himself and with the creation around him."[4] Undoubt-

[2] Elżbieta Krajewska-Kułak, Krystyna Kowalczuk, Agnieszka Kułak-Bejda, Andrzej Guzowski, and Wojciech Kułak, *Różne barwy przemocy* Vol. 1 (Białystok: Uniwersytet Medyczny, 2016), 6.

[3] Ibidem, 13.

[4] *Katechizm Kościoła Katolickiego* (Poznań: Pallottinum, 1994), No. 374. "God is infinitely good and all His works are good. Yet no one can escape the experience of suffering or the evils in nature which seem to be linked to the limitations proper to creatures: and above all to the question of moral evil. Where does evil come from? «I sought whence

edly, "evil pervades our lives, as does good, which constantly clashes with evil. It takes much work on self-improvement, much good will, or even sacrifice and heroism for good to prevail and triumph over evil […]. Evil has never been easy to capture and define. It has always defied the human imagination."[5]

The issue of violence is still topical in literature and the media. With confidence, it can be stated that violence is unfortunately ubiquitous. It is inflicted in a variety of environments and spheres of life in modern civilizations. In today's world, it is increasingly visible and disturbing. So how can violence be defined? We pose this question at the beginning, and all the answers should be treated as a starting point for further considerations. Obviously, the concept of violence is not easy to define.[6]

It is commonly replaced with other concepts such as crime, brutality, or cruelty. Many authors define violence as "a specific relationship" between people that is based on the use of power, which seriously hinders the ability of a victim to self-defend. In this "clash", one person assumes the position of power over another; the victim is weaker and the perpetrator stronger. However, violence cannot be simply identified with aggression; what sets them apart is the position of power that one individual has over the other. In the case of violence, it is always the perpetrator that has this advantage, while in the case of aggression, power is frequently balanced. It seems that the main purpose of violent behaviour (the aggressor's aim) is to do harm, cause pain, inflict suffering, and to humiliate the victim. The perpetrator is aware of the effects of his actions, as violence is an intentional act aimed at controlling and subordinating the victim. Violence infringes on personal rights, such as the right to physical integrity, and human

evil comes and there was no solution» – says St. Augustine; and his own painful quest would only be resolved by his conversion to the living God. The «mystery of lawlessness» (2 Thess 2: 7) is clarified only in the light of the «mystery of our religion» (1 Timothy 3: 16). The revelation of divine love in Christ manifested at the same time the extent of evil and the superabundance of grace. We must therefore approach the question of the origin of evil by fixing the eyes of our faith on him who alone is its conqueror." Ibidem, No. 385.

[5] Krajewska-Kułak et al., "*Różne barwy przemocy*", 19.

[6] Cf. Joanna Różyńska, *Przemoc wobec dzieci w rodzinie* (Warszawa: Centrum Praw Kobiet, 2013), 13; also: Joanna Helios and Wioletta Jedlecka, *Współczesne oblicza przemocy. Wybrane zagadnienia* (Wrocław: Prawnicza i Ekonomiczna Biblioteka Cyfrowa, 2017), 15.

dignity. Unfortunately, for many people today, violence has become an incomprehensible and shameful way of life. It has become almost permanent part of the family life where it is a common phenomenon and what is worse, it has become one of the many elements in the chain of aggression.[7]

Various forms of violence are described in the literature (as it was mentioned in the introduction). This is mainly psychological, physical, sexual, and economic violence, as well as negligent treatment.

3. PSYCHOLOGICAL (EMOTIONAL) VIOLENCE

According to the research compiled and published in 2010 by the Bureau for Analysis and Documentation at the Senate Chancellery, "psychological violence includes all the acts that aim at depriving the victim of self-confidence to make them feel lonely and dependent on the aggressor only. Different forms of psychological violence include, for example: coercing and threatening, humiliating, intimidating, demeaning, emotional blackmailing, insulting, blaming, convincing of mental illness, isolating, manipulating a sense of guilt, punishing by withholding feelings, denying sexual intercourse, ridiculing, embarrassing, controlling or preventing contact with others, prohibiting the use of a telephone or a car, imposing one's own views, prohibiting the victim to leave home, not showing interest, disrespecting, criticising constantly, accusing of inducing violence, demanding absolute obedience, depriving of sleep and food, or destroying items valuable to the victim. Psychological violence may result in low self-esteem, increased alertness, nervous tics, change of moods, and the inability to control one's emotions."[8]

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[7] Ibidem, 15–16; also: Paweł Migała, *Wybrane elementy patologii społecznej w aspekcie ich uwarunkowań* (Józefów: WSGE, 2011), 27.

[8] Kancelaria Senatu. Biuro Analiz i Dokumentacji. Dział Analiz i Opracowań Tematycznych, *Przeciwdziałanie przemocy w rodzinie na tle rozwiązań legislacyjnych* (Warszawa: Kancelaria Senatu. Biuro Analiz i Dokumentacji, 2010), 8. Psychological violence also includes: "repeated humiliation and ridicule, manipulation for one's own purposes, engaging in conflicts, lack of proper support; e.g., mocking somebody else's views, religion, background, imposing one's opinions, punishing by denying interest, feelings or respect, constant criticism, making a person believe that they suffer from mental illness, social

Many authors believe that psychological violence is primarily an elusive form of mistreating the victim. Seemingly invisible, it is difficult to discern in everyday observation - which is usually based on what the aggressor says.[9] It is only later that the effects of prolonged mental disintegration become noticeable. Undoubtedly, psychological violence is difficult to diagnose, "because what for an outsider may seem to be a trivial event or harmless behaviour may constitute a hard blow to the victim's psyche – depending on their position in the family, in the group, or the frequency with which it occurs, and it may leave a permanent mark on their psyche, depriving them of their dignity and self-esteem."[10]

In this regard, one cannot ignore the family and the most vulnerable family members; i.e., children. Violence manifests itself in the family through "verbal abuse, ridiculing, mocking, scaring, moralizing, forcing another person to be loyal, blackmailing, excessive control, arousing guilt, disrespecting dignity and privacy, destroying personal property and posses-

isolation; i.e., controlling and prohibiting or limiting contacts with other people, demanding obedience, depriving someone of sleep and food, using threats, verbal degradation (name-calling, humiliating, demeaning, embarrassing) [...] inflicting mental suffering by controlling and limiting the victim's contact with friends, school and workplace, forced isolation and imprisonment, forcing the victim to watch images and acts of violence, intimidating, threatening to cause physical harm both to someone close and to others, the use of threats, blackmailing, threatening to commit a suicide, continuous harassment, abusing pets and destroying private property." Joanna Helios and Wioletta Jedlecka, *Współczesne oblicza przemocy. Wybrane zagadnienia*, 19.

[9] Ibidem, 19. Furthermore, Professor Irena Pospiszyl from The Maria Grzegorzewska University in Warsaw claims that psychological abuse "is often concealed under the mask of honesty and care, which seemingly cannot be found fault with.". Irena Pospiszyl, *Przemoc w rodzinie* (Warszawa: Wydawnictwa Szkolne i Pedagogiczne, 1994), 105. Violence against children is often referred to as "velvet-gloved violence. It may take the form of conscious cruelty to a child, and taking advantage of the child's helplessness in an intentional and perfidious way. But it may also consist in harming a child unknowingly due to being ignorant of the child's psyche and projecting one's own needs and model of happiness onto a child." Małgorzata Czerkawska and Mikołaj Markiewicz, "Przemoc wobec dzieci," accessed March 26, 2020, https://docplayer.pl/17654051-Przemoc-wobec-dzieci-malgorza ta-czerkawska-mikolaj-markiewicz.html; also: Joanna Helios and Wioletta Jedlecka, *Współczesne oblicza przemocy. Wybrane zagadnienia*, 20.

[10] Joanna Helios and Wioletta Jedlecka, *Współczesne oblicza przemocy. Wybrane zagadnienia*, 19.

sions, throwing away souvenirs, letters, or temporarily isolating a child."[11] Czerkawska and Markiewicz believe that "threatening children with kicking them out of the house, putting them in foster care, or abandoning them, and saying that you do not love them anymore, or that they make you ill, constitute an extremely perfidious psychological torture, especially when such threats are made to the youngest children who unquestionably believe in what their parents say, and are unaware of how real parental punishments and threats may be. Children treated in this way lose their sense of security, they experience anxiety, constant stress, sadness and loneliness. It is impossible to predict how deep and extensive wounds such violent behaviour inflicts on their psyche. Another manifestation of emotional violence is emotional coldness, i.e. not showing affection to a child. Parental love is necessary for a child to develop properly and then to function in their adult life. Children that are deprived of love cannot build healthy emotional relationships with others. When they grow up, they may be unable to show affection to their family members. Emotional violence is also used by overprotective parents. Excessive control and protecting a child against all possible failures may also affect the child's behaviour."[12]

It is difficult to diagnose the consequences of violence, especially when dealing with psychological (emotional) violence. Emotional abuse does not leave bodily injuries; however, it causes fear, anxiety, a sense of injustice and of not being loved by parents, rebellion, desire for revenge and other persistent experiences. It is described as a state of "painful mental suffering" and "moral anguish." Emotional abuse cannot be demonstrated in simple steps, as this would require examining certain family conditions. The recognizable consequences of emotional violence include: persistent headaches and dizziness, stomach and muscle aches, diarrhoea, body shivering, excessive sweating, urinary and faecal incontinence, vomiting, and chest pain.[13]

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[11] Małgorzata Czerkawska and Mikołaj Markiewicz, "Przemoc wobec dzieci," 9.

[12] Małgorzata Czerkawska and Mikołaj Markiewicz, "Przemoc wobec dzieci," 9; also: Paweł Migała, *Wybrane elementy patologii społecznej w aspekcie ich uwarunkowań*, 27.

[13] Cf. Czerkawska and Markiewicz, "Przemoc wobec dzieci," 10. Similarly, Helios and Jedlecka conclude that: "psychological violence leaves traces in the child's psyche. The consequences of psychological violence are comparable to the consequences of physical violence, or even more serious, and at the same time they are not easy to spot. This makes

It is worth noting that emotional violence has long-lasting effects on the psychophysical development of abused children. Children who are "emotionally abused do not accept themselves and have low self-esteem. Parents keep complaining about them, which further lowers their confidence. They start to have problems at school and are unable to meet school requirements, as they cannot count on their parents' help and often do not get on well with peers. Not being successful in the family and at school makes such children reluctant to take effort, because they believe they are bound to fail. As everything goes wrong, why make an effort to try. In this way, they lose a sense of purpose, which often results in suicide attempts. The consequences of emotional abuse also include the following cognitive, emotional and behavioural disorders: difficulty in controlling emotions, attention deficit disorder, distrust, phobias, sleep disorders, running away from home, and alcohol and drug addiction."[14]

Furthermore, it turns out that emotional violence has its fatal consequences "in the adult life of victims. Adults who were emotionally abused as children often hold negative expectations towards others and distrust them, they also tend to escape from the "dark past" into drug addiction, alcoholism and even crime. According to researchers, the remote somatic consequences of emotional violence include: increased blood pressure, cardiac arrhythmia,

it difficult to provide the child with proper support. Long-term psychological violence in particular, can disturb the child's development in many areas: social, emotional, and cognitive. Children who experience emotional abuse often grow up feeling guilty, and they have low self-esteem. The consequences of emotional abuse are especially severe if it is committed by mothers. The research clearly shows that exposure to mental violence in childhood has long-term effects. For example, it has been demonstrated that the effects of emotional abuse may vary depending on the form of abuse. Children who were repeatedly terrorized by their caretakers tend to suffer from anxiety and somatic disorders in their adult lives; whereas those who were ignored and emotionally neglected may develop *borderline* personality disorder. As a result of experiencing constant anxiety and fear, abused children develop a variety of psychosomatic disorders; e.g., sleep disorders, pain, vomiting, diarrhoea, eating disorders, as well as general illness and bad mood. In addition, they often suffer from enuresis (involuntary urination) and encopresis (involuntary soiling). Moreover, they are destructive and aggressive, have problems with focusing attention or are withdrawn, indifferent, nervous and depressed." Joanna Helios and Wioletta Jedlecka, *Przemoc wobec dzieci w rodzinie* (Wrocław: Prawnicza i Ekonomiczna Biblioteka Cyfrowa, 2019), 83–84.

[14] Małgorzata Czerkawska and Mikołaj Markiewicz, "Przemoc wobec dzieci," 10.

muscular hypertonia, gastric disorders, and psychosomatic diseases. Victims of emotional violence display low self-esteem also in adult life, which is hardly surprising considering how they were treated by their parents. They feel guilty and mentally dependent on their parents. People experiencing emotional abuse have a disturbed sense of identity, display strong need to control others, and they alienate themselves from others. They often fall into depression, are anxious and withdrawn, and feel lonely. They always try to do everything right, are self-aware, and strive for perfection. Children who experienced emotional violence often resort to it later in their lives. This is called the vicious circle mechanism and it may be the most drastic effect of violence, not only emotional, but also other forms of violence."[15]

Recently, the concept of *gaslighting*, which refers to an authoritative technique of manipulation, has become widely used in the context of psychological violence. In many abusive relationships, one person tends to manipulate their partner in such a way that the victim has the impression of becoming insane, is emotionally unstable, and no longer trusts himself, but only his perpetrator. This is one of the most cruel and sophisticated forms of violence. *Gas-lighters* are typically males with psychopathic traits. They attempt to dominate their partners gradually and incapacitate them to gain full emotional control over them. *Gas-lighters* are individuals who abuse various psychotropic substances and frequently come into conflict with the law. In their "sick" thinking, they do not want to leave their partners, yet they are unable to respect them. As individuals with psychopathic traits, they do not respect anyone, but need others (often those close to them) only to satisfy their own needs. The victims of *gas-lighters* are typically people with low self-esteem (wives, partners, children). They often experienced violence themselves when growing up (as children and adolescents), which renders them unaware of the "insanity" of their situation. Frequently, even being alert does not help when the aggressor uses manipulation. Sometimes a clever manipulator can destroy another person so skilfully and slowly that the victim is unaware of being entangled in a sick relationship, and their self-confidence is gradually weakened.[16]

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[15] Małgorzata Czerkawska and Mikołaj Markiewicz, "Przemoc wobec dzieci," 10.

[16] Cf. Joanna Helios and Wioletta Jedlecka, *Współczesne oblicza przemocy. Wybrane zagadnienia*, 20. The term *gaslighting* is derived from the title of a pre-war stage play "Gas

4. PHYSICAL VIOLENCE

Another form of violence is physical violence. The term refers to violating the physical integrity of another person; it is an intentional act causing body injury, inflicting pain, or a real threat of causing body injury. The consequences of physical violence may include: fractures, bruises, burns, cut wounds, etc. The aggressor inflicts these "wounds" by kicking, choking, pushing, slapping in the face, using firearms and sharp instruments. Physical violence often takes place in the home and in the family. Research carried out in Poland and worldwide clearly indicates that parents (although not just them) use a variety of corporal punishment measures, sometimes – quite peculiar. "Physical punishment ranges from light spanking to heavy beatings with visible signs such as bruises, wounds, burn marks, swelling, etc. It is expressed in the form of open aggression aimed at a child, parent or other person."[17]

Light" by British playwright Patrick Hamilton (1904-1962) and the film adaptations of the play. It tells a story of an overbearing husband abusing his wife by attempting to persuade her that she is insane. As a result of her husband's manipulations, the woman becomes increasingly paranoid, frightened and uncertain. Ibidem, 20. The concept of *gaslighting* is mentioned here as it clearly shows the inhumanity of family violence. For more details, see the English-language literature: Paige Sweet, "The Sociology of Gaslighting," *American Sociological Review*, Vol. 84 no. 5 (2019): 851–875; Andrew Spear, "Gaslighting, Confabulation, and Epistemic Innocence," *Topoi* 39, no. 1 (2020): 229–241; Robin Stern, *The Gaslight Effect. How to Spot and Survive the Hidden Manipulation Others Use to Control Your Life* (New York: Morgan Road Book, 2018); Natascha Rietdijk, "(You Drive Me) Crazy. How Gaslighting Undermines Autonomy" (MA thesis submitted for the Research Master's Philosophy Utrecht University, June 22, 2018; student number: 5591686, Utrecht University Library, 2018).

[17] Joanna Helios and Wioletta Jedlecka, *Współczesne oblicza przemocy. Wybrane zagadnienia*, 18. When presenting their own views and those of other authors, Helios and Jedlecka add the following claim: "It is obvious that the use of physical punishment against children has been present in many cultures and societies, including Poland and other countries of the Eastern and Central Europe. Numerous institutions and organisations are taking measures to limit the use of physical punishment. This practice is also the subject of social research which aims to diagnose how common the use of physical punishment is and what is the attitude towards such parental practices. It is pointed out that there is no single and commonly accepted definition of physical punishment, because it is difficult to delineate and describe this phenomenon. S. Wójcik quotes Strauss's definition,

Helios and Jedlecka firmly conclude that "in practice it is difficult to draw a line between physical punishment used as a correction tool and violence used by a parent, because the motives for parental behaviour are not always clear and what is more, parents are rarely aware of those motives. Therefore, it seems to be more appropriate to view physical punishment as some dimension of physical violence, rather than as a completely separate phenomenon. This view is accepted by most experts dealing with violence. The most important argument in favour of this view is that the use of physical punishment against children meets the definition of violence – it is an intentional act that causes harm to a child. This harm can be described as the actual damage to health, but also as the risk of such damage. Undoubtedly, the use of physical punishment also violates children's rights."[18]

The World Health Organisation defines physical violence as an act that results in the child experiencing physical harm. It may be a permanent, occasional or a one-off act. "The definition of physical violence against children as it was formulated by the United Nations points out to the intentional use of physical force that results in or has a high likelihood of resulting in harm to the health, life, development and dignity of the child [...] Spanking is considered to be an acceptable form of disciplining a child. A clear line is drawn between beating and a spank, with the former being condemned and the latter being approved of. There is a tendency to think that spanking and physical violence belong to two different categories. Yet, spanking has the same harmful consequences as other forms of physical violence."[19]

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which states that «it is an intentional use of physical force against a child to cause pain, but not injury to the body, and which is used for the purposes of correction and control of child's behaviour». Therefore, in this definition, the emphasis is placed on the purpose of punishment, and at the same time on the fact that physical punishment is by definition associated with inflicting pain … ." Joanna Helios and Wioletta Jedlecka, *Przemoc fizyczna wobec dzieci. Perspektywa prawna* (Warszawa: Wydawnictwo C.H. Beck, 2019), 4; also: Szymon Wójcik, "Postawy wobec kar fizycznych i ich stosowanie w sześciu krajach Europy Środkowo-Wschodniej. Wyniki międzynarodowego badania *The Problem of Child Abuse*," *Dziecko Krzywdzone*, no. 4 (2013): 7–8.

[18] Joanna Helios and Wioletta Jedlecka, *Przemoc fizyczna wobec dzieci. Perspektywa prawna*, 4.

[19] Joanna Helios and Wioletta Jedlecka, *Przemoc fizyczna wobec dzieci. Perspektywa prawna*, 7; also: Joanna Szafran, "Kary fizyczne jako przejaw przemocy wobec dzie-

When an attempt is made to define physical violence, attention should be paid to the following aspects: "violence is an intentional act, which means it is purposeful. This does not mean that the perpetrator's aim must be to hurt the child, violence is often treated as a means to an end. This end may be educational as well. Violence refers to beating not only to inflict pain, but also for the "child's good", to make a child learn more, be obedient, or to prevent a child from hurting themselves, etc. This means that even if the motive for beating is good, it is still violent behaviour. We speak about physical violence not only when a child suffers the actual harm, but also when there is a high risk that some act will result in such harm. The definitions of violence emphasise that it concerns in particular the relationship of a child with parents, caretakers or those exercising power[…]. It should be remembered, however, that violence can take so many different forms that the catalogue of violent acts is not exhaustive."[20]

ci," *Dziecko Krzywdzone*, no. 4 (2017): 56. With some concern, it should be noted that: "The results of the research conducted among adult Poles show that every other person (47.1%) personally knows the family where violence against children is used. The form of violence that children are exposed to depends on their sex. Boys are more likely to experience physical violence, while girls are more exposed to psychological violence. Most frequently, violence against children is inflicted by parents, more frequently by fathers than by mothers. Fathers are more likely to inflict violence on boys, while mothers on girls." Helios and Jedlecka, *Przemoc fizyczna wobec dzieci. Perspektywa prawna,* 9; also: Migała, *Wybrane elementy patologii społecznej w aspekcie ich uwarunkowań*, 31. Extensive, though drastic information on violence against children can also be found in: Jacek Błeszczyński and Anita Rodkiewicz-Rożek, "Przemoc wobec dziecka w rodzinie," *Wychowanie w Rodzinie*, no. 5 (2012): 145–162. Migała describes it as follows: "the most common forms of aggression towards children include: spanking (used by 84.4% of parents surveyed), hitting with a hand (used by 61.8% of parents surveyed, with respondents saying that they do it rarely, 21% – quite often, and 5% – very often), 43.5% of respondents used hard spanking, 40.6% admitted to spanking a child with a belt or some other objects, about a dozen percent admitted to acts of considerable brutality (hitting blindly, beating with fists, kicking, and incapacitating)." Migała, *Wybrane elementy patologii społecznej w aspekcie ich uwarunkowań*, 34.

[20] Szymon Wójcik, "Przemoc fizyczna wobec dzieci," *Dziecko Krzywdzone*, no. 11 (2012): 8; also: Joanna Helios and Wioletta Jedlecka, *Przemoc wobec dzieci w rodzinie*, 17; also: Joanna Helios and Wioletta Jedlecka, *Przemoc fizyczna wobec dzieci. Perspektywa prawna*, 7–8. An honest and clear description of physical abuse against children is offered by Joanna Różyńska, who claims that: "Beating and physical punishment are unacceptable discipline measures. Nothing can justify raising a hand on a child. Children must not be

Statistics on violence against children are collected and examined by the courts, the Polish Ombudsman, the police, as well as by the Domestic Violence Cross-functional Teams[21] and numerous assistance and crisis intervention centres. Data on violence against children collected in the so-called "Blue Card" procedure is one of the main sources of statistical information on this problem. The Blue Card procedure was implemented in Poland in 1998, and ever since it has been the most reliable integrated system of assisting and monitoring families where cases of violence have been reported.[22] It is worth noting here that this procedure is used mainly when reporting and analysing physical violence. Unfortunately, physical violence is very often accompanied by psychological and sexual abuse. Incidents of violence against children that are particularly dramatic, are recorded by the police as offences under Art. 207 of the Polish Penal Code.[23]

Article 207 of the Polish Penal Code provides: "§ 1. Anyone who mentally or physically mistreats a person close to him or her, or another person in a permanent or temporary state of dependence to the offender is liable to imprisonment for between three months and five years. § 1a. Anyone who mentally or physically mistreats a minor or a person who is vulnerable because of his or her mental or physical condition is liable to imprisonment for between six months and eight years. § 2. If the act specified in § 1 or 1a is carried out with particular cruelty, the offender is liable to imprisonment for between one and ten years. § 3. If the act specified in §§ 1

beaten because they are weaker, aggression breeds aggression, beating does not affect the conscience, but it is only hard on the skin – therefore, it is ineffective, beating humiliates, deliberate beating is inhumane and beating in anger is dangerous, because an adult does not control the force of the impact; beating is banned by the Constitution of the Republic of Poland, the Family and Guardianship Code and the Convention on the Rights of the Child." Joanna Różyńska, *Przemoc wobec dzieci w rodzinie*, 8.

[21] More in: Ustawa z dnia 29 lipca 2005 r. o przeciwdziałaniu przemocy w rodzinie (Dz. U. z 2005 r., Nr 180, poz. 1493); interesting information can be found in the extensive ministerial report: Ministry of Labour and Social Policy, *Krzywdzenie dzieci w Polsce. Raport* (Warszawa: Ministerstwo Pracy i Polityki Społecznej, 2008).

[22] More in: Rozporządzenie Rady Ministrów z dnia 13 września 2011 r. w sprawie procedury „Niebieskiej Karty" oraz wzorów formularzy „Niebieska Karta" (Dz. U. z 2011 r., Nr 209, poz. 1245).

[23] Cf. Joanna Helios and Wioletta Jedlecka, *Przemoc wobec dzieci w rodzinie*, 18–19. Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (Dz. U. z 1997 r., Nr 88, poz. 553 ze zm.).

or 2 results in a suicide attempt by the afflicted party, the offender is liable to imprisonment for between 2 and 12 years."

In terms of proper family functioning, one of the fundamental aims of criminal law is to eliminate family violence. Although there is still much to be done in this area, the legislator has essentially linked family protection with Art. 207 of the Penal Code, which defines the offence of mistreatment.[24] As S. Hypś notes, following the Supreme Court interpretation, the offence of mistreatment violates "basic principles of family life, affects family cohesion and durability, it is an important factor influencing the dissolution of marriage and family breakdown, and consequently – weakens the child-rearing function of the family, which in turn has harmful consequences for the physical, mental and moral development of children and young people and their social adaptation" (Polish Supreme Court, Resolution of 9 June 1976, VI KZP 13/75, OSNKW 1976, No. 7-8, item 86; Polish Supreme Court, Resolution of 25 November 1971, VI KZP 40/71, OSNKW 1972, No. 2, item 27). Furthermore, "there is no doubt that mistreatment undermines family integrity, hindering or even preventing its development, which takes place through raising children and ensuring proper care for parents" (Polish Supreme Court, Judgement of 2 February 1974, I KRN 33/74, OSNKW 1975, No. 3-4, item 38), thus "the welfare of the whole family is the subject of protection in this case (Polish Supreme Court, Judgement of 5 February 1996, Prok. and Pr. 1996, No. 10, item 1).[25] Likewise, the family and proper family functioning are recognised as an important good and protected under Art. 207 of the Polish Penal Code.[26]

5. CONCLUSIONS

In conclusion, it should be emphasised that the features of a criminal act under Art. 207 of the Polish Penal Code are described by the verb 'to

[24] Cf. Sławomir Hypś, "Rozdział XXVI. Przestępstwo przeciwko rodzinie i opiece," in *Kodeks karny. Komentarz,* ed. Alicja Grześkowiak, Krzysztof Wiak (Warszawa; Wydawnictwo C.H. Beck, 2015), 1036.

[25] Sławomir Hypś, "Rozdział XXVI. Przestępstwo przeciwko rodzinie i opiece," 1036–1037.

[26] Sławomir Hypś, "Rozdział XXVI. Przestępstwo przeciwko rodzinie i opiece," 1037.

mistreat' and two alternate adverbs 'physically' or 'mentally', which specify the perpetrator's behaviour that makes them subject to criminal liability. Physical and mental mistreatment, as already mentioned, may occur separately or together. However, to be criminally liable, it is enough for the perpetrator to commit one form of violence. Therefore, it seems that the statutory distinction between physical and mental abuse is fully justified. Life experience clearly shows that all physical suffering involves mental suffering, but not all mental suffering is linked to physical pain. Mental mistreatment involves inflicting "injuries" that have a harmful effect on the mental sphere and well-being. "The judiciary determines the intensity and extent of psychological suffering based on the facts of the case and circumstances. Physical abuse involves inflicting physical pain that has a negative effect on the human body. However, inflicting pain by the perpetrator does not have to involve physical injury or violation of bodily integrity. Sometimes treating a victim in a way that aims to damage their health condition can also be classified as physical abuse."[27] A serious difficulty in defining violence is connected with defining human rights in a unified way. These vary from culture to culture and have been evolving throughout history. Violation of these rights constitutes the essence of what is referred to as violent behaviour. Each society defines and prevents violence differently and in its own way indicates those who judge the perpetrators of prohibited acts.

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[27] Sławomir Hypś, "Rozdział XXVI. Przestępstwo przeciwko rodzinie i opiece," 1039.

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HUMAN DIGNITY CONCEPTS IN JUDICIAL REASONING. STUDY OF NATIONAL AND INTERNATIONAL LAW[1]

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ABSTRACT

Many modern legal systems declare, that protection of human dignity plays an important role in its construction. Therefore, a question may be asked if the concept of dignity is similar in different legal systems. The following paper presents the results of the research on human dignity concepts in reasoning of national (Polish and German Supreme Courts) and international courts (ICC, ECHR). Both national systems provide a constitutional protection of human dignity, Rome Statute, which constitutes the ICC, prohibits behaviours infringing dignity (model of Geneva Conventions), whereas the European Convention of Human Rights does not include the term "human dignity", only prohibition of torture or "inhuman or degrading treatment", what is understood as protection of dignity. On the basis of the research there could be stated, that each legal system has developed its own concept of human dignity, although all concepts have a similar core, as nearly all ways of understanding "protection of human dignity" are combined with a commitment to respect each person. This kind of respect could be assumed as a basis of human dignity protection.

Keywords: human dignity, comparative law, international law

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1. INTRODUCTION

Human dignity is considered as one of the most precious values in the modern world. It is protected by a majority of legal systems, both national and international. Although in many legal acts one may find an obligation to protect dignity, none of those acts contains its definition. As the consequence of this situation, the meaning of "human dignity" remains unclear and may cause misunderstandings.

The concept of "human dignity" has been a problem for a long time not only for lawyers, but also for philosophers. The main question about "human dignity" is its unclear meaning and its position as an important value or basis of other rights[2]. According to this statement, human dignity should be protected in every possible situation, not only as an exception, so there should exist some rules of legal protection. For effective legal protection, there should exist a precise way of understanding this term. What is making this consideration even harder, is that every legal system is different. Therefore, there could exist thousands of human dignity concepts if every court builds its own interpretation. These concepts could be totally different or very similar depending on court's concepts. Some would argue, that there is a universal meaning of the human dignity concept, called sometimes a minimum core of human dignity. Main issue in "minimum core" of human dignity would be "intrinsic worth of the person" which is property of every human without exceptions[3]. To verify if this thesis is true, all legal systems should be analysed in perspective of the meaning of human dignity.

In the following paper there will be presented the most important ways of understanding the term "human dignity" in the judgements of international criminal tribunals (ICC, ICTY, ICTR), the European Court of Human Rights and criminal chambers of supreme courts in Germany and Poland (Bundesgerichtshof and Sąd Najwyższy). The International Crimi-

[2] Understanding dignity as basis for other human rights can be found in German Basic Law or Polish constitution.

[3] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", *The European Journal of International Law* 19, no. 4 (2008): 679, https://doi.org/10.1093/ejil/chn043.

nal Court is based on the Rome Statute, which evokes the phrase "human dignity" in art. 8 and art. 68. This court decides in most important criminal cases in international society and on some level influences on decisions of national courts. Taking into account international role of these courts, in the matter of criminal law, it couldn't be omitted.

The European Court of Human Right is a court for all European cases in which human rights could have been infringed. This court is based on the European Convention of Human rights, which does not contain the term "human dignity". Nevertheless, the Court relatively often refers to the term "human dignity" in its judgements. The ECHR is not a criminal court, but very often decides in cases connected with criminal law, such as conditions in prisons or punishments. This institution is considered a big authority in European law and ECHR judgments have great influence on national jurisdictions.

Besides the ICC and ECHR in following paper will be presented two national courts – Polish and German. Constitutional regulations in both countries protect human dignity. Both German Basic Law and Polish Constitution use similar wording, as Polish Constitution was partially inspired by German text. German Basic Law is very significant, as it was the first constitution after World War II which ensured the protection of dignity. In that time, it was supposed to prevent the cruelty that happened during the war. This document inspired many legislators in other countries in the area of human rights protection.

As was said before, protection of human dignity is an important part of the legal system. But how can we say if the protection is sufficient? Is it possible to infringe dignity and what would it look like? Such questions are focused on a practical side of law, not on a theoretical concept of constitutional law. Essential is the meaning of such protection for non-lawyers who could be participating in some cases. The answer to this question could be found in judgments of courts. Judicial understanding of this term could give the answer how the protection of dignity looks. Research including international and national judgements could also give a clue on an issue of plurality of dignity concepts in an international perspective.

The following research was focused on a meaning of dignity in the area of criminal law. The concept of dignity seems to have essential meaning in the criminal law, because concept of human dignity influences on all fields

of law, including criminal law. Also, the nature of criminal law is specific, as it is concerning subtle issues of punishment which could infringe one's freedom. However, important is not only the way of understanding "human dignity", but also whether the obligation of dignity protection influences proceedings and given judgments. In other words, what does it mean for individuals, that their dignity is protected in criminal law? Of course, criminal cases are usually not the subject of constitutional court's reasoning, but of state supreme courts – in the case of Germany and Poland – *Bundesgerichtshof* (BGH) and *Sąd Najwyższy* (SN) in their criminal chambers.

2. INTERNATIONAL COURTS

2. 1. International criminal tribunals (ICC, ICTY, ICTR)

In the area of criminal law the reasoning of the International Criminal Court should be especially important. This court decides on cases with enormous importance in the world, like genocide or crimes against the humanity. Conduct judged by the ICC could be as well judged by national courts, if they ensure adequate conditions of the process. That is the reason why ICC judgments could have an influence on judgments of other criminal courts. In the matter of international criminal law, the status of "human dignity" is slightly different than in other legal systems. In the Rome Statute there are a few articles concerning "human dignity" – Article 8 and Article 68(1). Both these articles consider dignity in similar, yet not identical way. As the ICC was formed of the basis of experience of other international criminal tribunals and to some point is a continuation of two other tribunals, also the judicial experience of ICTR and ICTY should be analysed in this perspective.

As the Article 8 of Rome Statute states, one form of war crime is "Committing outrages upon personal dignity, in particular humiliating and degrading treatment". Worth mentioning is the fact, that this fragment is identical with common Article 3 of four Geneva conventions,

which prohibits such conducts against certain groups of people[4], what only underlines that war crimes are usually interpreted in the view of these Conventions. The interpretation of this type of crime should be consistent with its previous understanding, also in the ICTY and ICTR judgements.

The aim of artical 3 of the Geneva Conventions was to protect human dignity and ensure human treatment to all people "without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria"[5]. The protection of human dignity could be implemented in law in positive and negative ways as an obligation to human treatment or prohibition of infringing the value. Instead of obligation to such treatment, conventions contain the list of prohibited behaviours, what was assumed as a more flexible solution[6]. In practice, the list of behaviours is only a little bit more precise than the general obligation. Therefore, the courts still had to define the sense of "outrage upon human dignity".

As the ICTY has stated in the case of Aleksovski vs. The Prosecutor "An outrage upon personal dignity within Article 3 of the Statute is a species of inhuman treatment that is deplorable, occasioning more serious suffering than most prohibited acts falling within the genus."[7] and "the act must cause serious humiliation or degradation to the victim. It is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule."[8]. In later judgement the ICTY argued, that crime does not have any temporal requirement, so the effect doesn't have to be "lasting"[9].

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[4] ICC, Judgment of 22 March 2016, Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06 OA 2, icc-cpi.int, 30.

[5] The International Committee of the Red Cross, Geneva Conventions of 12 August 1949, Common Article 3.

[6] ICTY, Trial Chamber Judgment of 25 June 1999, Prosecutor v. Zlatko Aleksovski, Case No.: IT-95-14/1-T, icty.org, 49.

[7] ICTY, Trial Chamber Judgment of 25 June 1999, Prosecutor v. Zlatko Aleksovski, Case No.: IT-95-14/1-T, icty.org, 54.

[8] ICTY, Trial Chamber Judgment of 25 June 1999, Prosecutor v. Zlatko Aleksovski, Case No.: IT-95-14/1-T, icty.org, 56.

[9] ICTY, Trial Chamber Judgement of 22 February 2001, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No.:IT-96-23-T&IT-96-23/1-T, icty.org, 501.

The Court considers the prohibited behaviour as humiliation and degradation. Behaviours considered by the Court as "outrage upon dignity" had mostly a social context and were connected with public humiliation[10]. The treatment was damaging the victim's social status and was bound with great shame or deprivation of respect in society[11]. In some cases, the behaviour had specific meaning in a concrete social group and humiliation had a religious context.

It is clear that the level of suffering in such cases is strictly connected to individual sensibility of the victim. Additionally, the Court was looking for more objective criterium of infringement. It stated, that "the humiliation must be so intense that the reasonable person would be outraged"[12]. Objective criterium is necessary in judging the infringement of human dignity, as also the victim need not to be personally aware of a humiliation, but it is sufficient if the humiliation is recognized objectively. According to the Elements of Crime, such judgement should take on the account also the cultural background of the situation[13]. Both subjective and objective elements should be taken into account[14].

None of the criminal tribunals gives a definition of behaviour which could be considered as an outrage against humanity, but it is decided in

[10] Examples: 'Prosecuting War Crimes of Outrage upon Personal Dignity Based on Evidence from Open Sources – Legal Framework and Recent Developments in the Member States of the European Union', Genocide Network Secretariat EUROJUST, 2014, http://www.eurojust.europa.eu/doclibrary/genocide-network/KnowledgeSharing/Prosecuting%20war%20crimes%20of%20outrage%20upon%20personal%20dignity%20based%20on%20evidence%20from%20open%20sources%20(February%202018)/2018-02_Prosecuting-war-crimes-based-on-evidence-from-open-sources_ EN.pdf.

[11] 'Prosecuting War Crimes of Outrage upon Personal Dignity Based on Evidence from Open Sources – Legal Framework and Recent Developments in the Member States of the European Union'.

[12] ICTY, Trial Chamber Judgment of 25 June 1999, Prosecutor v. Zlatko Aleksovski, Case No.: IT-95-14/1-T, icty.org, 56, similarly: ICTY, Appeal Chamber Judgement of 12 June 2002, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No.:IT-96-23-T&IT-96-23/1-T, 501, 162.

[13] *Elements of Crime*, (The Hague: International Criminal Court, 2011), Article 8(2)(b)(xx), § 1, fn. 49.

[14] ICTY, Trial Judgment of 2 November 2001, Prosecutor v. Miroslav Kvočka Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub PrcacKamilojica Kosmla Case No.: IT-98-30/1, icty.org 167.

specific cases. Consequently, there could arise a problem of classification of conduct such as rape or other sexual conduct, especially if the victim was imprisoned or the conduct has a public or especially humiliating character, as in the Furundzija case[15]. In view of the Prosecutor in the Kunarac case, rape could be assumed as an outrage against humanity, but for the clarity of the process and to avoid cumulative conviction problems, this conduct should be prosecuted separately[16].

As was said before, rape could be assumed in some situations as an outrage against dignity. Other conducts such as prisoning people in harsh condition, demoralizing treatment[17], or other "serious humiliating and degrading treatment" such as "beating, rape and sexual assault, harassment, humiliation and psychological abuse, and confinement, in inhumane conditions"[18], forcing someone to walk in front of the soldiers without underwear[19] and many other, also could be acknowledged as outrage against dignity. Importantly, the Rome Statute protects human dignity even after death of the person, so the corpse could be an object of this crime[20].

The crime of outrage against dignity is not the only institution in the Rome Statute concerning dignity. Also, Article 68 (1) of the Statute contains the obligation to protect witnesses' dignity. The justification of the existence of this article seems to be clear – being a witness is hard for all

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[15] ICTY, Trial Judgment of 10 December 1998, Prosecutor v. Anto Furundzija, Case No.: IT-95-17/1-T, icty.org, 272.

[16] ICTY, Trial Chamber Judgement of 22 February 2001, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No.:IT-96-23-T&IT-96-23/1-T, icty.org, 554.

[17] ICTY, Trial Judgment of 2 November 2001, Prosecutor v. Miroslav Kvočka Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub PrcacKamilojica Kosmla Case No.: IT-98-30/1, icty.org, 191; ICTY, Trial Chamber Judgement of 22 February 2001, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No.:IT-96-23-T&IT-96-23/1-T, icty.org, 501.

[18] ICTY, Trial Judgment of 2 November 2001, Prosecutor v. Miroslav Kvočka Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub PrcacKamilojica Kosmla Case No.: IT-98-30/1, icty.org, 171-173.

[19] ICC, Decision on the confirmation of charges of 30 September 2008, Prosecutor v. Germain Katanga, Mathieu Ngudjolo Chui, Case No.: ICC-01/04-01/07, icc-cpi.int, 375.

[20] *Elements of Crime*, (The Hague: International Criminal Court, 2011), Article 8(2)(b)(xx), § 1, fn. 49.

victims of crime and conduct judged by the ICC could be much more traumatic for them. The aim of proceeding should not cause more harm to the victims, so the Court should act with compassion for victims, not only in reasoning and sentencing but especially during the proceedings.

The basic meaning of Article 68 (1) is to protect victims from humiliation or another psychological or physical harm. Therefore, sometimes the ICC decides to protect victim's identity or location, justifying it with the need to protect his or her dignity[21]. Article 68 (1) is for the Court an obligation, so the Court itself must take into account the vulnerability of witnesses, and sometimes decide, that some statements are inadmissible during the hearing[22].

There are cases, in which victims have influence on the admissibility of evidence. In one of them[23] the Court decided about the Victims' Observations and granted victims the right "to lead evidence pertaining to the guilt or innocence of the accused, and to challenge the admissibility or relevance of evidence in the trial proceedings." which concerns, among others, the evidence, that could be "harmful" to their dignity[24].

Other meaning of "dignity" in ICC documents is served by witnesses and victims. In their statements they share their thoughts and their feelings about the conduct. Sometimes they state, that they felt deprived of dignity, or that their dignity had been damaged[25]. That meaning, although not legal, is very interesting as it shows the intuitive understanding of "dignity" – partly as the aspect of social status, partly as self-esteem. What should

[21] ICC, Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing of 4 May 2016, Prosecutor v. Jean-Pierre Bemba Gombo, Case No.: ICC-01/05-01/08-3384, icc-cpi.int, 39.

[22] The Court had to reject some statements on the basis, that witnesses hadn't been informed about parties intention to rely on their statements. ICC, Decision on the confirmation of charges of 29 January 2007, Prosecutor v. Thomas Luganga Dyilo, Case No.: ICC-01/04-01/06, icc-cpi.int, 58-59.

[23] ICC, Appeal Judgment of 11 July 2008, Prosecutor v. Thomas Luganga Dyilo, Case No.: ICC-01/04-01/06 OA 9 OA 10, icc-cpi.int, 103-105.

[24] ICC, Appeal Judgment of 11 July 2008, Prosecutor v. Thomas Luganga Dyilo, Case No.: ICC-01/04-01/06 OA 9 OA 10, icc-cpi.int, 103-105.

[25] ICC, Decision on Sentence pursuant to Article 76 of the Statute of 21 June 2016, Prosecutor v. Jean-Pierre Bemba Gombo, Case No.: ICC-01/05-01/08 icc-cpi.int, 38-39. One of the witnesses said even „we have no value".

be pointed out, is that the conduct that resulted in depriving dignity in the victims' view could be described as "humiliating". According to the Court's decision humiliating behaviour is behaviour infringing dignity. That implies, that respect for the person is the constitutional part of dignity.

Another source of understanding dignity in reasoning of the ICC are decisions about reparations. In these documents, it is stated, that the perpetrator's conduct had humiliated the victim and through this had damaged her or his dignity. The reparation should enable victims to recover their dignity[26]. In the decision-making process, the Court should respect the victims' dignity[27]. The Court takes into account not only the social status in the group, but also the individual feeling of humiliation and damage of dignity, such as individual feeling about their family's death and the indignity of burial ("the impossibility of burying corpses, the indignity of burials not performed in keeping with the rites and customs of the people in question")[28].

On the basis of the International Criminal Courts' reasoning it could be stated, that "outrage against human dignity" is an infringement bound with damages on social status (as the victim could be considered as "dirty" after rape), serious humiliation or victim's moral system (as enforcing victim to immoral behaviour). It has more in common with internal well-being of the victim than physical pain (thus of course it is often connected). Dignity is damaged if the reasonable observer considers behaviour as humiliating in the moment of conduct. Also, the social background of both the victim and the perpetrator could be important for judgement, as one behaviour could be considered as more humiliating or causing more damage in different cultures[29].

The ICTY has acknowledged the protection of human dignity understood as an aspect of personality as one of the basic values in modern

[26] ICC, Reparations Order of 17 August 2017, Prosecutor v. Ahmad Al Faqi Mahdi, Case No.: ICC-01/12-01/15, icc-cpi.int, 28.

[27] ICC, Reparations Order of 17 August 2017, Prosecutor v. Ahmad Al Faqi Mahdi, Case No.: ICC-01/12-01/15, icc-cpi.int, 32.

[28] ICC, Order for Reparations pursuant to Article 75 of the Statute of 24 March 2017, Prosecutor v. Germain Katanga, Case No.: ICC-01/04-01/07, icc-cpi.int, 231.

[29] ICC, Decision on Sentence pursuant to Article 76 of the Statute of 21 June 2016 Prosecutor v. Jean-Pierre Bemba Gombo, Case No.: ICC-01/05-01/08, icc-cpi.int, 38-39.

human rights law. It stated "it is difficult to conceive of a more important value than that of respect for the human personality. It can be said that the entire edifice of international human rights law, and of the evolution of international humanitarian law, rests on this founding principle"[30]. Part of this concept is granting victims the right to satisfactory participation in the process. Therefore, a victim should testify in appropriate conditions and have the right to present evidence.

2. 2. EUROPEAN COURT OF HUMAN RIGHTS

While the ICC is an international court, working on cases from all around the world, the ECHR works only on European cases on the basis of the European Convention of Human Rights. This convention itself is a very specific document among other international treaties. In this convention, there is no expression "human dignity", what is very rare in the post-war world. Some of the authors of the Convention admitted, that it was an intentional decision as the authors wanted to create a practical system, not to start another war for values, what was especially significant in the time of the Cold War[31]. Before the 2002 the term "human dignity" has not been used in the system of documents connected with the ECHR. For the first time it appeared in the Preamble to the Additional Protocol no. 13 about abolishing the death penalty.

However, the Court uses the expression "human dignity", even though it is not included in the Convention. Up to this date (January 2020) 1060 judgments containing the phrase "human dignity" can be found in the ECHR database. For the reasoning of the ECHR, "human dignity" is one of the most important values, even though some could argue that it has no normative meaning due to its absence in the Convention.

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[30] ICTY, Judgment of 25 June 1999, Prosecutor v. Zlatko Aleksovski, Case No.: IT-95-14/1-T, icc-cpi.int, 54.

[31] Antoine Buyse, "Dignified Law: The Role of Human Dignity in European Convention Case-Law, Keynote Delivered on 11 October 2016, at Utrecht University", *The ECHR Blog,* October 21, 2016, http://echrblog.blogspot.com/2016/10/the-role-of-human-dignity-in-echr-case.html.

According to A. Buyse, "dignity" in judgments of the ECHR could be used in differentiated meanings as "(1) the specific rights to which it is mostly applied; (2) the way it differentiates according to the specific facts and context of a case; (3) the role it plays in the legal argument"[32].

The ECHR uses "dignity" mostly concerning human rights which are assumed as basic or "core" like "the right to life, the prohibition of torture and inhuman and degrading treatment, and finally the prohibition of slavery and servitude."[33]. The Court assumes that prohibition of torture and inhuman treatment is bound with dignity[34]. According to the Court, the link between Article 3 and human dignity is so strong, that it is impossible to analyse this article without evoking the concept of human dignity. As the Court has emphasized in its judgments, the aim of Article 3 was to protect dignity, which could be interfered by "degrading" treatment, which is not necessarily based on a physical violence[35].

The majority of the analysed judgments, which use the expression "human dignity" or "dignity" were concerned on conditions of imprisonment. The Court had stated, that "Where a person is deprived of his liberty, the State must ensure that he is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention"[36]. This opinion is often repeated in ECHR judgments. Judgements of the ECHR in cases of imprisonment could be divided into two main groups – concerning physical conditions in prisons and on imprisonment itself.

In the group focusing on imprisonment, there should be a distinction in judgments about the punishment of imprisonment, especially about life

[32] Antoine Buyse, "Dignified Law: The Role of Human Dignity in European Convention Case-Law, Keynote Delivered on 11 October 2016, at Utrecht University".

[33] Antoine Buyse, "Dignified Law: The Role of Human Dignity in European Convention Case-Law, Keynote Delivered on 11 October 2016, at Utrecht University".

[34] ECtHR Judgement of 28 September 2015 Case Bouyid v. Belgium, application no. 23380/09, hudoc.int, 81.

[35] ECtHR Judgement of 28 September 2015 Case Bouyid v. Belgium, application no. 23380/09, hudoc.int, 90.

[36] ECtHR Judgement of 19 February 2009, Case A. and others v. The United Kingdom, application no. 3455/05, hudoc.int, 128.

imprisonment without prospect of reduction or earlier release and other judgments. As the ECHR has stated, some types of punishment is not allowed under regulations of the Convention and can be treated as a violation of Article 3. The perspective of irreducible punishment can induce serious mental health problems[37].

Also, specific conditions are given to the imprisonment of children and juveniles. On the basis of diverse international documents, the Court has stated, that this groups of detainees should be treated with respect to their dignity. On the basis of art. 3 of the Convention as well as on the basis of other international covenants, the State should ensure medical care for all detainees, also juveniles[38]. When the State fails to fulfil these conditions or the detainee doesn't get necessary medical care, it is a situation of inhuman treatment.

Police officers are obliged to respect detainees' dignity, "any recourse to physical force which had not been made strictly necessary by the person's own conduct diminished human dignity and was in principle an infringement of the right set forth in Article 3"[39]. It seems to be obvious, but in such situations the detainee is in much more uncomfortable position than the state officer, because he is dependent on the officer's reaction. What can be surprising, the Court stated, that the rule from Article 3 of the Convention prohibiting inhuman or degrading treatment or punishment has no exceptions, even in the state of serious danger like a terroristic attack[40]. On the one hand, this statement confirms that the protection of dignity is unconditional (as Article 3 protects the value of dignity), on the other hand it seems to be inconsistent with the previous statement, that any unjustified recourse to physical force is prohibited, which raises questions about the permissibility of justified use of physical force. Does it mean that if a detainee provokes such behaviour of the police officer,

[37] ECtHR Judgement of 19 February 2009, Case A. and others v. The United Kingdom, application no. 3455/05, hudoc.int, 129.

[38] ECtHR Judgement of 23 March 2016, Case Blokhin v. Russia, application no. 47152/06, hudoc.int, 27, 136, 138, 140.

[39] ECtHR Judgement of 28 September 2015 Case Bouyid v. Belgium, application no. 23380/09, hudoc.int, 56.

[40] ECtHR Judgement of 28 September 2015 Case Bouyid v. Belgium, application no. 23380/09, hudoc.int, 81.

he waives the protection of his dignity? Or that only unjustified attack is harmful for dignity? If the first option is correct, it means that the protection of dignity is not unconditional, but exist only if the person wants it. If the second one, it is inconsistent with whole understanding of dignity, as the same conduct could be diminishing or not, depending on previous behaviour of the other party, what causes reasonable doubts about the sense of the institution. The court itself doesn't give the answer, as it says, that significant is the fact that "treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance"[41]. What is more, it is sufficient if the victim is humiliated in his/her own eyes[42]. However, every situation is unique and should be analysed separately, taking into account all of circumstances. If the infringement is strictly connected with an unlawful behaviour of the prisoner as in the previous analysed example, it would be unfair to consider police officers as guilty of depriving dignity, when the prisoner decided to behave in such way and had to predict the reaction of officers.

According to the court, human dignity could be infringed by degrading or humiliating conduct. Such behaviour should be recognized objectively, it could not depend on the individual's feeling[43]. The subjective feeling of harm would be important but is not a necessary state if the conduct was legally admissible. In view of N. Mavronicola it is rather the matter of "wrong" than "harm"[44], what could be helpful in the process of delimitation of wrongful behaviour. This perspective presumes, that this kind of "wrong" is objective and clear. Similarly, A. Buyse believes, that the argument of "human dignity" helps the Court distinguish between permissible

[41] ECtHR Judgement of 28 September 2015 Case Bouyid v. Belgium, application no. 23380/09, hudoc.int, 87.

[42] ECtHR Judgement of 28 September 2015 Case Bouyid v. Belgium, application no. 23380/09, hudoc.int.

[43] ECtHR Judgement of 28 September 2015 Case Bouyid v. Belgium, application no. 23380/09, hudoc.int, 101; Natasa Mavronicola, "Bouyid and Dignity's Role in Article 3 ECHR," *Strasbourg Observers* (blog), October 8, 2015, https://strasbourgobservers.com/2015/10/08/bouyid-and-dignitys-role-in-article-3-echr/.

[44] Natasa Mavronicola, "Bouyid and Dignity's Role in Article 3 ECHR".

and prohibited behaviour[45]. In practice, important would be to judge the case in the perspective of treating a person with special respect (contrary to objects or animals) or providing proper conditions to develop personality[46].

Moreover, human dignity plays another important role in the legal system of the ECHR – as way to enrich a discourse and offer opening the system to natural law. As said A. Buyse: "*human dignity* may be a rhetorical linchpin between societal understandings of what is humane and what carries moral stigma on the one hand and the hard black-letter approach of law on the other"[47]. It is important to open positive law to extra-legal values such as human dignity. As a result, specific behaviour doesn't have to be prohibited in particular, but the judge of the ECHR could assume it as such, using protection of human dignity as argumentative tool. It also increases the feeling of social justice, if the victim could evoke protection of his/her dignity, which is commonly known value.

3. MEANING OF "HUMAN DIGNITY" IN REASONING OF NATIONAL COURTS

3.1. Bundesgerichtshof (BGH)

German *Grundgesetz* has an opinion of one of the most significant legal acts in the matter of human dignity protection. After its entry into force it has become the model legislation in this issue. Many younger legal acts have been made on the basis of this act. *Grundgesetz* have been created in a specific time, shortly after the Second World War, when many people were shocked by the cruelty done by people to people. Common reaction was to prevent such events, also by the law. That is the reason why dignity protection was placed at the first place in *Grundgesetz*, and it cannot be changed.

[45] Antoine Buyse, "Dignified Law: The Role of Human Dignity in European Convention Case-Law, Keynote Delivered on 11 October 2016, at Utrecht University".

[46] Natasa Mavronicola, „Bouyid and Dignity's Role in Article 3 ECHR".

[47] Antoine Buyse, 'Dignified Law: The Role of Human Dignity in European Convention Case-Law, Keynote Delivered on 11 October 2016, at Utrecht University'.

The German *Bundesgerichtshof* (German Supreme Court) is not only the court but also an institution, that should resolve doubts about legal interpretation. Therefore, its reasoning is more important than a sole decision. That is the cause why its judgments should be analysed as it sets the line of interpretation for all courts in Germany.

Most of the BGH judgments are related to the way of treating people. In one case, the BGH has decided that even the consent of the harmed person cannot justify the harm of dignity and treating people in an undignified manner[48]. Some judgments of the BGH concerned the boundary between dignity and punishment. The penalty should be compatible with human dignity protection. In addition, BGH had decided that the length of the punishment of imprisonment should protect the realistic chance of regaining freedom. Otherwise, the punishment infringes human dignity[49].

The principle of compatibility of the penalty with the principle of human dignity protection is also applicable to the way of administering punishment. According to the BGH, punishment should be related to the specific criminal conduct. Therefore, the court should precisely determine the alleged conduct in the indictment. Therefore, alternative description of conduct both in indictment and judgment is inappropriate, as it results in a state of uncertainty[50].

In some judgments the BGH decides about freedom of speech and personal dignity. It has decided, that also dignity of a social group could be infringed by defamation. It is especially important in case of incitement to hatred, as in Germany *Volksverhetzung*[51]. This decision is particularly interesting, because usually the personal dignity is concerned as an attribute or aspect of an individual, not of a group. In the mentioned decision, the BGH has affirmed, that also feelings of social groups are worth protection.

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[48] German Supreme Court, Resolution of 24 October 2018, Ref. No. 1 StR 212/18, 11.

[49] This reasoning is applied not only in case of punishment life imprisonment without prospect of reduce or earlier release, but also in cases of relatively short imprisonment that is still longer than estimated life length of the detainee. BGH Resolution of 25 January2018, Ref. No. 3 StR 613/17, 3.

[50] German Supreme Court Resolution of 11. March 2015, Ref. No. 2 StR 495/12, 56.

[51] German Supreme Court Resolution of 30 October 2018, Ref. No. 3 StR 167/18, 6.

The expression "human dignity" in the judgments of the BGH has broader meaning, as it appears in cases of "typical" crimes, such as murder or theft. In one of these cases, the BGH gave nearly a definition of harm done to the human dignity, stating, that it is the conduct, which attacks the core of one's personality[52]. The conduct should also suggest, that the worth of one's life is significantly lower than others. That is a very important statement, because it enables application of the rule of human dignity protection in many cases, not limiting it to the cases of defamation or insult. The deciding element in the situation should be the way of infringement and the possible attack on one's personality. Moreover, this way of understanding dignity relates to two basic views of dignity – human and personal dignity, as it assumes an attack on the core of someone's personality in such manner. The first element relates to human dignity, the core of being a human, the second to personal dignity, as the conduct could be judged objectively as diminishing behaviour.

In similar way the BGH states that no one should be treated as an object of political actions. If state organs disregard a person's individuality and dignity, it would be unlawful[53].

3.2. Sąd Najwyższy (SN)

Article 30 of the Polish Constitution contains an obligation of dignity protection, similar to the German *Grundgesetz*. Like in Germany, the Polish legal system belongs to civil law systems and every legal act must be consistent with the Constitution, criminal law acts and judgments. In the matter of criminal law, most difficult cases are viewed by the *Sąd Najwyższy* (SN), the Polish Supreme Court. The SN in the last 18 years had only a few times used the expression "human dignity" in criminal cases.

Most of the cases concern the crime of defamation, (Article 212 of Polish Criminal Code[54]) and the connection between this crime and freedom

[52] German Supreme Court Judgement of 27 July 2017, Ref. No. 3 StR 172/17, 31.

[53] German Supreme Court, Resolution of 25 March 2015, Ref. No. 4 StR 525/13, 14.

[54] Article 212 § 1 Polish Criminal Code of 6 June 1997, Journal of Laws 2020, No. 1444 („Whoever imputes to another person, a group of persons, an institution or organisational unit not having the status of a legal person, such conduct, or characteristics that may discredit them in the face of public opinion or result in a loss of confidence neces-

of the press. First of all, the SN in these cases uses "dignity" in its social aspect, meaning the respect within the group or self-esteem. It is especially important in this type of crime. Conflict between press freedom and respect for personal goods is a universal problem. The SN stated that press freedom doses not have an absolute character and the protection of personal goods has privilege[55]. It does not mean, that the press cannot state anything that infringes one's personal dignity, but these statements cannot be false.

In some situations, the insult could be harmful not only to one person, but also to the group of people (as in the Article 257 of Polish Criminal Code[56]). It is interesting, because this type of crime typically touches individual persons, and protects the personal, individual dignity. The SN stated, that statements could be also harmful for dignity of a group[57]. In the case of defamation of a state officer, the SN states, that the protected value is the dignity of this officer (besides the functioning of public institutions)[58].

4. CONCLUSIONS

Courts are using the expression "human dignity" in different ways and in different meanings. What is interesting, the ECHR uses this expression a lot, even though there is no statement "human dignity" in Convention

sary for a given position, occupation or type to activity shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year"). https://www.imolin.org/doc/amlid/Poland_Penal_Code1.pdf [25.01.2020].

[55] Polish Supreme Court, Judgment of 6 December 2005, Ref. No. I CK 204/05, unreported, 11.

[56] Article 257 Polish Criminal Code of 6 June 1997, Journal of Laws 2020, No. 1444 („Whoever publicly insults a group within the population or a particular person because of his national, ethnic, race or religious affiliation or because of his lack of any religious denomination or for these reasons breaches the personal inviolability of another individual shall be subject to the penalty of deprivation of liberty for up to 3 years"). https://www.imolin.org/doc/amlid/Poland_Penal_Code1.pdf [25.01.2020].

[57] Polish Supreme Court, Resolution of 17 August 2016, Ref. No. IV KK 53/16, unreported, 7.

[58] Polish Supreme Court, Judgment of 22 June 2017, Ref. No. IV KK 194/17, unreported, 4.

and the meaning of "human dignity" is mostly created in judgments. At the state level, both German and Polish supreme courts use this expression, but in slightly different ways.

From different types of judgments, it could be concluded, that basic meanings of "human dignity" in different courts have much in common. It is consistent with the theory of C. McCrudden, who claims, that the central idea of human dignity is universal, at least in European culture[59]

Another conclusion from the presented analysis is that only some courts are developing the concept of dignity. On the other hand, the ICC just like the state courts decides about the situation of an individual, but refers to dignity relatively rarely and in specific situations. It could be the consequence of the fact, that national courts are based on state constitutions, which often assume dignity as the most important value and basis of the system, whereas the ICC is based on the Rome Statute, in which "human dignity" is treated only as evoking the text of the Geneva Conventions and its Common Article 3.

Comparing two national courts is interesting, because both German and Polish constitutions include the article about protection of dignity, but judgements of the SN and the BGH are different. The SN focuses on the meaning of dignity in cases of defamation, nearly without reflections about human dignity as inherent and not disposable, whereas the BGH has some concept about understanding human dignity.

After this study, it seems to be clear, that there is no clear concept of dignity at the state and international level. Every court has its own concept, which was developed through years. However, all courts are using the expression "human dignity" in a quite similar way, mostly in cases of disrespect, defamation or harsh treatment. Among other meanings, courts understand infringement of the dignity, when person is treated as an object, or is forced to live in really poor conditions (especially during imprisonment). All of them take into consideration the individual feeling of an infringement of social status or self-esteem.

As it was pointed out, besides differences, some similarities in understanding "human dignity" can be found. As C. McCrudden stated, the

[59] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", 675.

core of understanding human dignity remains the same or very similar in acknowledging the worth of every human being[60]. The most basic and most general meaning of human dignity as in every understanding dignity is connected with respect for another person and the universal value of a human, independent from his personal situation.

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[60] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," 723.

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RUSSIANS ON THE POLISH LABOUR MARKET

*Krystyna Gomółka**

ABSTRACT

The article looks into the employment of Russian citizens in Poland in 2004–2018. It presents the legal basis for Russians' entering Poland and taking up work without having to seek a work permit, and specifies who must apply for such a permit. Russian citizens can obtain refugee status under the Geneva Convention, which grants them the right to move freely, choose their place of residence and undertake paid employment, while guaranteeing social security. On the basis of the Act on granting protection to aliens, citizens of the Russian Federation may obtain subsidiary protection *if their return to their country of origin may expose them to a real risk of serious harm. A tolerated stay is granted to aliens* where an alien might be expelled to a country in which their life, freedom and personal security would be jeopardised, where they could be subjected to torture, degrading treatment, humiliation, forced to work or deprived of the right to a fair trial. Training and employment can be undertaken in Poland under the bilateral agreements between Poland and Russia: the Treaty on friendly and good-neighbourly cooperation and the Cooperation Agreement in the fields of science, culture and education. In Poland, the entry and stay of foreign nationals is governed by the Act on aliens, their education by the Higher Education Act, whereas the employment of foreigners is regulated by the Act on employment promotion and labour market institutions.

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The empirical basis of the study was provided by the analysis of data from the Polish Ministry of Family, Labour and Social Policy and the Demographic Yearbook. Russians constitute the third largest group (after Ukrainians and Belarusians) of the post-Soviet States' citizens coming to Poland. The analysis conducted showed that employment in Poland was chiefly sought by the citizens of the Russian Federation who arrived in Poland for a limited period and for permanent residence. In 2004, the Russians represented 4.4% and in 2018 – 0,66% of all foreigners who received work permits in Poland. Before 2015 some Russian nationals took up work in Poland as the managers of their own companies. Since 2015, there has been an influx of workers from Russia in three occupational groups: IT specialists, skilled workers and workers in elementary occupations. Most of the Russians were employed in the wholesale and retail, information and communication, construction, transport and warehousing sectors, which were the same sectors where Polish entrepreneurs reported demand for Russian workers. The demand significantly exceeded the number of Russians employed.

Keywords: Russians, labour market, work permit, professions practised, national economy sectors

1. RUSSIANS WORKERS ON THE POLISH LABOUR MARKET AS THE SUBJECT OF RESEARCH. LITERATURE

This study focuses on the presence of Russians on the Polish labour market between 2004 and 2018. The employment of citizens of the Russian Federation in this market is an important subject of research for a number of reasons. Russian Federation citizens are among the three most numerous groups of foreigners arriving in Poland – after Ukrainians and Belarusians. Polish legislation offers many employment opportunities for foreigners legally residing in Poland regardless of the length of their stay, while precisely specifying who needs a work permit and who does not need to apply for it. This study is intended to show which groups of Russian citizens are most likely to take up work in Poland, and which ones are not interested in employment. It also aims to provide information on the number of Russians who receive work permits and what share of foreigners employed in the Polish labour market they represent. The data analysed is intended to provide information on the type of employment undertaken by Russians according to the Polish classification of business activities

(PKD code)[1] and selected occupational groups and professions. Analysis of the employment data should identify the national economy sectors in which Polish employers chose to hire Russian workers.

The employment of immigrants in Poland has been given much attention in literature. The largest number of analyses and studies are concerned with workers from Ukraine, who account for about 80% of all workers from the post-Soviet countries employed in Poland. The study by Brudnarska, Grothe and Lesińska shows the migration of Ukrainian citizens in the context of socio-economic development[2]. Binkowski defines the role of Ukrainians in the Polish labour market[3], whereas Szpakowska, Buchwald and Romanowski demonstrate the attractiveness of the Polish labour market for Ukrainians[4]. The expectations and needs of Ukrainians in Poland are the focal point of the publication edited by Lubicz Miszewski[5]. Przemyślańska-Włosek presents the opinions of Ukrainians on working in Poland, based on survey results[6].

There are fewer publications that analyse the employment of foreign nationals in Poland. Poland's migration policy in the context of the employment of foreigners in Poland is described by Solga[7]. The demand-related and structural aspects of the employment of foreigners in Poland

[1] Polish Classification of Business Activities.

[2] Zuzanna Brudnarska, Małgorzata Grothe, Magdalena Lesińska, *Migracje obywateli Ukrainy do Polski w kontekście rozwoju społeczno-gospodarczego. Stan obecny, polityka transfery pieniężne* (Warsaw: Centre of Migration Research, 2012).

[3] Jakub Binkowski, "Ukraińcy ratunkiem dla polskiej demografii," in *Imigranci wsparciem dla rynku pracy i przedsiębiorstw*, ed. Teresa Kupczyk (Wrocław: Wydawnictwo Gazeta Wyborcza, 2017), 7–17.

[4] Justyna Szpakowska, Tomasz Buchwald, Robert Romanowski, "Atrakcyjność polskiego rynku pracy dla obywateli Ukrainy: przyczyny, mechanizmy, konsekwencje migracji zarobkowych," *Optimum. Studia Ekonomiczne*, no. 2 (2016): 163–184.

[5] Michał Lubicz Miszewski, *Imigranci z Ukrainy w Polsce. Potrzeby i oczekiwania, reakcje społeczne, wyzwania dla bezpieczeństwa* (Wrocław: Akademia Wojsk Lądowym im. Tadeusza, 2018).

[6] Joanna Przemyślańska-Włosek, „Opinia pracowników z Ukrainy na temat pracy w Polsce," in *Imigranci wsparciem dla rynku pracy i przedsiębiorstw*, ed. Teresa Kupczyk (Wrocław: Wydawnictwo Gazeta Wyborcza, 2017), 7–17.

[7] Brygida Solga, "Polityka migracyjna Polski i jej regionalny wymiar," *Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach*, no. 290 (2016): 51–60.

are shown by Piotrowski and Organiściak-Krzykowska[8]. The problems of immigrants on the Polish labour market are outlined in the study by Frelak and Bieniecki[9]. Kałuża-Kopias uses the statistics from the Ministry of Labour and Social Policy to characterise the employment of immigrants in Poland, taking into account their nationalities[10].

None of the studies available in literature focuses on the employment of Russians in the Polish labour market, and this article aims to fill the gap in the body of research on that subject.

2. DATA AND METHODS

In order to investigate the employment of Russians in the Polish labour market, it is necessary to review the provisions of the Polish law which allow employment on the basis of a work permit or without such a permit. The numerical data relating to the employment of foreigners in Poland can be found in the data bases compiled since 2008 by the Ministry of Family, Labour and Social Policy. On the basis of this data, it is possible to determine the number of work permits granted, by PKD section, occupational group and profession, as well as the number of statements by Polish employers wishing to assign work to Russians, by national economy sector.

This study is based on the following research methods: system analysis, comparative methods and quantitative methods, allowing to show the numbers of Russian citizens employed in Poland by PKD section, occupational group and profession.

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[8] Marek Piotrowski, Anna Organiściak-Krzykowska, "Zatrudnienie cudzoziemców na polskim rynku pracy – aspekty popytowe i strukturalne," *Studia Prawno-Ekonomiczne*, vol. C (2016): 315–328.

[9] Justyna Frelak., Mirosław Bieniecki, "Praktyka funkcjonowania migrantów ekonomicznych w Polsce," in *Migranci na polskim rynku pracy. Rzeczywistość, problemy wyzwania*, ed. Witold Klaus (Warsaw: Association for Legal Intervention, 2007).

[10] Dorota Kałuża-Kopias, "Imigranci na polskim rynku pracy według statystyk MP i PS," *Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach*, no. 258 (2016): 17–29.

3. LEGAL BASES FOR ARRIVALS AND EMPLOYMENT OF RUSSIAN CITIZENS

Russian nationals may migrate to Poland under international and bilateral agreements concluded between Poland and the Russian Federation. The arrival of Russian nationals seeking refugee status was made possible when Poland signed the Geneva Convention of 28 July 1951, which grants refugees, inter alia, the right to freedom of expression, freedom of movement and choice of residence, the right to take up wage-earning employment and the guarantee of social security[11]. Another form of protection existing in addition to refugee status is subsidiary protection, introduced in Poland in 2008. The Act of 13 June 2003 on granting foreign nationals protection in the territory of the Republic of Poland provides that *"Subsidiary protection shall be granted to an alien where their return to the country of origin may expose them to a real risk of serious harm and, because of that risk, they cannot or do not wish to benefit from the protection of the country of origin"*[12]. Polish legislation also provides for an alternative form of protection, referred to as tolerated stay, governed by the Act on aliens of 12 December 2013. This type of protection is granted where an alien might be expelled to a country where their life, freedom and personal security would be jeopardised, where they could be subjected to torture, degrading treatment, humiliation, forced to work or deprived of the right to a fair trial, or where their rights relating to family life or their child's rights might be infringed[13].

The arrival of Russian citizens in Poland to take up employment or education is possible on the basis of bilateral agreements concluded between the two countries. In Article 8 of the Treaty on friendly and good-neighbourly cooperation, Poland and Russia committed themselves to creating favourable conditions for the development of economic activity and the movement of goods, services, labour and capital. Article 13(1) provides

[11] Convention Relating to the Status of Refugees, adopted in Geneva on 28 July 1951, Journal of Laws 1991, No. 119, item 515.

[12] Act on granting foreign nationals protection in the territory of the Republic of Poland of 13 June 2003, Journal of Laws 2003, No. 128, item 1176.

[13] Act on aliens of 12 December 2013, Journal of Laws 2013, item 1650.

for the development of cooperation in the field of culture, science and education[14]. The agreement on cooperation in the field of science, culture and education stressed that cooperation between universities and research institutions should be based on plans, programs and agreements[15].

The development of mutual contacts was to be encouraged by the expansion of border crossings[16]. In addition, Poland and Russia signed an agreement on international road transport[17] and on the travelling conditions of citizens, which agreement stipulates that border crossing between the two states should be based on visas[18].

Conclusion of the Readmission Agreement between the Russian Federation and the European Community has increased the effectiveness of efforts to combat illegal immigration[19]. Russia's relations with Poland in this area were governed by the implementation protocol between the two states on the implementation of the readmission agreement. It specified the authorities responsible for the implementation of the agreement, the application method, the rules for application processing, the method of escorting of the persons to be readmitted and the coverage of financial costs[20].

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[14] Treaty between the Republic of Poland and Russia on friendly and good-neighbourly cooperation signed in Moscow on 22 May 1992, (Journal of Laws 1993, item 291).

[15] Agreement between the Government of the Republic of Poland and the Russian Federation on cooperation in the field of science, culture and education signed in Warsaw on 25 August 1993, Journal of Laws 1994, No. 36, item 133.

[16] Agreement between the Government of the Republic of Poland and the Government of the Russian Federation on border crossings signed in Moscow on 22 May 1992, Official Gazette of the Republic of Poland (M. P.) of 2003, No 37m, item 528.

[17] Agreement between the Government of the Republic of Poland and the Government of the Russian Federation on international road transport, signed in Warsaw on 30 August 1996, Official Gazette of the Republic of Poland (M. P.) of 2005, No. 61, item 806.

[18] Agreement between the Government of the Republic of Poland and the Government of the Russian Federation on the travelling conditions of the citizens of the Republic of Poland and the citizens of the Russian Federation of 18 September 2003, Official Gazette of the Republic of Poland (M. P.) of 2003, No. 51, item 800.

[19] Readmission Agreement between the Russian Federation and the European Community signed at Sochi on 25 May 2006, OJ L 129/40 of 17.05.2007.

[20] Implementation Protocol between the Government of the Republic of Poland and the Government of the Russian Federation on the implementation of the Readmission Agreement between the European Community and the Russian Federation signed in Sochi

The entry, stay and departure of aliens, as well as their employment are governed by national legislation. The most important statute that enables entry is the Act on aliens, which stipulates that non-EU nationals may cross the EU border if they hold a valid travel document and a visa, the type of which depends on the purpose of entry and stay of the holder[21].

The 2017 amendment to the Act on aliens introduced a provision stipulating that "A temporary residence and work permits shall also be granted where the purpose of the alien's stay in Poland is to work in an occupation which is desirable for the Polish economy, as defined in the provisions issued pursuant to paragraph 5, the alien has the vocational qualifications required to engage in that occupation and the cumulative conditions referred to in paragraphs 1, 2, 4 and 5 of paragraph 1 are fulfilled". It is not required to demonstrate that an employer is unable to meet the human resources needs of the local labour market in order for a foreigner to take up an occupation in demand or practise a high-skilled profession. Such foreigners may apply for a permanent residence permit after 4 years of uninterrupted stay in Poland[22].

Foreign nationals can receive education in Poland by virtue of the provisions of the higher education law[23]. The Russian citizens who took up permanent residence in Poland between 2004 and 2018 included repatriates and Russians who had married a Polish citizen[24].

The Act on employment promotion and labour market institutions of 20 April 2004 governs the employment of foreign nationals on the basis of a work permit and without such a permit. Foreigners who must apply for permission to work in Poland (Article 88) include those who[25]:

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on 25 May 2006, signed in Moscow on 28 November 2012, Official Gazette of the Republic of Poland (M. P.) of 2015, item 525.

[21] Act on aliens of 12 December 2013, Journal of Laws 2013, item 1650.

[22] Act amending the Act on aliens and certain other acts of 24 November 2017, Journal of Laws 2018, item 107.

[23] Act of 12 September 1990 on higher education, Journal of Laws 1990 No 37, item 385.

[24] *Demographic Yearbook* 2004–2018 (Warszawa: Wydawnictwo GUS, 2005–2019).

[25] Notice of the Marshal of the Sejm of the Republic of Poland on the announcement of the consolidated Act on employment promotion and labour market institutions of 07 June 2018, Journal of Laws 2018, item 1265.

1. perform work in the territory of Poland on the basis of an employment contract with an entity whose head office, branch or establishment is based in Poland;
2. hold a position in the Management Board of a legal person entered in the register of entrepreneurs and stay in Poland for a period exceeding 6 months over a period of 12 consecutive months;
3. work for a foreign employer and are posted to its Polish branch or establishment for a period of more than 30 days within a calendar year;
4. work for a foreign employer without a branch or establishment in Poland for the purpose of an export service;
5. work for a foreign employer in Poland for a period exceeding 30 days within 6 consecutive months for a purpose other than those indicated in the preceding paragraphs.

The types of permits issued are identified in Article 88 of the Act on employment promotion and labour market institutions of 2004 and the regulation of the Minister of Labour and Social Policy of 07 December 2017 on the issue of work permits[26]:

– Type A permit may be issued to an alien who performs work in the territory of Poland on the basis of an employment contract with an employer whose registered office, place of residence, branch, establishment or other form of activity is situated in the territory of Poland;
– Type B permit may be issued to a foreigner holding a position in the Management Board of a legal person entered in the register of entrepreneurs or a capital company in the process of formation, if they stay in the territory of Poland for a period exceeding six months within a consecutive 12 months;
– Type C permits is issued to a foreign national who performs work for a foreign employer and is posted to the territory of Poland for a period exceeding 30 days in a calendar year, to a branch or estab-

[26] Regulation of the Minister of Family, Labour and Social Policy on the issue of aliens' work permits and the entry of a declaration on the assignment of work to an alien in the register of statements of 07 December 2017, Journal of Laws 2017, item 2345.

lishment of a foreign entity or an affiliated entity within the meaning of the Act of 26 July 1991 on income tax on natural persons;
- Type D can be received by an alien working for a foreign employer without a branch or establishment in Poland, for the purpose of an export service;
- Type E permit is issued to foreign nationals who works for a foreign employer and is posted to the territory of Poland for a period exceeding 3 months within a period of consecutive 6 months for a purpose other than those indicated in items 2 to 4.

Immigrants whose stay in Poland is considered undesirable[27] cannot expect to be employed in the territory of Poland.

The requirement of obtaining a work permit does not apply (Article 87) to foreigners who:

1) hold a permit for temporary residence in Poland under: Article 144 – for the purposes of studying in bachelor's, master's or doctoral courses; Article 151 – a temporary residence permit for the purposes of scientific research; Article 151b(1) – a long-term researcher's mobility permit; Article 158(2)(1) or (2) meeting the conditions for granting a temporary residence permit for a member of the family of a Polish citizen (being in a marriage recognized by the Polish law with a Polish national or being a minor child of a Polish national); Article 161 – meeting the conditions for granting a temporary residence permit to a member of the family of an alien for the purpose of family reunification; Article 176(2) – meeting the conditions for granting a temporary residence permit to victims of human trafficking; Article 186(1)(3), (4) or (7) of the Aliens Act of 12 December 2013 – meeting the conditions for a mandatory temporary residence permit based on other circumstances (persons holding a long-term EU residence permit granted by another Member State if: (a) they intend to work or conduct economic activity in Poland; (b) they intend to undertake or continue their studies or vocational training; (c) the alien: demonstrates that there are other circumstances justifying their residence in Poland; is a member of the family of an alien with whom they have been residing in the territory of another Member State is accompanied by or wishes to

[27] Act on the effects of the assignment of work to aliens unlawfully staying in the territory of the Republic of Poland of 15 June 2012, Journal of Laws 2012, No. 769.

join them; immediately prior to the application for residence permit, was resident in Poland on the basis of a temporary residence permit for the purpose of carrying out scientific research which they either completed and are seeking work in Poland or planning to undertake economic activity, and when a national visa was granted to a foreign national visa for the purpose of carrying out scientific research or development work;

(2) are married to a Polish national or a foreign national referred to items 1 to 6 of paragraph 1 (refugee, recipient of subsidiary protection, permanent residence permit, long-term resident of the European Union, humanitarian residence, tolerated stay, recipient of temporary protection) or hold a permit for temporary residence in Poland granted in connection with their marriage;

(3) are a descendant (aged 21 years or dependant) referred to in Article 2(1)(8)(B) of a Polish national or a foreign national referred to in points 1–2 and paragraph 1(1–6) (refugee, recipient of subsidiary protection, permanent residence permit, long-term resident of the European Union, humanitarian residence, tolerated stay, recipient of temporary protection) and hold a permit for a temporary stay in Poland;

(4) hold a permit for temporary residence in Poland granted pursuant to Article 159(1) – meeting the conditions for a mandatory temporary residence permit for the purpose of family reunification, or Article 161b(1) – on account of the long-term stay of a member of the family of a researcher, where the purpose of their stay in the territory of Poland is to stay with the researcher in accordance with the Act of 12 December 2013 on aliens;

(5) are staying in Poland on the basis of Article 108(1)(2) (confirmation of an application for temporary residence) or of Article 206(1)(2) (confirmation of an application for permanent residence) of the Act of 12 December 2013 on aliens, or on the basis of a stamp affixed to the travel document, which confirms the application for a long-term resident's EU residence permit when an alien has been exempted from the obligation to hold a work permit prior to the application;

6) hold a valid Pole's Card (*Karta Polaka*);

7) are entitled to reside and work in the territory of an EU Member State, the European Economic Area or of the Swiss Confederation, employed by an employer established in the territory of that State and temporarily posted by that employer to provide services in Poland;

8) are allowed to work without a work permit under international agreements[28] .

The detailed rules for foreign nationals performing work without a work permit are laid down in the Regulation of the Ministry of Labour and Social Policy of 21 April 2015. The persons who can work on this basis include: 1/ instructors, advisers, supervisors working in EU support programmes; 2/ language teachers undertaking employment in kindergartens, schools, institutions, centres, teacher training establishments, colleges or OHP voluntary labour corps; 3/ members of the armed forces or civilian staff working in international military structures on the basis of agreements concluded by Poland; 4/ permanent foreign correspondents who hold media accreditation; 5/ persons performing artistic services – up to 30 days a year; 6/ persons giving occasional lectures – up to 30 days a year; 7/ athletes taking part in sporting events – up to 30 days a year; 8/ other persons working in connection with international sports events; 9/ clergy and members of religious orders – in connection with their functions in churches and religious organisations; 10/ undergraduate, postgraduate and doctoral students; 11/ students in vocational training and student organisations leaders; 12/ students working in public employment services and their foreign partners; 13/ students and pupils from European Union countries, the European Economic Area or the Swiss Confederation who perform work within the framework of vocational practices as provided for by the study regulations or the curriculum; 14/ participants in cultural or educational exchange programmes, humanitarian or development aid programmes, or student holiday employment programmes organised by the Minister for Labour; 15/ graduates of Polish upper secondary schools, universities or full-time doctoral studies at Polish universities, Polish Academy of Science institutes or other research institutions; 16/ persons who conduct research as academic workers;17/ persons posted by a foreign employer to Poland for a period not exceeding 3 months in a calendar year for the purpose of: a/ carrying out assembly, maintenance, repair of equipment, machinery or other equipment manufactured by the foreign employer; b/ collection of ordered machinery or equipment manufactured by

[28] Act on employment promotion and labour market institutions of 20 April 2004, Journal of Laws 2018, item 1265.

a Polish entrepreneur, c) training of employees of the Polish employer who is the recipient of the equipment, constructions or machinery; d) looking after exhibition stands of the foreign employer[29].

4. THE NATURE OF THE RESIDENCE OF RUSSIAN CITIZENS IN POLAND AND EMPLOYMENT OPPORTUNITIES

Between 2004 and 2018, Russian citizens arrived in Poland to settle there permanently or for a limited period. The third group consisted of Russian citizens seeking international protection. Details of the time and nature of the Russians' arrivals in Poland are given in Table 1.

[29] Regulation of the Minister of Labour and Social Policy on cases in which the assignment of work to an alien in the territory of the Republic of Poland is permitted without the need for a work permit of 21 April 2015, Journal of Laws 2015, item 588.

Table 1. Russian citizens arriving in Poland in 2004–2018

Year	Permanent	Repatriates	Settlement/residence permit for a definite period of time	Students	Refugees	Subsidiary protection	Tolerated stay	Asylum seekers
2004	294	35	299/1389	458	194	-	758	0
2005	350	32	353/1495	380	285	-	1803	0
2006	176	40	224/1273	467	199	-	2015	0
2007	258	38	255/1468	386	105	-	2870	0
2008	156	25	245/1478	284	129	1060	1486	0
2009	104	32	146/1365	374	103	2334	65	0
2010	121	23	148/1379	387	43	203	110	0
2011	104	31	234/1323	409	82	180	112	0
2012	122	26	204/1617	508	67	119	242	0
2013	134	19	204/1605	616	63	111	301	0
2014	143	31	173/843	734	114	121	202	0
2015	349	25	3539/2850	1055	21	116	101	1
2016	189	44	3646/3655	1042	10	80	42	0
2017	221	43	3851/4276	1055	15	72	28	0
2018	269	116	451/2394	1077	9	70	12	0

Source: own compilation based on: Rocznik Demograficzny 2004–2018, Warszawa 2005–2019.

The data in Table 1 shows that the number of Russians arriving in Poland increased between 2004 and 2018. Every year, several hundred people arrived in Poland to settle there permanently. A majority of those were Russian citizens who made that decision having married a Polish citizen. The repatriates represented a less numerous group, although their number increased steadily in the period investigated. The largest group comprised citizens of the Russian Federation who came to Poland for a limited period. A substantial proportion of those were students doing undergraduate and postgraduate studies at Polish universities, of all types. The largest groups of students studied at major Polish universities: University of Warsaw, Jagiellonian University, Nicolaus Copernicus University in Toruń, and the University of Wrocław[30].

After Poland's accession to the European Union, a large number of Russian Federation citizens came to Poland, mainly Chechens seeking refugee status. Only a few of them fulfilled the requirements of the Geneva Convention[31] and acquired such status. Many more Russians were granted tolerated stay and subsidiary protection status. Between 2004 and 2018 only one Russian citizen received asylum in Poland. According to the findings of Polish researchers, few Chechens were interested in staying in Poland or taking up any work. More than 90% of the arrivals in Poland left Poland within two years to move to Western European countries[32].

Citizens of the Russian Federation residing in Poland legally were allowed to undertake employment. The number of Russians granted work permits as compared to the overall number of foreigners is shown in Table 2.

[30] Krystyna Gomółka, *Polityka Polski wobec studentów, doktorantów i stażystów z państw poradzieckich* (Toruń: Wydawnictwo Adam Marszałek, 2016), 114.

[31] Convention Relating to the Status of Refugees, adopted in Geneva on 28 July 1951, Journal of Laws 1991, No. 119, item 515.

[32] Adam Białous, "Kim są Czeczeńcy żyjący w naszym kraju. Najliczniejsi „uchodźcy" wybudzają różne opinie," January 1, 2020, https://www.pch24.pl/kim-sa-czeczeni-zyjacy-w-naszym-kraju--najliczniejsi-uchodzcy-wzbudzaja-rozne-opinie-,49119,i.html.

Table 2. Citizens of the Russian Federation granted work permits in 2004–2018

Year	Total number of permits issued to aliens	Number of permits for Russian citizens
2004	13,179	584
2005	11,151	594
2006	12,063	543
2007	14,798	547
2008	18,022	420
2009	29,340	540
2010	36,622	491
2011	40,808	549
2012	39,144	719
2013	39,078	822
2014	43,663	654
2015	65,786	579
2016	127,394	1008
2017	235,628	1433
2018	328,768	2190

Source: own compilation based on: Demographic Yearbook 2004–2018, Warsaw 2005–2019.

In 2004, Russians accounted for 4.4% of foreigners and in 2018 for 0.66% of all foreigners who were permitted to work in Poland. The number of Russians employed increased since 2004, as did the overall number of foreigners entering employment in Poland. Table 3 shows the types of work permits issued in the period 2010–2018.

Table 3. Number of Russian nationals who have entered employment in 2010–2018, by type of permit

Type of permit	2010	2011	2012	2013	2014	2015	2016	2017	2018
A	392	471	622	698	576	504	946	1362	1913
B	60	56	65	71	41	23	18	35	33
C	32	18	25	42	27	36	34	56	87
D	7	1	5	1	0	4	8	13	144
E	0	0	2	10	10	12	2	8	13

Source: own compilation based on: Cudzoziemcy pracujący w Polsce. Statystyki, https://archiwum.mpips.gov.pl/analizy-i-raporty/cudzoziemcy-pracujacy-w-polsce-statystyki/ (access date: 19.12.2019).

The largest number of Russians were granted type A permits, i.e. permits to perform work under an employment contract with an employer whose registered office is in Poland. The fewest Russians received type E permits, i.e. for employees posted to Poland to perform a specific task. Table 4 shows a breakdown of statistics relating to Russian employees in Poland by selected occupational groups and professions.

Table 4. Work permits for Russian citizens in 2008-2018 by selected occupational groups and professions

Occupational group	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Management	182	186	120	116	194	194	176	182	310	782	647
Functions in the management boards of legal persons	69	61	36	41	35	45	35	21	19	12	92
Skilled workers	49	67	64	70	96	108	122	116	284	494	938
Elementary occupations	10	24	25	27	41	69	32	32	72	68	225
IT specialists	12	16	5	11	9	8	14	64	270	342	328
Lawyers	4	4	3	1	2	1	0	0	0	1	0
Artistic occupations	26	37	21	34	10	11	7	6	8	12	21
Medical professions	6	10	1	12	5	3	4	7	9	8	1
Doctors	4	5	1	6	3	1	0	0	0	0	0
Nurses and midwives	0	0	0	3	0	0	1	0	0	0	0
Teaching professions	11	5	9	0	5	6	5	11	0	14	14
Language teaching	2	0	0	6	0	0	0	0	3	3	3

Source: own compilation based on: Cudzoziemcy pracujący w Polsce. Statystyki, https://archiwum.mpips.gov.pl/analizy-i-raporty/cudzoziemcy-pracujacy-w-polsce-statystyki/ (access date: 19.12.2019).

The data shown in Table 4 suggest that the Russian citizens who took up employment in Poland between 2004 and 2015 were mainly managers, often of their own companies[33]. Since 2015, there has been a steady increase in the number of skilled workers and workers in elementary occupations who entered employment in Poland. The number of Russian IT specialists also grew since 2015. Other occupational groups and professions did not attract many Russians entering Poland. The number of work permits by PKD (Polish classification of business activities) section is shown in Table 5.

[33] Tomasz Dziewulski, "Co jest rosyjskie w Polsce?," December 10, 2019, https://wspieramrozwoj.pl/artykul/66/rosyjskie-produkty-i-firmy-w-polsce .

Table 5. Number of permits issued to Russian citizens in 2008–2017 by selected PKD sections

Category	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Agriculture, forestry, Hunting, fishing	-	-	8	26	19	13	12	14	3	6	4
Industrial processing	76	81	72	50	51	33	13	17	29	124	201
Construction	7	15	25	53	58	54	67	51	77	134	503
Wholesale and retail trade	123	146	101	116	207	207	147	93	104	134	126
Transport and warehousing	-	-	36	47	48	59	57	98	182	247	324
Hospitality and catering	13	11	10	21	19	21	7	6	17	25	39
Information and communication	-	-	1	20	53	40	36	64	288	352	265
Financial intermediation, real estate, insurance	68	111	2	7	6	12	19	10	12	20	23
Science and technology	-	-	53	62	77	134	62	71	98	145	138
Education	12	9	4	7	9	11	8	6	3	6	6
Healthcare and social care	11	10	6	9	10	6	3	1	3	1	4
Households with employees	-	-	21	30	31	45	32	28	28	33	31

Source: Author's compilation based on Cudzoziemcy pracujący w Polsce . Statystyki, https://archiwum.mpips.gov.pl/analizy-i-raporty/cudzoziemcy-pracujacy-w-polsce-statystyki (access date: 22.12.2019).

The data presented in Table 5 indicate that in 2008–2018 the largest number of Russians were permitted to work in the wholesale and retail trade sector, information and communication, construction, transport and warehousing, whereas the fewest work permits were issued to Russians seeking employment in the education, healthcare and social welfare sector.

Since 2008, Polish employers have been able to submit statements on the assignment of work to an alien. Table 6 shows the number of employers' statements on the assignment of work to Russians by PKD section in 2008–2018.

Table 6. Employers' statements on the assignment of work to Russians by national economy sector in 2008–2018

Category	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Agriculture, forestry, hunting, fishing	91	131	188	123	184	134	152	331	449	363	17
Mining and quarrying	-	-	-	-	-	-	2	1	1	14	7
Industrial processing	-	-	-	54	109	116	114	176	411	660	724
Electrical energy production, water and gas supply	-	-	-	-	-	-	5	2	0	0	0
Water supply, wastewater and waste management	-	-	-	-	-	-	10	4	32	65	10
Construction and related	182	55	74	182	412	159	140	222	495	910	514
Wholesale and retail trade	233	149	62	90	170	183	168	167	253	429	145

Category	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Industry	223	178	60	0	0	0	0	0	0	0	0
Transport Warehousing	72	31	40	77	80	98	74	155	403	509	394
Catering, hospitality, storage	31	32	25	33	40	40	20	55	114	212	81
Information and communication	-	-	-	21	17	39	137	261	411	263	158
Financial and insurance activities	-	-	-	9	10	16	17	22	22	31	15
Real estate activities	0	0	0	0	0	0	2	12	9	21	19
Professional activities, science and technology	-	-	-	27	62	39	48	80	104	186	55
Administrative services	-	-	-	-	-	-	93	227	925	2172	372
Public administration, national defence, compulsory social security	-	-	-	-	-	-	13	1	1	2	0
Education	-	-	-	6	9	6	9	28	18	13	10
Health care and social welfare	-	-	-	21	14	3	4	13	30	28	14
Culture and entertainment	-	-	-	-	-	-	58	23	37	45	23
Other services	-	-	-	-	-	-	131	109	102	179	79
Households with employees	21	21	22	32	52	53	32	50	51	38	9

Category	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Temporary work agencies	28	32	27	0	0	0	0	0	0	0	0
Other	259	127	200	288	465	371	-	-	-	-	-

Source: Author's compilation based on: Cudzoziemcy pracujący w Polsce. Statystyki, https://archiwum.mpips.gov.pl/analizy-i-raporty/cudzoziemcy-pracujacy-w-polsce-statystyki/ (access date: 29.12.2019).

According to employers, Russian workers were in highest demand in wholesale and retail, construction, transport, as well as information and communication sectors, and since 2014 also in administration services. The fewest statements concerning Russian employees were submitted in the sectors of electrical energy production, water and gas supply, mining and quarrying, public administration, national defence and social security.

5. CONCLUSIONS

Russians may enter Poland legally on the basis of international and bilateral agreements signed by Poland and Russia. They may receive refugee status under the Geneva Convention, subsidiary protection on the basis of the Polish Act on granting protection to aliens, or be granted tolerated stay on the basis of the Law on aliens. The conditions for undertaking university studies are laid down by the Polish Higher Education Act, whereas the Act on employment promotion and labour market institutions governs the rules of entering employment. Between 2004 and 2018, relatively few Russians, including repatriates, arrived to settle in Poland permanently. A majority of Russians came to Poland for a limited period of time. That group included students and people who intended to seek employment in Poland. The Russian Federation citizens having refugee status were not interested in finding jobs in Poland; most of them were Chechens, who left Poland within two years of arrival to move to Western European countries.

In 2004, Russian nationals represented 4.4% and in 2018 – 0,66% of all foreigners who received work permits in Poland. A majority were granted A type permits, and the fewest acquired type E permits. Between 2004

and 2015, Russians often took up work in Poland as managers, often of their own companies. Since 2015, there has been an increase in the numbers of workers from Russia in three occupational groups: IT specialists, skilled workers and workers in elementary occupations. In 2004-2018, the largest numbers of Russian workers were employed in the wholesale, retail, information and communication, construction, transport and warehousing sectors. These were the industries where Polish employers wished to hire them, as evidenced by the submitted statements on the assignment of work to Russian nationals. The demand for Russian workers exceeded the number of employees, so the Polish labour market offered employment opportunities for a more numerous group of Russians.

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STATE PURCHASING POLICY – A NEW INSTITUTION OF PUBLIC PROCUREMENT LAW

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ABSTRACT

The state's purchasing policy is one of the new institutions of the Public Procurement Law. Influenced by the changes in the package of directives coordinating public procurement procedures in 2014, our national legislator has taken steps to use public procurement for purposes other than strictly purchasing. Therefore, the authors' considerations strive to define the concept of "purchasing policy of the state", outlining the role and scope thereof in the functioning of the modern state. Furthermore, the authors try to point out problems related to its implementation by the public authorities, stating finally that purchasing policy will only be effectively implemented if all participants of the public procurement market are aware of the policy objectives.

Keywords: Public procurement law, National purchasing policy, Directives coordinating public procurement procedures

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1. INTRODUCTION

The objectives of the current policy of public authorities are usually expressed by the current government, and they de facto create the means by which the public sector will meet its expectations and the scope of these expectations[1]. There is a doctrinal consensus that the role public authority plays in the economy evolves towards attaining the policy objectives through stimulating participating entities rather than through directive administrative action[2]. It seems that the philosophy of effective government action in the area of policy implementation could be understood as creating optimal conditions for the development of a free operation of private entities in all spheres of economic and social life. Therefore, the government should designate tasks so that it can, within its competences, 'steer not row', i.e. provide services and invest in related infrastructural projects on market terms and thus, more effectively and professionally.

Efficient implementation of the state's policy[3] requires an appropriate legal instruments. Therefore, purchasing policy, as a public management tool, will definitely be incorporated into public policy[4].

Intuitively we all seem to know what 'state's purchasing policy' means. However, this concept appeared for the first time in the draft Public Procurement Law Act, which, according to the Act on Introductory Regulations, enters into force on 1st January 2021[5]. The state's purchasing policy, pursuant to Art. 22 (1) of the draft Public Procurement Law Act, is to specify the state's priority activities in the area of public procurement, as

[1] Hubert Izdebski, and Michał Kulesza, *Administracja publiczna. Zagadnienia ogólne* (Warsaw: Liber, 1998), 99–120.

[2] Hubert Izdebski, and Michał Kulesza, *Administracja publiczna. Zagadnienia ogólne*, 99–120; Hubert Izdebski, *Historia myśli politycznej i prawnej* (Warsaw: C.H. Beck, 1996), 154–156; Marek Wierzbowski, *Prawo gospodarcze. Zagadnienia publicznoprawne* (Warsaw: WoltersKluwer, 2005), 27–28.

[3] Dawid Sześciło, „Polityka publiczna i rola administracji w jej tworzeniu," in *Administracja i zarządzanie publiczne. Nauka o współczesnej administracji*, ed. Dawid Sześciło, (Warsaw: Wyd. Stowarzyszenie Absolwentów Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, 2014), 58.

[4] Jerzy Hausner, *Zarządzanie publiczne* (Warsaw: Wyd. Scholar, 2008), 46 and next.

[5] Act on Introductory Provisions Public Procurement Law of Day Month Year, Journal of Laws 2019, item 2020.

well as the desired conduct of entities which has been awarded contracts, including in particular the purchase of innovative or sustainable products and services, taking into account in particular standardization aspects, calculations costs in the product life cycle, corporate social responsibility, dissemination of good purchasing practices and tools[6]. The state's purchasing policy is to be a strategic document setting out specific values and goals that, in a given period, should guide the public procurement process. Thus, the state's purchasing policy employs public procurement to engage with different areas of the state's operation.

2. SHORT HISTORICAL OUTLINE

Despite the fact that the concept of "state purchasing policy" has only recently appeared in the area of public procurement, we have been witnessing purchasing strategies and detailed actions in this field for many years. For example, the need to define clear guiding principles for public procurement appeared in the first years after Poland regained independence. Regulating the basic principles and forms of awarding government contracts while outlining the objectives of economic policy, to a large extent, contributed to the dynamic development of the country at that time[7]. An important element of building a uniform public procurement system was the establishment of the Distribution Office with the task of centralizing government procurement[8]. It was created at the Ministry of Industry and Trade. All government bodies were obliged to direct their orders for industrial products to the Distribution Office, which divided these orders between relevant industrial plants. The fact that a central public administration body was created to centralize government procurement pointed to the paramount need to harmonize legal solutions in this area, and to increase the efficiency of the awarded contracts. It was also the first step

[6] Act on Public Procurement Law of day. Month, Year, Journal of Laws 2019, item 2019, as amended.

[7] Andrzej Panasiuk, *Publicznoprawne ograniczenia przy udzielaniu zamówień publicznych* (Bydgoszcz – Warsaw: Oficyna Wydawnicza Branta, 2007), 16–23.

[8] Decree of the Head of State on the creation of a Distribution Office to centralize government procurement, Journal of Laws 1918, No 19, item 55.

towards pursuing an informed state policy in the area of public procurement. The adoption of the Act on Supplies and Works for the Treasury, Local Government, and Public Law Institutions on 15th February 1933 complemented the earlier actions[9]. This Act set out general principles for the distribution of public procurement, at the same time outlining the objectives of the State's economic policy. The post war years saw the economy transformed. The private sector was liquidated to significantly expand and strengthen the socialized sector. Thus, it was also necessary to adapt the provisions on public distribution, which have evolved towards a particular preference for the socialized sector[10]. The post-war State and its economy needed efficient instruments enabling the implementation of public objectives. Therefore, the times of introducing the principles of a planned economy controlled centrally by the state apparatus followed. The planned economy was an essential aspect of the operation of the state, for it was based on a central plan. Moreover, it allowed for the implementation of a command-and-control economy i.e. an economy where demand and supply are regulated by the state. Such a model of the economy lacked competition and thus, led to the misallocation of the state-owned factors of production. Economic plans were the basic method for exercising state control over economic processes. In the centrally planned economy model, so called, planned agreements played the role of public procurement. In the 1950s, an obligation to conclude planned agreements was introduced to comply with the rule of law, ensure discipline in the implementation of economic plans, improve cooperation in implementing these plans, and consolidate the principles of economic settlement. The ambit of the mutual rights of obligations provided for in the planned agreements extended to supply, sale, and transport of goods. Their size and scope resulted from the economic plans. Planned agreements covered the entire supply and sale plan as well as, if possible, the carriage of goods. The parties concluding

[9] Act on Supplies and Works for the Treasury, Local Government, and Public Law Institutions on 15 February 1933 complemented the earlier actions, Journal of Laws 1933, No 19, item 127.

[10] Act on supplies, works and services for the Treasury, local government and certain categories of legal persons of 18 November 1948, Journal of Laws 1948, No 63, item 494 and Act on planned contracts in the socialist economy of 19 April 1950, Journal of Laws 1950, No 50, item 180.

the planned agreement were obliged to determine its content based on the economic plan, specifying mutual obligations, taking into account the general interests of the national economy and the principles of economic settlement. On the other hand, in the period immediately preceding the socio-economic changes taking place in the country, government orders were planned and conducted centrally by selected departmental units. Following the Socio-economic Planning Act of 26th February 1982, the Council of Ministers compiled, by a resolution, a list of goods which would be obtained via public procurement[11]. The aforementioned act employed the Council of Ministers to organise and supervise implementation of government orders. To ensure the proper implementation of important economic objectives, as well as improve the supply of particularly scarce resources, and ensure that government orders are fulfilled, the Council of Ministers, by resolution, formulated a list of raw materials and intermediate goods allocated for production purposes[12]. Generally, lists of such raw materials, materials and products covered by government procurement were established as part of central annual plans, and were only amended and supplemented by resolutions of the Council of Ministers[13]. The national plan, paramount in the period of centralist economic planning, had three functions: it pressured enterprises to perform planned tasks and achieve results according to the plan; it assessed the implementation of the above-mentioned objectives, productive efficiency, and overall enterprise's activity; as well as being the basis for the calculation of wages for the entire staff[14].

Thus, since its very establishment public procurement was a conduit for implementation of state policy.

The state's purchasing policy in the light of European law European law does not refer to the economic results of specific contracts concluded

[11] Act of the Council of Ministers of 26 February 1982, Journal of Laws 1987, No 4, item 26, as amended.

[12] Resolution No. 280 of the Council of Ministers of December 30, 1982 regarding government procurement of materials and products, Journal of Laws 1983, No. 1, item 9.

[13] Andrzej Panasiuk, *Publicznoprawne ograniczenia przy udzielaniu zamówień publicznych*, 23–34.

[14] Zdzisław Dąbrowski, „Aktualne koncepcje planowania (gospodarki narodowej)," *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, no. 1 (1984), 206.

in the public procurement system. As illustrated by the directives coordinating public procurement, it focuses more on defining the increasing number of policy objectives which Member States may regard as generating significant additional costs. Therefore, each Member State in its purchasing policy must individually develop its approach to conducting policy promoting political goals, rather than minimizing the costs of such transactions. The implementation of specific non-purchasing goals, such as environmental protection, social requirements, or support for disadvantaged social groups, such as minorities or the disabled, always ensues higher transaction costs.

In European law, as S. Arrowsmith rightly points out, there are currently three main areas of interest when using public procurement to achieve political goals: – environmental protection through green public procurement, – social responsibility through socially responsible public procurement, – innovation through public procurement promoting innovation[15].

When public procurement serves other policy objectives costs should always be compared with benefits[16]. Achieving non-shopping goals often entails paying higher prices, thereby negatively impacting the contractor's offer e.g. diminishing the service quality. The benefits of social and environmental requirements increase prices and restrict competition, as some contractors refrain from participating in public procurement procedures. In addition, there are costs to ensure compliance with contractual requirements. In general, additional costs may arise both due to additional costs incurred by contractors in meeting environmental or innovative requirements, and because some contractors cannot meet these requirements and therefore cannot participate at all, which limits competition. The EU public procurement directives based on the Treaty of Rome aim to create the European single market. Therefore, the European Union may pursue completely different goals than central and local governments of the Member States. Sometimes this policy can be difficult to implement without adversely affecting the local market, and thereby leading to the loss of local

[15] Sue Arrowsmith, „Horizontal Policies in Public Procurement. A Taxonomy", *Journal of Public Procurement*, no. 10(2) (2010), 149–186.

[16] Christopher Mccrudden, *Buying Social Justice: Equality, Government Procurement & Legal Change* (Oxford: Oxford University Press, 2007), 594–617.

jobs and even the bankruptcy of local companies. Increased use of policy objectives contained in public procurement can often result in additional administrative burdens and thus, costs for local authorities.

The provisions on public procurement are being reviewed in Europe each time a new package of directives coordinating public procurement procedures is developed[17]. Usually during the debates regarding the direction of change two opposite positions emerge. First calls for more active use of public procurement as a policy tool to stimulate innovation, green technologies and social inclusion. This, however, would require more flexible public procurement instruments and ex post monitoring of results to reduce their abuse. The second favours further integration of the European market, and thus the introduction of provisions that limit the use of flexible procedures and control ex ante procedures instead of ex post results. For some time, we have been able to observe a trend that every change in the package of directives coordinating the award of public contracts includes an increasing number of policy objectives. This can be beneficial at some levels and for particularly privileged groups. At the same time, however, it may cause conflicts of interest with other levels, as in the case of contracts awarded by specific groups of public entities. Basically, every new goal has additional costs and can limit competition, which can increase prices. As a result, public entities can obtain less favourable offers compared to the private sector.

To reduce the negative aspects related to the use of policy objectives in public procurement, the public sector should simplify and standardize public procurement policies, often seeking alternative solutions.

3. THE ROLE AND SCOPE OF PURCHASING POLICY

Due to the fact that strategic planning is long-term and focused on defining and achieving specific goals the state's purchasing policy should

[17] Directive 2014/24 / EU of 26 February 2014 on public procurement, repealing; Directive 2004/18 / EC. Directive of 26 February 2014 on the award of contracts by entities operating in the water, energy, transport and postal services sectors, repealing; Directive 2004/17 / EC. Directive 2014/23 / EU of 26 February 2014 on the award of concessions.

stem from the state's development strategy. The operational planning strategy facilitates the concentration of organizational resources. While it focuses only on basic activities, such as directions of the undertaken activities it also significantly reduces functional uncertainty caused by an evolving environment, thereby increasing adaptability[18].

Purchasing policy should be treated as one of the instruments for implementing the state's development strategy. Its objectives should be closely related to long-term socio-economic policy. These goals should reflect the socio-economic needs determined by the external and domestic condition, the basic requirements of the political system and the value system of various social groups.

The basic document which refers to the state's purchasing policy is currently the Strategy for Responsible Development for the period up to 2020 (including the perspective up to 2030). The midterm Strategy for Responsible Development for the period up to 2020 is a pivotal document for the activities concerning the country's economy. The basic assumption of the Strategy is that the Polish economy needs new development impulses that will ensure stable competitiveness growth based on different development factors such as: growing role of knowledge and technology in the economic processes; development and further expansion of Polish companies; establishment of a savings system; increasing quality of institutions and their social interaction. They must supplement the current factors including low labour costs, inflow of foreign investments, increase in education quality, and structural changes resulting from EU membership. While public procurement is to play an important role in implementing the strategy the state's purchasing policy has been identified as a strategic project included in the area of reindustrialization of the midterm national development strategy.

In its essence, the purchasing policy of the state must primarily focus on implementing the assumptions of the midterm strategy. However, at the lowest level the public procurement procedure is driven by the basic rule of achieving the greatest benefit because the ultimate goal of public procurement is to ensure a cost-efficient public expenditure. This key

[18] James A.F. Stoner, and Charles Wankel, *Kierowanie* (Warsaw: Państwowe Wydawnictwo Ekonomiczne, 1992), 99–100.

principle appreciates not only the price of goods or services, but also their suitability and quality. The criterion of cost-efficiency can be defined as "the optimal combination of lifetime costs and quality to meet customer requirements[19]." However, imposition of additional requirements to serve political needs (e.g. environmental, social or innovative goals) distorts the cost-efficiency analysis. Most procurement systems aim to promote competition and economic benefits. However, there are often other conflicting goals, such as promoting allocative efficiency, customer satisfaction, risk avoidance, and promoting a uniform ecological approach[20].

As the above considerations show, various goals potentially included in the purchasing policy are inconsistent. Therefore, some degree of political compromise seems inevitable. For example, cost-effectiveness requirements may favour large foreign contractors over of a small local company. Thus, the potential positive effect on the local market is foregone. The doctrine emphasizes that private sector rarely takes into account transparency let alone higher price for it often turns out to be contrary to accepted commercial practices. However, there is a widespread agreement that policy should play a fundamental role in spending public funds[21].

Political instruments and objectives mainly relate to the order itself and do not engage with the entire cycle – from identifying the need for purchase through the purchasing process itself to the implementation of the contract – despite the barriers which are present at these stages and the fact that they generally involve a wider set of actors and stakeholders. Therefore, purchasing policy should also address these issues. Purchasing policy is usually seen as a legal tool to stimulate domestic production and consumption. By entering into agreements on specific sectors or social groups, the state can redistribute wealth, promote industrial strategies or ensure sustainable development.

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[19] Kim Loader, „The Challenge of Competitive Procurement: Value for Money Versus Small Business Support," Public Money & Management, no. 27 (2007): 307–314.

[20] Steven L. Schooner, "Desiderata: Objectives for a System of Government Contract Law," Public Procurement Law Review, no. 11 (2002): 103.

[21] Steven L. Schooner, "Commercial Purchasing: the Chasm between the United States Government's Evolving Policy and Practice," in *Public Procurement: the Continuing Revolution*, ed. Sue Arrowsmith, and Martin Trybus (London: Kluwer Law International, 2002), 63.

4. IMPLEMENTATION OF THE STATE'S PURCHASING POLCY

The development of the state's purchasing policy will not alone bring the expected results, unless its implementation is not appropriately regulated, both at the level of central and local authorities. Purchasing policy as a public sector operating strategy will be determined not only by internal conditions prevailing in the administration itself, but also by the external environment, which will have a decisive impact on its implementation, in connection with, e.g., globalization or integration processes, so as to be able to effectively facilitate socio-economic development.

The implementation of the purchasing policy will consist of a number of activities aimed at achieving the goals set in the policy, outlining the appropriate tools to achieve these goals, and then monitoring their implementation. Direction and objectives of the purchasing policy should originate from the analysis of the socio-economic environment of the state. Appropriate instruments should be assigned to each goal to enable its implementation through procurement. Policy designers should, first of all, answer the questions of what they want to achieve, what values they want to protect, and what they want to avoid. Only then it is possible to indicate the goals, develop proper strategies, design proper tools, and eventually assess them.

The state's purchasing policy is a long-term document that can be modified to reflect changing external conditions and new objectives that emerge. Under the draft Public Procurement Law Act, the state's purchasing policy is to be developed every 4 years and adopted by the Council of Ministers by way of a resolution, at the request of the Minister of Finance (Art. 21 of the Act of 11 September 2019, Public Procurement Law Act). The Minister will also be responsible for preparing the project and coordinating its implementation.

The document of the state's purchasing policy itself remains inoperative unless there are specific rules for its implementation at certain levels of public administration. The legislator's actions in this respect should be appreciated, because in accordance with the instruction of Art. 22 of the draft Public Procurement Law Act, the contracting authority being the central government administration body, prepares a management strategy for individual purchasing categories, in line with the purchasing policy of the state. The strategy specifies key orders for the implementation of the state's

purchasing policy. Therefore, the strategy is an executive document of the state's purchasing policy, practically used by the institutions awarding public tenders.

Central orders as well as joint orders can serve as good tools for achieving the objectives of the country's purchasing policy efficiently.

European legislators already introduced the central contracting authority in the package of directives coordinating public procurement procedures in 2004. In our national legal order, this institution was established in 2006 by the Public Procurement Law Act seeking to implement Directive 2004/18 /EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public contracts for works, supplies and services[22]. During the next review of EU directives, which resulted in the adoption of a new package of directives in 2014, this legal institution was refined. Currently, art. 2(1)(14) of the Directive 2014/24 / EU[23] defines the concept of "centralized purchasing activities" as activities conducted on permanent basis. The implemented legal structure allowed the awarding entities, pursuant to art. 4 (11) of the Public Procurement Law Act, for purchasing orders from the central contracting authority or from contractors selected by it without applying the act. It concerned government administration and was aimed at merging large orders. When the state's purchasing policy enters into force, it should be implemented through purchasing activities carried out by central procuring entities.

5. CONCLUSIONS

The introduction of the obligation to develop a purchasing policy into Polish public procurement law should be considered as the next step to-

[22] Directive 2004/18 / EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public contracts for works, supplies and services, Journal of Laws L 134 of 2004, s. 114, as amended.

[23] Directive of the European Parliament and of the Council of 26 February 2014 on public procurement, repealing Directive 2004/18 / EC, O.J.E.C., L 94 z 28.03.2014 r., s. 65 and Articles 55-57 of Directive 2014/25 / EU, concerning centralized purchasing activities and procurement involving contracting entities from different Member States, were formulated in a very similar way as the provisions of Art. 37-39 of Directive 2014/24 / EU.

wards the rational use of public procurement in accordance with the current needs of the state. The action of the national legislator results from changes in European law, which is evolving towards the use of public procurement for policy purposes other than strictly purchasing. As M. Szydło indicates economic planning as a state intervention in the economy, is also a natural instrument in the social market economy. The modern state, willing to minimize its intervention in the economy, is somewhat forced to introduce strategic planning in all its aspects.[24] Therefore, in order for the purchasing policy to be implemented efficiently, procuring institutions must be aware of the purpose set by the legislator. Therefore, one must be aware of the objective and know the tools at one's disposal to fully and effectively implement purchasing policy.

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[24] Marek Szydło, "Planowanie indykatywne jako funkcja państwa wobec gospodarki," in *Funkcje współczesnej administracji gospodarczej. Księga dedykowana Profesor Teresie Rabskiej*, ed. Barbara Popowska (Poznań: Wydawnictwo Poznańskie, 2006), 148.

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