e-ISSN 2545-384X

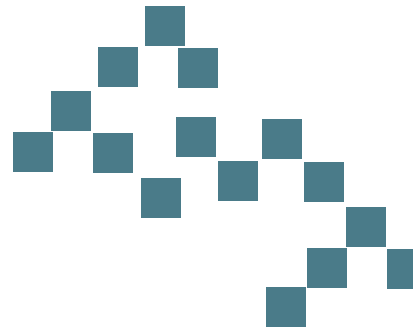
REVIEW OF EUROPEAN AND COMPARATIVE LAW

Volume 44 2021/1

REVIEW
OF EUROPEAN AND COMPARATIVE LAW

REVIEW
OF EUROPEAN AND COMPARATIVE LAW

Volume 44 2021/1



Wydawnictwo KUL
Lublin 2021

Cover design
Agnieszka Gawryszuk

Typesetting
Jarosław Łukasik

The Editor will be pleased to consider contributions provided they are not submitted for publication in other journals. Articles must be presented in their final form in English. Special attention should be given to quotations, footnotes and references, which should be accurate and complete (specific formatting rules are available on the Review website).

e-ISSN 2545-384X

The original version is the electronic version.

Wydawnictwo KUL, ul. Konstantynów 1 H
20-708 Lublin, tel. 81 740-93-40, fax 81 740-93-50
e-mail: wydawnictwo@kul.lublin.pl
http://wydawnictwo.kul.lublin.pl

TABLE OF CONTENTS

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLIV
YEAR 2021, ISSUE 1, pp. 7–18
DOI: https://doi.org/10.31743/recl.11344

OBSERVANCE OF HUMAN RIGHTS AS AN ELEMENT OF SHAPING THE POSITION OF THE EUROPEAN ENTERPRISE IN THE KNOWLEDGE-BASED ECONOMY

*Kinga Machowicz**

ABSTRACT

The goal of the article is to determine the role played by observance of human rights in shaping the position of the European enterprise in the knowledge-based economy. It has been assumed that the condition most expected by an entrepreneur is to achieve a competitive advantage. The concept of observance of human rights in conducting business activities is connected with business ethics and the idea of corporate social responsibility, while economic well-being can be achieved in the conditions of a knowledge-based economy. One of the conditions for the survival and development of the employer conducting business activities in the knowledge-based economy is to effectively motivate employees to reveal their knowledge and use it in practice. Non-financial motivation may involve the feeling of identification with the employer.

Keywords: human rights, democracy, innovations, knowledge based-economy

* Dr. habil., Associate Professor, Faculty of Social Sciences, The John Paul II Catholic University of Lublin; correspondence address: Al. Racławickie 14, 20-950 Lublin, Poland; e-mail: machowicz@kul.pl; https://orcid.org/0000-0002-6519-7903.

1. INTRODUCTION

For some years social sciences have witnessed an increasingly evident tendency for investigating phenomena in interdisciplinary approaches. Economy no longer sees people and their rights in terms of the same capital as the financial or real capital. At the same time there is no doubt that even now business activities would not be possible without human participation. Taking the foregoing observations into account, it should be said that the objective of the article is to determine the role played by observance of human right in shaping the position of the European enterprise in the knowledge-based economy. It has been also assumed, based on the universal paradigm in social sciences, that the condition that is most expected by entrepreneurs conducting their business activities in Europe is the achievement of a competitive advantage. This article has been prepared based mainly on the method of institutional-legal analysis, the critical analysis of literature, including literature referring to the judicial decisions of the European Court of Human Rights.

2. THE CONCEPT OF CORPORATE SOCIAL RESPONSIBILITY VERSUS HUMAN RIGHTS PROTECTION IN THE COUNCIL OF EUROPE'S SYSTEM

The CSR concept shows that behaviors connected with the running of enterprises have a strong impact on the condition of the natural environment, human relations at the workplace, personality development, and on the proportions of time devoted to work and the employee's free time. At the same time, the norms of human rights protection also belong to some of the so-called specific norms of business ethics. That is why one of the elements of the CSR concept is the inclusion of legal responsibility in its scope[1]. The CSR concept has gained a new dimension because, without leaving the spheres of practice and scientific considerations, it also spreads to the normative sphere. The links of this idea with the protection of human rights are more and more noticeable. In the coming years the CSR

[1] Krzysztof Kietliński, Victor Martinez Reyes and Tadeusz Oleksyn, *Etyka w biznesie i zarządzaniu* (Cracow: Oficyna Ekonomiczna, 2005), 132–160.

concept will also continue to be endowed with legal sanctions at different levels. States can change their legislation. The practice of administrative and judicial authorities may certainly take into account the interpretive CSR context when applying ratified international agreements. That is why business entities are facing the not entirely voluntary implementation of CSR principles.

In a democratic state the behaviors of entrepreneurs translate into the implementation of both the first generation of human rights (inter alia personal rights), the second (economic, social and cultural rights) and the third generation of human rights (solidarity rights – collective rights vested in the public). Conducting business activities most often involves the questions of property protection (including intellectual property) but also the observance of such human rights and freedoms as the prohibition of slavery or forced labor, right to privacy, and freedom of expression. It is moreover recognized that property rights as first-generation human rights can be effectively protected by the Council of Europe's system. This stems from the requirement of ensuring an effective protection mechanism for human dignity at the level of protection of an individual's material existence[2].

3. INTELLECTUAL PROPERTY AS A HUMAN RIGHT AND THE KNOWLEDGE-BASED ECONOMY

The conduct of economic activities in businesses that use modern technologies requires that intellectual property rights be respected. An entrepreneur who implements innovations should consider the justifiability of applying first of all for intellectual property protection. Having secured such protection, the entrepreneur prevents competitors from legally and gainfully utilizing the solutions developed in his/her enterprise even if these solutions are already within reach of the competitors. The entrepreneur, exercising his/her human rights, thereby places him/herself in a better position in the market because the ECHR accorded to intellectual property the protection of the exercise of property rights and the peace-

[2] Krzysztof Orzeszyna, Michał Skwarczyński and Robert Tabaszewski, *Prawo międzynarodowe praw człowieka* (Warsaw: Wydawnictwo C.H. Beck, 2020), 325.

ful use of property. In judicial decisions the concept of property is interpreted broadly enough to be applied to (explainable) financial profits of specific entities[3]. Moreover, the ECHR notices the wide impact of innovation policy on the human rights system, which may in turn lead to the conclusion that the Court's future decisions in this area will shape the regional development of intellectual property. Although the Court's judicial decision-making depends on the complaints filed by citizens, yet as a result of the settlement of this matter, an essential turnabout can be observed in the decisions by this body that significantly changes the stance of the Council of Europe's agencies on cases concerning intellectual property. For while the Court was initially reluctant to engage in considerations on legal protection standards in this area, then as a result of the decision in the case in question it paved its way, as it were, to setting appropriate standards in the future. It can thus be expected that industrial property assets will continue to be the subject of the Court's interest and its decisions will set the limit to their protection and the rules of settling the collision with other convention-protected interests[4].

The concept of the knowledge-based economy has in turn been defined in literature many times. It is emphasized that it is the economy based on knowledge resources and the use of knowledge potential, i.e. the elements that become strategic factors of its development. The understanding of how people produce new products and knowledge that enables effective and efficient operation is regarded as the most important problem in the knowledge-based economy[5].

The ability to create and acquire knowledge and to use it effectively contributes to generating innovation, achieving a competitive advantage

[3] Łukasz Duda, and Jakub Kociubiński, "Realizacja ochrony własności w Europejskiej Konwencji Praw Człowieka na podstawie orzeczenia Lithgow i inni," *Wrocławskie Studia Erazmiańskie* 3 (2009): 235.

[4] Mariusz Załucki, "Własność przemysłowa w Europejskiej Konwencji Praw Człowieka. Wokół granic monopolu eksploatacyjnego i nowych standardów ochrony," *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej* 1 (2018): 138–148.

[5] Elżbieta Skrzypek, "Kapitał intelektualny jako podstawa sukcesu organizacji w społeczeństwie wiedzy," in *Wiedza w gospodarce, społeczeństwie i przedsiębiorstwach: pomiary, charakterystyka, zarządzanie*, ed. Elżbieta Skrzypek, and Krzysztof Piech (Warsaw: Instytut Wiedzy i Innowacji, 2007), 73.

and economic success[6]. In the conditions of the knowledge-based economy the achievement of a competitive advantage is often associated precisely with innovations. According to the OECD, innovation is defined as "the implementation of a new or significantly improved product (good or service) or process, a new marketing method, or a new organizational method in business practices, workplace organization, or external relations"[7]. The basic types of innovation are: product, process, organizational and marketing innovation. Out of these types it is first of all marketing innovations that may impact on the exercise of personal human rights. Marketing innovations involve the implementation of new methods within the four basic elements of marketing activity: product design, selling and distribution, promotion, and pricing strategy. Unlike product innovations, marketing innovations do not have to involve changes of the functional and utilitarian characteristics of products, they may concern only the improved perception of products by customers[8], or, in some way, influence the purchase decisions that are part of the customer's private sphere.

The studies on innovation and the state's innovation policy present innovations as one of the key factors of the competitive advantage of enterprises and economies. According to Porter, enterprises are able to achieve a competitive advantage owing to successes in implementing innovative solutions. Hamel and Prahalad assume that the creation in an enterprise of key competencies allows gaining a lasting competitive advantage since the pace of social changes that are the source of new needs and new domains is subject to constant growth and the formerly applied ways are not able to ensure the long-term success of an enterprise. Consequently, entrepreneurs should seek to base their successes on new products and services[9].

---

[6] Piotr Stożek, "A Spatial Analysis of the Knowledge-Based Economy in Poland," *Comparative Economic Research* 17(4) (2014): 222.

[7] OECD/Eurostat, Oslo Manual, Guidelines for Collecting and Interpreting Innovation Data, Paris: OECD Publishing, 2005, 48.

[8] OECD/Eurostat, Oslo Manual, Guidelines for Collecting and Interpreting Innovation Data, Paris: OECD Publishing, 2005, 50–55.

[9] Krystyna Poznańska, "Innowacyjność jako źródło przewagi konkurencyjnej polskich przedsiębiorstw," *Materiały i Prace Instytutu Funkcjonowania Gospodarki Narodowej* 82(LXXXII) (2002): 65–79.

The vague concept of competitive advantage and the multitude of elements that may at least potentially make up this advantage, combined with descriptive scientific theories, can, from the standpoint of economic practice, translate at least into the identification of elements available to a specific entrepreneur. This identification should subsequently result in the development and implementation of a situation-specific strategy for achieving a competitive advantage in the market. The simultaneous adoption of this manner of conduct by many business entities can bring about diverse results. In the present determinants of the economy it is difficult to imagine a variant in which only one enterprise will achieve an advantage. Rather, it will be a group of enterprises in a similar situation, better than the other competitors. The more so that by conducting a competent law-making policy the state prevents the extreme form of achieving a competitive advantage, i.e. the monopolization of the market. Consequently, taking measures to establish one's competitive advantage may de facto simply be a condition for one's mere survival in the market.

Product innovations involve the introduction of new or significantly improved goods and services with regard to their characteristics or applications. These embrace significant improvements regarding technical specifications, components and materials, built-in software, ease of use or other functional features. A product innovation is also a new application of a product and an improved way of providing a service. Product innovations can also be created based on any kind of intellectual property, or even a combination of its kinds – in one product there may co-exist inventions, functional design and/or topographies of integrated circuits; its external form can be an industrial designer product, and the whole can be given a trademark. Furthermore, the adopted solutions can be assessed in the context of copyright. In practice, assessing which products are creative encounters objective difficulties: "There remains, however, the area of the so-called semantic shadow, or the collection of works that may but not always will be recognized as the object of copyright. The stability of definition, and thereby legal certainty, is weakened by the constant development of science (including technologies that support the creative process; consequently the factor of the author's creative contribution is sometimes

challenged)"[10]. For a work to function as industrial property, it has to satisfy the statutory requirements imposed on this kind of property. If a work does not have trademark distinctiveness, it will not be able to be for example a trademark[11].

4. THE IMPORTANCE OF OBSERVANCE OF PERSONAL AND ECONOMIC HUMAN RIGHTS FOR SHAPING THE POSITION OF AN ENTERPRISE IN THE MARKET

Human rights are seen through the prism of the personal dignity of the individual human being. This interpretation ensures at least the relative priority of human rights over taking care of the economic development of a country. It is relative because one of the rights – the right to private life – may be restricted on account of the need to protect the economic well-being of a country although at the same time no restrictions may infringe the essence of human rights. The role of the bodies that ensure the execution of treaties-mandated obligations amounts to verifying whether the establishment of originally more rigorous domestic criteria for the possibility of limiting human rights comply in practice with at least the international minimum standard of protection. These agencies do not, however, have the powers to assess whether the State authorities comply with the legislation.

The minimum protection standards are set first of all by the provisions of the International Covenant on Civil and Political Rights[12] and the European Convention on Human Rights and Fundamental Freedoms[13]. The latter international convention is a basal treaty presenting

[10] Daria Katarzyna Gęsicka, "Wykładnia pojęć w prawie autorskim," *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej* 3 (2012): 69.

[11] Jakub Kępiński, "Czy znak towarowy może być utworem?," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 77(2) (2015): 182.

[12] International Covenant on Civil and Political Rights of 19 December 1966.

[13] Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950 as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, ETS No. 5: ETS No. 009, 4: ETS No. 046, 6: ETS No. 114, 7: ETS No. 117, 12: ETS No. 177.

a cross-sectional approach to personal human rights and to voting rights. The regional protection system is complemented by conventions with a narrower objective scope. In contrast, the enacted amended Chapter of Fundamental Rights[14] turned out to be the enriched reflection of standards developed within the Council of Europe. In the European Union there is indeed the impressive human-rights legal framework which coexists with constitutional traditions and the institutions of EU Member States[15]. With the passage of time, the framework will have to be filled with practice.

The right to private life is a concept that cannot be said to have been exhaustively defined in the statutory law or in judicial decisions or literature. Its constituent elements include inter alia the right to maintain one's psychophysical identity, to personality development, the right to family life of those gainfully employed, or the right to secrecy of correspondence. An element of the right to privacy is also professional activity and running businesses because professional life is a sphere of human activity in which interpersonal contacts are developed[16]. On the other hand, the sphere of privacy of the entrepreneur-employer comprises first of all business/trade secrets. Even the right that is apparently inseparably and exclusively associated with natural persons can, under specific circumstances, be exercised by legal persons that demand respect for good reputation, for their registered office, branches or other business premises[17].

The conduct of business activities is often more effective by utilizing cooperation and exchange of experiences understood as emanating from the freedom of expression and freedom of association. The foundation of any human communication is the freedom of expression. The essence of this freedom entails the right to express one's views and to gain and disseminate information. However, the freedom of expression is not absolute, which means that it can be limited on account of the protection of

[14] Charter of Fundamental Rights of the European Union (consolidated version), OJEU C 202 of 7 June 2016.

[15] Michael O'Flaherty, "Ochrona praw człowieka w dzisiejszej Europie," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 79(1) (2017): 50.

[16] ECHR Judgement of 16 December 1992. Case Niemietz v. FRG, application no. 13710/88, A. 251-B.

[17] ECHR Judgement 16 April 2002. Case Stés Colas Est et al. v. France, Chamber II, application no. 37971/97.

other values and interests. From the perspective of the issues discussed in the present study, this is first of all the protection of personal interests of superiors, subordinates and associates. The exercise of the freedom of expression is therefore accompanied by responsibility in legal and ethical terms. This responsibility is not, however, tantamount to the prohibition to express disapproval or controversial views. In turn, the respect for the freedom of association of entrepreneurs is simply characteristic of a democratic government: "Among the many justifications for protecting freedom of speech and association, the argument from democracy is perhaps the most influential one"[18]. In a democratic system, one of the legally admissible goals of association can by all means be the intention to conduct business activities. The prohibition of slavery or forced labor in the development of labor relations is manifested on the other hand in diverse ways. This is protection both at the level of ratified international agreements, EU law, and domestic law. These detailed regulations in the framework of national law may refer to guarantees of labor protection, the minimum wage level, the right to safe and hygienic working conditions, the right to holidays specified by law, the right to an annual paid leave, and statutory maximum working time standards. The observance of these rights can be used to create the entrepreneur's positive image, which may indirectly result in building a competitive advantage because it may profitably translate into purchasing decisions taken by consumers. However, the role of the observance of human rights in building this advantage is most noticeable only in the context of consequences of the violation of these rights.

5. CONSEQUENCES OF VIOLATION OF HUMAN RIGHTS

A democratic state, when performing its role as a guarantor of human rights (also exercised in the economic sphere) has, by shaping the legislation, to appropriately ensure a balance in the exercise of these rights by different entities in different spheres of human activity because an individ-

[18] Stefan Sottiaux and Stefan Rummens, "Concentric democracy: Resolving the incoherence in the European Court of Human Rights' case law on freedom of expression and freedom of association," *International Journal of Constitutional Law* 10(1) (2012): 125.

ual cannot have rights that are merely illusory. Illusory protection would follow from norms that would not be reflected in practice whereas, under the accepted international standards, the protection of rights and freedoms cannot be illusory but actual and effective[19].

A measurable form of protection is therefore the possibility of applying legal measures in the case of the violation of the entrepreneur's interests. In economic reality, the obtaining of ex post protection most often entails financial compensation. It may not necessarily allow the injured person to have all image losses compensated for but it may influence violators strongly enough to prevent their unlawful actions. And if the violator is the employer, such a situation is unimaginable in the sectors with the employee market. In other sectors of the economy a lot depends on the level of assertiveness of employees and former employees. They are able to take appropriate legal steps to protect employee rights or personal interests. Furthermore, legal measures based on the freedom of expression and at the same time launched in the media on an adequately large scale can result in reducing the consumers' interest in goods or services offered by a given entrepreneur. And this may cause a discernible decrease in income. In any case, business activity deliberately based on the violation of human rights in a democratic state should also start a cause-and-effect sequence that will, through the necessity of paying compensation and a decrease in income, force the violator to terminate his/her business activity.

6. CONCLUSIONS

As the present review of human rights exercised in the field of economy shows, the concept of the respect for/observance of human rights began to be combined with business ethics, the idea of corporate social responsibility, when it was found that the so-called wild capitalism is not the right means to develop entrepreneurship and does not thereby achieve economic well-being. In contrast, economic well-being can be achieved

[19] ECHR Judgement of 7 July 1989. Case Soering v. United Kingdom, application no. 14038/88, A. 161.

in the conditions of a knowledge-based economy. Moreover, assuming that the fundamental goal of entrepreneurs' activities is to develop their enterprises, which determines survival in the market, the respect for human rights even becomes part of business activity. It is possible to achieve the fundamental goal of survival when employees identify with the employer's objectives and manner of operation. Identification takes place the easier the more the employees are convinced that they can exercise their rights at the workplace. Identification is, moreover, indispensable so that employees willingly revealed the results of all activities executed thanks to their knowledge. At present, one of the conditions for the survival and development of the enterprise is to effectively motivate employees to reveal their knowledge and to apply it in practice. It is already taken for granted that employees are strongly motivated by financial incentives. In the conditions of competition between entrepreneurs such comparable motivational financial incentives can be offered by at least several potential employers. However, that which will influence the employee's identification with his/her employer is actually likely to come from non-financial factors. The emphasis on the role of trust and individual approach to the employee, as well as the practice of rewarding depending on the results of work, competence or skills stem from the rather seldom verbalized assumption of human dignity and the need to respect the individual's natural rights. Cases of violation of human rights may in turn start legal proceedings for responsibility implying financial burdens that are large enough to necessitate even the cessation of business. That is why the observance of human rights has a significant, multifaceted and positive impact on the position of the enterprise operating in the knowledge-based economy. The problems presented in this study can certainly be examined only from the separate angles of the industrial property law, labor law or civil law. However, the omission of the context of man's role and position in the discussion on the legal situation of entrepreneurs conducting business activities in the conditions of knowledge-based economy would overly narrow down the research area.

REFERENCES

Duda, Łukasz, and Jakub Kociubiński. "Realizacja ochrony własności w Europejskiej Konwencji Praw Człowieka na podstawie orzeczenia Lithgow i inni." *Wrocławskie Studia Erazmiańskie* 3 (2009): 234–252.

Gęsicka, Daria Katarzyna. "Wykładnia pojęć w prawie autorskim." *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej* 3 (2012): 66–77.

Kępiński, Jakub. "Czy znak towarowy może być utworem?." *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 77(2) (2015): 177–191.

Kietliński, Krzysztof, Victor Martinez Reyes, and Tadeusz Oleksyn. *Etyka w biznesie i zarządzaniu*. Cracow: Oficyna Ekonomiczna, 2005.

OECD/Eurostat. Oslo Manual, Guidelines for Collecting and Interpreting Innovation Data, Paris: OECD Publishing, 2005.

O'Flaherty, Michael. "Ochrona praw człowieka w dzisiejszej Europie." *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 79(1) (2017): 49–57.

Orzeszyna, Krzysztof, Michał Skwarczyński, and Robert Tabaszewski. *Prawo międzynarodowe praw człowieka*. Warsaw: Wydawnictwo C.H. Beck, 2020.

Poznańska, Krystyna. "Innowacyjność jako źródło przewagi konkurencyjnej polskich przedsiębiorstw." *Materiały i Prace Instytutu Funkcjonowania Gospodarki Narodowej* 82(LXXXII) (2002): 65–79.

Skrzypek, Elżbieta. "Kapitał intelektualny jako podstawa sukcesu organizacji w społeczeństwie wiedzy." In *Wiedza w gospodarce, społeczeństwie i przedsiębiorstwach: pomiary, charakterystyka, zarządzanie*, edited by Elżbieta Skrzypek, and Krzysztof Piech, 73–87. Warsaw: Instytut Wiedzy i Innowacji, 2007.

Sottiaux, Stefan, and Stefan Rummens. "Concentric democracy: Resolving the incoherence in the European Court of Human Rights' case law on freedom of expression and freedom of association." *International Journal of Constitutional Law* 10(1) (2012): 106–126.

Stożek, Piotr. "A Spatial Analysis of The Knowledge-Based Economy In Poland." *Comparative Economic Research* 17(4) (2014): 221–236.

Załucki, Mariusz. "Własność przemysłowa w Europejskiej Konwencji Praw Człowieka. Wokół granic monopolu eksploatacyjnego i nowych standardów ochrony." *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej* 1 (2018): 138–148.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLIV
YEAR 2021, ISSUE 1, pp. 19–36
DOI: https://doi.org/10.31743/recl.11311

STRUCTURING OF STATUTORY VALUES OF POLISH TAX PROCEDURES

*Andrzej Gorgol**

ABSTRACT

This paper aims to provide a critical analysis of the regulation of statutory principles of tax proceedings under a preliminary assumption that the values of Polish tax procedures shall reflect the general determination of the legal system. An attempt was made to demonstrate that the structuring of axiology of these procedures does not fully account for this constitutional requirement.

Keywords: tax procedures, tax proceeding, values, principles, system, structuring

1. INTRODUCTION

In a democratic state of the law[1], tax procedures shall be regulated by law, as they constitute proceedings conducted by public authority organs to which the constitutional obligation of these organs to operate on the basis and within the limits of law applies[2]. From this principle follow certain essential practical implications for the conduct of the tax procedure and the fulfilment of its aims. First, the tax organ shall determine whether

* Dr. habil. Andrzej Gorgol, Associate Professor, Department of Administrative Law and Financial Law, Institute for Legal Sciences, University of Zielona Góra; correspondence address: ul. Bartnicza 15, 20-810 Lublin, Poland; e-mail: agorgol@gmail.com; https://orcid.org/0000-0002-4313-4426.

[1] See Article 2 of The Constitution of the Republic of Poland of 2d April, 1997 (Journal of Laws No. 78, item 483, as amended), hereinafter referred to as the Constitution.

[2] See Article 7 of the Constitution.

legal provisions grant it the competence to consider a certain matter. In case of a negative verification on the issue of competence is tantamount to the prohibition to initiate this procedure, let alone it conducts it. Any violation of the directive to refrain from taking any actions exceeding the scope tax organ competence constitutes a grave legal deficiency, which shall be eliminated even if the tax proceeding results in a final decision, and not only in cases where a non-final decision is appealed by parties during the proceeding. The gravity of the violation of law justifies a departure from the principle of stability of decisions which may not be challenged in the administrative course of the proceeding. A defective decision is declared invalid, which the tax organ merely determines[3]. Second, after the positive establishment of the legal basis for acting, the competent tax organ shall establish, in which legal form regulated by law, it will perform its public task. In such a case, the organ also does not have the freedom to act, as according to the rule of law it is obliged to operate on the basis and within the limits of the law. Administrative discretion does not infringe upon this systemic standard, and its application may be necessary due to the existence of open-ended terms in the legal provision and judicial discretion in the process of application of the law. A full binding of the organ with legal provisions during a tax procedure may cause that the outcome of this procedure will not consider all values of the system of law and its legal stipulations.

It is worth noting that the constitutional standard of legality positions the structure of tax administration within the legal system, but falls short in differentiating the legal form of acts and determining systemic solutions. In a democratic state of the law, all sources of binding law shall be observed. The multitude and variety of their legal forces pose challenges not only when constructing systemic contents, but also upon the application of the law. Undoubtedly, each system shall be internally coherent, i.e., free from contradictory or conflicting norms[4]. Moreover, no loopholes shall be

[3] According to Article 247§1 point 1 of the Act of 29 August 1997 – Tax Ordinance Act, (consolidated text, Journal of Laws of 2020 item 1325, amended), hereinafter referred to as the T.O.A.

[4] Andrzej Gorgol, "Aksjologiczne uwarunkowania zmian w Ordynacji podatkowej. Wybrane problemy. Kierunki zmian," in *Ordynacja podatkowa: stan obecny i kierunki zmian*, ed. Rafał Dowgier (Białystok: Temida 2, 2015), 47–51.

present in it. Specific elements of the legal system do not operate in separation, but they are rather interoperable. In addition, many complex and versatile normative, axiological, and praxeological links exist between them.

2. STRUCTURING OF VALUES OF TAX PROCEDURES AS A LEGISLATIVE PROCESS

Tax procedures are institutions located within the legal system. From this follows the next conclusion that their axiology should form a reflection of this system. Formulating procedural principles in the legislative process requires consideration of both systemic determinations and specific features of these procedures. Structuring of the values of Polish legal procedures is a law-making process which leads to the creation of a sui generis subsystem within the larger legal system. The essence of this process can be perceived as the adaptation of normative, axiological and praxeological systemic assumptions to the conditions in which the tax administration performs its public tasks. It is also manifested in the differentiation of the solutions of the legal system, thus increasing the level of its internal diversity. In this case, the legislative process ends up with the creation of a new structure which can be described by a sui generis paradox of multitude in unity and unity in multitude.

As has been noted, the axiology of the legal system has a constitutional grounding. Systemic values are differentiated from the legal perspective. Some of them have the form of legal provisions while others lack such form. It shall be stressed, however, that irrespective of such differentiation, all constitutional values should be reflected in the content of procedural provisions. Otherwise, a systemic inconsistency would occur and the principle of direct application of the constitution would be violated. Constitutional values stemming from legal provisions can be general or specific. Decoding their meaning requires the application of systemic interpretation, including *argumentum a rubrica*[5] reasoning. The positioning of a given legal provision within the formal layout of the legal act is not

[5] Jerzy Wróblewski, *Rozumienie prawa i jego wykładnia* (Wrocław, Łódź, etc.: Zakład Narodowy im. Ossolińskich, 1990), 74; Lech Morawski, *Wykładnia w orzecznictwie*

accidental and is an indication of law-making reasonability. General provisions which have basic meaning for the application of the whole legal act are located before specific provisions having a more specialized character and a narrower scope of application. Undoubtedly, the already mentioned constitutional rule of lawfulness, which is located in Chapter I of the Constitution of the Republic of Poland titled "the Republic of Poland" belongs to them. The principle of two instance proceedings has a more specific character[6], as in the Constitution, it is considered in the context of measures for the protection of rights and freedoms of the citizen and the individual. It fulfils with additional meaning the systemic standard of legality, albeit in scope limited to the challenging of decisions and rulings issued in the first instance. Constitutional values which do not have the form of a legal provision are included in turn in the Preamble which forms an integral part of the Constitution[7]. This introduction underlines the solemn significance of the legal act, describes the circumstances of its adoption, and indicates the aims whose realization it is to serve. The preamble to the Constitution plays an important role both in the systemic and functional interpretation of the binding law[8]. The axiology of this part of the Constitution serves also as a legislative directive for formulating of the values of tax procedures[9].

The axiology of tax procedures is regulated in the Tax Ordinance which does not include a preamble. A preamble was neither provided for in the draft new codification of the general tax law[10]. This omission may cause doubt since the Tax Ordinance constitutes a significant legal

sądów. Komentarz (Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora", 2002), 198–199.

[6] See Article 78 of the Constitution.

[7] Sławomir Lewandowski, "Charakter normatywny preambuły," *Studia Iuridica* 36 (1998): 114–136.

[8] Małgorzata E. Stefaniuk, *Preambuła aktu normatywnego w doktrynie oraz procesie stanowienia i stosowania polskiego prawa w latach 1989 – 2007* (Lublin: Wydawnictwo UMCS, 2009), 62, 96, 115.

[9] Gorgol, "Aksjologiczne," 50.

[10] Rządowy projekt ustawy – Ordynacja podatkowa., Druk Sejmowy nr 3517 z dnia 4 czerwca 2019 r. (The Bill – Tax Ordinance Act, introduced by the Council of Ministers to the Sejm, The Printing of The Sejm of 4 June 2019).

act rightly dubbed as the code of the taxpayer[11]. From the viewpoint of regulating tax procedures, the meaning of the Tax Ordinance is more pronounced than the one of the Act on the National Tax Administration[12], which is an incomplete and specific way regulating tax procedures. In the case of customs and tax inspection, the Tax Ordinance has a mutatis mutandis application that is in consideration of the distinction of this procedure[13]. The Act on the National Tax Administration begins with a preamble which underlines the meaning of the constitutional obligation to pay public levies[14], fiscal security and its protection, the modern and favorable performance of public obligations and effective collection of public levies[15]. This legal act regulates above all issues connected with the structure and forms of operation of tax administration and serves as a professional circular. The normative matter of its content justifies thus its qualification as a systemic law. The preamble points to the axiology of the National Tax Administration, which has significance only in the realization of tax procedures by governmental tax organs. The values enumerated at the beginning of this act do not substitute the values of the tax proceedings set out in the Tax Ordinance, but specify them in a limited scope. For this reason, one may conclude that the model statutory values of tax procedures are included only in the Tax Ordinance and have only a normative character.

The legislative process leading to the structuring of the values of tax procedures requires conferring the proper legal form to normative solutions. Axiology should not be regulated by acts of internal management[16], which are bounded only within the framework of hierarchical subordina-

[11] Andrzej Gorgol, "Zagadnienia ogólne," in *Prawo podatkowe*, eds. Paweł Smoleń, and Wanda Wójtowicz (Warsaw: Wydawnictwo C.H. Beck, 2015), 77; Andrzej Gorgol, "Ordynacja podatkowa, czy daninowa?," *Państwo i Prawo* 4 (2013): 3–14.

[12] The Act of 16 November 2016 of The National Revenue Administration, (consolidated text, Journal of Laws of 2019 item 768, amended), hereinafter referred to as the N.R.A.

[13] See Article 94 of the NRA.

[14] See Article 84 of the Constitution.

[15] Andrzej Gorgol, "Uwagi wstępne," in *Ustawa o Krajowej Administracji Skarbowej. Komentarz*, eds. Leszek Bielecki, and Andrzej Gorgol (Warsaw: Wydawnictwo C.H. Beck, 2018), 2–3.

[16] See Article 93 of the Constitution.

tion of lower organs, offices, and organizational units to the administrative organ of a higher rank. The influence of the values of tax procedures extends also to entities outside the administrative structure. The acts of internal management may not form sources of rights and obligations to the participants of tax procedures. As has been mentioned, the axiology of the legal system shall be coherent, as it plays an important role in the application of the law on the whole territory of the country. It is for this reason that the values of tax procedures shall not be stipulated in the content of the statutory authorizations conferring legislative competence to pass local legal acts with a scope of application limited to the territory of a given territorial unit of the country[17]. It is also improper to regulate values in the form of executive regulations which are applied on the territory of the whole country, but their normative matter is limited to casuistic issues, technical from the viewpoint of creating necessary conditions for the realization of the statute[18]. The axiology of tax procedures shall have at minimum a statutory form. From it follows directives binding on the administrative organs and shaping the legal standing of the participants of the proceeding. Tax procedures interfere with constitutionally protected rights and freedoms.[19]. In a democratic state of the law, the basis of such interference may only be a statute. The axiology of tax procedures can be shaped not only by Poland but also by organs functioning on a supranational level. Legal acts issued at this level have a dual legal effect. On the one hand, they become an element of the domestic legal system, on the other they apply in relations between different public and international law entities. Both prerequisites are met in the case of the provisions of the EU law which are directly applicable in Poland and in the case of bilateral and multilateral international agreements, ratified by Poland and published in the Official Journal of Laws[20].

[17] See Article 94 of the Constitution.

[18] See Article 92 of the Constitution.

[19] Means for the defence of freedoms and rights are especially regulated by Articles 77-81 of the Constitution.

[20] Compare Article art. 97 section 1, Article 89, Article 90, Article 91 of the Constitution.

3. THE ESSENCE OF STATUTORY VALUES OF TAX PROCEDURES

The Tax Ordinance regulates three main tax procedures, i.e. tax proceeding[21], verification activities[22], and tax inspection[23]. In the first place, one needs to establish whether they have a common axiology and if they are characterized by distinct values. From the substantive and formal point of view, these three procedures constitute separate proceedings[24]. Tax proceeding is a jurisdictional proceeding meaning it is directed at issuing a binding resolution of a tax matter. As a specific form of the administrative proceeding, it furnishes in principle with an administrative decision[25]. Tax inspection is a procedure whose aim is to verify the conformity with the tax law provisions of entities bound by them[26]. A tax organ reaches factual determinations which it compares with specific law provisions and documents its activities in an inspection protocol[27]. Verification activities are a procedure with a less formalized level and different scope of application. They aim to verify the timeliness and correctness of the performance of the taxpayer's payment obligation, filing of tax declarations, calculation of tax deductions, and applications for tax returns, as well as other obligations[28]. The legal position of entities subject to verification procedures tends to be weakened to concerning the entities subject to tax inspection. Less formalization of these activities and the fact that they are not deemed a control procedure causes that certain essential limitations protecting en-

[21] See Division IV of the T.O.A.

[22] See Division V of the T.O.A.

[23] See Division VI of the T.O.A.

[24] Gorgol, "Prawne," 140–145; Andrzej Gorgol, "Dekodyfikacja postępowań administracyjnych w sprawach finansowych," in *Kodyfikacja postępowania administracyjnego. Na 50-lecie k.p.a.*, ed. Janusz Niczyporuk (Lublin: Wydawnictwo WSPA, 2010), 189–198; Andrzej Gorgol, "Postępowanie podatkowe jako szczególny rodzaj postępowania, administracyjnego," in *Zarys finansów publicznych i prawa finansowego*, ed. Wanda Wójtowicz (Warsaw: Wolters Kluwer Polska, 2014), 200–201; Andrzej Gorgol, "Odrębności aksjologii postępowania podatkowego," in *Aksjologia prawa administracyjnego*, Vol. 1, ed. Jan Zimmermann (Warsaw: Wolters Kluwer Polska, 2017), 1137–1148.

[25] See Article 207 §1 of the T.O.A.

[26] See Article 281 §2 of the T.O.A.

[27] See Article 291 §2 and §2 of the T.O.A.

[28] See Article 272 of the T.O.A.

trepreneurs subject to inspection are not applied[29]. Formal distinction of these three procedures is further confirmed by the fact that they are regulated in separate, general redaction units of the statue, i.e., sections. It is also worth to note the sequence of their appearance. In the first place, the tax proceeding is regulated, followed by verification activities and tax inspection. The most extensive is the normative subject matter of the section called "tax proceedings" and the two following sections contain fewer provisions. Such an approach shall be viewed as proper,[30] as it is unnecessary to repeat the same regulations in different redaction units of the statute. In such cases, an instrument of the law-making technique called a reference is applicable. In the sections regulating verification activities and tax inspections included are provisions referring to the respective application of enumerative listed provisions on tax proceedings[31]. This leads to the conclusion that the tax proceeding is a model tax procedure. From the legislative point of view, it is almost self-contained. Verification activities in turn and tax inspection are specific procedures characterized by solutions departing from the model of tax proceedings. Provisions located in the following two sections after the part regulating tax proceedings govern only the distinctive features of these proceedings. These regulations need to be supplemented by tax proceedings provisions for the verification activities and tax inspection to be realized. In this legislative sense, they are incomplete and not self-contained.

There are two arguments in favour of acknowledging that there is a common axiology of tax procedures. First, sections called 'verification procedures' and 'tax inspection' do not include provisions directed at regulating the catalogue of values of these two proceedings. Second, provisions referring to the respective application to regulations of tax proceedings include also those which are called 'general principles'[32]. It follows that the values of tax procedures constitute the principles of procedural tax

[29] According to Article 291c of the T.O.A. control of economic activity of a taxpayer that is an entrepreneur shall be governed by the provisions of Chapter 5 of the Act of 6 March 2018 – Entrepreneurs' Law (consolidated text Journal of Laws of 2019 item 1292, amended).

[30] Gorgol, "Aksjologiczne," 56–57.

[31] Compare Article 280 and Article 292 of the T.O.A.

[32] Chapter 1 Division IV of the T.O.A.

law. The normative character translates into their binding force. As has been mentioned before, they form directives for the tax organ. For the taxpayer, in turn, they operate as guarantees of its rights rather than sources of its obligations.

A normative description of the general principles includes the adjective 'general' which causes an internal differentiation of statutory values of tax procedures. General principles can be contrasted in terms of a dichotomy with specific principles[33]. The feature of being general shall not be understood as encompassing the totality of principles, a common set of all principles of the generality of operational directives. General principles are rather characterized by the fact that they apply to the whole tax procedure. Legal provisions may, of course, introduce exceptions to these principles. In practice, not every procedural activity may be shaped according to the requirements of the given principles. A synonym of generality is the universality of the said principle. Specific principles in turn have a more narrow scope of application limited to specific stages of the proceedings. In practice, they play an important role in the evidentiary proceeding, which is manifested by the principle of free evaluation of evidence[34]. The term 'general principles' is not a legal notion in which legal provisions are worded. For these reasons, one may classify them as unnamed principles. As all principles of tax procedures, they have a normative character and their application, apart from tax proceeding, to verification activities and tax inspections is grounded in the respective referencing provisions.

The *in dubio pro tributario* principle may find application in all tax procedures and is stipulated in the Tax Ordinance[35]. For this reason, it may not be viewed as a specific principle. A question arises, however, whether it is one of the general tax principles? An answer to this question must be negative. The *in dubio pro trubutario* principle has application to all provisions of tax law, both substantive and procedural. It contains an interpretational directive applicable to dubious provision in favour of a taxpayer. This principle finds application to all, both general and specific principles of tax procedures. In practice, the *in dubio pro tributario* principle is

[33] Gorgol, "Aksjologiczne," 57–58.
[34] See Article 191 of the T.O.A.
[35] See Article 2a of the T.O.A.

a 'met principle,' i.e. the principle of principles for tax proceedings. It plays an important role in the application of this law, and not in the lawmaking phase in which the structuring of values of tax procedures occurs.

4. THE INTERNAL STRUCTURE OF STATUTORY VALUES OF TAX PROCEDURES

One should underline in the first place that there exists a multitude of statutory values of tax procedures. The set of general principles has the form of a closed catalogue[36] and specific principles are not listed in such a catalogue, which does not mean that their number is not limited by legal provisions. As has been noted, there exists a hierarchy between constitutional and statutory values in that general and specific statutory values are subordinate to constitutional standards. This hierarchy reflects the distinctive legal force of legal acts and their situation within the Polish legal system. General principles in turn are superior towards specific principles.

The issue of the structuring of statutory values of tax procedures necessitates also the assessment of their internal relations, i.e. the links existing within each group of such principles. This issue is important to determine whether in Polish law there exists a subsystem or subsystems of values of tax procedures. A multitude of values is necessary for the existence of one common system for all statutory values of a subsystem, as well as for the existence of separate systems grouping general and specific values. Similar to the legal system, the constituent elements of a subsystem may not be a chaotic, but rather an ordered set. Their order stems from their functional influence, and not from the differentiation of their legal force. From the formal point of view, all general and specific principles have the same statutory rank. Distinct scope of application of both groups of values, however, speaks to the discernment of the two subsystems.

From the legislative point of view, no subsystem of statutory principles has a hierarchically constructed internal structure. This means that each element is equivalent to other elements of the set. Grammatical and linguistic interpretation of legal provisions regulating the statutory axiology

[36] Chapter 1 Division IV of the T.O.A.

of tax procedures supports the notion that there is no place for hierarchy in their content. Depending on the approach adopted, they can be distinguished as to their substance. The first approach accounts for the situation of a given principle among statutory provisions, which allows for *argumentum a rubrica* reasoning. In this approach, the order of regulating tax procedure values in a given legal act is of significance. The research is subject to horizontal analysis. The second approach accounts for the situation of principles and their regulating legal acts within the whole legal system. What is analyzed are the internal relations between statutory tax procedure values. The research is subject to vertical analysis. This leads to a hierarchy of values under consideration of the indirect influence of provisions of a higher legal force on the content of statutory regulations. This means that the higher rank in the subsystem of statutory values of tax procedures is occupied by those principles which to a higher degree are aligned with constitutional standards.

The catalogue of general principles of tax procedures is set out in 10 statutory articles[37]. This does not mean that their number is equivalent to the number of these articles. In reality, there are more principles than the redaction units as one of the articles sets forth two principles, i.e. the conduct of the proceeding in a manner, increasing trust in tax organs[38] and informing the participant of tax proceeding about the tax law provisions which are in connection with the pending proceeding[39]. The statutory catalogue is opened by the principle of legality[40] and closed with the principle of restriction of proceedings' transparency only to its parties[41]. The remaining principles are enumerated as follows: the principle of conducting proceedings in a manner increasing trust in tax organs, the principle of informing the participant to the proceedings about tax legal provisions in connection with the pending proceedings, the reliability principle[42], the principle of active participation at its stage of proceedings[43], the princi-

[37] From Article 120 of the T.O.A. to Article 130 of the T.O.A.
[38] See Article 121 §1 of the T.O.A.
[39] See Article 121 §2 of the T.O.A.
[40] See Article 120 of the T.O.A.
[41] See Article 129 of the T.O.A.
[42] See Article 122 of the T.O.A.
[43] See Article 123 of the T.O.A.

ple of persuasion[44], the principle of promptness and efficiency[45], the principle of written nature of proceedings[46], the principle of two instance proceedings[47], the principle of the relative stability of a final decision[48].

Application of the second criterion of the hierarchy of values of tax procedures causes changes in their sequence motivated by the order of their appearance in the statutory catalogue. *Prima facie,* the legality principle was mentioned in the first place among the values of tax proceedings. As has been noted, this principle forms the fundamental standard of the functioning of the democratic state of law. When comparing its meaning in the statutory and constitutional approach, one may conclude that its inclusion in the statutory catalogue not only does not bring anything new concerning the constitutional formulation but also limits its content[49]. In the statutory sense, the legality principle contains only one operational directive based on legal provisions. What has been wrongly omitted is the constitutional requirement to operate within the limits of the law. This legislative error renders the statutory principle of legality redundant as the constitutional standard has a direct application. When applying this conclusion to all values, one can generalize that the inclusion in the statutory catalogue of a value is only then reasonable when it adds a new meaning to the meaning stipulated in the constitutional standard. It is not proper to repeat the same meaning in different legal provisions, let alone its limitation to the solution adopted in a legal act of a higher legal force. It shall be then concluded that the legality principle in its current statutory wording is inappropriately included in the statutory catalogue, let alone it beginning the sequence of the general principles.

It is to be stressed that all statutory values of tax procedures are linked to the constitutional principle of the democratic state of the law if they are formulated appropriately from the legislative perspective. Some of them account for other constitutional standards. They shall be thus located higher within the structure of general principles; this applies to, for example.

[44] See Article 124 of the T.O.A.
[45] See Article 125 of the T.O.A.
[46] See Article 126 of the T.O.A.
[47] See Article 127 of the T.O.A.
[48] See Article 128 of the T.O.A.
[49] Compare Article 7 of the Constitution and Article 120 of the T.O.A.

the principle of two-instance proceedings which is currently mentioned in the last but one place of the catalogue. Moreover, the principle of limited transparency is unnecessarily located as one of the last general principles, as it should not be linked to the transparency of public finances, but rather to the protection of privacy and personal data[50].

The functional interrelations between the general principles influence the structuring of values of tax procedures. As has been mentioned above, the principles shall be applied in the narrowest possible scope. Sometimes collisions may appear between directives stemming from these principles. For example, the necessity to establish all relevant circumstances for the resolution of a given case, as necessitated by the reliability principle[51], may cause complexity and prolongation of proceeding. In such a case, these implications are not in line with the principle of swiftness and simplicity of the proceeding[52]. When considering the issue of praxeological links between the general principles, it shall be stressed that the legality principle, when construed properly, shall be located at the peak of the structure of the statutory axiology of tax procedures. It forms the principle of general principles as the violation of any other principles is tantamount to the breach of the legality principle. In the structure of the values of tax procedures, the principle of active participation at all stages of the procedure[53] has in praxeological terms a higher rank than the reliability principle. This is connected with the conditioning of the establishment of all material facts to the resolution of the tax case upon the opportunity of the party to the tax proceedings to take a position on the conducted evidence[54].

The subsystem of specific principles is to a large extent dispersed and the lack of their pronunciation and the statutory catalogue may cause controversies connected with the number and naming of these principles. As has been noted, specific principles play a significant role in regulating the evidentiary proceeding. In jurisprudence, three examples of principles of this stage of tax procedure are named, i.e. the principle of objective

[50] Compare Articles 47 and 51 of the Constitution.
[51] See Article 122 of the T.O.A.
[52] See Article 125 §2 of the T.O.A.
[53] See Article 123 of the T.O.A.
[54] See Article 192 of the T.O.A.

truth, the principle of free evaluation of evidence and the principle of active participation of a party in the evidentiary proceeding[55]. It is noteworthy that among this enumeration two general principles linked to the conduct and assessment of evidence appear. Only the principle of free evaluation of evidence is a typical specific principle. In one article it has been pointed at the appearance of the principle of the equal evidentiary weight of evidentiary means, where it has been stressed that the application of a formal theory of evidence by assuming that a given circumstance can only be proved by specific evidentiary means[56]. In contrast to the discernment of a subsystem of general principles, the standardization degree of specific principles is less advanced. It shall be concluded that there is no formal hierarchy, neither vertical nor horizontal. Provisions regulating these principles are mentioned in the statute in given order. This is, however, caused by the peculiarities of the procedure and not by the rational approach aimed at conferring a special meaning to these principles. The criterion of the relation of these principles to the constitutional standards and general principles of tax procedures also appears baseless in creating a hierarchy of values applicable to specific stages of the procedure. It is to be stressed that any comparison of the meaning of values has only the sense, when they have common scopes of application. Specific principles are, however, stipulated in different phases of tax proceedings.

5. CONCLUSIONS

Structuring statutory values of tax procedures may be analyzed as an effect of an already concluded legislative procedure or a task which requires an amendment of already binding provisions of the law to optimize their application. Undoubtedly, these principles have a normative character and their structuring shall consider the determinations of the Polish

[55] Bogumił Brzeziński, Marek Kalinowski and Marian Masternak, *Ordynacja podatkowa – postępowanie – komentarz praktyczny* (Gdańsk: Ośrodek Doradztwa i Doskonalenia Kadr, 1999), 118–123.

[56] Piotr Pietrasz, "Komentarz do art. 180," in *Ordynacja Podatkowa*, eds. Cezary Kosikowski, Leonard Etel, Rafał Dowgier, Piotr Pietrasz, and Sławomir Presnarowicz (Warsaw: Wolters Kluwer Polska, 2007), 669–670.

legal system. It is undesirable if collisions or contradictions occur between the axiology of tax procedures and constitutional standards. Internal axiological contradiction in the system of law is presented when the values enumerated in the provisions of the basic statute (the Constitution) and its preamble are violated. This drawback can have undesired legislative, functional or praxeological consequences contrary to the principle of the democratic state of law and which impede the process of correct interpretation of procedural provisions of the tax law, and their application in specific cases. In this context, one may conclude that the existence of the defect of the statutory principle of legality, which content is determined too narrow to in regard to its constitutional model. The omission of the obligation of the tax organ within the confines of the law, and not only based on law, can be eliminated only after the application of the constitution-friendly interpretation of the statutory provision. The general principle of legality is redundant since the provisions of the Constitution are directly applicable and have a superior legal force. From the viewpoint of correct legislation, it is also improper to repeat the content of a legal provision of the act with higher rank without any modification thereof, as well as to omit essential provisions.

Structuring statutory values of tax procedures in the Tax Ordinance required consideration of the division of such procedures in tax proceedings, verification activities and tax inspection. Undoubtedly, despite the existence of differences in their nature, functions and legal regulation, it can be underlined that the axiology forms an element linking all these procedures. Structuring the statutory values of tax procedures was based on the supposition that principles of tax proceedings serve as a model for their application and also in other proceedings. Four determinants of the legislative process follow. First, there arises a necessity to fully regulate all principles of tax proceedings with statutory provisions. Second, the analogical regulation of values of verification activities and tax inspection in provisions referring to these procedures has been discarded. Third, a reference to the regulations of the tax proceeding has been applied in these provisions. Fourth, because of distinctions in verification activities and tax inspection, the provisions on the values of tax proceedings may find mutatis mutandis application to them and may not be applicable directly. The above- mentioned legislative steps should be deemed appropriate.

Structuring the statutory values of tax procedures, as well as of the axiology of the remaining tax procedures, has both a horizontal and vertical dimension. It also caused a differentiation of these principles, which may have a general or specific character. The level of structuring of general principles is more advanced than the specific principles. From the normative perspective, it manifests itself in equipping the term "general principles" with characteristics of the legal language and employing it as the statutory nomenclature for describing the redaction units of the Tax Ordinance referring to the axiology of tax proceedings. They include a closed catalogue of such principles. Specific principles in turn are regulated to an insufficient degree, which causes doubts connected with their number, names, content and even their existence.

Multitude and heterogeneity of principles of tax proceedings are the basic tenets determining the hierarchy of values which occurs in the form of the structuring of statutory values in tax procedures. In a vertical perspective, it considers the structure of the Polish legal system. Statutory values are subject to the axiology of legal acts of a higher rank, i.e. not only constitutional standards but also the provisions of EU law applied directly in Poland and ratified international agreements published in the Official Journal of Laws of the Republic of Poland. The division into general and specific principles influences their vertical hierarchy. Despite the same legal force, the general principles of tax proceedings override its specific principles. It seems not only from the higher level of their legal regulation but above all from the subject matter scope of their application during the tax procedure. Structuring of general and specific principles of tax proceedings leads to the situation in which they co-exist as two subsystems of tax procedure values.

In a horizontal view, the hierarchy of specific values is unwarranted. It is supported by not only insufficient level of their structuring, divergent scopes of application, but also the lack of functional interrelationships. Characteristics of the subsystem of general principles allow for a hierarchy of these values within their internal structure. The highest rank shall be ascribed to values whose content has a direct reference to the constitutional standards. Axiological links between general principles of tax procedures and constitutional standards may not account for these overarching principles which are common to the whole statutory structure. Application

of the systemic rule of the democratic state of the law does not allow for the differentiation of general principles and discernment of their position within the axiological hierarchy, as all statutory principles shall account for this rule. Apart from the constitutional criterion, in the horizontal structuring of the general values of the tax procedures, arguments referring to *argumentum a rubrica* employed in the systemic interpretation of the law may be considered. It shall be postulated that the order of situation of the general principle in the statutory catalogue reflects its axiological meaning. More important values should be regulated before the remaining values. The Tax Ordinance falls short of this requirement. This is evidenced, for example by situating in the statutory catalogue of a less important value of written proceedings before the principle of two instance proceedings, which directly refers to the axiological constitutional standard. The functional and praxeological links between the values shall be included subsequently after the constitutional criterion. This is why the principle of active participation of the parties at all stages of the proceedings occupies a higher rank in the hierarchy of general principles than the principle of reliability of the proceedings.

The legislative criterion has no less important meaning in the structuring and hierarchy of tax procedure values, which accounts for the current order of regulating general principles. It stems from the assumption of the reasonableness of the lawmaker which is not fully confirmed in this paper. The necessity to adapt the content of the statutory catalogue of general principles to their axiological meaning is not only motivated by doctrinal considerations. Ordering of the sequence of the occurrence of these principles may facilitate the interpretation of procedural provisions of tax law and their application in the practice of tax organs.

REFERENCES

Brzeziński, Bogumił, Marek Kalinowski, and Marian Masternak. *Ordynacja podatkowa – postępowanie – komentarz praktyczny.* Gdańsk: Ośrodek Doradztwa i Doskonalenia Kadr, 1999.

Gorgol, Andrzej. "Aksjologiczne uwarunkowania zmian w Ordynacji podatkowej. Wybrane problemy. Kierunki zmian." In *Ordynacja podatkowa: stan obecny*

i kierunki zmian, edited by Rafał Dowgier, 47–51, 50, 56–57, 57–58. Białystok: Temida 2, 2015.

Gorgol, Andrzej. "Dekodyfikacja postępowań administracyjnych w sprawach finansowych." In *Kodyfikacja postępowania administracyjnego. Na 50-lecie k.p.a.*, edited by Janusz Niczyporuk, 189–198. Lublin: Wydawnictwo WSPA, 2010.

Gorgol, Andrzej. "Odrębności aksjologii postępowania podatkowego." In *Aksjologia prawa administracyjnego*, Vol. 1, edited by Jan Zimmermann, 1137–1148, Warsaw: Wolters Kluwer Polska, 2017.

Gorgol, Andrzej. "Ordynacja podatkowa, czy daninowa?." *Państwo i Prawo* 4 (2013): 3–14.

Gorgol, Andrzej. "Postępowanie podatkowe jako szczególny rodzaj postępowania administracyjnego." In *Zarys finansów publicznych i prawa finansowego*, edited by Wanda Wójtowicz, 200–201. Warsaw: Wolters Kluwer Polska, 2014.

Gorgol, Andrzej. "Prawne aspekty kodyfikacji procedur podatkowych." In *Prawo podatkowe*, edited by Paweł Smoleń, and Wanda Wójtowicz, 140–145. Warsaw: Wydawnictwo C.H. Beck, 2015.

Gorgol, Andrzej. "Uwagi wstępne." In *Ustawa o Krajowej Administracji Skarbowej. Komantarz*, edited by Leszek Bielecki, and Andrzej Gorgol, 2–3. Warsaw: Wydawnictwo C.H. Beck, 2018.

Gorgol, Andrzej. "Zagadnienia ogólne." In *Prawo podatkowe*, edited by Paweł Smoleń, and Wanda Wójtowicz, 77. Warsaw: Wydawnictwo C.H. Beck, 2015.

Lewandowski, Sławomir. "Charakter normatywny preambuły." *Studia Iuridica* 36 (1998): 114–136.

Pietrasz, Piotr. "Komentarz do art. 180." In *Ordynacja Podatkowa*, edited by Cezary Kosikowski, Leonard Etel, Rafał Dowgier, Piotr Pietrasz, and Sławomir Presnarowicz, 669–670. Warsaw: Wolters Kluwer Polska, 2007.

Stefaniuk, Małgorzata E. *Preambuła aktu normatywnego w doktrynie oraz procesie stanowienia i stosowania polskiego prawa w latach 1989 – 2007.* Lublin: Wydawnictwo UMCS, 2009.

Wróblewski, Jerzy. *Rozumienie prawa i jego wykładnia.* Wrocław, Łódź, etc.: Zakład Narodowy im. Ossolińskich, 1990.

Morawski, Lech. *Wykładnia w orzecznictwie sądów. Komentarz.* Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora", 2002.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLIV
YEAR 2021, ISSUE 1, pp. 37–52
DOI: https://doi.org/10.31743/recl.11162

COUNCILLOR CLUBS IN COMMUNES IN POLAND AND FRANCE

*Monika Augustyniak**

ABSTRACT

The article presents the legal status of councillor clubs in Poland and in France. It discusses establishment and functioning of clubs that are usually created on the basis of political criteria, in the light of a councillor's free mandate and social control. It presents elements of club's financing and possibility to express opinions by minority clubs in a council. The analysis of the legal status of councillor clubs leads to conclusions and determination of the direction of changes in the scope of the research concerned.
The legal status of councillor clubs corresponds to the issue of quality of democratisations of a self-governing authority. Therefore, specification of premises determining organisation and operation of councillor clubs in a municipal council is a significant regime-related issue. The problems related to functioning of the councillor clubs in the Polish and French legal orders is currently a challenge for contemporary local self-government.

Keywords: councillor clubs, councillor's free mandate, social control

---

Research project executed at the Department of Law, Administration and International Relations of Andrzej Frycz Modrzewski Krakow University, financed with funds devoted to its statutory activity on the basis of the decision no WPAiSM/DS/1/2020.

* Dr. habil. Monika Augustyniak, Associate Professor of KAAFM, Faculty of Law, Administration and International Relations, Andrzej Frycz Modrzewski Krakow University; correspondence address: Gustawa Herlinga-Grudzińskiego 1, 30-705 Kraków, Poland; e-mail: monikaaugustyniak1@gmail.com; https://orcid.org/0000-0001-6196-1989.

1. INTRODUCTION

The subject of interest of this article covers the legal status of councillor clubs in communes in Poland and in France. An interesting issue is to determine the relationship between a free mandate of a councillor resulting directly from the provisions concerning regime in the acts on local governments and the actual *de iure* legal status of a commune councillor. This analysis leads to conclusions and determination of the direction of changes in the scope of the research concerned.

The legal status of a councillor of an entity of local self-government is one of the central issues of contemporary local government. It corresponds to the issue of quality of democratisations of a self-governing authority. Therefore, specification of premises determining organisation and operation of councillor clubs in a commune council is a significant regime-related issue and its discussion will lead to a reflection on the legal status of a councillor in Polish local self-government. A need of change in regulations on organisation, operation and funding of councillor clubs is currently a challenge for contemporary local self-government.

Legal dogmatic and comparative legal methods have been used in this article.

2. ESTABLISHMENT AND INTERNAL ORGANISATION OF COUNCILLOR CLUBS IN COMMUNES IN THE POLISH AND FRENCH LEGAL ORDERS

The Polish legal order, according to article 23 sec. 2 of the Act on Commune Self-Government, provides for a possibility to establish councillor clubs under principles defined in the charter of a given commune[1]. A commune councillor is not obliged to establish and belong to a club. However, if they wish to do so, a commune charter should give them such a possibility. Establishment of a club and participation in it should result from values that are approved by the law, preferred by a councillor and that aim at the welfare of the community. This is the way how the legis-

[1] The Act on Municipal Self-Government of 8 March 1990, Journal of Laws 2020, item 713, as amended, hereinafter AMSG.

lator enables fulfilment of a human right to freedom of assembly in order to enhance the possibility of operation of a single councillor. A councillor club is established according to certain criteria allowed by law, including political ones[2]. The legal grounds of operation of a club comprise not only the act on local self-government and a charter of a given commune, but also regulation of a given club. The regulation is not subject to approval by the municipal authorities. Furthermore, it is not evaluated by the voivode within the scope of control and supervision.

In the French legal order, the existence of councillor clubs in a decision making body is regulated by the provisions of the General Code of Territorial Communities (**Code général des collectivités territoriales** or CGCT[3]) and the internal provisions of a municipal council (conseil municipal). The organisation and operation of the municipal council is governed by the council's internal regulation that should be adopted within 6 months from election of the council (this provision is binding for communes comprising at least 3,500 inhabitants – see article L. 2541-5 CGCT). The regulation of a previous council is applicable until the date of adoption of a new regulation. If the chairperson of a council refuses to provide a regulation to the council for the purpose of its adoption, it will be an act of abuse of authority, arrogation of powers [4]. Communes above 3,500 inhabitants are obliged to adopt regulations of internal operations of a municipal council for a term of office. In small communes, below 3,500 inhabitants, adoption of the above regulation is optional. The regulation defines, for instance, the rights of councillors belonging to clubs and of minority groups in a council[5]. This act may be challenged in the administrative court [6].

---

[2] Supreme Administrative Court, Judgement of 12 May 2017, Ref. No. II OSK 2216/15, LEX no. 2321536.

[3] Code général des collectivités territoriales (General Code of Territorial Communities, CGCT) – source: https://www.legifrance.gouv.fr.

[4] Rep. min. no 42396, JOAN Q.1er mai 2000, p. 2751 – see Philippe Lacaïle, *L'élu municipal. Statut de l'élu et foncionnement du conseil municipal* (Paris: Berger-Levraut, 2014), 173.

[5] See Jacques Ferstenbert, François Priet, and Paule Quilichini, *Droit des collectivités territoriales* (Paris: Dalloz, 2016), 247.

[6] See CE Sect. 10 fevr. 1995, Riehl et Cne de Coudekerque-Branche c/Devos, Lebon, 66-67; GADD no. 13.

Under CGCT provisions, a municipal council in its internal regulation should define in detail the following issues within the scope of the following three procedures:

- organisation of budget debate (article L. 2312-1 of CGCT);
- terms and conditions of consultations on contracts and public procurement (art. L. 2121-12 CGCT);
- terms and conditions of presentation of and replies to oral questions (art. L. 2121-19 CGCT).

According to article L2121-28 CGCT operation of the councillor clubs (des groupes d'élus) may be subject to resolutions of the municipal council, including the internal regulation of its operation. Unlike in the Act, these issues cannot govern regulation concerning allowances and prohibition of subsidising clubs. In this context, it is necessary to maintain the rights related to the mandate of an individual councillor in the provisions of the regulation, such as the right to information and the right to speak that cannot be combined with club membership. As an example, the councillor's rights to ask oral questions should be mentioned. Councillors have the right to ask oral questions (*questions orales*) on issues related to a given municipal community. This provision does not refer to councillor clubs, because this right is connected only with retention of rights related to the mandate of an individual councillor, such as right to information and speech, which cannot be connected *de iure* with club membership[7].

Both in the Polish and French legal orders, councillor clubs are closely related to functioning of the commune's decision making body, so the municipal council /conseil municipal defines the principles of operation of councillor clubs, which in fact leads to their subordination to the decision making body in the council. However, a councillor club is neither the commune's authority, nor its assisting authority[8]. Therefore, the club's status cannot be confused with the status of the council's commission[9].

[7] CAA Lyon, 7 mars 2013, n°12LY01424.

[8] See Paweł Chmielnicki, "Komentarz do art. 23," in *Ustawa o samorządzie gminnym. Komentarz*, ed. Paweł Chmielnicki (Warsaw: LexisNexis, 2010), 312.

[9] See Czesław Martysz, "Komentarz do art. 23," in *Ustawa o samorządzie gminnym. Komentarz*, ed. Bogdan Dolnicki (Warsaw: WoltersKluwer, 2018), 379.

Clubs are used by a councillor to maintain regular relations with inhabitants and their organisations, in particular to acknowledge demands raised by commune inhabitants. A club performs an advisory function for a councillor. It helps a councillor to focus on the welfare of commune's self-governmental community. It is an indicator of respect of the borders of the institution of councillor's free mandate that means that a councillor represents the entire self-governmental community, while bearing only the political liability for exercising of their mandate. An assessment of the councillor's activities takes place during the next local elections. It is the case of both Polish and French legal orders. In the case law of the administrative courts it is pointed out that since the electorate cannot restrict the councillor's freedom in exercising of a mandate, either the municipal council cannot apply any disciplinary measures in case of an unreliable councillor if they do not fulfil the obligation to participate in the works of the council and its internal bodies[10]. However, councillor's absence from work of the municipal bodies is connected with financial issues, that is reduction of allowances in result to their absence from meetings of the bodies, where a given councillor was elected for. It is significant that a councillor does not make statements and does not give consent for election to a specific commission. In its judgement dated 26 November 2019, the Supreme Administrative Court stated that no provisions of the mandatory legislation imposes an obligation on the municipal council to receive a statement from a councillor that they agree on being a candidate for a member of a specific commission. However, it should be taken into account that a councillor should focus mainly on the welfare of commune's self-governmental community, and according to the oath, they should fulfil their obligations fairly and reliably. A councillor should actively participate in work of the council and a commission, act in the interest of local community, focusing on the welfare of self-governmental community, leaving aside their own interests or the interests of their political parties in favour of public activities[11].

[10] Provincial Administrative Court in Warsaw, Judgement of 15 January 2015 r., Ref. No. II SA/Wa 1837/14, LEX no. 1748270.

[11] Supreme Administrative Court, Judgement of 26 November 2019, Ref. No. II OSK 2672/19, LEX no. 2778148.

But the club membership entails a statement given by the respective councillor on participation in the work of a given club. Such consent must be explicit, because it can impact on rights of clubs, e.g. in respect to presentation of resolutions or appointment of a club representative to mandatory standing committees of the council.

The charter of a council cannot limit a councillor in their freedom to associate in councillor clubs, that is in fulfilment of their tasks and obligations. A council cannot impose an obligation on a councillor to be a member of a specific club, although the legislator makes it indirectly since the composition of two standing committees (the audit committee and the complaint, motion and petition committee) depend on memberships in clubs of the members of the decision making body. Clubs most often reflect the political composition of a council, although increasingly more often groups of councillors appear under a name of a club that gather councillors in order to introduce a specific social or ecological initiative.

The Polish legislator defined the minimum number of club members, pointing out that a councillor club shall be established by at least 3 councillors, which means that the provisions of a commune charter may determine limits of persons belonging to a club, but not the minimum amount of members of a given club. While establishing a club, the municipal council should take account of the councillor's right of freedom to associate in freely established clubs, and thus it should take account of the reality, including the number of members of a council and the social and political relations in it.[12]

The legislator pointed out to voluntary establishment of clubs in the decision making body but decided that the members of two mandatory committees in the council have to reflect representatives of clubs. According to article 18a sec. 2 of ANSG, the review committee consists of councillors, including representatives of all clubs, expect of councillors who hold positions of chairperson and deputy chairpersons of the council. Similar regulation refers to the members of the complaint, motion and petition committee appointed in compliance with the amendment

[12] Supreme Administrative Court, Judgement of 14 November 2017, Ref. No. II OSK 427/16, LEX no. 2469400.

of 2018[13]. In the judgement dated 17 April 2019, the Voivodeship Administrative Court in Szczecin pointed out that a resolution preventing a councillor club from having a representative in the compliant, motion and petition committee is contradictory to legal provisions, and *that is* invalid. No legal provision binds an assessment of results of violation of a requirement concerning members of a committee with examination of circumstances pointing out to good or bad will of the decision making body[14].

Non-attached councillors may also participate in works of these two committees, but it does not balance the privileged position of clubs in respect to the membership of two key committees in the municipal council[15].

The regulation of a club defines bodies of a club, e.g. a meeting of club members, chairperson of a club and a secretary. It also determines the scope of their activities, as well as forms and modes of adopting resolution and presenting opinions. Tasks of a chairperson of a club include providing the current list of club members to the chairperson of a council, which is important in respect to representation of clubs in works of the committees of a municipal council. The chairperson of a council keeps a register of clubs, where the data provided in such notification are recorded.

The chairperson of a club prepares and chairs club meetings. He/she presents draft opinions and co-ordinates the work of a club in the municipal council and its committees. He/she runs the organisational and financial operations of a club.

In the French legal order councillors may establish clubs according to their political preferences. They consist of members who are registered or connected with a given club. The minimum number of club members depend on the provisions of the council's internal regulation, but usually it

[13] Act of 11 January 2018 on amendment of some acts in order to increase the participation of citizens in the process of election, functioning and control of some public bodies (Journal of Laws 2018, item 130), hereinafter the amendment of 2018.

[14] Provincial Administrative Court in Szczecin, Judgement of 17 April 2019, Ref. No. II SA/Sz 232/19, LEX no. 2655827.

[15] See Monika Augustyniak, "O potrzebie odpolitycznienia samorządu gminnego – marzenie normatywne," *Samorząd Terytorialny*, no. 7-8 (2020): 47.

is at least 3 or 5 councillors[16]. CGCT provisions do not regulate this issue, leaving it for a decision of a municipal council. Also, the issue of principles and mode of operation of clubs is subject to the provisions of the Council's internal regulation[17].

Councillors may be members of a club or be non-attached with any club registered in the council. A councillor who is not a member of any club may join a club of non-attached councillors it if consists of at least three members or declare connection with a selected registered councillor club upon consent of the chairperson of such club. Councillor clubs and groups of non-attached councillors are reported to a mayor (the executive body of a commune) for the purpose of registration. Then the mayor informs the municipal council about it. Mayor's decision on refusal to acknowledge members of a given club may be appealed against in an administrative court.

It possible to be a member of one club only. A councillor club is established in result of a statement submitted to a mayor and signed by all members who wish to participate in the group of councillors concerned, together with a list of such persons and information of the chairperson of the club. The charter of the club enters into force after the document upon publication of the document in the "Official Municipal/Departmental Bulletin" (« Bulletin municipal/départemental officiel »). Documents shall be published promptly. All changes of members and a chairperson should be reported to the mayor in the same way for the purpose of publication. On the conditions defined by the council and within the limits defined by law, the mayor provides selected clubs with materials and human resources necessary for their operation. He/she equips the councillor clubs in the assisting apparatus[18].

Space for information to be published by clubs is booked in every Public Information Bulletin that contains information on organisation and functioning of a municipal council and on the website of a given

[16] CAA Nancy, 4 juin 1998, ADJA 1998, 885.

[17] TA Paris 26 mars 1999, Mame, Dr. adm. 1999, 359.

[18] See article 26 du Règlement adopté lors de la séance du Conseil municipal du 10 février 2015; https://www.fontenay-aux-roses.fr/975/reglement-interieur-du-conseil-municipal.htm, (access: 03.10.2020). See Philippe Lacaïle, *L'élu municipal. Statut de l'élu et foncionnement du conseil municipal* (Paris: Berger-Levraut, 2014), 137.

commune. As from the enactment of the Act of 27 February 2002 (Loi n° 2002-276 du 27 février 2002 relative à la démocratie de proximité[19]), communes with at least 3,500 inhabitants that publish a public information bulletin (Bulletin d'information générale) devoted to undertakings of a commune and its management, in any form, also in the Internet and on Facebook, are obliged to book space in it for the opposition, in particular for clubs of councillors from the opposition on the terms and conditions defined in the internal regulation (article L2121-27-1 CGCT). These issues are governed by the internal provisions of a municipal council. The right of councillors and councillor clubs to express own opinions cannot be restricted, in particular in the period of elections. Division of space in a municipal bulletin only on the basis of results of elections would not take account of possible changes in the distribution of power in the council between the majority and the opposition during a term of office[20].

Local councillors elected in general elections, who fulfil their obligations in compliance with ethical rules defined in the Local Councillor Charter (Charte de l'élu local – this act is governed by article L. 1111-1-1 CGCT)[21], should act according to those rules. The charter should be read out by the mayor or his/her representative at the initial meeting of the municipal council[22]. It reminds everyone about ethical obligations of elected councillors, which affects their activities in the council, committees and councillor clubs.

3. FUNCTIONING OF COUNCILLOR CLUBS IN THE LIGHT OF THE FREE MANDATE OF A COUNCILLOR AND SOCIAL CONTROL IN POLAND AND IN FRANCE

The clubs in the Polish and French municipal self-government are used by councillors to maintain regular relations with inhabitants and their or-

[19] Loi n° 2002-276 du 27 février 2002 relative à la démocratie de proximité, NOR: INTX0100065L.

[20] CCA Versailles 13 dec. 2007, M. Bellebeau, AJDA 2008, 894.

[21] See Vincent Potier, *Déontologie des élus et des fonctionnaires territoriaux* (Paris: Dalloz, 2015), 200.

[22] See Jean Waline, *Droit administratif* (Paris: Dalloz, 2018), 138.

ganisations. They receive postulates and motions submitted by inhabitants of a commune, to present them further to municipal authorities for examination. Councillors are representatives of the electorate, inhabitants of a given local community and they represent local and public interests, but not their particular ones.

Pertaining to article L. 2121-13 of CGCT, every councillor has the right to be informed, within the scope of their mandates, on all issues concerning a commune that are subject to meetings of the council, which are accessible for the public. Although the provision refers to an individual councillor, it pointed out in the French literature that the interpretation of this article does not exclude application of this article to councillor clubs, provided that it does not restrict a non-attached councillor in exercising of the rights they have.[23] There are some exceptions in this field, e.g. the institution of the councillor's oral question.

In the French legal order, preparation of an agenda of a meeting belongs to the scope of responsibilities of the executive body in a local community. It refers also to preparation of draft resolutions. In the internal regulations of councils, clubs have rights granted by the French body presenting draft resolutions, e.g. to request for suspension of a meeting of a council[24]. Councillor clubs may submit amendments to draft resolutions and present their opinions and motions on a session of a council within the scope of the issues discussed. They may also submit formal motions[25]. Every committee in a council elects a chairperson and a deputy chairperson of a committee, and such election should reflect political pluralism on a municipal council.

In the Polish legal order, under the amendment of 2018, the legislator is granted the right to a club to propose draft resolutions. A club may

[23] See Nadia Ben Ayed, *La constitution des groupes d'élus*, Le Courrier des maires no. 282 Septembre 2014, https://www.seban-associes.avocat.fr/wp-content/uploads/2015/08/pub_cdm_groupesdelus.pdf.

[24] See article 25 Règlement adopté lors de la séance du Conseil municipal du 10 février 2015; https://www.fontenay-aux-roses.fr/975/reglement-interieur-du-conseil-municipal.htm, (access: 03.10.2020).

[25] See article 2 and article 5 Règlement intérieur du Conseil de Paris (Adopté lors de la séance des 4 au 6 février 2019 - 2019 DDCT 21), source: https://cdn.paris.fr/paris/2019/07/24/09e31f716a64d71503df2bcaba33620d.pdf.

present a draft resolution on every issue, that is not subject to the exclusive competence of the executive body of a commune. Additional rights for clubs, that have been granted to them as from the new term of office of the council, are related to the obligation of council's chairpersons in respect to introduction of a draft resolution proposed by a club to the agenda. These provisions are to counteract blocking of drafts presented by councillors or councillor clubs by larger groups or the chairperson of the council who selects draft resolutions to be included in the agenda on a given session at his/her discretion. It gives real guarantees for exercising of councillor's free mandate.

At a request of a councillor club, the chairperson of the council introduces a draft resolution to the agenda of the next session of the decision making body, if it has been submitted by a councillor club, provided that it was received by the council at least 7 days before commencement of a session. In this manner every councillor club may propose not more than one draft resolution for every next session of a given municipal council. Thus, it should be stated that the legislator has privileged a councillor club in respect of proposing resolutions that are obligatorily introduced at its request to an agenda. Before, only the executive authority was entitled to use this mode. Failure to introduce a draft resolution proposed in this manner by a club to an agenda violates the provisions of the Act on Municipal Self-Government. It should be mentioned that these regulations refer only to introduction of a draft to an agenda, not the issue of voting that still remains the right of municipal councillors.

A councillor should be a member of one club only, although such prohibition is not directly expressed in the act. However, memberships of a councillor in more than one club may result in unreliability of exercising of the councillor's mandate and their participation in such committees of the council (the review committee, the complaint, petition and motion committee), where the representatives of all clubs are obliged to participate. The provisions of club regulations often prohibit memberships in other councillor clubs in case of members of a given club. The provisions in both legal orders are the same.

In both legal orders, a term of office of a club is the same as the term of office of the decision making body in a commune, because members of a club are councillors elected for the same term of office. The term of office

of a council in Poland is 5 years, while in France – 6 years[26]. The regulation of a club should define reasons of expiry of club membership, such as death of a councillor, expiry of councillor's mandate, exclusion from the club or accession to another club.

It is a task of the club to work out and present opinions, submit motions and opinions about draft resolutions and – in case of councillor clubs in Poland – presenting draft resolutions on important issues for a commune and a club. The main objective of operations of every club should be to act for the sake of inhabitants and the community, taking into account the subject and aim of operations of a given club.

In the Polish legal order, the regulation of a club defines forms and manner of financing of a club. These issues may be also regulated in a separate resolution of a club, if the regulation so defines. A club may not receive subsidies from the commune's budget. Clubs that achieve their objectives are entitled to submit motions and present the municipal council with opinions on draft resolutions that are subject to the discussion of the municipal council. The main tasks of a club is to represent the club's objectives by the club members in the municipal council and individual internal committees of the council. The commune's charter must not restrict club's rights resulting from the Act. Membership in a club is voluntary and it is confirmed in writing in form of a declaration. Pertaining to article 24 sec. 3 of ANSG, councillors may submit oral questions and inquiries about issues related to a commune to the commune's executive body. A councillor club is not entitled to ask oral questions[27]. This right has been granted by the legislator to a councillor only.

[26] See Jean-Bernard Auby, Jean-François Auby, and Rozen Noguellou, *Droit des collectivités locales* (Paris: Presses Universitaires de France – P.U.F, 2015), 139. It should be underlined that territorial communities (communes, departments, regions) are managed by councils, whose members are elected for a term of office of 6 years in direct or indirect elections.

[27] The manner and result of examination of an oral question or inquiry made in the manner defined by the provisions of the Act on Municipal Self-Government are not subject to appeal in administrative courts – Provincial Administrative Court in Gorzów Wielkopolski, Judgement of 19 August 2020, Ref. No. II SAB/Go 186/20, LEX no. 3048373.

In case of non-subordination to the club's will, e.g. when a councillor acts contradictory to the club's resolutions or in a detrimental way for the club's interests, the club's chairperson may impose sanctions defined in the regulation, such as warning, suspension of member's right for a definite period of time or removal from a club. It should be pointed out that disciplinary sanctions in clubs are allowed, contrary to the legal status of a councillor who cannot be held liable according to the provisions of the Act on Municipal Self-Government due to the institution of councillor's free mandate that is exercised. The club's regulation may introduce provisions stating that club members decide on the voting discipline during a session of the municipal council, on request of the chairperson of a club, with a respective majority of votes, e.g. with an absolute majority of votes. In particularly justified cases, the chairperson of a club shall release club members from the club's discipline.

One can ask the question whether the institution of councillor clubs in Polish communes is needed in order to pursue interests of members of local communities. If the institution of clubs correlated only with members of mandatory committees in a decision making body of local self-government, without impact on the scope of exercising of councillor's mandate, such institution is well justified in legal provisions. But an order to vote in compliance with the club's discipline that is introduced by clubs should be considered a breach of councillor's free mandate, which unfortunately often takes place in practice. It denies the idea of representation of community's interests by a given councillor.

In the French legal order, a municipal council may allocate administrative premises, office equipment to a club and cover costs related to documents, correspondence and telecom services. These issues were regulated in provisions of articles L.2121-27 et L.2121-13-1 du CGCT.

The time spent in the administrative premises, as made available to councillors, is distributed among various councillor clubs in mutual agreement. If such mutual agreement cannot be reached, a mayor distributes time in proportion to number of members of a given club[28].

[28] See article 33 Règlement adopté lors de la séance du Conseil municipal du 10 février 2015; https://www.fontenay-aux-roses.fr/975/reglement-interieur-du-conseil-municipal.htm.

In result of a decision of a municipal council, a mayor may delegate one or two persons from town hall's administrative staff to assist clubs. Necessary funds are allocated in a special chapter of the municipal community's budget (but they must not be higher than 30% of the total salaries paid to the council members). It should be emphasized that the Council of the State decided that subsidies granted to councillor clubs are unacceptable. The internal regulation may define the minimum number of councillors that is necessary for establishment of a club. In communes above 3,500 inhabitants, councillors of the opposition (who are not members of any club) may have the common premises to their disposal free of charge, if they ask for it. The mayor should guarantee such premises to the opposition in or outside a town hall[29]. The premises should be allocated within reasonable period of time, so the opposition can exercise its rights[30].

In both legal orders, councillor clubs cannot represent the decision making body in a commune in contacts with other entities. These are bodies operating within the structure of the decision making body. Clubs are represented by the chairperson of a club or another club member who is authorised to represent club interests. Public announcement of club's opinions is the expression of private opinions of its members only.

4. CONCLUSIONS

When determining the principles of operation of councillor clubs, the decision making body should take account article 58 sec. 1 of the Polish Constitutions that guarantees freedom of association to everybody. It means the freedom of councillors to establish clubs and associate, therefore, when determining the principles of operation of clubs, a municipal council cannot hinder the councillors' right to participate in clubs according to specific criteria, most often political or social ones[31].

[29] See Martine Lombard, Gilles Dumont, and Jean Sirinelli, *Droit administratif* (Paris: Dalloz, 2015), 176.

[30] See Jacques Ferstenbert, François Priet, and Paule Quilichini, *Droit des collectivités territoriales* (Paris: Dalloz, 2016), 248.

[31] Supreme Administrative Court, Judgement of 22 August 2013, Ref. No. II OSK 1619/13, LEX no. 1418816.

Councillor clubs in France are used by a councillor to maintain a regular relation with inhabitants to acknowledge demands raised by them. They help a councillor to focus on the welfare of the self-governmental community, determining respect of the institution of a councillor's free mandate. This means that their aim and nature are not different than in the case of Polish councillor clubs.

Under CGCT, the French legislator more widely defined the rights of a club in respect to financial means and auxiliary apparatus necessary for club's operations than did the Polish legislator, that left those issue for determination in a commune charter and regulation of a given club.

In both legal orders, on one hand the right to establish councillor clubs derives from exercising of councillor's free mandate and it is its guarantee, but on the other hand, when a club whip is imposed in case of voting of a draft resolution, it may become a restriction in exercising of councillor's free mandate. Finding the right balance between these two planes is challenging for a responsible councillor who represents interests not only of their electorate, but mainly of the municipal community.

The amendment of 2018 strengthened the position of Polish councillor clubs both from the perspective of the regime (providing for obligatory membership of a councillor in two standing committees in the council) and from the functional perspective (granting the right to propose draft resolutions and guaranteeing a possibility to submit a draft resolution of a councillor club to the discussion of a council). These activities of the legislator should be appreciated, but they seem to be insufficient from the perspective of real strengthening of the position of councillor clubs in the self-governmental community. The French legislator did not grant the right to propose draft resolutions to clubs and left it to the commune's executive body.

A significant element of functioning of French councillor clubs is the statutory obligation to book space in the public information bulletin (Bulletin d'information générale) for expression of opinions by the opposition, in particular by clubs of opposition councillors on the conditions defined in internal regulations. This legal regulation should be appreciated. This solution may be used by the Polish legislator as an original and interesting form of the normative scope of the public information bulletin concerned.

Both in the Polish and French legal orders, councillor clubs make it possible for councillors to present numerous initiatives, opinions, motions. Councillor clubs in a municipal council /conseil municipal may submit amendments to draft resolutions submitted in the way and on principles defined in the charter/internal regulation. Councillors belonging to clubs and non-attached councillors actively participate in works of a council and commission and may speak during a session. It strengthens the possibility of verification of activities by a councillor club, including members of a local community, which is an important element of social control.

REFERENCES

Auby, Jean-Bernadr, Auby Jean-François, and Noguellou Rozen. *Droit des collectivités locales*. Paris: Presses Universitaires de France – P.U.F, 2015.

Augustyniak, Monika. "O potrzebie odpolitycznienia samorządu gminnego – marzenie normatywne." *Samorząd Terytorialny*, no. 7-8 (2020): 44–53.

Ben Ayed, Nadia. *La constitution desgroupes d'élus*. Le Courrier des maires no 282 Septembre 2014, https://www.seban-associes.avocat.fr/wp-content/uploads/2015/08/pub_cdm_groupesdelus.pdf.

Chmielnicki, Paweł. "Komentarz do art. 23." In *Ustawa o samorządzie gminnym. Komentarz*, edited by Paweł Chmielnicki, 310–312. Warsaw: LexisNexis, 2010.

Ferstenbert, Jacques, Priet François, and Quilichini Paule. *Droit des collectivités territoriales*. Paris: Dalloz, 2016.

Lacaïle, Philippe. *L'élu municipal. Statut de l'élu et foncionnement du conseil municipal*. Paris: Berger-Levraut, 2014.

Lombard, Martine, Dumont Gilles, and Sirinelli Jean. *Droit administrative*. Paris: Dalloz, 2015.

Martysz, Czesław. "Komentarz do art. 23." In *Ustawa o samorządzie gminnym. Komentarz*, edited by Bogdan Dolnicki, 378–381. Warsaw: Wolters Kluwer, 2018.

Potier, Vincent. *Déontologie des élus et des fonctionnaires territoriaux*. Paris: Dalloz, 2015.

Waline, Jean. *Droit administratif*. Paris: Dalloz, 2018.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLIV
YEAR 2021, ISSUE 1, pp. 53–80
DOI: https://doi.org/10.31743/recl.9958

ENVIRONMENTAL MANAGEMENT OF ISO 14001 SYSTEM ENFORCEMENT IN EU COUNTRIES

*Elżbieta Zębek**

ABSTRACT

The European Union International Organization for Standardization management system for the environment (ISO 14001) is established by European Commission Regulation 1221/2009. This legislates a voluntary system where organizations can register in a community eco-management and audit scheme. In the literature, this standard is recognized as an instrument of international environmental protection law, introduced by *soft law* regulations. ISO 14001 has been implemented by many global and European organizations, and it strives to improve the quality of their environmental resources.

It was considered that the ISO 14001 eco-management and audit scheme enforced protection of environment in EU countries by imposing the obligation to implement appropriate legal regulations in this area. This article aims is determine what legal solutions in chosen UE countries enable the effective implementation of ISO 14001 and what positive effects it has on the state of the environment in these countries.

The results demonstrated that the number of certified organizations is increasing despite the many difficulties and costs of implementing and organizing required environmental protection areas. The implementation of ISO 14001 was described using the example of Poland and Italy compared to other EU countries. The uptake identifies improved environmental quality, and this is confirmed by indicators of decreasing gas emissions and increasing waste recycling which improve global

* Dr. habil. Elżbieta Zębek, Associate Professor, Faculty of Law and Administration, Department of International Public Law and Law of European Union, University of Warmia and Mazury in Olsztyn; correspondence address: Obitza 1, 10-752 Olsztyn, Poland; e-mail: elzbieta.zebek@uwm.edu.pl; https://orcid.org/0000-0002-8637-8391.

air, soil and water quality. The higher implementation index of the ISO 14001 standard in Italy translates into higher environmental quality indicators in this country than in Poland.

Keywords: EU, Environmental management, ISO 14001, Enforcement, Environmental status

1. INTRODUCTION

The European Union (EU) is a supra-national organization which currently devotes a lot of time to environmental protection in accordance with the principle of sustainable development. The importance of business responsibility for environmental conditions has increased with expanded use of natural resources and increased degraded pollutant emissions, and the effectiveness of an organization's environmental protection is measured by the extent of their responsible behavior. Moreover, the EU's introduction of more stringent environmental regulations has forced economic entities to implement environmental management systems to meet the higher prescribed quality standards[1]. Industrial adherence to these regulations will improve environmental quality and promote economic development in line with the principles of sustainable development. In addition, the 1972 Stockholm Declaration decrees that sustainable development should combine human rights with environmental and economic law and this is reflected in the preamble: "For the purpose of attaining freedom in the world of nature, man must use knowledge to build, in collaboration with nature, a better environment. To defend and improve the human environment for present and future generations has become an imperative goal for mankind-a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development". At the 1992 conference in Rio de Janeiro, the relationship between environmental deterioration and economic development was demonstrated. At the same time, the right to

[1] Krislin Kivi, and Natalja Gurvits, "Eco-Management and Audit Scheme (EMAS) implementation in the European Union: survey of Estonian certified organisations," *European Integration Studies* 11 (2017): 215, http:// 10.5755/j01.eis.0.11.17982.

development was indicated, taking into account the environmental needs of present and future generations[2]. This is also reflected in EU environmental policy, especially in Article 191 TFEU, which defines the objectives and principles of this policy. These include: 1) preservation, protection and improvement of the quality of the environment; 2) protection of human health; 3) careful and rational use of natural resources; 4) promoting measures at the international level to deal with regional or worldwide environmental problems, in particular combating climate change; 5) a high level of protection taking into account the diversity of situations in different regions of the EU[3]. The above implies the need to apply appropriate legal instruments in environmental protection in conditions of sustainable development, also addressed to entities conducting business activity.

According to J. Ciechanowicz-McLean, the use and importance of economic instruments of environmental protection law is currently increasing, which indirectly affect the activities of entities obliged to protect the environment, i.e. marketable licenses, insurance or pro-ecological management systems[4]. Environmental management systems are classified as legal instruments aimed at environmental protection and the addressees are enterprises[5]. Such instruments include ISO quality management and environmental management standards.

Analyzing the legal nature of the ISO standard, it can be concluded that they are not legislative acts in terms of jurisprudence, but fulfill the criteria of normative acts as norms created outside the state apparatus and subject to limited binding force, addressed to members of their organizations[6]. Thus, the ISO standards in the field of quality and environmen-

---

[2] See more: Janina Ciechanowicz, *Międzynarodowe prawo ochrony środowiska* (Warsaw: PWN, 1999), 30; Zbigniew Bukowski, *Prawo międzynarodowe a ochrona środowiska* (Toruń: Dom Organizatora, 2005), 90.

[3] Maria M. Kenig-Witkowska, *Prawo środowiska Unii Europejskiej* (Warsaw: Lex a Wolters Kluwer business, 2012), 20.

[4] Janina Ciechanowicz-McLean, and Tomasz Bojar-Fijałkowski, ed. *Gospodarcze prawo środowiska* (Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego, 2009), 7.

[5] Janina Ciechanowicz-McLean, *Prawo ochrony i zarządzania środowiskiem*. 2nd ed. (Warsaw: Difin, 2019), 52.

[6] Jolanta Jabłońska-Bonca, *Wstęp do nauk prawnych* (Poznań: Ars Boni Et Aequi, 1996), 37–42.

tal management are normative acts of statutory law with binding force directed towards addressees, who are voluntary members of the organization constituting this act, thus taking their place in the legal system. Environmental management is regulated by the norms of environmental law with the use of all available administrative and legal instruments[7]. In the EU, the legal definition of an environmental management system is included in article 2(k) of the Regulation (EC) No 761/2001[8], means the part of the overall management system that includes the organizational structure, planning activities, responsibilities, practices, procedures, processes and resources for developing, implementing, achieving, reviewing and maintaining environmental policy[9]. The environmental management system is one of the indirect instruments of environmental law, and at the same time is responsible for the implementation of environmental objectives[10]. The ISO standard serves to strengthen the environmental protection at the level of the enterprise through voluntary self-control. The aim is to improve the ecological activity of various entities and to harmonize national standards related to environmental management[11].

The European Union International Organization for Standardization ISO 14001 is the most formal standard for eco-management in EU countries. ISO 14001 contains standards and guidelines for both environmen-

[7] Tomasz Bojar-Fijałkowski, "Elementy zarządzania jakością i zarządzania środowiskowego wspomagające nowe zarządzanie publiczne w administracji," in *Pomiędzy zarządzaniem publicznym a ogólną teorią administracji*, ed. Ewa Jasiuk, Gerard P. Maj, Kamil Sikora, and Stanisław Wrzosek (Radom: Wydawnictwo WSH, 2013), 134, 136.

[8] Regulation (EC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) (OJ L 114, 24.4.2001, p. 1–29).

[9] See more: Tomasz Bojar-Fijałkowski, "Wykonanie Rozporządzenia (WE) 761/2001 przez organy administracji publicznej w Polsce," in *Finansowanie zadań administracji publicznej ze środków UE*, ed. Marcin Szewczak, and Małgorzata Ganczar (Lublin: Wydawnictwo KUL, 2001), 9–20.

[10] Tomasz Bojar-Fijałkowski, "Ocena skuteczności zarządzania środowiskowego jako instrumentu prawa ochrony środowiska na przykładzie EMAS," in *Dekada harmonizacji w prawie ochrony środowiska*, ed. Maciej Rudnicki, Anna Haładyj, and Kamila Sobieraj (Lublin: Wydawnictwo KUL, 2011), 230.

[11] Janina Ciechanowicz-McLean, *Ochrona środowiska w działalności gospodarczej* (Warsaw: LexisNexis, 2003), 145–146.

tal management and technological norms that support existing organization functions such as auditing. These standards relate to "monitoring an organization's activities to minimize harmful effects on the environment caused by its production activities that pollute or deplete natural resources"[12]. Therefore, environmental management is a process carried out by an organization within itself, aimed at minimizing its impact on all elements of the environment based on obligatory standards, identified with sectoral environmental protection law, as well as voluntary ones, e.g. regulating environmental management systems occurring in the organization itself according to the rules and under the control of administrative authorities[13].

ISO 14001 defines the criteria for an environmental management system which can be certified, and it defines the framework that a company or organization should apply to create an effective environmental management system. In addition, ISO 14001 implementation and application guarantees the company management and employees that the environmental impact of their operations is monitored and that the state of their resources is improved[14]. Eco-management system included ISO 14001 was introduced by the European Parliament and Council Resolution

[12] James H. McCreary, "ISO 14001 A framework for coordinating existing environmental management responsibilities," *CIM Bulletin* 89 (1996): 824; Lighthouse Consulting, "Summary of ISO 14000," Coastal Resources Center, University of Rhode Island, 2003, accessed February 23, 2019, https://www.crc.uri. edu/download /12_ISO_14000_ Summary_ok.pdf.

[13] Tomasz Bojar-Fijałkowski, "Nauka o zarządzaniu w gospodarczym prawie ochrony środowiska – analiza wybranych pojęć," in *Zasada zrównoważonego rozwoju w wymiarze gospodarczym i ekonomicznych*, ed. Bartosz Rakoczy, Karolina Karpus, Małgorzata Szalewska, and Martyna Walas (Toruń: Wydawnictwo UMK, 2015), 205; Tomasz Bojar-Fijałkowski, "Odpowiedzialność prawna organizacji z certyfikowanym systemem EMAS," in *Odpowiedzialność za środowisko w ujęciu normatywnym*, ed. Elżbieta Zębek, and Michał Hejbudzki (Olsztyn: Wydawnictwo UWM, 2017), 236.

[14] See: European Commission, "EU Ecolabel indoor cleaning services Commission Decision (EU) 2018/680," September 2018, accessed February 23, 2019, http: Artykuł%20 EMAs/ normy%20EMAS%20i%20ISO/180525 _User%20 Manual__ Ecolabel%20indoor%20cleaning%20services%20 september%202018.pdf; ISO, "Popular standards ISO 14000 family, Environmental management," 2018, accessed February 23, 2019, https:// www.iso.org /iso-14001-environmental-management.html.

No. 1221/2009[15]. The targeted organizations especially included financial institutions, schools, service providers and manufacturing companies which wished to limit negative environmental effects through humanitarian desire and without external legal obligation[16]. This system specified its expectations by nominating the following sectors: retail trade, tourism, construction, food and beverage manufacturing, agriculture, public administration, car manufacturing, electrical and electronic equipment manufacturing, waste management, telecommunications and the manufacture of metal products[17].

It was considered that the ISO 14001 eco-management and audit scheme enforced protection of the environment in EU countries by imposing the obligation to implement appropriate legal regulations in this area. The implementation of ISO 14001 was described on the example of Poland and Italy compared to other EU countries. The following research hypothesis was formulated: what legal solutions in these countries enable the effective implementation of ISO 14001 and what positive effects it has on the state of the environment in these countries? This article uses the dogmatic-legal and comparative-law methods. Examined was the effectiveness of ISO 14001 enforcement for EU countries' environmental improvement by analyzing the legal regulations, literature and available statistical data on the different ISO 14001 implementation methods and the environmental state in these countries.

[15] OJ L 342, 22.12.2009, p. 1–45.

[16] See: George Balan, and Laris Dragolea, "Implementation of environmental management systems – ISO 14001 or EMAS," *Academic Research International* 4(3) (2013).

[17] Patricia Tourais, and Nuno Videira, "Why, How and What do Organizations Achieve with the Implementation of Environmental Management Systems? – Lessons from a Comprehensive Review on the Eco-Management and Audit Scheme," *Sustainability* 8(3) (2016): 283, https://doi.org/10.3390/su8030283; European Commission, "EMAS – key benefits for organisations and authorities," EMAS scheme in Slovenia, Ljubljana, 14 September 2017, accessed February 23, 2019, http://Artykuł%20EMAs/normy%20EMAS%20i%20ISO/2_delavnica%20 EMAS_PAQUOT_14sept2017.pdf.

2. MAIN ASSUMPTIONS AND LEGAL BASIS OF THE ISO 14001 ENVIRONMENTAL MANAGEMENT STANDARD IN THE EU

Environmental system management is mainly determined by European Commission (EC) Regulation No 1221/2009 which establishes a voluntary system allowing organizations to register in a community international eco-management and audit scheme (ISO). The objective is to promote continuous improvement in the environmental performance by implementing environmental policies, programs and management systems and their regular audit. Further important aims are to provide the public with additional information on the environmental performance of participating sites and to encourage active employee involvement in the establishment of environmental management systems[18].

The ISO 14001 standards are based on the Deming cycle which inspired the "Plan-Do-Check-Act" movement. This principle enables organizations to continuously improve associated environmental outcomes by harmonizing[19];

(1) Planning the environmental aspects under legal requirements, environmental policy, objective and targets;
(2) Doing; by following the action plan which considers resources and responsibilities, employee involvement, communication and reporting;
(3) Checking by monitoring the results and recording the audit, evaluation and compliance results;
(4) Acting, through continuous management assessment of environmental performance.

The initial planning phase defines the processes required to deliver the best possible results. This is followed by implementing the activities in the planned procedures, checking plan efficiency and identifying the areas

[18] Alfred M. Farmer, ed., *Manual of European Environmental Policy* (London: Routledge, 2012), 934.

[19] See more: Francesco Testa, Fabio Iraldo, and Tiberio Daddi, "The Effectiveness of EMAS as a Management Tool: A Key Role for the Internalization of Environmental Practices," *Organization & Environment* 31(1) (2017): 52, https://doi.org/10.1177%2F1086026616687609.

that require improvement. The final stage then sets new goals in a revised environmental plan[20].

Adherence to EU Regulation No 1221/2009 demands determination of the organization's current environmental management system. This should include; (1) a description of all direct and indirect activities which result in significant environmental impact; (2) environmental objectives and targets currently in place and (3) a summary of the effectiveness of the set objectives and targets. The collected data will enable annual comparison of environmental performance and determine areas that need improvement. This Regulation then emphasizes the requirements for implementing environmental policies, programs and management systems. These include auditing the accreditation and functioning of environmental verifiers, and also the information that must be provided to the ISO14001 and EMAS bodies. Annex II part B of this Regulation stresses the required environmental reviews, legal compliance, environmental performance, employee involvement and communication aspects. This is complemented by Article 19 which specifies that the environmental verifier must validate updated information in the environmental statement at least on an annual basis[21].

EC Regulation 196/2006[22] is the most important legislation for ISO 14001 implementation. This regulation amended Annex I in EC Regulation 761/2001 to reflect ISO Standard 14001:2004 and it repealed Decision 97/265/EC on the recognition of ISO 14001:1996. These changes were made to ensure consistency in environmental management system requirements. Annex I stated "organizations participating in the EMAS eco-management and audit scheme (EMAS) shall implement the require-

[20] Piotr Pachura, and Agnieszka Ociepa-Kubicka, "Management and audit scheme (EMAS) functioning on the example of the water supply and sewerage joint stock company of the Częstochowa District," *Polish Journal of Management Studies* 10(2) (2014): 148.

[21] Commission Regulation (EU) 2017/1505 of 28 August 2017 amending Annexes I, II and III to Regulation (EC) No 1221/2009 of the European Parliament and of the Council on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) (Text with EEA relevance) (OJ EU L 222/1 29.8.2017).

[22] Commission Regulation (EC) 196/2006 of 3 February 2006 amending Annex I to Regulation (EC) 761/2001 of the European Parliament and of the Council to take account of the European Standard EN ISO 14001:2004, and repealing Decision 97/265/EC (OJ L 32/4).

ments of EN ISO 14001:2004 which are described in Section 4 of the European Standard". This annex legislated that environmental management system requirements included the general requirements, environmental policy, planning, implementation and operation, control of documents and checking and management review. The general requirements included "the organization shall establish, document, implement, maintain and continually improve an environmental management system in accordance with the requirements of this International Standard and determine how it will fulfil these requirements". The organization must define the scope and policy of their environmental management. This should therefore be "(a) appropriate to the nature, scale and environmental impacts of its activities, products and services; (b) include a commitment to continual improvement and prevention of pollution; (c) include a commitment to comply with applicable legal requirements and with other requirements to which the organization subscribes which relate to its environmental aspects; (d) provide the framework for setting and reviewing environmental objectives and targets; (e) be documented, implemented and maintained; (f) communicated to all persons working for or on behalf of the organization and (g) is available to the public".

Organizations should identify the legal obligations and the environmental aspects of their activities, products and services within the defined scope of the environmental management system that it can control, and also those that it can influence in planned and new developments and new or modified activities, products and services. This will establish the aspects that have or can have significant impact on the environment. Legally, "the organization shall establish, implement and maintain documented environmental objectives and targets, at relevant functions and levels within the organization. The objectives and targets shall be measurable, where practicable, and consistent with the environmental policy, including the commitments to prevention of pollution, to compliance with applicable legal requirements and with other requirements to which the organization subscribes, and to continual improvement". The environmental system management should also include human resources and specialized skills, organizational infrastructure, technology and financial resources. The legislation further requires that "the organization shall ensure that any person(s) performing tasks for it or on its behalf that have the potential

to cause a significant environmental impact(s) identified by the organization is (are) competent on the basis of appropriate education, training or experience, and shall retain associated records. The organization shall provide training in the range of environmental aspects and its environmental management system. The organization shall establish, implement and maintain procedures to make persons working for it or on its behalf aware of: (a) the importance of conformity with the environmental policy and procedures and with the requirements of the environmental management system; (b) the significant environmental aspects and related actual or potential impacts associated with their work, and the environmental benefits of improved personal performance; (c) their roles and responsibilities in achieving conformity with the requirements of the environmental management system; and (d) the potential consequences of departure from specified procedures".

The evolution of the Environmental Management System and ISO 14001 had three stages. The ISO 14001:1996 first phase involved the overall organizational structure and management system with planning activities, responsibilities, practises, procedures and resources for developing, implementing, achieving and maintaining environmental policy. The ISO 14001:2004 second stage was targeted at the actual management system procedures used in developing and implementing its environmental policy and the management of the organization's individual environmental aspects. The final ISO 14001:2015 phase focused on changing and managing the relevant environmental protection procedures, and then fulfilling compliance obligations, addressing ongoing risks and recognizing opportunities for improvement[23]. The ISO 14001:2015 scope covers the management outcomes expected in enhanced environmental performance, fulfilled compliance obligations and achievement of environmental objectives. The major objectives were a planned 20 % reduction in production energy use within 4 years, 100% recycling of paper and plastic waste before 2017 and the elimination of persistent organic pollutant emissions by the end of 2016[24]. The intended planning should therefore comply with

[23] Martin Abraham, *Sustainable Technologies* (Amsterdam: Elsevier, 2017), 24–25.

[24] European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of

legal obligations, combat threatening risks in the individual production processes and seek and create opportunities for beneficial environmental outcomes. The product life cycle and all service procedures must be considered in planning interventions, and these may require a complete overhaul. It is essential to monitor the consecutive and interlinked stages from raw material acquisition and generation from natural resources to their final disposal[25]. Important company benefits certified by ISO 14001 include: (a) conformance with legislative and regulatory requirements; (b) minimized risk of regulatory and environmental liability; (c) improved efficiency and reduced resource consumption and waste; (d) less energy consumption; (e) reduced costs for emissions, discharges, waste handling, transport and disposal; (f) increased competitive advantage by demonstrating environmental commitment and (g) improved company image through a solid foundation of improved relationships with customers, investors, regulators and the broader community[26].

The main reason companies decided to implement the ISO 14001 system was the customer and contractor expectation and requirement of this standard. The following five key principles were instrumental in ISO 14001 adoption; (1) environmental policy, (2) planning, (3) implementation, (4) action and (5) checking and reviewing the management system while focusing on continuous improvement[27]. Authors have indicated the following motivating forces for ISO 14001 implementation;

---

the Regions", A European Strategy for Plastics in a Circular Economy{COM(2018)28final}, Brussels, 16.1.2018SWD(2018) 16 final; European Commission, "A European Strategy For Plastics in a Circular Economy," accessed March 23, 2019, https://ec.europa.eu/environment/ circular -economy /pdf /plastics-strategy-brochure.pdf.

[25] Stefan Larsson, "ISO 14001:2015, Six Dimensions of Sustainability," 2015, accessed March 21, 2019, http:/artykuł%20EMAs/normy%20EMAS%20i%20ISO/2015-12-02-Stefan-Larsson.pdf.

[26] "ISO 14001 Environmental Management Systems Training, Audit & Certification Services," 2018, accessed March 25, 2019, www.saiglobal.com/assurance.

[27] See: Inaki Heras-Saizarbitoria, ed., *ISO 9001, ISO 14001, and New Management Standards* (Cham: Springer International Publishing, 2018), 98, https://doi.org/10.1007/978-3-319- 5675-5; Evangelos Psomas, Christos V. Fotopoulos, and Dimitrios P. Kafetzopoulos, "Motives, difficulties and benefits in implementing the ISO 14001 Environmental Management System," *Management of Environmental Quality An International Journal* 22(4) (2011): 511, https://doi.org/10.1108/14777831111136090.

(1) the response to pressure from external stakeholders; (2) pro-action and anticipation of future business problems; (3) legal problems and (4) internal influences. Motivation is also inspired by the ISO 14001 certification of environmental responsibility which commands respect in international markets and provides competitive advantage. Barriers to obtaining this certificate include companies' anti-environmental policy, involved costs and the protection of its trade-mark and resources despite employee desire to protect the environment. Companies with this certificate acknowledged that the greatest difficulties in obtaining the ISO 14001 certificate were defining appropriate environmental goals and the methods of measuring environmental improvement. This knowledge is most important because the identification of environmental aspects is an essential factor in determining the effort needed to implement the standard. There is also the additional difficulty of the lack of human resources, rather than finances, in operating the environmental protection system. This interrupts the implementation process and resources are then redirected to core business operation[28]. Authors have also reported that some firms fail to satisfy all legal environmental provisions in their operations and can therefore incur administrative or judicial sanctions of fines and damages to plaintiffs. The inadvertent discovery of existing regulatory violations can also prevent companies from considering ISO 14001 implementation. Any potential advantage is counteracted by strict auditing of unknown extent, and the company may feel threatened by the possibility of having to defend charges of negligence, failure of disclosure or intent of non-compliance[29].

[28] Evangelos Psomas, Christos V. Fotopoulos, and Dimitrios P. Kafetzopoulos, "Motives, difficulties and benefits in implementing the ISO 14001 Environmental Management System," *Management of Environmental Quality An International Journal* 22(4) (2011): 516, https://doi.org/10.1108/14777831111136090; Paula C. Murray, "The international environmental management standard, ISO 14000: a non-tariff barrier or a step to an emerging global environmental policy?," *Penn Law: Legal Scholarship Repository* 18(2) (2014): 579; Aline Vomero Reisa, Fabio de Oliveira Nevesa, Suzana Eda Hikichia, Eduardo Gomes Salgadoa, and Luiz Alberto Beijoa, "Is ISO 14001 certification really good to the company? a critical analysis," *Production Systematic Review* 28 (2018), https://doi.org/10.1590/0103-6513.20180073.

[29] Raymond C. Wilson, "What you don't know can definitely hurt you," *Pollution Engineering* 30(12) (1998): 33–34.

European Commission data reveals that Europe had 105,534 organizations with ISO 14001 certification in 2012, and this contrasted with 285,844 globally. European countries also have ISO 14001 implementation growth rates, where Spain and Italy recorded the highest certification increase in 2012[30]. The ISO recorded 301,647 certificates issued to 171 countries by December 2013 (available at https://www.iso.org/the-iso-survey.html). The five major industry sectors involved were: (1) 40,430 construction companies (2) 24,791 raw and finished metal products (3) 22,663 electrical and optical equipment (4) 15,516 wholesale and retail trade and motor vehicle repair and (5) 12,957 rubber and plastic product companies. In contrast, EMAS registered approximately 4,000 organizations and over 9,000 enterprises in 2017[31]. The data show that Italy, Spain and The United Kingdom had the highest number of ISO 14001 registered organizations in 2012, while Poland had the average number of approximately 2,000. Further analysis of the average European certificate growth rate highlighted approximately 13% growth between 2005 and 2012. In addition, the 2012 ISO Central Secretariat Survey reported that services are aggregated as a single sector. This service group comprises the highest number of ISO 14001 certifications and it includes hotels, restaurants, transport, storage and communication, engineering services and education and public administration[32].

[30] European Commission, "Final Report Supporting the Evaluation of the Implementation of EMAS," June, 2015, accessed March 28, 2019, http:/Artykuł%20EMAs/normy%20EMAS%20i%20ISO/30752634-549a-11e7-a5ca-01aa75ed71a1.en.pdf.pdf.

[31] European Commission, "EMAS – key benefits for organisations and authorities," EMAS scheme in Slovenia Ljubljana, September 14, 2017, accessed March 25, 2019, http://Artykuł%20EMAs/normy%20EMAS% 20i%20ISO/2_ delavnica%20EMAS_PAQUOT_14sept2017.pdf; See: Luis M. Ciravegna, and Martins da Fonseca, "ISO 14001:2015: An Improved Tool for Sustainability," *Journal of Industrial Engineering and Management* 8(1) (2015): 42, http://dx.doi.org/10.3926/jiem.1298.

[32] European Commission, "Final Report Supporting the Evaluation of the Implementation of EMAS," June, 2015, accessed March 26, 2019, http:/Artykuł%20EMAs/normy%20EMAS%20i%20ISO/30752634-549a-11e7-a5ca-01aa75ed71a1.en.pdf.pdf.

3. IMPLEMENTATION OF ISO 14001 IN THE LEGAL SYSTEM OF CHOSEN EU COUNTRIES

The analysis of the implementation of the ISO 14001 standard was carried out using the example of Poland and Italy with an average and high index of implementation of this standard by the organization and enterprises. The group of ISO 14001 standards in Poland is a collection of several standards related to environmental management. Some of the international standards have been implemented in the Polish legislation. Poland implemented the standard earlier ISO 14001:2004[33], which defined the criteria necessary to be met by the organization applying for the certificate. The certification procedure may be carried out only by an accredited inspection body, the competences and powers of which in this regard are determined by national law[34] – The Polish Center of Accreditation. Initially, the certification body carries out an initial audit including a documentation review, assessment of the appropriateness of the selection and description of environmental aspects. Compliance with applicable law, the implementation of environmental policy and the principles of continuous improvement established by the organization are subject to control. After the initial procedure, the certifying audit starts to check the compliance of the organization's procedures with the provisions of the standard. The most important issues covered by the control include the method of identifying aspects and the implementation of environmental objectives and tasks, as well as corrective and preventive actions in this regard. After detecting and correcting any shortcomings and non-conformities, the auditor recommends the certification body to issue an environmental man-

[33] Based on the document: "ISO14001: 2004 Environmental management systems, requirements and guidelines for use."

[34] Currently obliged the Act of 13 April 2016 on conformity assessment and market surveillance systems (LJ of 2019, item 544 as amended), which implemented the provisions of the Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 (OJ L 218, 13.8.2008, p. 30–47).

agement system certificate for the audited organization. The validity of such a certificate is usually 3 years[35].

In September 2015, the new ISO 14001: 2015 standard was issued. The transition period for adapting the environmental management system to the new requirements was 3 years. The new standard places even greater emphasis on environmental protection and, within this framework, on proactive initiatives. The key change in the new edition is the inclusion of the risk management requirement in the environmental management system. The implementation of ISO 14001: 2015 can also lead to savings – by improving the efficiency and productivity of the organization. The way to do this is to identify approaches to reduce waste, optimize the consumption (costs) of raw materials and utilities, reduce losses, etc. This standard contains more detailed requirements for the process approach based on the identification of environmental risk types, introduces requirements for the life cycle of goods and services and the supply chain, among others by new requirements for suppliers and the provision of environmental information to product recipients, as well as abolishing the obligation to create a procedure for the identification of environmental aspects (maintaining the requirement of identification only). Before starting the implementation of the updated standard, it is necessary to identify the areas in the management system (the so-called gaps) necessary for the implementation of new elements of the standard. The task of this stage is to identify the areas and processes necessary to update or change the organization so as to obtain full compliance with the new requirements. Examples of identified environmental aspects in the ISO 14001: 2015 system are as follows: emission of pollutants into the air from transport and production processes, biological imbalance, domestic and technological sewage, harmfulness to human and animal health, odor emission, water consumption and energy, hazardous substances, municipal and hazardous waste. The organization applying for this standard must demonstrate that its ac-

[35] See: Tomasz Bojar-Fijałkowski, "System ISO 14001 jako instrument międzynarodowego prawa ochrony środowiska," *Europejski Przegląd Prawa i Stosunków Międzynarodowych* 4(19) (2011): 54–56.

tivities comply with environmental legislation[36]. The list of legal acts in the field of environmental protection (not a closed catalog), the activities of which must be compliant on the day of the ISO 14001 zero audit, include: 1) acts on general principles of environmental protection law, water law, maintenance of cleanliness and order, water supply and sewage disposal, waste and packaging management, ozone-depleting substances, greenhouse gas management system, chemicals, waste electrical and electronic equipment[37], 2) executive regulations[38] to these acts and EU regulations[39].

[36] The requirements are included in the document: PN-EN ISO 14001: 2015-09 "Environmental management systems – Requirements and guidelines for use."

[37] Act of 27 April 2001 Environmental Protection Law (LJ of 2020, item 1219 as amended), Water Law of 20 July 2017 (LJ of 2020, item 310), Act of 13 September 1996 on maintaining cleanliness and order in municipalities (LJ of 2020, item 1439), Act of 7 June 2001 on collective water supply and collective discharge wastewater (LJ of 2019, item 1437 as amended), Act of 14 December 2012 on waste (LJ of 2020, items 797, 875), Act of 13 June 2013 on the management of packaging and packaging waste (LJ of 2020, item 1114), the Act of 15 May 2015 on substances that deplete the ozone layer and on certain fluorinated greenhouse gases (LJ of 2019, item 2158 as amended), the Act of 17 July 2009 on the system for managing the emissions of greenhouse gases and other substances (LJ of 2020, item 1077), the Act of 25 February 2011 on chemical substances and their mixtures (LJ of 2019, item 1225 as amended), the Act of 11 September 2015 on waste electrical and electronic equipment (LJ of 2019, item 1895).

[38] The scope of the regulations of the ordinances covers, inter alia: substances particularly harmful to the aquatic environment; conditions for discharging sewage into water or soil; waste catalog; acceptable methods of their recovery; dealing with waste oils; emission standards for installations, fuel combustion sources and waste incineration or co-incineration devices; the scope of information contained in the report to the National Database on emissions of greenhouse gases and other substances; fees for using the environment; packaging labeling patterns; minimum annual recovery and recycling levels for multi-material packaging and for hazardous substance packaging; permissible levels of electromagnetic fields in the environment; reports on ozone-depleting substances or fluorinated greenhouse gases; the categories of dangerous substances; types and quantities of hazardous substances present in the plant, which determine the classification of the plant as an plant with an increased or high risk of a serious industrial accident; the requirements to be met by a safety report on a high-risk establishment.

[39] Regulation (EC) No 842/2006 of the European Parliament and of the Council of 17 May 2006 on certain fluorinated greenhouse gases (OJ L 161, 14.6.2006, p. 1–11); Regulation (EU) No 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases and repealing Regulation (EC) No 842/2006 (OJ L 150, 20.5.2014, p. 195–230), Regulation (EC) No 1005/2009 of the European Parliament

The ISO 14001: 2015 environmental management system must be formally established, documented, implemented, maintained and improved. According to the guidelines, this standard must meet the following requirements: 1) description and implementation of the documentation supervision procedure; 2) identifying and planning operations that are related to significant environmental aspects; 3) specific environmental goals and tasks; 4) specific operational criteria; 5) procedures for identifying significant environmental aspects; 6) informing suppliers and contractors about ISO 14001: 2015 procedures and applicable requirements. The entrepreneur must implement a number of procedures relating to: a) identifying and responding to potential emergency events that may have an impact on the environment; b) responding to accidents and preventing or reducing the related negative impacts on the environment; (c) regularly monitoring and measuring the characteristics of the operations which may have a significant effect on the environment; d) corrective and preventive actions; e) identify, store, secure, retrieve and preserve ISO 14001: 2015 records; f) internal auditing; (g) identification of environmental aspects related to activities, products and services; h) identifying and having access to legal and other requirements to which the organization has committed itself. In addition, an inventory of documented environmental objectives and tasks and environmental programs should be drawn up, the role, responsibilities and authority, training program, internal communication and sharing information on significant environmental aspects should be specified in ISO14001: 2015. After a positive result of the certification audit, a certificate is issued. It is valid for 3 years, provided that annual surveillance audits are carried out to ensure the continued effectiveness of the management system[40].

Italy is one of the leaders in the implementation of ISO 14001: 2015. This standard defines standard requirements for environmental management systems. In this country, the new edition of ISO 14001 focuses in particular on the "Life Cycle" for management system certification, taking

and of the Council of 16 September 2009 on substances that deplete the ozone layer (OJ L 286, 31.10.2009, p. 1–30).

[40] PN-EN ISO 14001: 2015-09 "Environmental management systems – Requirements and guidelines for use."

into account the economic, environmental and social impacts associated with product design and development at each stage of the life cycle. The certification process is similar to that in Poland. The certification body is ACCREDIA established in accordance with the EU requirements specified also in the Regulation EC 765/2008 requires every member state to nominate a national Accreditation Body and it has granted, for the first time, a legal status to this activity, recognizing it as an expression of public authority. Certification ensures high quality of products, services and environmental management systems and all applicable regulations. With regard to ISO 14001: 2015, special attention is paid to the continuous improvement of the environmental performance of the organization itself. A novelty compared to the previous edition of the standard is the establishment of an organization to analyze the "causes" that affect its ability to achieve what has been agreed. Some of these reasons certainly include environmental conditions and their changes, but the technological, financial, political, social context also needs to be taken into account[41]. An important goal that must be achieved by the organization is the compliance of its activities with environmental policy, pollution prevention; the use of processes, practices, techniques, materials, products, services or energy that must be avoided, limited or controlled (separately or in combination); reducing the emission or discharge of any kind of pollutant or waste in order to reduce the negative impact on the environment; respecting compliance obligations, legal and other requirements that the organization must or will choose to fulfill[42]. Implementation of ISO 14001: 2015 requires compliance with the catalog of legal regulations in the field of environmental protection in the country. In Italy the key environmental legislation is Legislative Decree no. 152/2006, the Environmental Consolidated Act (ECA) (*Norme in materia ambientale or Codice dell' Ambiente*), including the following aspects: Environmental general principles, Envi-

[41] "Mapping ISO 14001:2015 and ISO 14001:2004, For more information about ISO 14001:2015 and related standards," accessed October 6, 2020, https://committee.iso.org/tc207sc1.

[42] "Terms and definition in ISO 14001:2015 – where did they originate from?" ISO TC 207 SC1 information note September 2015, Annex SL version May 2015 refers to Annex SL of the Consolidated ISO Supplement to the ISO/IEC Directives, Part 1, 6th edition, published May 1, 2015.

ronmental Impact Assessment (EIA) and Integrated Pollution Prevention and Control (lPPC) permit, Water resources management and soil protection, Waste and packaging management, Remediation of contaminated sites, Air protection and air emissions, and Environmental damage. There are separate environmental laws regulating specific areas, for example: Presidential Decree no. 59/2013: Single Environmental Authorisation (*autorizzazione unica ambientale*) (AUA), Legislative Decree no. 49/2014: waste electrical and electronic equipment (WEEE), Legislative Decree no. 166/2010: ambient air quality and Legislative Decree no. 188/2008: waste batteries and accumulators (WBA) and others[43]. The high efficiency of the implementation of ISO 14001: 2015 resulted from the setting of strict time regimes by the accreditation body. The companies carried out this adaptation process with the support of accredited bodies, which had to plan verification for the first certification, supervision or renewal only in accordance with the new standards a few months after the announcement of the new edition of the standard. A few months before the deadline for implementing this standard, the certified companies' transition to new standards was 93% for ISO 14001: 2015[44].

4. EFFECT OF ISO 14001 IMPLEMENTATION ON THE STATE OF THE ENVIRONMENT IN THE EU

Sustainable development is the fundamental EU legal principle in environmental protection. This provides a practical guideline for companies in setting environmental goals. However, the functioning of companies based on ensuring this principle and the related removal of existing negative effects on environmental quality requires multiple actions. The legislation at European community level already encourages organizations to participate in eco-management and auditing and to implement stringent

[43] Eva Maschietto, and Maggiore Besseghini, "Environmental law and practice in Italy: overview," Practical Law, Law stated as at July 1, 2020, Thomson Reuters, accessed October 10, 2020, https://uk.practicallaw.thomsonreuters.com/1-503-2608? transitionType=Default&contextData=(sc.Default)&firstPage=true.

[44] ACCREDIA, "The Italian Accreditation Body," accessed October 10, 2020, https://www.accredia.it/en/.

environmental indicators that validate their environmental and sustainable development reports[45].

Company ISO 14001 efficiency in improving environmental performance has four components: "better compliance with regulations, better management of environmental impact, reduced environmental risk and reduced pollution"[46]. Authors confirm that ISO certification provides improved environmental outcomes. However, the standard establishes only obligation to comply with applicable regulations and does not identify environmental performance in the certification process. The compliance noted with environmental protection regulations indicates appropriate organization adaptation to ongoing change in environmental protection requirements[47].

European Union Regulation 1221/2009 obliges organizations to report environmental performance using key efficiency indicators (KPIs) for relevant environmental aspects. The parliament considers that the following aspects have significant negative environmental impact; hazardous and non-hazardous waste production, building cleaning and maintenance, electricity and water consumption and the transport of people and goods. The EU environmental policy reflects the vision of the ISO 14001 environmental systems and considers the main problems and environmental goals. It also provides a framework for setting and reviewing the environmental goals that organizations must adopt. These should then be adapted to the nature, scale and impact of their activities, products and services

[45] Communication from the Commission to the European Parliament and the Council, Strategy for the sustainable competitiveness of the construction sector and its enterprises, COM/2012/0433 final */Brussels, July 31, 2012 COM(2012) 433 final; European Commission, Commission Staff Working Document, Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress, Brussels, 20.3.2019 SWD(2019) 143 final.

[46] Magali A. Delmas, *Government credible commitment and investment in environmental management standards ISO 14001 in Europe and in the United States* (Santa Barbara, Bren School of Environmental Science and Management University of California, 2003).

[47] Janusz Myszczyn, "The environmental management systems as a opportunity in promoting sustainable development with special emphasis on the community eco-management and audit scheme (EMAS)," *Folia Pomeranae Universitatis Technologiae Stetinensis, Oeconomica* 333(86)1 (2017): 68, http://doi.org/ 10.21005/oe.2017.86.1.07.

that affect the environment[48]. This policy includes the commitment to continuously improve these systems, to prevent pollution and to comply with all relevant legal requirements. To help ensure these outcomes, the 2017 Annex III Action Plan was adopted by the Environmental Management Steering Committee on the 9th of December 2016. An example of the required Key Environmental Performance Indicators (KPIs), established by the European Parliament and the organization's results achieved after the implementation of ISO 14001 in 2012-2016: (1) CO_2 emission was to be reduced by 27.3%; (2) electricity consumption reduction by 4% from 12.4% between 2012 and 2016; and the EU Parliament's 4% target was vastly exceeded; (3) gas, heating oil and district heating consumption reduction by 5% between 2012 and 2016; (4) the quantity of office and kitchen waste decreased by 28.62% during the monitored period, significantly exceeding the 5% target, and (5) annual waste recycling objective was 68% in 2016; although the 65.8% recycling recorded in 2016 is just below the 68% objective, this was exceeded in 2014 with 68.9% and in 2015 with 77.4%[49]. The European Environment Agency (EEA) is an agency of the European Union established by Council Regulation (EEC) No 1210/90[50], which established the European Environment Information and Observation Network (EIONET). One of the main tasks of the EEA under this mandate is to publish a report on the state of the environment, trends in environmental change and related prospects every 5 years. Based

[48] European Commission, Commission Decision (EU) 2017/2285 of 6 December 2017 Amending the user's guide setting out the steps needed to participate in EMAS, under Regulation (EC) 1221/2009 of the European Parliament and of the Council on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) (notified under document C(2017) 8072) (OJ L 328/38, 12.12.2017).

[49] Report of the European Parliament Environmental Statement for 2016, pursuant to Annex IV to Regulation (EC) 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC. Adopted by the Steering Committee for Environmental Management Verified by on June 20-29, 2017 on September 26, 2017.

[50] Council Regulation (EEC) No 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network (OJ L 120, 11.5.1990, p. 1–6).

on the analysis of data from this institution, in Italy in 1990-2018 there was a decrease in greenhouse gas emission by 11.4% and in Poland by 10.7%[51]. In 2017, in terms of energy consumption in Italy, the largest share was recorded for natural gas and oil and petroleum products, and next for renewables and biofuels, while in Poland – for solid fossil fuels, oil and petroleum products and natural gas. The final consumption in comparison with other EU countries at the level in Italy was 180 and in Poland 190 kWh per thousand EUR. The circular material use rate in 2010-2016 in Italy increased from 11 to 17.2%, and in Poland it was constant at 10.2%. Domestic material waste production in 2018 in Italy was 8 and in Poland 20 tonnes per capita. In addition, the highest waste treatment recycling rate in the EU was recorded for Italy at 78.9% with landfills at 14% while in Poland at an average level of 46.2% with landfills 28%[52]. Therefore, the implementation of the ISO standard in more organizations can be associated with an increase in environmental quality indicators in a given country, as can be seen in the case of Italy, which achieves higher greenhouse gas reduction rates, lower energy consumption and waste production, and the highest in Europe regarding waste recycling.

5. CONCLUSIONS

The ISO 14001 environmental management system standard is an instrument of international environmental protection law introduced by *sof law* regulations. It is a voluntary system that does not constitute a part of any legal order, however it is legally enforced because it is introduced by normative acts of international environmental law[53]. The benefits to be derived from the ISO 14001 international standard are increasingly

[51] EUROSTAT, "European Environmental Agency, Greenhouse gas emission statistics – emission inventories," accessed October 10, 2020, https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1180.pdf.

[52] EUROSTAT, "Energy, transport and environment statistics – 2019 edition," accessed October 10, 2020, https://ec.europa.eu/eurostat/en/web/products-statistical-books/-/KS-DK-19-001.

[53] Tomasz Bojar-Fijałkowski, "System ISO 14001 jako instrument międzynarodowego prawa ochrony środowiska," 57.

recognized and welcomed by organizations in European Union countries. The implementation rate is therefore increasing.

Available literature gives four reasons why every organization should consider environmental factors in its management processes (1) organizations must be ethical because they have a duty of care for the earth, their employees, customers and all living things. For example, ISO 14001 and similar standards will prevent firms giving employees silicosis in the future and limit smog that sometimes hides the sky, (2) economic forces today demand preserving precious resources, generating less waste and dangerous substances and using less energy. All these measures will reduce costs and the likelihood of sanctions, (3) all organizations are facing increased legal obligations as governments are now forced to step in and counteract past environmental disasters and (4) commercial interests will continue to drive organizations to be more competitive[54]. Acceptance of ISO 14001 principles forces organizations to bear the costs of certification and also those associated with changing management structure and implementing environmentally friendly procedures. These involve at least reducing harmful emissions, remediation of previous environmental damage and ensuring safe future emissions, waste disposal and water and sewage management[55].

The procedures for the implementation of ISO 14001 must comply with the regulations and guidelines set out in EU Regulations 761/2001 and 1221/2009 and national legislation on certification, and most importantly, the activities of the organization applying for the certificate must comply with national legislation on environmental protection. The implementation of the ISO 14001 standard requires a procedure and certification by a legally authorized accreditation body. Enterprises have been obliged to implement the new edition of the ISO 14001: 2015 standard within

[54] Alina Matuszak-Flejszman, "Benefits of Environmental Management System in Polish Companies Compliant with ISO 14001," *Polish Journal of Environmental Studies* 18(3) (2009): 413.

[55] Urszula Szymańska, and Ewa Mikołajczak, "Międzynarodowa norma ISO 14001 w procesie zarządzania zasobami środowiska," *Ochrona Środowiska* 2 (2001): 25; Elżbieta Zębek, "Obowiązki i działania przedsiębiorstw w zakresie ochrony środowiska przed odpadami niebezpiecznymi," in *Prawo ochrony środowiska jako warunek prowadzenia działalności gospodarczej*, ed. Janina Ciechanowicz-McLean, and Tomasz Bojar-Fijałkowski (Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego, 2009), 118.

3 years. The key change in the new edition is the inclusion of the risk management requirement in the environmental management system, which will undoubtedly improve the effectiveness of environmental protection. When analyzing the implementation process of this environmental standard in Poland and Italy, it can be concluded that the procedures are similar to the international ISO standards specified in national documents. However, a slightly different approach was noted in implementing ISO 14001: 2015. In Poland, the risk assessment for all elements of the environment has been taken into account in detail, while in Italy the new edition of ISO 14001 focuses in particular on the "Life Cycle" for management system certification, taking into account the economic, environmental and social impacts associated with product design and development at every stage life cycle. The main task is to set up an organization to analyze the "causes" that affect its ability to achieve what has been previously determined. Thus, here is a broader approach to the analysis of the causes, which includes not only environmental conditions and their changes, but also the technological, financial, political and social context. In addition, special attention is paid to the continuous improvement of the environmental performance of the organization itself. A greater number of legal acts in Poland has also been noticed, and thus greater dispersion of legal regulations in the field of environmental protection, which does not always favor their effective application. The multitude of regulations in Poland, greater than in Italy, does not prove that the implementation of the ISO 14001 system is more effective. The data shows that the accreditation body in Italy imposed greater time regimes for the implementation of the new ISO 14001: 2015 standard and was modeled directly on the international (Canadian) guidelines indicated in the ISO 14001: 2015 document package with a commentary on explaining many issues in this regard.

As previously mentioned, immeasurable improvement in environmental quality is more important than measurable economic benefits. Sustainable development aids in ensuring a clean environment which is essential for all life, including present and future human generations. In addition, although economic viability necessitates the use of environmental resources, observation of the principles of environmental law, as ISO 14001, maintains precautionary and preventative emission reduction targets. In conclusion, the ISO 14001 management system provides an excellent

instrument for environmental quality improvement and it also supports the principle of "polluter pays". Evidence of ISO 14001 worth is proven herein by the increase in the number of European Union organizations which have decided to implement this environmental management system. Finally, this ISO 14001 uptake correlates with the enhanced environmental quality witnessed in the decreased noxious gas emissions and increased waste recycling which are improving our air, soil and water quality. Based on the data on Environmental Performance Indicators in the analyzed countries in the years after the implementation of ISO 14001, it is possible to link the implementation of the standard in a larger number of organizations with an increase in environmental quality indicators in a given country, which can be seen in the case of Italy, which achieves higher greenhouse gas reduction indicators, lower consumption of energy and less waste production, and the highest in Europe for waste recycling. Therefore, a postulate arises here, in order to achieve an improvement in the quality of the environment in the EU, enterprises should be supported through simpler procedures for the implementation of environmental standards and encouraged by the introduction of more encouraging legal and administrative instruments.

REFERENCES

Abraham, Martin. *Sustainable Technologies*. Amsterdam: Elsevier, 2017.

Balan, George, and Dragolea Laris. "Implementation of environmental management systems – ISO 14001 or EMAS." *Academic Research International*, no. 4(3) (2013).

Bojar-Fijałkowski, Tomasz. "Wykonanie Rozporządzenia (WE) 761/2001 przez organy administracji publicznej w Polsce." In *Finansowanie zadań administracji publicznej ze środków UE*, edited by Marcin Szewczak, and Małgorzata Ganczar, 9–20. Lublin: Wydawnictwo KUL, 2001.

Bojar-Fijałkowski, Tomasz. "System ISO 14001 jako instrument międzynarodowego prawa ochrony środowiska." *Europejski Przegląd Prawa i Stosunków Międzynarodowych*, no. 4(19) (2011): 48–65.

Bojar-Fijałkowski, Tomasz. "Ocena skuteczności zarządzania środowiskowego jako instrumentu prawa ochrony środowiska na przykładzie EMAS." In *Dekada*

harmonizacji w prawie ochrony środowiska, edited by Maciej Rudnicki, Anna Haładyj, and Kamila Sobieraj, 219–240. Lublin: Wydawnictwo KUL, 2011.

Bojar-Fijałkowski, Tomasz. "Elementy zarządzania jakością i zarządzania środowiskowego wspomagające nowe zarządzanie publiczne w administracji." In *Pomiędzy zarządzaniem publicznym a ogólną teorią administracji*, edited by Ewa Jasiuk, Gerard P. Maj, Kamil Sikora, and Stanisław Wrzosek, 127–144. Radom: Wydawnictwo WSH, 2013.

Bojar-Fijałkowski, Tomasz. "Nauka o zarządzaniu w gospodarczym prawie ochrony środowiska – analiza wybranych pojęć." In *Zasada zrównoważonego rozwoju w wymiarze gospodarczym i ekonomicznych*, edited by Bartosz Rakoczy, Karolina Karpus, Małgorzata Szalewska, and Martyna Walas, 199–210. Toruń: Wydawnictwo UMK, 2015.

Bojar-Fijałkowski, Tomasz. "Odpowiedzialność prawna organizacji z certyfikowanym systemem EMAS." In *Odpowiedzialność za środowisko w ujęciu normatywnym*, edited by Elżbieta Zębek, and Michał Hejbudzki, 235–250. Olsztyn: Wydawnictwo UWM, 2017.

Bukowski, Zbigniew. *Prawo międzynarodowe a ochrona środowiska*. Toruń: Dom Organizatora, 2005.

Ciechanowicz, Janina. *Międzynarodowe prawo ochrony środowiska*. Warsaw: PWN, 1999.

Ciechanowicz-McLean, Janina. *Ochrona środowiska w działalności gospodarczej*. Warsaw: LexisNexis, 2003.

Ciechanowicz-McLean, Janina, and Tomasz Bojar-Fijałkowski, ed. *Gospodarcze prawo środowiska*. Gdańsk: Wydawnictwo UG, 2009.

Ciechanowicz-McLean, Janina. *Prawo ochrony i zarządzania środowiskiem*. 2nd ed. Warsaw: Difin, 2019.

Ciravegna, Luis M., and Martins da Fonseca. "ISO 14001:2015: An Improved Tool for Sustainability." *Journal of Industrial Engineering and Management*, no. 8(1) (2015). http://dx.doi.org/10.3926/jiem.1298.

Delmas, Magali A. *Government credible commitment and investment in environmental management standards ISO 14001 in Europe and in the United States*. Santa Barbara: Bren School of Environmental Science and Management University of California, 2003.

Farmer, Alfred M., ed. *Manual of European Environmental Policy*. London: Routledge, 2012.

Heras-Saizarbitoria Inaki, ed., *ISO 9001, ISO 14001, and New Management Standards.*

Cham: Springer International Publishing, 2018. https://doi.org/10.1007/978-3-319- 5675-5.

Jabłońska-Bonca, Jolanta. *Wstęp do nauk prawnych*. Poznań: Ars Boni Et Aequi, 1996.

Kenig-Witkowska, Maria M. *Prawo środowiska Unii Europejskiej*. Warsaw: Lex a Wolters Kluwer business, 2012.

Kivi, Krislin, and Natalja Gurvits. "Eco-Management and Audit Scheme (EMAS) implementation in the European Union: survey of Estonian certified organisations." *European Integration Studies*, no. 11 (2017): 211–219. http://10.5755/j01.eis.0.11.17982.

Larsson, Stefan. *ISO 14001:2015, Six Dimensions of Sustainability*. 2015. http:/artykuł%20EMAs/normy%20EMAS%20i%20ISO/2015-12-02-Stefan-Larsson.pdf.

Maschietto, Eva, and Maggiore Besseghini. *Environmental law and practice in Italy: overview, Practical Law*, Law stated as at July, 1, 2020. Thomson Reuters, 2020. https://uk.practicallaw.thomsonreuters.com/1-503-2608? transitionType=Default&context Data=(sc.Default)&firstPage=true.

Matuszak-Flejszman, Alina. "Benefits of Environmental Management System in Polish Companies Compliant with ISO 14001." *Polish Journal of Environmental Studies*, no. 18(3) (2009).

McCreary, James H. "ISO 14001 A framework for coordinating existing environmental management responsibilities." *CIM Bulletin*, no. 89 (1996).

Murray, Paula C. "The international environmental management standard, ISO 14000: a non-tariff barrier or a step to an emerging global environmental policy?." *Penn Law: Legal Scholarship Repository*, no. 18(2) (2014): 577–615.

Myszczyn, Janusz. "The environmental management systems as a opportunity in promoting sustainable development with special emphasis on the community eco-management and audit scheme (EMAS)." *Folia Pomeranae Universitatis Technologiae Stetinensis, Oeconomica*, no. 333(86)1 (2017): 63–78. http://doi.org/10.21005/oe. 2017.86.1.07.

Pachura, Piotr, and Agnieszka Ociepa-Kubicka. "Management and audit scheme (EMAS) functioning on the example of the water supply and sewerage joint stock company of the Częstochowa District." *Polish Journal of Management Studies*, no. 10(2) (2014): 143–150.

Psomas, Evangelos, Christos V. Fotopoulos, and Dimitrios P. Kafetzopoulos. "Motives, difficulties and benefits in implementing the ISO 14001 Environmental Management System." *Management of Environmental Quality An International Journal*, no. 22(4) (2011). http://doi.org/10.1108/14777831111136090.

Szymańska, Urszula, and Ewa Mikołajczak. "Międzynarodowa norma ISO 14001 w procesie zarządzania zasobami środowiska." *Ochrona Środowiska*, no. 2 (2001): 21–27.

Testa, Francesco, Fabio Iraldo, and Tiberio Daddi. "The Effectiveness of EMAS as a Management Tool: A Key Role for the Internalization of Environmental Practices." *Organization & Environment*, no. 31(1) (2017): 48–69. http://doi.org/10.1177 %2F10860 26616687609.

Tourais, Patricia, and Nuno Videira. "Why, How and What do Organizations Achieve with the Implementation of Environmental Management Systems? – Lessons from a Comprehensive Review on the Eco-Management and Audit Scheme." *Sustainability*, no. 8(3) (2016): 283. http://doi.org/10.3390/su8030283.

Vomero, Reisa Aline, Fabio de Oliveira Nevesa, Suzana Eda Hikichia, Eduardo Gomes Salgadoa, and Luiz Alberto Beijoa. "Is ISO 14001 certification really good to the company? a critical analysis." *Production Systematic Review*, no. 28 (2018). https://doi.org/10.1590 /0103-6513.20180073.

Wilson, Raymond C. "What you don't know can definitely hurt you." *Pollution Engineering*, no. 30(12) (1998): 33–34.

Zębek, Elżbieta. "Obowiązki i działania przedsiębiorstw w zakresie ochrony środowiska przed odpadami niebezpiecznymi." In *Prawo ochrony środowiska jako warunek prowadzenia działalności gospodarczej*, edited by Janina Ciechanowicz-McLean, and Tomasz Bojar-Fijałkowski, 113–120. Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego, 2009.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLIV
YEAR 2021, ISSUE 1, pp. 81–102
DOI: https://doi.org/10.31743/recl.10650

LEGAL INSTRUMENTS IN THE DEVELOPMENT OF ELECTROMOBILITY IN THE EUROPEAN UNION, WITH PARTICULAR FOCUS ON PLANNING ACTS

*Katarzyna Kokocińska**

ABSTRACT

This paper discusses and characterizes actions undertaken for the development of electromobility as part of the incentive policy pursued by the state. In most European countries, development of the electric vehicle market is largely contingent on electromobility policies, but the measures adopted with a view to supporting it do not always yield the expected results. Effectiveness of supporting actions depends on the cooperation of entities which are responsible for development and social-economic cohesion. The situation requires a multi-level approach to the implementation of electromobility development policy, consolidation of actions of various stakeholder groups, and one common direction in the national development of the electric vehicle market. Development planning acts are the very instruments which serve to enhance the efficacy of efforts undertaken jointly by public administration bodies and foster partnership-based relations between state, regional, and local authorities and their social and economic partners.

Keywords: planning, development policy, electromobility, legal instruments of support

---

The article is a result of a fellowship at the CEU San Pablo University in Madrid (December 2019), as part of the author's studies into integrated development programming.

* Dr. habil. Katarzyna Kokocińska, Associate Professor, Faculty of Law and Administration, Chair of Public Economic Law, Adam Mickiewicz University Poznań; correspondence address: Al. Niepodległości 53, 61-714 Poznań, Poland; e-mail: katarzyna.kokocinska@amu.edu.pl; https://orcid.org/0000-0002-1008-3538.

1. INTRODUCTION

Among the priorities of state activity affirmed in strategic documents of development policy – including the key mid-term strategy for national development[1] – considerable emphasis is placed on the need to modernize transport systems by supporting transport which relies on alternative fuels. Thus formulated, the aim of the national development policy corresponds with the activities of the Union institutions, oriented towards climate protection and modernization of the world economy within the paradigm of sustainable development.[2] New challenges that the European Union and its member state face at this point in the wake of economic or humanitarian crises as well as emergencies such as the COVID-19 pandemic still do not result in major changes to the current policies of EU institutions. Protection of the climate and efforts for sustainable development will remain priorities of the Union, which is endorsed in e.g. the European Green Deal[3], promulgated in late 2019 and early 2020. EGD is "a new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use. It also aims to protect, conserve and enhance the EU's natural capital, and protect the health and well-being of citizens from environment-related risks and impact."[4] The specific goals on which the implementation of the EGD depends include the necessity to modernize transport systems by further reduction of the emission of greenhouse gases and pollution generated by transport,

[1] Resolution No. 8 of the Council of Ministers of 14 February 2017 on the adoption of Strategy for Responsible Development to 2020 (with a perspective to 2030), Monitor Polski of 2017, item 260, which replaced the medium-term strategy adopted under the expired resolution of the Council of Ministers of 25 September 2012 on the adoption of the National Development Strategy 2020 (Monitor Polski of 2012, item 882).

[2] Communication of the European Commission CARS 2020: Action Plan for a competitive and sustainable automotive industry in Europe of 8.11.2012, COM(2012) 636 final; White Paper. Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system of 28.3.2011, COM(2011) 144 final.

[3] European Commission, The European Green Deal, COM(2019) 640 final.

[4] European Commission, The European Green Deal, COM(2019) 640 final, p. 1.

as well as encouraging member states to increased effort in developing alternative fuels infrastructure.[5] Apart from suggesting a framework action plan which, among other things, encompassed assessment of legislative options to boost the production and supply of sustainable alternative fuels for the different transport modes, review of the Alternative Fuels Infrastructure Directive and the Trans European Network – Transport Regulation, and a proposal for more stringent air pollutant emissions standards for combustion-engine vehicles, the Commission stressed the necessity to increase effectiveness of action through improved collaboration, coordination and achieving synergy. Also, one of the priorities of the EU policy adopted in *EUROPE 2020. A strategy for smart, sustainable and inclusive growth*[6], namely increased competitiveness and energy security that more efficient use of resources and energy can ensure, will be pursued within the new financial perspective and cohesion policy for 2021–2027. When drafting a range of regulations concerned with the disbursement of funds from its budget, the EU stated that it is a priority to strive for a "more environmentally friendly, emissions-free Europe", which implements in-

[5] The Communication from the Commission asserts that "the EU should in parallel ramp-up the production and deployment of sustainable alternative transport fuels." It is expected that "by 2025, about 1 million public recharging and refuelling stations will be needed for the 13 million zero- and low-emission vehicles expected on European roads. The Commission will support the deployment of public recharging and refuelling points where persistent gaps exist, notably for long-distance travel and in less densely populated areas, and will launch as quickly as possible a new funding call to support this. These steps will complement the measures taken at national level". Furthermore, it is declared that "the Commission will propose more stringent air pollutant emissions standards for combustion-engine vehicles. The Commission will also propose to revise by June 2021 the legislation on CO2 emission performance standards for cars and vans, to ensure a clear pathway from 2025 onwards towards zero-emission mobility. In parallel, it will consider applying European emissions trading to road transport, as a complement to existing and future CO2 emission performance standards for vehicles."

[6] Communication from the Commission EUROPE 2020. A strategy for smart, sustainable and inclusive growth, Brussels 2010, COM (2010) 2020 final. There are three underlying priorities of the strategy, expressed in the attributes of the prospective development: smart, sustainable and socially inclusive; all these elements are interrelated and reflect the envisioned social market economy in Europe of the 21st century. The goals declared there are relevant and representative for all member states; if accomplished, they are expected to enhance economic, social, and territorial cohesion and solidarity.

ternational agreements, invests funds in the transformation of the energy sector and renewable energy sources as well as addresses climate change. In the proposal relating to long-term financial framework for 2021–2027, the European Commission advanced the ambitious goal of taking climate issues into account in all EU programmes.[7] The priority in question has become one of goals and challenges of development that Poland is committed to tackle in 2021-2027[8].

Union policies with respect to climate and energy are also reflected in legislative efforts. The Electromobility and Alternative Fuels Act of 11 January 2018[9], which implements the solutions adopted in the Directive 2014/94/EU of the European Parliament and of the Council of 22 October 2014 on the deployment of alternative fuels infrastructure[10], is simultaneously fully consistent with the tenets of the national policy for the development of the electromobility sector.[11] The enactment constitutes a comprehensive legal instrument which determines the principles governing the development and functioning of alternative fuels infrastructure, stipulates the obligations of public entities in that respect as well as the information obligations, establishes conditions for the functioning of clean transport zones and defines how planning documents should be drafted and implemented. From the standpoint of this study, it is also significant that the legislator determined the manner in which public tasks are to be carried out by the entities obligated to discharge them. Nationals structures are thus required to cooperate with Union institutions; furthermore government-level bodies are to collaborate with territorial self-gov-

[7] https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:52018PC0375.

[8] Assumptions of the Partnership Agreement for 2021–2027 https://www.funduszeeuropejskie.gov.pl/media/76917/zup2021-2027.pdf.

[9] Journal of Laws 2018, item 317 as amended, hereinafter as "Electromobility Act".

[10] Official Journal of the European Union L 307, 28 October 2014, 1.

[11] Piotr Lissoń notes that "…in the light of provisions contained in Directive 2014/94, electromobility (alternatively *electro-mobility*, or *e-mobility*; Ger. *Elektromobilität*, Fr. *L'électromobilité*) denotes use of electric energy as a source of propulsion of wheeled vehicles or watercraft (vessels or ships) used in inland or maritime transport. However, the meaning of the term is not specified in the definitions in Article 2, Directive 2014/94."; Piotr Lissoń, "Zadania gminy w zakresie elektromobilności," in *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, ed. Katarzyna Kokocińska, and Jarosław Kola (Warsaw: C.H. Beck, 2019), 57–86.

ernment units which, for their part, need to encourage private entities to become involved.

Development-oriented efforts also include introduction of an incentive policy, in that the state puts subjectively and objectively varied supporting measures (instruments) into effect to promote the development of a given sector of national economy. As it follows from studies conducted in most European countries, the development of the electric vehicle market largely depends on the policies supporting electromobility.[12] Moreover, it is noted that the applied supporting measures do not always yield the expected results.[13] Genuinely effective supporting actions often hinge on an element which the EU strongly emphasizes, namely cooperation of the entities responsible for development and social-economic cohesion. The situation requires multi-level approach to the implementation of electromobility development policy[14], consolidation of actions of various stakeholder groups, and adoption of one, common direction in the national development of the electric vehicle market.[15]

This paper aims to demonstrate that achieving cohesion of actions undertaken by public administration bodies to promote development of electromobility and integration of efforts to accomplish strategic development goals are not feasible if cooperation is not adequately structured. Here, development planning acts provide the instruments to enhance the efficacy

---

[12] The issue is discussed more broadly by Ivan Kondratenko, "Najlepsze europejskie praktyki w zakresie wspierania rozwoju elektromobilności," in *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, eds. Katarzyna Kokocińska, and Jarosław Kola (Warsaw: C.H. Beck, 2019), 39–56.

[13] See Michał Kania, "Umowy w sprawach zamówień publicznych oraz umowy o partnerstwie publiczno-prywatnym jako forma wsparcia elektromobilności," in *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, eds. Katarzyna Kokocińska, and Jarosław Kola (Warsaw: C.H. Beck, 2019), 165–190.

[14] See Katarzyna Kokocińska, "Spójność działań organów władzy wykonawczej na rzecz rozwoju (na przykładzie sektora elektromobilności)," in *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, eds. Katarzyna Kokocińska, and Jarosław Kola (Warsaw: C.H. Beck, 2019), 3–16.

[15] Recital 14, Directive 2014/94/EU: "Fuels included in the national policy frameworks should be eligible for Union and national support measures for alternative fuels infrastructure, in order to focus public support on a coordinated internal market development towards Union-wide mobility using alternative fuels vehicles and vessels."

of cooperative actions of public administration bodies and build partnership-based relations between state, regional, and local authorities and their social and economic partners.

For this reason, this study examines the measures to support the development of electromobility while focusing on the instruments such as development strategies, plans or programmes which the doctrine of public law qualifies as means of intervention that serve the state to perform its function of economic planning.[16]

2. SOCIAL AND ECONOMIC CIRCUMSTANCES OF TRANSFORMATION TOWARDS ELECTROMOBILITY

The established goals of state policy provide the foundation for implementing a system to support a particular sector; with regard to the electromobility sector, the solutions are determined by the objectives of Union policy. From the EU standpoint, the outcomes of applied supporting measures are a vital matter, whereas their type and nature are dictated by internal, national circumstances (next to economic goals, social and environmental conditions are particularly stressed). The selection of measures (e.g. more socially or economically oriented), their intensity, scope of application, accessibility (public or private entity) follow from the adopted national policy which specifies the goals relating to the development of electromobility. Also, the obligation to pursue Union policy to mitigate climate change bears crucially on the implementation of instruments to support development of electromobility.[17] However, for certain countries that key objective goes hand in hand with other critical goals, such as reduction of CO_2 emissions (Norway), increased economic competitiveness

[16] Thus e.g. Kazimierz Strzyczkowski, *Prawo gospodarcze publiczne* (Warsaw: Lexis Nexis, 2011), 184 ff.

[17] Mona Hymel, Larry Kreiser, Janet E. Milne and Hope Ashiabor, eds., *Innovation Addressing Climate Changes Challenges. Market-based Perspectives*, Critical Issues in Environmental Taxation, Volume XX (Cheltenham, UK Northampton, MA, USA: Edward Elgar Publishing Limited, 2018).

(Germany[18], France), lower dependence on fossil fuels (the Netherlands) or higher energy security, which the governments of EU states often invoke.[19]

Striving for clean and sustainable transport is declared a priority by most states[20], and the prospect of reduced pollution and greenhouse gas emissions associated with the electric fleet is the main reason to exchange combustion engine vehicles for their electric alternatives. Nonetheless, studies show that this is not universally applicable, as it has been demonstrated[21] that in countries where coal remains the principal energy source, using an electric vehicle is more harmful than using a vehicle powered by a combustion engine.[22] Consequently, the role of electric vehicles in facilitating daily life in large urban centres – cited as a prime cause behind the development of electromobility – loses some of its significance. Still, other advantages of electric vehicles are mentioned, such as reduced noise[23] and air pollution, all as part of the concept of smart cities in which transport does meet the requirements of sustainability, meaning that it is socially inclusive, environmentally friendly, safe, integrated and technologically oriented.[24] Public awareness and readiness with respect to transi-

[18] Die Bundesregierung, German Federal Government's National Electromobility Development Plan, Berlin 2009, https://www.bmu.de/fileadmin/bmu-import/files/pdfs/allgemein/application/pdf/nep_09_bmu_en_bf.pdf, last access: 15.8.2020.

[19] See: Ivan Kondratenko, "Najlepsze europejskie praktyki w zakresie wspierania rozwoju elektromobilności," in *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, eds. Katarzyna Kokocińska, and Jarosław Kola (Warsaw: C.H. Beck, 2019), 39–56.

[20] Marta Villar Ezcurra, *Cambio Climático, Fiscalidad y Energía en los Estados Unidos: Una batería de ejemplos a considerer* (Cizur Menor, Navarra: Civitas, 2012).

[21] Lindsay Wilson, Shades of Green: Electric Cars' Carbon Emissions around the Globe; Reducing the environmental impact of road construction Technical Report, ARRB Group Limited: Vermont South, Australia 2013.

[22] Marcin Łuszczyk, "Uwagi do planu rozwoju elektromobilności w Polsce," *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu*, no. 491 (2017): 274–282.

[23] Marta Villar Ezcurra, "Noise pollution taxes: a possibility to explore," in *Innovation Addressing Climate Changes Challenges. Market-based Perspectives*, eds. Mona Hymel, Larry Kreiser, Janet E. Milne, and Hope Ashiabor, Critical Issues in Environmental Taxation, Volume XX (Cheltenham, UK Northampton, MA, USA: Edward Elgar Publishing Limited, 2018), 113–126.

[24] Technologies which contribute to the development of smart cities include autonomous vehicles, fast bus transportation or shared mobility in the form of e.g. carsharing, carpooling, ridesharing, ridesourcing.

tion towards electromobility are also crucial, which necessitates educational action as well.

In view of the environmental, social and economic circumstances, specific categories of public entities in EU member states are obligated to contribute to the development of national infrastructure that enables electricity-powered vehicles to be widely used. In Poland, this includes the obligation arising under Article 32 of the Electromobility Act, which imposes the requirement of developing location plans for publicly accessible charging stations. The legislator also determines a range of tasks associated with public investment in the sector, as well as enjoins public entities to promote it through a policy of model institutions, as central and local administration are obligated to electrify their fleet (Articles 30 and 35). To a considerable degree, obligations relating to electromobility – including those mentioned above – lie with the territorial self-government units, district authorities in the main, which are expected to set up charging stations (Article 60) and establish particular rules of using electric vehicles in road traffic (Article 39). This is due to the fact that district-level public bodies possess competences with regard to planning and regulations, as well as carry out tasks which include provision and organization of services for the community, or traffic organization and management.[25]

Still, the obligatory contribution of public entities to the development of electromobility is not the dominant notion or direction of transformation towards electromobility. According to Directive 2014/94/EU, member states should have the ability to implement its provisions primarily by means of a broad array of incentives and regulatory or non-regulatory measures, acting in close cooperation with entities in the private sector, which should play the key role in supporting the development of alternative fuels infrastructure (Recital 15).

[25] Piotr Lissoń, "Zadania gminy w zakresie elektromobilności," in *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, eds. Katarzyna Kokocińska, and Jarosław Kola (Warsaw: C.H. Beck, 2019), 57–86.

3. LEGAL CHARACTERIZATION OF MEASURES (INSTRUMENTS) TO SUPPORT THE DEVELOPMENT OF ELECTROMOBILITY

In further disquisition, it is presumed after K. Strzyczkowski that the term "measure of action" (or, alternatively, "instrument") denotes any behaviour that may be within the purview of public administration.[26] Such a broad approach to the behaviours of administration makes it possible to employ a very capacious legal category which comprises diverse forms of influence that the state (public administration) may exert on the economy. When classifying measures (instruments) that are brought to bear in the domain of economy, they tend to be distinguished into general and individual measures. The first category encompasses measures applicable to the entire economy or particular industry, such as strategies, plans, and programmes. The second includes those measures which are intended or addressed to a specific entity. Next to orders, proscriptions, and fines, measures which have an economic impact are employed increasingly often. Given the perspective adopted here, the development of electromobility is fostered primarily by positive intervention measures, both those intended for specific entities (e.g. economic incentives such as subsidies or grants), as well as general ones, by means of which the state discharges its function of economic planning. It is precisely planning instruments which are given a prominent role in building the EU's alternative fuels market; this matter is discussed in greater detail further on.

Polish legislator follows the universal trend, having recognized the necessity to employ supporting measures with the development of electromobility in mind, and emulating the solutions adopted in other European countries which seek to accomplish the goals of Union policy in this respect. After all, Directive 2014/94/EU allows member states to implement its provisions using a broad range of incentives to launch investment in sustainable transport and support the development of a continuous network of alternative fuels infrastructure in the European Union.[27] It has

[26] Strzyczkowski, *Prawo publiczne gospodarcze*, 197 ff.

[27] Supporting measures for the alternative fuels infrastructure are applied in accordance with the rules of state aid contained in the Treaty on the Functioning of the European Union (Article 107 et seq.).

to be underlined that the pace, the kind and the scope of support differs across most European states, due to which the emergence of the European electric vehicle market is not a uniform process.

The national legislator opted for an intermediate regulation, introducing individual supporting instruments which have an indirect effect on the conduct of its addressees. The measures, referred to as economic impact measures, motivate one to particular behaviours, i.e. behaviours which are deemed desirable from the standpoint of state policy (and goals specified in policy acts). In the doctrine, such a behaviour of the state bodies which intervene into the economic domain to accomplish economic goals is described as regulation through stimulus.[28]

Among the instruments which support the development of electromobility, in other words instruments geared towards the accomplishment of public goals (which in this case means increasing the number of electric vehicles) which have been intended for individual entities (businesses, other enterprises, consumers), financial stimuli are predominant.[29] Article 51 of the Electromobility Act introduces an amendment to the Personal Income Tax Act of 26 July 1991[30], extending the range of exclusions from tax deductible expenses. In accordance with the amendment, write-offs in respect of wear on passenger car, made pursuant to the rules set forth in Article 22(a)-22(o) of the Personal Income Tax Act, in the part calculated on the value of the car exceeding the amount of PLN 225,000 for passenger car which is an electric vehicle within the meaning of Article 2(12) of the Act, and PLN 150,000 for other passenger cars, are no longer deemed tax-deductible expenses. Also, Article 52 of the Electromobility Act amends the Corporate Income Tax Act of 15 February 1992[31], whose amended Ar-

[28] Strzyczkowski, *Prawo publiczne gospodarcze*, 200.

[29] See: Claudia Kettner and Daniela Kletzan – Slaming, "Vehicle taxation in EU Member States," in *Innovation Addressing Climate Changes Challenges. Market-based Perspectives*, eds. Mona Hymel, Larry Kreiser, Janet E. Milne, and Hope Ashiabor, Critical Issues in Environmental Taxation (Cheltenham, UK Northampton, MA, USA: Edward Elgar Publishing Limited, 2018), 83–97; Celina Kacperski and Florian Kutzner, "Financial and symbolic incentives promote 'green' charging choices," *Transportation Research Part F: Traffic Psychology and Behaviour*, vol. 69 (2020): 151–158.

[30] Journal of Laws of 2018, item 200, 2017, item 2494 and 2018, items 106 and 138.

[31] Consolidated text: Journal of Laws 2019, item 865.

ticle 16(1)(4) excludes write-offs in respect of wear on passenger car, made pursuant to the rules set forth in Article 16(a)-16(m) of the Corporate Income Tax Act, in the part calculated on the value of the car exceeding the amount of PLN 225,000 for passenger car which is an electric vehicle within the meaning of Article 2(12) of the Act, and PLN 150,000 for other passenger cars from tax deductible expenses. The Electromobility and Alternative Fuels Act also establishes preferential conditions for the purchasers of electric and hydrogen-powered vehicles, who are exempt from excise duties. Furthermore, under Article 163(a) of the Excise Duty Act, temporary exemption is granted until 1 February 2021 for hybrid passenger cars, in which electric energy is supplied by connecting to an external source of energy. Another instrument which encourages purchase of electric vehicles is the possibility of obtaining subsidies, whether by entrepreneurs or persons who do not engage in any business activity. It is noted that this form of support most often convinces one to purchase an electric vehicle.[32] In many European countries, all-electric vehicles are exempt from pollution tax (Austria), vehicle property tax (Bulgaria, Spain), as well as registration fee (France, Greece, the Netherlands). Yet another measure is exemption from road tax, its considerable reduction, or increased limits for amortization write-offs (Czech Republic, Cyprus).

In their efforts to increase the share of electric vehicles on the national market, EU states employ non-financial supporting measures as well. They may not have as great an impact as the financial incentives, but they do influence the decision to purchase an electric vehicle because of the convenience it involves (especially in large urban centres). The most frequently encountered non-financial instruments include the ability to park or use toll roads free of charge, as well as use bus lanes.[33]

---

[32] Petra Zsuzsa Lěvay, Yaniss Drossinos and Christian Thiel, "The effect of fiscal incentives on market penetration of electric vehicles: A pairwise comparison of total cost of ownership," *Energy Policy*, vol. 105 (2017): 524–533.

[33] Norway is widely considered a country whose policy to promote electromobility proves the most successful. The policy was launched in the 1990, as Norway abolished import duties on electric vehicles. Then in 1996, owners of electric vehicles were made exempt from vehicle property tax, while since 1997 persons driving electricity-powered vehicles no longer had to pay on toll roads (chiefly motorways and expressways). In 1999, special registration plates were introduced for electric vehicles, while their owners would not be

The degree and extent to which financial and non-financial measures are applied depends on numerous factors; in the main these include the capacity of the energy system, the state of road infrastructure or social-economic benefits. It is underlined that an intensive policy needs to be pursued if the aim is to increase the number of alternatively-powered vehicles, enhance their price competitiveness, and create more preferential conditions for their use. The benefits one quotes, such as the anticipated improvement of the quality of life in the cities as a result of diminished air and noise pollution generated by urban transport, development of a technology market with a potential to compete internationally, boosting electric bus segment at enterprise level and the related research-and-development potential, or reduction of overall ownership costs in city transport during the entire life-cycle of a bus, are sufficient reasons for a state to opt for an active policy in that respect.[34]

4. PLANNING INSTRUMENTS FOR THE DEVELOPMENT OF ELECTROMOBILITY

Although member states themselves select appropriate supporting instruments and decide on the intensity of their application, Directive 2014/94/EU stresses the need for a coordinated policy of introducing alternative fuels in order to prevent fragmentation of the internal market. It is thus asserted that "coordinated policy frameworks of all Member

charged for parking in urban areas. Another important element of the electromobility policy was partial reduction of the vehicle tax for businesses using electric vehicles, introduced in 2000. In 2001, VAT on electric vehicles was abolished. The subsequent milestone was allowing electric vehicles to use bus lanes in 2003. A programme to create a network of charging stations launched in 2008, while as of 2009, persons driving an electric vehicle are not required to pay the fare for the car when travelling by ferry. In 2011, small-sized electric vehicles were permitted to park diagonally. Finally, the year 2012 saw a cross-party agreement, according to which concessions and reliefs for owners of electric vehicles would remain in place until 1 January 2018, after which date they would be gradually rescinded.

[34] Sebastian Bobowski and Jan Gola, "Elektromobilność w systemie zamówień publicznych – aspekty prawne i ekonomiczne," in *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, eds. Katarzyna Kokocińska, and Jarosław Kola (Warsaw: C.H. Beck, 2019), 57–86.

States should therefore provide the long-term security required for private and public investment in vehicle and fuel technology, and infrastructure build-up, in order to serve the dual purpose of minimising dependence on oil and mitigating the environmental impact of transport."[35] For this reason, Directive 2014/94/UE establishes an obligation for all member states to introduce national policy frameworks, which determine general and specific national goals and define actions relating to the development of the alternative fuels market. These objectives, along with the minimal requirements of the alternative fuels infrastructure that include charging stations for electric vehicles, natural gas (LNG and CNG) and hydrogen refuelling points and common technical specifications of such points, as well as user information requirements, are to be met by means of national policy frameworks in all member states.

The above means that the provisions of Union law obligate member states to undertake planning activities which on the one hand serve EU-wide coordination and, on the other, well-thought-out (planned) execution at the national level.[36] At the same time, they do not dictate any solutions regarding structural organization and the modes of action which aim to

[35] Recital (10), Directive 2014/94/EU.

[36] On the institution of planning see e.g.: Stanisław Biernat, "Zagadnienia prawne procedury planowania gospodarczego," *Krakowskie Studia Prawnicze*, Year VI (1973): 37–55; Adam Chełmoński, "Instytucje administracyjnoprawne w zarządzaniu gospodarką narodową," in *System Prawa Administracyjnego*, vol. IV, ed. Teresa Rabska (Wrocław–Warsaw–Cracow–Gdańsk: Ossolineum, 1980), 449–462; Janusz Łętowski, "Miejsce i funkcje planowania w działalności administracji," *SP* 1983, vol. 1 (75): 3–34; Andrzej Bator, *Normy planowania gospodarczego w systemie prawa* (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 1992); Kazimierz Strzyczkowski, *Administracyjnoprawne instytucje planowania* (Warsaw: Wydawnictwo Uniwersytetu Warszawskiego, 1985); idem: *Podstawowe problemy prawne planowania* (Warsaw: Państwowe Wydawnictwo Naukowe 1990); Jerzy Supernat, *Zarządzanie* (Wrocław: Wydawnictwo Colonia Limited, 2005); Marek Szydło, "Planowanie indykatywne jako funkcja państwa wobec gospodarki," in *Funkcje współczesnej administracji gospodarczej. Księga dedykowana Profesor Teresie Rabskiej*, ed. Bożena Popowska (Poznań: Wydawnictwo Poznańskie, 2006), 143–162; Peter Badura, *Das Planungsermessen Und die rechtsstaatliche Funktion des Allgemeinen Verwaltungsrechts, Festschrift zum 25 Jährigen Bestechen des Bayerisches Verfassungsgerichstshof* (Booberg–Verlag, 1972); Eberhard Schmidt-Assmann, "Planung unter dem Grundgesetz," *Die öffentliche Verwaltung*, no. 16 (1974): 541–547; Marek Górski and Joanna Kierzkowska, "Strategie, plany i programy," in *Prawo administracyjne materialne*, vol. 7, *System Prawa Admin-*

achieve the goals stated in the directive, but underline the need to ensure the capacity to carry out tasks arising from it. Much emphasis is placed on coordinated approach by designating planning acts (national policy frameworks), exchange of information and best practices between member states and focusing public support on development (Recitals 10-14, Directive 2014/94/EU).[37]

Directive 2014/94/EU provides that "national policy frameworks may consist of several plans, strategies or other planning documentation developed separately or in an integrated manner, or in another form, and at the administrative level decided upon by the Member States" (Recital 13), while the scope of national policy frameworks is related to the development of alternative fuels market (Article 3). Consequently, a national policy framework constitutes an act of development policy, therefore the principles and conditions of its drafting and adoption, its objective scope as well as its status in the legal order is determined by national laws. Certain authors are of the opinion that the drafting and adoption of a national policy framework relies on the provisions of the Electromobility Act.[38] However, in the Polish legal system, the rules of according to which state policy acts (planning acts which should be construed as strategic development programming acts) are prepared and adopted are set out in a dedicated piece of legislation, namely the Act on the Principles of Development Policy (APDP) of 6 December 2006.[39]

---

istracyjnego, eds. Roman Hauser, Zygmunt Niewiadomski and Andrzej Wróbel (Warsaw: C.H. Beck, 2012), 172–220 and literature cited therein.

[37] Directive 2014/94/EU asserts that it is necessary for the member states to organize actions at state level in a manner ensuring effective implementation of the policy, in accordance with the normative standard (e.g. Recitals 10, 12, 13, 14 and 65 of the Directive), further supported by the Treaty principles of subsidiarity, partnership, and proportionality, and relying on the paradigm of integrated approach to development. Concerning that issue see: *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, eds. Herwig Hofmann, Alexsander H. Türk (Cheltenham: Edward Elgar, 2009); Katarzyna Kokocińska, "Integrated programming in national development," *Ruch Prawniczy Ekonomiczny i Socjologiczny*, vol. 4 (2019): 139–149.

[38] Thus for instance: Arkadiusz Ratajczak, "Komentarz do art. 43-44," in *Ustawa o elektromobilności i paliwach alternatywnych. Komentarz*, ed. Mariusz Swora (Warsaw: C.H. Beck, 2019), 233.

[39] Consolidated text: Journal of Laws of 2019, item 1295 as amended.

The act is concerned with the state's tasks in an area which remains fundamentally significant for other spheres of activity of public authorities, as it involves all aspects pertaining to national development and cohesion in each statutory dimension, whether objective (field- or industry-related), and spatial (territorial). The aim of development policy is to ensure continuous and sustainable development of the country, promote social, economic, regional and spatial cohesion, enhance competitiveness of the economy, and create new workplaces at national, regional, or local level.[40] The legal mechanisms of development policy which the act establishes, also where it applies to public planning, should be considered a mainstay of the actions of the executive and thus superior to the remaining areas of planning. The relevance of development programming governed by the APDP derives both from the subjective scope of development policy, which includes the Council of Ministers and territorial government units, as well as from the aforementioned goal of programming, its territorial extent and absence of any limitations as to the subject matter covered by programming. Furthermore, it needs to be noted that programming documents (development strategies and programmes), adopted as part of development policy for different temporal horizons at various levels of territorial division and in various spheres of social-economic life, are to be interlinked according to the APDP. After all, actions undertaken by public entities and their administration must be harmonized to contribute to the development of the country and its cohesion.[41]

The national system of strategic development planning is well aligned with the legal order.[42] The Act on the Principles of Development Policy expressly refers to the connection between preparation of development

[40] Katarzyna Kokocińska, *Prawny mechanizm prowadzenia polityki rozwoju w zdecentralizowanych strukturach władzy publicznej* (Poznań: Wydawnictwo Naukowe UAM, 2014).

[41] The matter is discussed more broadly in Katarzyna Kokocińska, *Prawny mechanizm prowadzenia polityki rozwoju w zdecentralizowanych strukturach władzy publicznej* (Poznań: Wydawnictwo Naukowe UAM, 2014).

[42] The author deliberately refers to the analyzed process as "development programming" instead of "planning", because the former term is used by the legislator. For instance, in Article 3(a) APDP mentions undertaking initiative with respect to strategic programming, including development policy or regional policy programming; Article 9 cites EU programming periods, Article 13 states that development strategies define, in particular,

programming acts and their implementation, between taking decisions as to how development should be designed and putting them into practice. The system of strategic programming for development policy consists of development strategies[43] (whose character may be defined as indicative[44]), which are then put into practice by means of operational-implementative documents, i.e. programmes[45] (aimed at influencing). Planning documents associated with development policy are functionally coupled with legal acts which provide for measures to encourage specific entities (e.g. in the domain of electromobility development) to pursue goals stated in those documents. Thus, their function is to motivate one to make certain states of affair a reality.[46]

State strategy for development has been laid out in a mid-term strategy of national development, i.e. Strategy for Responsible Development. Vision, Principles and Priorities of Development in the Economic, Social, and Spatial Dimensions to 2020 (with a perspective to 2030). In the latter document, the Council of Ministers assumes cohesion growth in the social, economic, environmental and territorial dimension, underlining the significance of intervention in the horizontal areas, including digitization, transport, energy, and the environment. These development

the diagnosis of situation within the scope covered by strategic programming, while Article 35(a) speaks of effective coordination of programming.

[43] Pursuant to Article 9 of the Act on the Principles of Development Policy, development strategies include long-term national development strategy, mid-term national development strategy, as well as other development strategies, which represent documents defining basic conditions, goals and directions of development applicable to sectors, domains, regions or spatial development, including metropolitan and functional areas.

[44] Such documents contain information on trends, challenges, concepts and scenarios of social-economic development seen in a particular perspective, thus indicating objectives, directions and priorities of development. They reflect the state of public affairs in a given sphere with respect to particular dimensions (national, territorial, or domain-specific), and determine the directions of development policy (and state intervention) which are the most likely to accomplish strategic goals.

[45] The content of programmes which focus on specific objectives and actions undertaken to accomplish those (simultaneously specifying applicable sources of financing), permits them to be classified as programming documents of the influencing type.

[46] Thus e.g. Marek Szydło, "Planowanie indykatywne jako funkcja państwa wobec gospodarki," in *Funkcje współczesnej administracji gospodarczej. Księga dedykowana profesor Teresie Rabskiej*, ed. B. Popowska (Poznań: Wydawnictwo Poznańskie, 2006): 143–162.

landmarks are to be reached through key initiatives, defined as flagship and strategic projects.[47] One of the major strategic projects is the Electromobility Development Programme, whose framework (as it follows from the Strategy) was to be "(…) established in the act on electromobility and other alternative fuels in transport". The programme was expected to be carried out by concentrating public means on the development of that market. According to the Council of Ministers, such a scope of action would make it possible to meet the objectives of the Electromobility Development Plan in Poland "Energy for the Future"[48] and the national policy framework for the development of alternative fuels infrastructure.[49] National policy framework should be classified among development strategies referred to in Article 9(3) APDP, i.e. other development strategies defined as documents which set out basic conditions, aims, and directions of development with respect to sectors, domains (as well as regions or spatial development, including metropolitan and functional areas). The content of strategies spans e.g. the diagnosis of situation in the area to which strategic programming applies whilst allowing for environmental factors as well as spatial and territorial differences, provide forecasts of development trends in the period covered by the strategy, designate goals of development and directions of intervention along with desired benchmarks of accomplishment (with spatial and territorial differences factored in), determine the modes of reaching such goals and establish the financial framework. The above means that state policy to promote

[47] See: Katarzyna Kokocińska, "Spójność działań organów władzy wykonawczej na rzecz rozwoju – na przykładzie sektora elektromobilności," in *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, eds. Katarzyna Kokocińska, and Jarosław Kola (Warsaw: C.H. Beck, 2019), 3–18; Agnieszka Chwiałkowska and Jarosław Kola, "Wpływ ustawy o elektromobilności i paliwach alternatywnych na realizację umów na wykonywanie zadania publicznego – rozważania nad spójnością działań prawodawcy," in *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, eds. Katarzyna Kokocińska, and Jarosław Kola (Warsaw: C.H. Beck, 2019), 87–114.

[48] Document adopted by the Council of Ministers on 16 March 2017, file:///C:/Users/User/Downloads/DIT_PRE_PL%20(1).pdf; last access: 15.8.2020.

[49] Document adopted by the Council of Ministers on 29 March 2017, https://www.gov.pl/documents/33372/436746/DRO_Krajowe_ramy_polityki_rozwoju_infrastruktury_paliw_alternatywnych.pdf/ae190d89-d530-cada-4b61-4d3c1b36a4a3; last access: 15.8.2020).

the development of electromobility is constructed on multiple levels and takes both national and EU circumstances into consideration.

Directive 2014/94/EU stresses the necessity for coordinated and cohesive action which is founded on cooperation and partnership. Therefore, national policy framework represents a legal instrument linked to development programming acts which manifest the development policy pursued by public authorities. In addition, national policy framework constitutes an important element of the policy adopted by the EU to promote growth of the alternative fuels market in the transport sector and encourage development of the required infrastructure, which means that it is thoroughly aligned with the document system of EU development planning. After all, it needs to be emphasized that the essence of policy acts pertaining to development-oriented action lies in the statutory requirement of cohesion, which should be met by means of cooperation.

National policy framework offers an instrument thanks to which actions undertaken at the national level (involving exercise of public powers at various tiers) by diverse entities (public and private) can be cohesive, in keeping with the intentions of the Union and national legislators. The cohesion will also be retained with respect to regulations at EU level which, among other things, should be attributed to the fact that policy frameworks are developed in a procedure based on cooperation and consultation. On the other hand, the Electromobility Act merely establishes the scope of regulation of the national policy framework with regard to Union laws, and determines the procedure in which the national framework should be drafted and adopted, confining itself to stating which bodies are competent in that respect.[50]

[50] Pursuant to Article 4 of the Electromobility Act, minister in charge of climate is responsible for affairs responsibility developing the national framework; it is then adopted by the Council of Ministers by way of resolution and promulgated in Monitor Polski, the Official Journal of the Republic of Poland. Immediately upon being approved by the Council of Ministers, the minister in charge of climate affairs conveys the framework to the European Commission.

5. CONCLUSIONS

It follows from the deliberations above that planning documents play a particular role in the pursuit of development policy in the area of electromobility. The import of planning acts as measures (instruments) employed by public administration bodies lies in their content, as they indicate goals for the future and the manner in which they are to be achieved. Their legal nature is no less relevant. Planning acts include planning norms, in other words norms which specify goals and directions of action. Given the issues under discussion, it must be underlined that these norms only program actions and means to carry them out, being no more than stimuli to undertake them. By designating goals and directions of actions, the norms contained in planning acts are addressed to public administration but they do not constitute their source of competence; instead, they indicate the manner in which such bodies are to make use of the latter.[51] They require implementation, which should be seen as a requirement of cooperative compliance with other legal acts.[52]

Planning acts also include national policy frameworks, the foremost instrument that Union and national bodies employ to influence the development of electromobility. The elements covered by the national framework in accordance with Article 43(2) of the Electromobility Act, such as assessments of the current state and future development of the alternative fuels market in the transport sector, the national goal in terms of the number of charging points installed at publicly accessible charging stations, the national goal in terms of natural gas refuelling points, actions required to accomplish those national goals, or actions to support the development of alternative fuels infrastructure in public collective transport services, are simultaneously a legal instrument applied to coordinate actions on the market of alternative fuels infrastructure. Coordination of actions of relevant bodies in the infrastructure sectors is a component of integrated approach in public policy as it serves to deliver complementary actions,

[51] Thus e.g.: Eugeniusz Ochendowski, *Prawo administracyjne. Część ogólna* (Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa, 2009).

[52] Teresa Rabska, *Prawo administracyjne stosunków gospodarczych* (Warsaw – Poznań: Państwowe Wydawnictwo Naukowe, 1977).

enabling the latter to be carried out (from the programming stage to execution/implementation) in a way which ensures that common strategic goals are achieved.

National policy frameworks provide an instrument which makes it possible for actions taken at various levels of public administration to be cohesive, thus conforming with the state of affairs envisioned in EU and national legislation. This cohesion on the part of public bodies engaging in development-oriented actions is a real challenge in view of the many public interests that need to be taken into account[53]. Integrated approach in the undertakings of public administration[54] means concentrated efforts geared towards accomplishment of strategic development goals. At present, electromobility is precisely one of the areas which acquires strategic significance for development by virtue of policy acts dedicated to that issue.

REFERENCES

Bator, Andrzej. *Normy planowania gospodarczego w systemie prawa*. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 1992.

Badura, Peter. *Das Planungsermessen Und die rechtsstaatliche Funktion des Allgemeinen Verwaltungsrechts, Festschrift zum 25 Jährigen Bestechen des Bayerisches Verfassungsgerichstshof*. Booberg–Verlag, 1972.

Biernat, Stanisław. "Zagadnienia prawne procedury planowania gospodarczego." *Krakowskie Studia Prawnicze*, Year VI (1973): 37–55.

Bobowski, Sebastian, and Jan Gola. "Elektromobilność w systemie zamówień publicznych – aspekty prawne i ekonomiczne." In *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, edited by Katarzyna Kokocińska, and Jarosław Kola, 57–86. Warsaw: C.H. Beck, 2019.

Chełmoński, Adam. "Instytucje administracyjnoprawne w zarządzaniu gospodarką narodową." In *System Prawa Administracyjnego*, vol. IV, edited by Teresa Rabska, 449–462. Wrocław–Warsaw–Cracow–Gdańsk: Ossolineum, 1980.

Chwiałkowska, Agnieszka, and Jarosław Kola. "Wpływ ustawy o elektromobilności i paliwach alternatywnych na realizację umów na wykonywanie zadania

[53] Davies Huw, "Exploring the Impact of Policy on Road Transport in 2050," *Johnson Matthey Technology Review*, no. 64 (2020): 253.

[54] Katarzyna Kokocińska, "Integrated programming in national development," *Ruch Prawniczy Ekonomiczny i Socjologiczny*, vol. 4 (2019): 139–149.

publicznego – rozważania nad spójnością działań prawodawcy." In *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, edited by Katarzyna Kokocińska, and Jarosław Kola, 87–114. Warsaw: C.H. Beck, 2019.

Górski, Marek, and Joanna Kierzkowska. "Strategie, plany i programy." In *Prawo administracyjne materialne*, vol. 7, *System Prawa Administracyjnego*, edited by Roman Hauser, Zygmunt Niewiadomski, and Andrzej Wróbel, 172–220. Warsaw: C.H. Beck, 2012.

Huw, Davies. "Exploring the Impact of Policy on Road Transport in 2050." *Johnson Matthey Technology Review*, no. 64 (2020): 252–262.

Hymel, Mona, Larry Kreiser, Janet E. Milne, and Hope Ashiabor, ed. *Innovation Addressing Climate Changes Challenges. Market-based Perspectives*. Critical Issues in Environmental Taxation, Volume XX, Edward Elgar Publishing Limited, 2018.

Hofmann, Herwig, and Alexsander H. Türk, ed. *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*. Cheltenham, UK Northampton, MA, USA: Edward Elgar Publishing Limited, 2009.

Lissoń, Piotr. "Zadania gminy w zakresie elektromobilności." In *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, edited by Katarzyna Kokocińska, and Jarosław Kola, 57–86. Warsaw: C.H. Beck, 2019.

Kacperski, Celina, and Florian Kutzner. "Financial and symbolic incentives promote 'green' charging choices." *Transportation Research Part F: Traffic Psychology and Behaviour*, vol. 69 (2020): 151–158.

Kania, Michał. "Umowy w sprawach zamówień publicznych oraz umowy o partnerstwie publiczno-prywatnym jako forma wsparcia elektromobilności." In *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, edited by Katarzyna Kokocińska, and Jarosław Kola, 165–190. Warsaw: C.H. Beck, 2019.

Kettner, Claudia, and Daniela Kletzan – Slaming. "Vehicle taxation in EU Member States." In *Innovation Addressing Climate Changes Challenges. Market-based Perspectives*, edited by Mona Hymel, Larry Kreiser, Janet E. Milne and Hope Ashiabor, Critical Issues in Environmental Taxation, Volume XX, 83–97. Cheltenham, UK Northampton, MA, USA: Edward Elgar Publishing Limited, 2018.

Kondratenko, Ivan. "Najlepsze europejskie praktyki w zakresie wspierania rozwoju elektromobilności." In *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, edited by Katarzyna Kokocińska, and Jarosław Kola, 39–56. Warsaw: C.H. Beck, 2019.

Kokocińska, Katarzyna. "Spójność działań organów władzy wykonawczej na rzecz rozwoju (na przykładzie sektora elektromobilności)." In *Prawne i ekonomiczne aspekty rozwoju elektromobilności*, edited by Katarzyna Kokocińska, and Jarosław Kola, 3–16. Warsaw: C.H. Beck, 2019.

Kokocińska, Katarzyna. "Integrated programming in national development." *Ruch Prawniczy Ekonomiczny i Socjologiczny*, vol. 4 (2019): 139–149.

Kokocińska, Katarzyna. *Prawny mechanizm prowadzenia polityki rozwoju w zdecentralizowanych strukturach władzy publicznej*. Poznań: Wydawnictwo Naukowe UAM, 2014.

Lěvay, Petra, Ioannis Drossinos, and Christian Thiel. "The effect of fiscal incentives on market penetration of electric vehicles: A pairwise comparision of total cost of ownership." *Energy Policy*, vol. 105 (2017): 524–533.

Łętowski, Janusz. "Miejsce u funkcje planowania w działalności administracji." *SP*, vol. 1 (75) (1983).

Łuszczyk, Marcin. "Uwagi do planu rozwoju elektromobilności w Polsce." *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu*, no. 491 (2017): 274–282.

Schmidt-Assmann, Eberhard. "Planung unter dem Grundgesetz." *Die Öffenfliche Verwaltung*, no. 16 (1974): 541–547.

Strzyczkowski, Kazimierz. *Prawo gospodarcze publiczne*. Warsaw: Lexis Nexis, 2011.

Strzyczkowski, Kazimierz. *Podstawowe problemy prawne planowania*. Warsaw: Państwowe Wydawnictwo Naukowe, 1990.

Strzyczkowski, Kazimierz. *Administracyjnoprawne instytucje planowania*. Warsaw: Wydawnictwo Uniwersytetu Warszawskiego, 1985.

Supernat, Jerzy. *Zarządzanie*. Wrocław: Wydawnictwo Colonia Limited, 2005.

Szydło, Marek. "Planowanie indykatywne jako funkcja państwa wobec gospodarki." In *Funkcje współczesnej administracji gospodarczej. Księga dedykowana profesor Teresie Rabskiej*, edited by Bożena Popowska, 143–162. Poznań: Wydawnictwo Poznańskie, 2006.

Wilson, Lindsay. *Shades of Green: Electric Cars' Carbon Emissions around the Globe; Reducing the environmental impact of road construction Technical Report*. ARRB Group Limited: Vermont South, Australia, 2013.

Villar Ezcurra, Marta. *Cambio Climático, Fiscalidad y Energía en los Estados Unidos: Una batería de ejemplos a considerer*. Cizur Menor, Navarra: Civitas, 2012.

Villar Ezcurra, Marta. "Noise pollution taxes: a possibility to explore." In *Innovation Addressing Climate Changes Challenges. Market-based Perspectives*, edited by Mona Hymel, Larry Kreiser, Janet E. Milne, and Hope Ashiabor, Critical Issues in Environmental Taxation, Volume XX, 113–126. Edward Elgar Publishing Limited, 2018.

Ochendowski, Eugeniusz. *Prawo administracyjne. Część ogólna*. Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa, 2009.

Rabska, Teresa. *Prawo administracyjne stosunków gospodarczych*. Warsaw – Poznań: Państwowe Wydawnictwo Naukowe, 1977.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLIV
YEAR 2021, ISSUE 1, pp. 103–126
DOI: https://doi.org/10.31743/recl.11495

FINANCIAL-LAW PROBLEMS IN PROVIDING FREE-OF-CHARGE LEGAL AID IN POLAND. LEGAL COMPARATIVE ASPECTS

*Marzena Świstak**

ABSTRACT

Free-of-charge legal assistance remains one of the key areas of state activity. However, the system created is not optimal and its formal, organisational and financial framework needs to be modified. This concerns not only an increase in the amounts of funding, but also the quality of services provided. Not only is the choice of the legal and organisational model of providing legal assistance doubtful, but also the subjective and objective scope of the statutory regulations (including in the context of interpretation of tax regulations) raise some objections. As a postulate for the law as it should stand *de lege ferenda*), it is proposed to make appropriate legislative changes, aimed not only at clarifying the content of the provisions, or removing the legislative inconsistencies found, but also at thoroughly considering a remodelling of the legal assistance system in Poland. The above conclusions were formulated against the backdrop of the organisational and financial legal solutions adopted in other countries. To this end, the author used the formal-dogmatic and comparative legal methods, and also resorted to the historical method as an auxiliary method, in order to show the evolution of the institution under analysis.

Keywords: legal aid, attorney-at-law, advocate, tax on goods and services, personal income tax

* Dr. Marzena Świstak, Assistant Professor, Faculty of Law and Administration, Maria Curie–Skłodowska University in Lublin; correspondence address: Pl. Marii Curie–Skłodowskiej 5, 20-031 Lublin, Poland; e-mail: marzena.swistak@poczta.umcs.lublin.pl; https://orcid.org/0000-0002-3910-6019.

1. INTRODUCTION

Legal aid is an area of activity of the state, which enjoys a constant broad social demand. In view of the above, it is all the more important to ensure efficient organisational and financial legal mechanisms in this area. It is also important to build an organisational and information framework to ensure that citizens can indeed exercise their constitutional rights effectively. A discussion has been held for many years about the optimal model of legal and civic counselling in Poland, which would meet citizens' needs and, at the same time, ensure the practical effectiveness of the regulations.[1] As a result of legislative work, an Act was adopted on 5 August 2015, under which, as of 1 January 2016, eligible persons may benefit from an organised system of legal aid.[2]

It should be pointed out as a side note that in comparison with other European (and even non-European) countries, Poland is quite late in structuring the system of legal aid. In many countries, legal solutions in this area were already effective in the 1950s.[3] This does not mean, however, that there were no solutions in Poland for providing legal aid to citizens

[1] In more detail: Łukasz Bojarski and Grzegorz Wiaderek, "Starania o ustawową regulację dostępu do nieodpłatnej pomocy prawnej – historia i stan obecny," in *Obywatel i prawo IV*, ed. Agata Winiarska (Warsaw: Instytut Spraw Publicznych, 2009), 13–39 and Łukasz Bojarski, "Dostęp do nieodpłatnej pomocy prawnej – propozycje zmian," in *Obywatel i prawo III*, ed. Agata Winiarska (Warsaw: Instytut Spraw Publicznych, 2008), 34–67; Jolanta Arcimowicz, *Potencjał społeczny poradnictwa prawnego i obywatelskiego. Analizy i opinie #132* (Warsaw: Instytut Spraw Publicznych, 2013), 1–5; Grzegorz Chimiak, *Poradnictwo prawne i obywatelskie w Polsce. Stan obecny i wizje przyszłości* (Warsaw: Instytut Spraw Publicznych, 2013), 111–113.

[2] Act on Legal Aid, Free-of-charge Civic Counselling and Legal Education of 5 August 2015, Journal of Laws 2019, item 294 as amended, hereinafter referred to as the Legal Aid Act. Due to the entry of the Legal Aid Act into force, a total of 1524 consultancy points were established (2 per one powiat [district, county] at a minimum) to provide legal aid for 5 days a week on average for at least 4 hours a day (Article 8(3) of the Legal Aid Act). It is pointed out that a total of 1520 consultancy points are to operate in 2021 (1 point per 25 thousand inhabitants), Szymon Cydzik, "Ministerstwo zwiększa środki na pomoc prawną," accessed November 8, 2020, https://prawo.gazetaprawna.pl/artykuly/1484690,pomoc-prawna-kwota-bazowa-2021.html.

[3] E.g. The legal aid law of 1969 applicable in the South Africa, the Access to Justice Act of 1999 (and the previous act of 1949) applicable in England and Wales, or the legal

before the Legal Aid Act was enacted. There was a mechanism of *ex officio* legal assistance provided by advocates and attorneys-at-law at the stage of judicial proceedings (or pre-trial proceedings), once the court found that the applicant met the relevant conditions.[4] At the out-of-court stage, legal consultancy tasks were carried out by some public administration institutions and bodies, as well as non-governmental organizations which provided free legal assistance as part of their statutory tasks.[5]

Due to the scope of this study, the inclusion of systemic issues regulated in the Polish Legal Aid Act (both in organisational and financial terms) is limited to its first pillar, i.e. provision of legal aid. Selected aspects of this area of state activity (taking into account the comparative perspective) are shown in the context of the tax-law consequences of actions taken by professional legal representatives (attorneys-at-law and advocates). The financing background has also been taken into account, which undoubtedly translates into the shape of the model adopted for the provision of legal aid and the quality of services provided.

2. LEGAL AID PROVISION SYSTEM – A MODEL APPROACH

It cannot be ignored that, since the stage of legislative work until the entry of the Legal Aid Act into force, there were constantly critical voices not only about the model of legal aid itself, but also its subjective scope (the group of beneficiaries of legal aid) and objective scope (type and extent of services to be provided). The Polish Ombudsman pointed out that the catalogue of people entitled to receive free legal assistance was incorrectly (too narrowly) outlined in it, which prevented the most deprived persons from using the assistance. Therefore, funds from the state budget

aid law of 1998 in Belgium, or the Legal Aid Act of 1994 (and the previous act of 1956) applicable in the Netherlands.

[4] Act of 14 June 1960, Code of Civil Procedure, consolidated text Journal of Laws 2020, item 1740 and Act of 6 June 1997, Code of Criminal Procedure, consolidated text Journal of Laws 2020, item 1740 and Act of 30 August 2002, Law on procedure before administrative courts, consolidated text Journal of Laws 2019, item 2325, as amended.

[5] e.g. social assistance institutions, National Labour Inspectorate, district consumer ombudsmen, MP offices.

allocated to the implementation of this programme are not used with full efficiency. Moreover, it was found that a single-tier structure of legal aid (limited to pre-trial proceedings) was not the optimal solution for an efficient and effective legal aid system.[6]

In this context, it should also be noted that the amendments to the Act to date have not led to a major remodelling of the legal aid system in Poland. Although the circle of beneficiaries and the objective scope of legal aid have been expanded, it has not been decided to build a robust, well-managed and centralized legal aid system that would be based on the activities of a single body (institution) processing applications for legal aid at the pre-trial stage. Such solutions were adopted, for example, in France or the Scandinavian countries. There was also no institution administering the legal aid system, such as the *Legal Services Commission* operating in England and Wales.

Legal science distinguishes various models of legal aid (with the participation of professionals and various non-governmental organizations), which are fully (or mostly) financed from central or regional budgets. The following models are indicated: charity model, judicare model, welfare model, mixed models and models based on digitalisation. The criterion for distinguishing between the judicare model and the welfare model is the participation of the categories of persons involved in the provision of legal aid. In the welfare model, social and legal support is provided. In the judicare model, the emphasis is shifted to a procedural approach, and the service is provided by professionals (lawyers) who are paid for their services. In the welfare model, on the other hand, social preventive actions are emphasized so as to prevent arising legal problems.[7] The trends for automation and computerization of legal aid are visible in the model

[6] "Wystąpienie Rzecznika Praw Obywatelskich do Prezydenta RP z dnia 6 lipca 2017 r.," accessed November 8, 2020, https://www.rpo.gov.pl/pl/content/system-nieodplatnej-pomocy-prawnej-wymaga-zmian-rzecznik-pisze-w-tej-sprawie-do-prezydenta-rp.

[7] Michael Zander, "The First Wave," in *Access to Justice and the Welfare State*, ed. Mauro Cappelletti (Florence: European University Institute, 1981), 27–47; James Gordley, "Variations on a Modern Theme," in *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies*, eds. Mauro Cappelletti, Earl Johnson and James Gordley (Milano: Dott. A. Giuffrè Editore, 1975).

based on the digitalisation of legal aid.[8] Therefore, it seems that the model of legal aid used in Polish conditions is based on the dominant participation of professionals (attorneys-at-law and advocates) and supplemented by the activity of non-governmental organizations.

Observing trends throughout Europe, it can be concluded that, of course, none of the models occurs in the socio-economic environment in its pure for. Rather mixed solutions dominate. It seems reasonable, however, to adopt for Polish conditions the option of two-tier legal aid with a single institution administering (coordinating) the provision of legal aid. It should be noted that the lack of centralisation in the system of providing legal aid could result in too much fragmentation. Such a phenomenon has been observed on a large scale, for example, in the decentralised Belgian system based on the operation of numerous autonomous institutions (Committees on Legal Aid) which operate based on rules set exclusively by themselves, which may lead not only to a weakening of the quality of the services provided, but even a breach of the guarantee of civil rights.[9]

Concerning the introduction of a two-tier model of legal aid system structure (as recommended by the Polish Ombudsman), these solutions are not isolated and are applied in such European countries as Germany, Belgium or Croatia.[10] It is also surprising that, until 2020, it was not decided to take into account the Ombudsman's proposal (reasonable one, as it seems) to allow providing advice through telecommunication means. Scholars in the field criticised the fact that due to the obligation to provide services in person at the legal aid consultation point, the possibility of providing free legal aid by telecommunication means was excluded.[11] It was only because of the SARS – CoV – 2 (COVID 19) pandemic that appro-

[8] Clayton Christensen, *The Innovator's Dilemma. When New Technologies Cause Great Firms to Fail* (Massachusetts: Harvard Business School Press, 1997).

[9] "National Report Belgium, ILAG, Helsinki 2011," accessed November 10, 2020, http://www.internationallegalaidgroup.org/.

[10] "Wystąpienie Rzecznika Praw Obywatelskich do Prezydenta RP z dnia 6 lipca 2017 r.," accessed November 8, 2020, https://www.rpo.gov.pl/pl/content/system-nieodplatnej-pomocy-prawnej-wymaga-zmian-rzecznik-pisze-w-tej-sprawie-do-prezydenta-rp.

[11] Mateusz Kaczocha, *Ustawa o nieodpłatnej pomocy prawnej oraz edukacji prawnej. Komentarz* (Warsaw: LEX el., 2016).

priate legislative amendments were made to the Act to digitalise the provision of legal aid (although this solution was not carried out correctly from the point of view of legislative technique).[12]

In organisational terms, the Polish system of legal aid is based on the cooperation of local government units and the self-government of legal professions with central government bodies supervising and financing the performance of tasks. Non-governmental organizations carrying out public benefit activities were also included. The agreements concluded between the powiat [district, county] (represented by the Powiat Board) and the municipalities (represented by the mayor) for the purpose of carrying out the task of providing free legal aid, specify in particular the place of provision of legal aid – legal aid consultation points, a schedule listing the days and times on which legal aid will be provided and the rules of cooperation in ensuring access to premises to lawyers providing free legal aid.[13] Where the powiat carries out the tasks by itself, the starosta (powiat administrator, district head) assigns the premises where the legal aid consultation points will be located and a schedule indicating the days and times during which the legal aid is to be provided.[14] The starosta is also responsible for disseminating knowledge about

[12] The Legal Aid Act was amended by adding Article 28a, with effect from 13 March 2020, which states that during an epidemic threat, during a state of epidemic or state of emergency, the provision of legal aid or the provision of free civic counselling may take place via telecommunication means and outside the premises of the consultation point. Importantly, before obtaining free assistance in the above manner, the beneficiary is also not obliged to submit a written declaration that he is not able to bear the costs of paid legal assistance, and a natural person who is a sole trader does not have to submit a declaration that he/she has not employed other persons in the last year. It can be mentioned as a side note that despite the legislative changes, the provisions of §3 and §4 of the Ordinance of the Minister of Justice of 21 December 2018 on legal aid and free civic counselling, Journal of Laws 2018, item 2492, as amended remained unchanged, i.e. it prohibits performing activities remotely. This ordinance has not been amended due to the epidemic situation. Of course, recognizing the primacy resulting from the principle of hierarchical sources of law, the statutory regulation prevails. However, taking into account the existing wording of the provisions of the ordinance, introducing appropriate changes in the relevant legal acts would be conducive to transparency and legal certainty.

[13] Article 9(1) of the Legal Aid Act.

[14] Article 9(3) of the Legal Aid Act.

the activities of the system of legal aid and free civic counselling among the residents of the powiat.[15]

The entity to organise the implementation of the task is powiat, which to this end concludes annual trilateral agreements (though bilateral may also take place) with the District Bar Council (for advocates) and the District Bar Association of Attorneys-at-Law, competent for the seat of the county authorities on the provision of legal aid in the area of the powiat concerned.[16] The bodies of the self-government of the professions of advocate and attorney-at-law have the status of entities cooperating with local government units in providing legal aid.[17] The agreements shall specify the number of advocates and attorneys-at-law who will provide legal aid (while ensuring their even participation in this task) at the designated consultation points, and the schedule of the days and times during which they will operate, the rules for the remuneration of lawyers providing free legal aid and the rules for the use of technical facilities at the consultation point. The District Bar Council and the District Bar Association of Attorneys-at-Law undertake, within the time limit specified in the agreement, to submit to the powiat the lists of advocates and attorneys-a-law and their deputies, who will provide legal aid at each consultation point, together with their contact details. They are selected through internal procedures based on rules of procedure adopted by the Polish Bar Council and The National Bar Council of Attorneys-at-Law concerning the rules for the appointment of advocates and attorneys-at-law to provide legal aid.[18]

The designation of advocates and attorneys-at-law for individual consultation points takes place under a resolution of the District Bar Council and the District Bar Association of Attorneys-at-Law. The Legal Aid Act has also provided for a mechanism for the staffing of legal aid consultation points in the absence of an agreement by 30 November of the year preced-

[15] Article 9(4) of the Legal Aid Act.

[16] Article 10(1) of the Legal Aid Act.

[17] Article 3 (5a) of the Act of 26 May 1982 Law on Advocates, hereinafter referred to as the Law on Advocates; Article 41 (5a) of the Act on Attorneys-at-Law, hereinafter referred to as the Act on Attorneys-at-Law.

[18] Article 58 (12)(l) the Law on Advocates and Article 60 (8)(g) of the Act on Attorneys-at-Law.

ing the year to which the agreement would relate. In such a situation, the starosta shall provide the presidents of bar councils with information on the municipal or powiat premises in which the legal aid consultation points will be located and a schedule indicating the days and times during which it will be provided. On the basis of this information, the president of the District Bar Council and the president of the District Bar Association of Attorneys-at-Law shall indicate advocates and attorneys-at-law to provide legal aid.[19]

The powiat concludes a contract with designated or assigned lawyers on the provision of legal aid by them. The essential terms of the contract are laid down in the Legal Aid Act Law and they also determine the tax status of these lawyers related to the provision of such services. The starosta has an obligation to provide conditions for the provision of legal advice, including to indicate the place and time of their provision, the manner of use of the premises made available and the facilities contained therein, and the rules on access to the database of legal acts enabling the provision of legal aid, as reflected in the content of the contracts concluded.[20]

The evaluation of the performance of legal aid tasks on the basis of collective information provided by starostas for a given year shall be carried out by the Minister of Justice by 30 June of the following year, and the results are communicated to the Joint Commission of the Central Government and Local Government, which is a forum for developing a common position of the central government and local government.[21] As indicated in the scholarly opinion, the review assumes, in particular, the assessment of the degree of task implementation, effectiveness, reliability and quality of task implementation, the correct use of public funds assigned for the implementation of the task, as well as verification of documentation kept for the task being carried out.

[19] Article 10(2) of the Legal Aid Act.

[20] Article 6 of the Legal Aid Act.

[21] Article 16 (1) and (2) of the Legal Aid Act; Article 2 (1) of the Act of 6 May 2005 on the Joint Commission of the Central Government and Local Government and representatives of the Republic of Poland in the European Committee of the Regions, Journal of Laws 2005, No. 90, item 759, as amended.

3. LEGAL AID – THE TAX-LAW ASPECTS

Pursuant to the general rule contained in the Legal Aid Act, legal advice in consultation points is provided in person by advocates and attorneys-at-law, and in particularly justified cases, trainee advocates or trainee attorneys-at-law by their authorization. In the light of the provisions of the Act, legal aid covers quite a wide spectrum of activities.[22] Scholars in the field point out that the substantive scope of legal aid falls within the notion of "providing legal aid" by an attorney-at-law and advocate.[23] The statutory definition of legal aid as a task of central government administration performed, as a rule, by powiats, is included in the constitutional legal basis[24] and is a solution to provide natural persons at the pre-trial stage with legal advice or indication of the possibility of an amicable settlement of a dispute, without the need to take legal action.

As a general rule, an attorney-at-law or advocate is obliged to "provide legal aid in person" (taking into account the possibility of using telecommunication tools during an epidemic). The Legal Aid Act provides that only in particularly justified cases will there be a basis for granting authorization to a trainee lawyer. The *ratio legis* of such a solution is the elimination of the reprehensible practice, which would consist in the fact that an attorney-at-law or advocate who has a contract with the powiat would be permanently substituted by a trainee attorney-at-law or a trainee advocate, who would have the appropriate authorization. This way of proceeding would circumvent the rules. However, the rules for granting the trainee lawyer an authorization in a situation when there are particularly justified circumstances have not been specified. The relevant regulations were not

[22] Article 3(1) of the Legal Aid Act.

[23] See Article 6(1) the Act on Attorneys-at-Law and Article 4(1) of the Act on Advocates. The same view in: Cezary Chabel, *Zakres przedmiotowy pojęcia „nieodpłatna pomoc prawna" oraz wyłączenia ustawowe* (Warsaw: LEX el., 2015). These conclusions with respect to the substantive scope of providing legal aid are confirmed by the content of model contracts posted on the website of the Ministry of Justice, especially §5 and §7 of the model contracts, accessed July 13, 2020, https://darmowapomocprawna.ms.gov.pl/pl/aktualnosci/news,7874,wzory-umow-na-swiadczenie-nieodplatnej pomocy.html.

[24] Article 166 (2) of the Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended.

referred to in this regard. In view of the above, it is appropriate to refer to the provisions of the acts relating to professional organizations of attorneys-at-law or advocates.[25] It is important to distinguish between a substitution power of attorney by an attorney-at-law or advocate, and an authorization for a trainee attorney-at-law or trainee advocate to substitute an attorney-at-law or advocate to a certain extent.

It should be mentioned that legal aid may also be provided by lawyers (who meet the requirements of the Act on Free Legal Assistance) from non-governmental organisations carrying out public benefit activities, including them, on an open tender basis, in the staffing of half the legal aid consultation points in the powiat.[26] Only in the case of failure to staff a legal aid point, which was entrusted by the powiat of a non-governmental organisation (as a result of a failure to select, conclude a contract with a non-governmental organisation by a starosta, or termination of the contract), the task of providing legal aid in this consultation point is transferred to advocates and attorneys-at-law.[27] The mixed system referred to above is not an exceptional solution adopted only in Poland. One could point, for example, to the solutions found in Belgium, where the legal aid system is composed of Legal Aid Committees, each consisting of: members of local bar associations, appointed by the presidents of local bar associations (half of the total number of the Committee), members of social welfare organisations (25% of the total number) and members of other organisations providing legal aid, such as consumer organisations (the remaining 25%).[28] There are also European solutions with a broader catalogue of entities entitled to provide legal aid than in Poland (e.g. Croatia, where trade unions and law clinics operating at universi-

[25] For more on the topic, see: Marzena Świstak, "Pełnomocnictwo substytucyjne a upoważnienie aplikanta do zastępowania radcy prawnego i adwokata – wybrane zagadnienia. Stan obecny i postulaty de lege ferenda," in *Samorząd a prawo do sądu*, ed. Jacek Sobczak (Lublin: Stowarzyszenie Naukowe Pro Scientia Iuridica, 2016), 125–144.

[26] Articles 5 and 11 of the Legal Aid Act.

[27] Article 11 and 12 of the Legal Aid Act.

[28] "National Report Belgium, ILAG, Helsinki 2011," accessed November 7, 2020, http://www.internationallegalaidgroup.org/.

ty law faculties were also allowed to participate in providing legal aid).[29] In the practice of providing legal aid by attorneys-at-law (or advocates), a number of issues have arisen at the point of contact between the application of the analysed Act of a l*ex specialis* nature and the tax law provisions. Undoubtedly, one of such issues is the definition of the VAT taxation rules.[30] A question has therefore been posed: Should the provision of legal aid under the principles laid down in the Legal Aid Act be regarded a VAT taxable activity? This issue has become the subject of consideration by the tax authorities.

According to the provisions of the VAT Act, the following activities are VAT taxable: the supply of goods and services for consideration in the territory of the country.[31] The provision of services referred to above shall be understood as any provision to a natural person, legal entity or organisational unit without legal personality which does not constitute a supply of goods within the meaning of Article 7 of the VAT Act.[32] The definition of provision of services within the meaning of the VAT Act is very broad. The provision shall be understood as any behaviour (both action and omission) which is not a supply within the meaning of Article 7 of the Act. A service will be only such a performance in the case of which there is a direct recipient who earns a benefit of a property nature. Therefore, an activity is subject to taxation only if it is performed as part of a legal relationship of an obligating nature, and one of the parties to the transaction may be considered a direct beneficiary of the activity.[33] For a given transaction to be taxable by value added tax, it should be carried out by a taxpayer.[34] The

[29] "Free Legal Aid Act, Ministerstwo Sprawiedliwości," accessed November 7, 2020, http://www.mprh.hr/beneficiaries-of-the-free-legal-aid.

[30] Act of 11 March 2004 on the Tax on Goods and Services, Journal of Laws of 2020, item 106, as amended, hereinafter referred to as the VAT Act.

[31] Article 5 (1) point 1 of the VAT Act.

[32] Article 8 (1) of the VAT Act.

[33] There should be a direct and clear link between the payment received and the performance for the benefit of payer.

[34] The VAT Act provides that, as defined by the regulations, taxable persons are legal persons, organisational units without legal personality and natural persons who run the business activity referred to in Article 15(2) of the VAT Act independently of the purpose or result of such activity (Article 15(1) of the VAT Act).

condition for a given activity to be VAT taxable is that two conditions are met: firstly, the activity should be included in the catalogue of activities subject to VAT, and secondly, it must be carried out by an entity which, in connection with its performance as part of the business activity, will be a taxpayer of the tax on goods and services. Business activity includes all activities of producers, traders or service providers, including those of natural resources and farmers, as well as activities of the liberal professions.[35] In particular, activities involving the use of goods or intangible assets on a continuous basis for profit-making purposes fall within the scope of this concept.[36]

The independently performed business activity referred to in Art. 15 (1) of the VAT Act, however, the activities for which the revenues are listed in Art. 13 points (2) to (9) of the PIT Act, if, due to the performance of these activities, these persons are related to the person who orders the performance of these activities by legal bonds establishing the legal relationship between the ordering party and performing the activities ordered as to the conditions for performing these activities, remuneration and liability of the ordering party towards third parties.[37] The use of the word "independently" in the wording of Article 15 (3) point 3 of the VAT Act, excludes taxation of employees and other persons, as long as they are related to the employer by an employment contract or other legal relationship creating bonds (subordination relationship) between the employer and the employee as to working conditions, remuneration and the employer's responsibility. This means that the revenues from the activities performed should not only be listed in Article 13 points (2) to (9) of the Personal Income Tax Act, but also other objective criteria must be met, including whether the activity of the service provider is based on economic risk, and thus who assumes responsibility for the services provided.

[35] In the case of a business activity, it is not merely the formal conditions for such an activity, but the fulfilment of the substantive features (see: Paweł Terpiłowski, "VAT przy usługach świadczonych na podstawie umowy zlecenia," accessed January 12, 2020, https://ksiegowosc.infor.pl/podatki/vat/zalres-opodatkowania/2866915,VAT-przy-uslugach-swiadczonych-na-podstawie-umowy-zlecenia.html.

[36] Article 15 (2) of the VAT Act.

[37] Article 15 (3) point 3 of the VAT Act.

Only and exclusively the activities, in which there are ties between the ordering party and the person performing the ordered activities, which establish a legal relationship in terms of conditions for performing these activities, remuneration and liability of the ordering party towards third parties, do not constitute an independent economic activity within the meaning of Art. 15 (2) of the act on tax on goods and services, Therefore, a person who, under a signed contract, establishes with the ordering party an economic relationship analogous to the employment relationship without bearing the economic risk related to the activities performed, will not be a taxpayer within the meaning of the VAT Act. Meeting the requirements that exclude the independence of action by concluding a legal relationship between the ordering party and the contractor as to the conditions for performing the outsourced activities, remuneration and liability of the ordering party to third parties, allows the performed activities to be excluded from VAT taxation.

The key to the assessment of the tax-law character is primarily the method of defining the "liability of the ordering party towards third parties". This is a factor that differentiates, in the light of the provisions of the VAT Act, running a business (a prerequisite for the status of a VAT taxpayer) from any other type of professional activity that does not give rise to being taxable under the VAT Act. Only when the person accepting the order is liable to third parties for the activities performed as part of the order. The liability for the performance of activities so understood indicates who bears the risk of the activity, and thus indicates the exclusion from the sphere of independence (and from the group of VAT taxpayers) of the entity which is not responsible towards third parties for the result of the work performed. Therefore, it is important for the parties to the obligation relationship to define correctly, in accordance with their intention, the type of activity, the conditions for the provision of these activities, remuneration and liability to third parties. Then it will be possible to correctly determine the tax-law status of a given entity. If the analysis of the civil-law contract (legal relationship) between the parties to the contract shows that all these three conditions are met, the contractor cannot be considered a VAT taxpayer. At the same time, the failure to fulfil any of the conditions means that the contractor acts as a VAT taxpayer. Therefore, the following conclusions follow from the provisions

of the VAT Act.[38] In order to recognize that certain activities performed by a natural person do not constitute an independently pursued business activity and thus remain outside the provisions of the Value Added Tax Act, it is important to meet all the elements listed in Art. 15 (3) point 3 of the VAT Act.

By applying the foregoing considerations to the provision of legal aid, it must be held that, as regards the first condition, i.e. the determination of the conditions for the performance of an activity, the use of the infrastructure and the internal organisation of the ordering party is in principle included in the substance of a typical service contract to provide legal aid by a natural person. The use of the infrastructure and the internal organisation of the ordering party means that the person receiving the order also does not bear economic risks in this regard (which is closely linked to the way in which remuneration is determined, that is the second condition which affects the determination of the tax-law status). In practice, the verification of the fulfilment of the second condition boils down to determining whether the contract provides for a fixed remuneration. Where the contract provides for a fixed remuneration, there can be no question about the economic risk being incurred by an attorney-at-law or advocate. The third condition, namely liability to third parties, is met if, according to the contract, the liability is on the part of the ordering party and not on the part of the actual contractor who accepts the order, which excludes the independent nature of his activities. The condition will also be met if the contract does not provide for (does not introduce) such liability.

Where all the conditions set out in Article 15(3) point 3 of the Act are met, activities performed by an attorney-at-law (or advocate) under a contract concluded with the powiat shall not be taxable by the tax on goods and services. Accordingly, the remuneration paid in this respect is not subject to value added tax and the attorney-at-law is not obliged to issue an invoice and pay the tax on goods and services.[39]

[38] Article 15 (3) point 3 of the VAT Act.

[39] As in: Individual interpretation issued by the Director of the National Tax Information of 15 April 2019, no. 0113-KDIPT1-1.4012.86.2019.2.AK, accessed January 12, 2020, http://sip.mf.gov.pl and Letter of 23 April 2019, no.0115-KDIT1-

On the other hand, referring to the provisions of the PIT Act, it should be noted that the catalogue of revenues to be included as the revenue from activities carried out in person is set out in Article 13 of the PIT Act.[40] Revenue from activities carried out in person as set out in Article 10(1) point 2 of the Act shall be deemed to be revenue from the provision of services, under an agreement of contract work or a specific-task contract, obtained exclusively from a natural person carrying out a business activity, a legal person and its organisational unit and an organisational unit without legal personality, with the exception of revenue from contracts concluded in the course of a non-agricultural economic activity carried out by a taxable person and revenues referred to in point 9).[41]

Therefore, the classification of revenue as the revenue from personally performed activities referred to in Article 13(8)(a) of the PIT Act depends on the cumulative fulfilment of the following conditions: 1) the commissioned service will be performed personally by the taxpayer, i.e. without the participation of persons employed under an employment contract, contract work or a specific-task contract, who would perform activities related to the essence of that service, 2) the civil-law contract has been concluded with a natural person performing business activity or a legal person and its organisational unit or an organisational unit not having legal personality[42],

1.4012.446.2019.3.MM, accessed January 12, 2020, http://sip.mf.gov.pl, Letter of 6 November 2017., no. 0112-KDIL1-2.4012.350.2017.2.MR, accessed January 12, 2020, http://sip.mf.gov.pl, Individual interpretation issued by the Director of the National Treasury Information of 18 September 2014, IPPP2/443-690/14-4/MT/MM, accessed January 12, 2020, http://sip.mf.gov.pl. Similarly: Letter of 25 October 2018, of the Director of the National Treasury Information, no. 0115-KDIT1-1.4012.637.2018.1.MN, accessed January 12, 2020, http://sip.mf.gov.pl.

[40] Article 13 (8) of the PIT Act.

[41] Article 13(9) of the PIT Act provides for revenue earned under enterprise management contracts, managerial contracts or contracts of a similar nature, including revenue from such contracts concluded as part of the taxpayer's non-agricultural business activity – except for the revenue referred to in point 7), i.e. revenue earned by persons, irrespective of the method of appointment of these persons, who are members of management boards, supervisory boards, committees or other governing bodies of legal persons.

[42] If civil law contracts (in particular contract work, specific-task contracts) were concluded with natural persons who do not carry out business activity, revenues from the provision of services to those entities could not be included in the source of revenue referred to in

3) the civil law contract will not be concluded within the scope of business activity conducted by the taxpayer. If an attorney-at-law (advocate) provides free legal assistance in person under a contract with the powiat, apart from his business activity, his revenue may be included in the category of revenue from the activity performed in person.

4. RULES OF FINANCING LEGAL AID

As already mentioned, the area of activity of the state involving the provision of legal aid to certain groups of citizens is a task that has been delegated to powiats (acting independently or in agreement with the municipalities in the area of a given powiat).[43] Such a delegation of central government administration tasks has its legal basis in the Act on powiat government.[44] Imposing, by way of a statutory act, the obligation to perform by a powiat the tasks specified in another legal act is acceptable in the Polish order and finds a constitutional basis.[45] In such a case, a statutory act should specify the mode of delegation and the manner of performing the delegated tasks and point out that changes in the scope of tasks and competences of local government units take place along with appropriate changes in the distribution of public income.

An order for a local authority to carry out a task must be linked to the provision of adequate financial resources for the performance of the task. This task is financed from the state budget from the part at

Article 13(8)(a) of the PIT Act. As a consequence, revenue from the provision of services under contract work agreements and specific-task contracts concluded with natural persons not conducting business activity should be included in revenue from the so-called other sources (Individual interpretation issued by the Director of the National Treasury Information of 12 March 2015, no. IBPBI/1/415-1409/14/SK, accessed January 12, 2020, http://sip.mf.gov.pl).

[43] The same view in: Provincial Administrative Court in Wrocław, Judgment of 25 May 2018, Ref. No. IV SAB/Wr 27/18, LEX no. 2510555.

[44] Article 8 (1) of the Legal Aid Act in conjunction with Article 4 (4) of the Act of 5 June 1998 on Powiat Government, consolidated text Journal of Laws of 2020, item 920.

[45] Article 166 (2) of the Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended.

the disposal of the voivodeship governors (wojewoda, a body of the central government at the regional level) by granting a specific-purpose subsidy to powiats. The institution of specific-purpose subsidy is regulated in principle by the provisions of the Act on public finance.[46] Specific-purpose subsidies are funds designed, inter alia, for financing or co-financing of central government tasks and other tasks assigned to local government units by law.[47] It should be stressed that a specific-purpose subsidy is a unilateral, free-of-charge and, in principle, non-refundable benefit.[48] It is intended for making a specific expenditure for a given purpose and in due time. In accordance with the provisions of the Act on public finance, the amounts of specific-purpose subsidies for central government tasks and other tasks assigned by separate laws to local government units shall be determined by the administrators of the budgetary part according to the rules adopted in the State budget to determine expenditure of a similar kind, unless otherwise provided for by separate provisions.[49] Specific-purpose subsidies for the implementation of tasks in the field of central government administration and other tasks assigned by laws shall be delegated to the local government unit by the voivodeship governor in sufficient advance for the full and timely performance of the tasks.[50]

The regulation of the Legal Aid Act in this area constitutes a *lex specialis* to the provisions of the Act on public finance and therefore takes precedence in application. On the other hand, the provisions of the Act on public finance apply to the subsidy in question to an extent not regulated by the Legal Aid Act. Therefore, the provisions of the Act on

[46] Act of 27 August 2009 on Public Finance, consolidated text Journal of Laws 2019, item 869, as amended, hereinafter referred to as the Act on public finance.

[47] Article 127 (1) (a) of the Act on public finance.

[48] Agnieszka Mikos-Sitek, "Prawo budżetowe," in Agnieszka Mikos-Sitek and Piotr Zapadka, *Prawo finansów publicznych* (Warsaw: Wydawnictwo C.H. Beck, 2018), 108; Mateusz Kaczocha, *Ustawa o nieodpłatnej pomocy prawnej oraz edukacji prawnej. Komentarz* (Warsaw: LEX el., 2016).

[49] Article 129 of the Act on Public Finance.

[50] Article 149 (1) of the Act on Public Finance.

public finance should be applied e.g. for the assessment of the impact of the failure to use the specific-purpose subsidy in a given financial year.[51]

The provisions of the Legal Aid Act stipulate that the provision of legal aid is financed from the state budget from the part at the disposal of voivodeship governors by the granting of specific-purpose subsidies to powiats. The amount of the subsidy is currently determined annually by the Minister of Justice in agreement with the Minister competent for budgetary matters in accordance with the procedure and time limits laid down in the provisions of the Act on public finance concerning the work on the draft budget law.[52]

The specific-purpose subsidy granted is allocated in 91% for salaries for contracts concluded with attorneys-at-law and advocates, while if the running of a consultation point is entrusted to a non-governmental organisation – for the selected non-governmental organisation, 6% – to cover the costs of organizational and technical support, and in 3% to legal education tasks entrusted to the non-governmental organisation.[53] The voivodeship governor, as the authority commissioning the task, may carry out checks and evaluations of the performance of the task by the powiat, in particular the efficiency, reliability and quality of its implementation, as well as the correct spending of public funds. For contracts concluded with non-governmental organisations, its implementation is to be checked by the starosta in accordance with the rules laid down in the Act of 24 April 2003 on public benefit activity and volunteerism.[54] This is why there is

[51] Article 168(1) of the Act on public finance provides that subsidies granted from the state budget in their part not used by the end of the financial year or within the period specified in a regulation issued under Article 181(3) must be returned to the state budget respectively by 31 January of the following year or within 21 days from the date specified in that regulation. Specific-purpose subsidies granted to local government units for the performance of tasks in the field of central government administration and other tasks delegated under statutory acts, in the part not used by the end of a given year, are subject to return to the state budget in the part in which the task was not performed, within the time limit specified in paragraph 1 (Article 168 (6) of the Act on public finance).

[52] Article 19 of the Legal Aid Act and Article 138 (6) of the Act on public finance.

[53] Article 20 (1) of the Legal Aid Act; Robert Rynkun-Werner, Magdalena Wasylkowska-Michór and Beata Paxford, *Ustawa o nieodpłatnej pomocy prawnej oraz edukacji prawnej. Komentarz* (Warsaw: Wydawnictwo C. H. Beck, 2016).

[54] Article 11(8) of the Legal Aid Act.

a dual-model system for financing legal aid. The first model is based on settlements with natural persons (attorneys-at-law and advocates) consisting in the payment of remuneration under contracts concluded with those entities, against VAT invoices or bills. The second, based on the model of specific-purpose subsidy for entities outside the public finance sector, transferred on the basis of contracts concluded. The method of settlement and verification of the performance of the task assigned was determined in each case in resolutions adopted by legislative bodies of the local government units. In the case of non-governmental organisations, the correct performance of the task was assessed on the basis of the reports submitted by those organisations.[55]

The basis for determining the amount of the subsidy to be granted for the task (legal aid) is the base amount (12 times the product of the base amount and the multiplier). The multiplier is to be calculated in such a way that the number of inhabitants of the district as of 31 December of the year preceding the financial year by two years, as determined by the President of the Central Statistical Office, is divided by 25 000, provided that it may not be less than 2 and greater than 35. The multiplier expressed as a non-integer shall be rounded up to an integer if the first decimal digit is equal to or greater than 5, or rounded down if the first decimal digit is less than 5. The Minister of Justice, in consultation with the minister competent for budgetary matters, shall determine annually, by regulation, the sum of the base amount, taking into account the expenditure limits[56] and the need to ensure the proper organisation of the system of legal aid, free civic counselling and legal education.[57]

The total maximum limit of expenditure resulting from the entry into force of the Act for the years 2016-2025 has been set at PLN 1,047,700 thousand. The base amounts and limits of expenditure from the state budget are presented respectively in Table 1 and Table 2.

[55] "Raport NIK, Funkcjonowanie systemu nieodpłatnej pomocy prawnej," LOP.430.001.2018, accessed November 10, 2020, https://www.nik.gov.pl/kontrole/P/17/090/.

[56] Article 28 of the Legal Aid Act.

[57] Article 20 of the Legal Aid Act.

Table 1.

Regulations of the Minister of Justice in the period 2016-2021. Sum of the base amount (in PLN).					
2016	2017	2018	2019	2020	2021*
5150	5217	5217	5500	5500	5500

**Ordinance of the Minister of Justice of 26th August 2020 on the base amount in 2021, Journal of Laws 2020, item 1501- effective from January 1, 2021.*

Source: Own study (analysis of the provisions of the Ordinance of the Minister of Justice on the base amount for 2016-2021, LEX el.)

Table 2.

Maximum limit of the State budged expenditure (on legal aid) for the period 2016 – 2021. Amount (in PLN thousands)					
2016	2017	2018	2019	2020	2021
94,183,200	96,161,047	98,565,074	100,930,635	103,352,971	105,833,441

Source: Own study (Article 28 of the Legal Aid Act)

In the budgets of local government units, the funds allocated for the implementation of the task were entered respectively in section 755 – justice, chapter 75515 – legal aid. The amount of the specific-purpose subsidy in the years 2016 to 2020 is presented in Table 3.

Table 3.

Budgetary acts for the years 2016 to 2020 expenses (in PLN thousand) related to the performance of the task of legal aid				
2016	2017	2018	2019	2020
94,037	95,478	95,416	100,914	100,518

Source: Own study (analysis of budgetary acts for 2016-2020, LEX el.)

A general conclusion can be drawn from the content of the data presented, that the amount of the specific-purpose subsidy allocated for the implementation of statutory tasks remained within the statutory lim-

its and did not show any major fluctuations, or showed even a minimal upward trend (except for a slight decrease in the amount of funding in 2018 and 2020). For base amounts, their increase could be observed in 2017 and 2019, however, despite government announcements, the base amount remained unchanged in the following years (2019-2021). In view of the growing expected inflation and fluctuations in this regard, the above solution should be assessed with criticism.[58]

5. CONCLUSIONS

The foregoing analysis, including the results of the audit of the system of providing legal aid in Poland, allow us to formulate a thesis that free legal and civic counselling, as well as legal education, are still the areas of state activity that enjoy high social demand. The organisational and information framework of the legal aid system, however, still needs to be improved. This includes both the quality of the services provided and an increase in their availability through wide-ranging information campaigns.[59] Unfortunately, it should be mentioned that the shortcomings and possible weaknesses of the system are not new elements. They were reported already at the stage of adopting the Act and they have still not been removed, despite the fact of the Act being effective for several years. It seems that in such an important area for society, more firm and effective steps should be taken leading to greater effectiveness of the regulations

[58] Szymon Cydzik, "Ministerstwo zwiększa środki na pomoc prawną," accessed November 8, 2020, https://prawo.gazetaprawna.pl/artykuly/1484690,pomoc-prawna-kwota-bazowa-2021.html; "Rada Polityki Pieniężnej, Projekcje inflacji i PKB (lipiec 2020)," accessed November 8, 2020, https://www.nbp.pl/home.aspx?f=/polityka_pieniezna/dokumenty/projekcja_inflacji_2020_lipiec.html.

[59] Similarly: "Ocena Ministra Sprawiedliwości z realizacji zadań z zakresu nieodpłatnej pomocy prawnej, nieodpłatnego poradnictwa obywatelskiego oraz edukacji prawnej za 2019 r.," accessed August 20, 2020, https://darmowapomocprawna.ms.gov.pl/pl/aktualnosci/news,14919,ocena-ministra-sprawiedliwosci-z-realizacji-zadan.html and "Informacja o wynikach kontroli, Funkcjonowanie systemu nieodpłatnej pomocy prawnej," LOP 403.001.2018, accessed August 20, 2020, https://www.nik.gov.pl/aktualnosci/pomoc-prawna-nieodplatna-potrzebuje-pomocy.html.

adopted. At the same time, it should be noted that the numerous requests for interpretation submitted to the Director of the National Tax Information and the ongoing disputes between taxpayers and tax authorities show that the interpretation of tax provisions in the context of providing legal aid still generates ambiguities, despite the passage of time. In the absence of clear and unambiguous regulations, it is necessary to fully regulate all the issues related to the provision of services by an attorney-at-law in the contract concluded with the powiat. This is not an optimal solution. It seems that the aim should be to precisely define in the Act the manner and conditions of providing services, by ensuring uniformity of positions presented by the tax authorities as to the exclusion of the activity of a taxpayer (attorney-at-law or advocate) from VAT taxation, and to determine the method of qualification of their income. The lack of appropriate regulations in this respect may result in an unfavourable interpretation for the taxpayer, and, consequently, generate the risk of tax arrears.

Despite these difficulties in interpretation and the signals of the relatively low efficiency of the legal aid system, it is not possible, at the same time, to ignore the fact that the Act fills a years-long legal void in such an important area of state activity and in view of such pressing social needs. It is undoubtedly a good step towards taking account of social needs and increasing legal awareness. It should not, however, be frozen in its original legislative framework, but, on the contrary, a thorough analysis of the solutions adopted from the point of view of the criterion of their effectiveness should be carried out with a deep insight. In this area, consideration should be given to a deeper reformulation of the system, by introducing a two-tier system, similar to that of solutions used in other European countries. Apart from the defining of full public funding, it would also be desirable to introduce the inflationary adjustment of the base amount, which is the basis for determining the amount of the specific-purpose subsidy. There is no doubt that social demand for this type of service is growing (the number of cases is increasing), and therefore it would not be good to lead to a situation which occurred, for example, in Belgium, where, despite the increase in cases at certain consultation points, the amount of subsidy has remained at the same level for a long time, generating a reduction in the remuneration of professionals, and consequently contributing to a reduction in the quality of services provided. Perhaps a solution would

also be to consider the introduction of a model of partial participation of the recipients of legal aid in the costs of providing thereof (with the degree of this participation being adjusted to the material situation of the applicant). This is intended to enable rational use of financial resources, as well as to increase the responsibility of the individual for initiating and conducting proceedings. Such solution was implemented in e.g. Croatia, the Netherlands and Germany.

REFERENCES

Arcimowicz, Jolanta. *Potencjał społeczny poradnictwa prawnego i obywatelskiego. Analizy i opinie #132.* Warsaw: Instytut Spraw Publicznych, 2013.

Bojarski, Łukasz. "Dostęp do nieodpłatnej pomocy prawnej – propozycje zmian." In *Obywatel i prawo III*, edited by Agata Winiarska, 34–67. Warsaw: Instytut Spraw Publicznych, 2008.

Bojarski, Łukasz, and Grzegorz Wiaderek. "Starania o ustawową regulację dostępu do nieodpłatnej pomocy prawnej – historia i stan obecny." In *Obywatel i prawo IV*, edited by Agata Winiarska, 13–39. Warsaw: Instytut Spraw Publicznych, 2009.

Chabel, Cezary. *Zakres przedmiotowy pojęcia „nieodpłatna pomoc prawna" oraz wyłączenia ustawowe*. Warsaw: LEX el., 2015.

Chimiak, Grzegorz. *Poradnictwo prawne i obywatelskie w Polsce. Stan obecny i wizje przyszłości*. Warsaw: Instytut Spraw Publicznych, 2013.

Christensen, Clayton. *The Innovator's Dilemma. When New Technologies Cause Great Firms to Fail*. Massachusetts: Harvard Business School Press, 1997.

Cydzik, Szymon. "Ministerstwo zwiększa środki na pomoc prawną." Accessed November 8, 2020. https://prawo.gazetaprawna.pl/artykuly/1484690,pomoc-prawna-kwota-bazowa-2021.html.

Gordley, James. "Variations on a Modern Theme." In *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies*, edited by Mauro Cappelletti, Earl Johnson, and James Gordley. Milano: Dott. A. Giuffrè Editore, 1975.

Kaczocha, Mateusz. *Ustawa o nieodpłatnej pomocy prawnej oraz edukacji prawnej. Komentarz*. Warsaw: LEX el., 2016.

Mikos-Sitek, Agnieszka. "Prawo budżetowe." In Mikos-Sitek, Agnieszka, and Piotr Zapadka, *Prawo finansów publicznych*, 85–143. Warsaw: C. H. Beck, 2018.

Rynkun-Werner, Robert, Magdalena Wasylkowska-Michór, and Beata Paxford. *Ustawa o nieodpłatnej pomocy prawnej oraz edukacji prawnej. Komentarz*. Warsaw: C. H. Beck, 2016.

Świstak, Marzena. "Pełnomocnictwo substytucyjne a upoważnienie aplikanta do zastępowania radcy prawnego i adwokata – wybrane zagadnienia. Stan obecny i postulaty de lege ferenda." In *Samorząd a prawo do sądu*, edited by Jacek Sobczak, 125–144. Lublin: Stowarzyszenie Naukowe Pro Scientia Iuridica, 2016.

Terpiłowski, Paweł. "VAT przy usługach świadczonych na podstawie umowy zlecenia." Accessed January 12, 2020. https://ksiegowosc.infor.pl/podatki/vat/zalres-opodatkowania/2866915,VAT-przy-uslugach-swiadczonych-na-podstawie-umowy-zlecenia.html.

Zander, Michael. "The First Wave." In *Access to Justice and the Welfare State*, edited by Mauro Cappelletti. Florence: European University Institute, 1981.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLIV
YEAR 2021, ISSUE 1, pp. 127–154
DOI: https://doi.org/10.31743/recl.11433

THE QUESTION OF PUBLIC PARTICIPATION IN THE PROCEDURE FOR AUTHENTIC INTERPRETATION OF LAWS

*Gordan Struić**

ABSTRACT

Authentic interpretation of laws is an interpretation of legal provisions that, due to their lack of clarity or misinterpretation in their application, is provided by the parliament. Unlike the legislative procedure, which is conducted, as a rule, in two (exceptionally three) readings, a proposal for giving an authentic interpretation is discussed in one reading. Starting from the understandings of some authors that the act of authentic interpretation of laws is contrary to the principle of democratic pluralism, and that it lacks the necessary level of democratic control and citizen participation, the author examines whether the Croatian parliamentary law enables public participation in the procedure for authentic interpretation of laws and, if so, what legal instruments can be used to implement it in parliamentary practice. To this end, the paper analyzes several relevant constitutional, legal, and procedural provisions of the Croatian parliamentary law, with reference to a parliamentary practice. Given the fact that the procedure for authentic interpretation in the Republic of Croatia, the Republic of North Macedonia, the Republic of Slovenia and the Republic of Serbia is regulated in a similar way by the rules of procedure of their respective parliaments, the relevant regulations of the latter three countries on the possibility of public participation in this procedure are analyzed as well. It was concluded that Croatian parliamentary law enables public participation in the procedure for authentic interpretation, through the instru-

* Gordan Struić, M.A., University Specialist in Comparative Politics, and PhD Candidate at the Faculty of Political Science, University of Zagreb, Republic of Croatia; Advisor in the Office of the President of the Croatian Parliament (Speaker's Office); correspondence address: Trg. sv. Marka 6, 10000 Zagreb, Republic of Croatia; e-mail: gordan.struic@gmail.com; http://orcid.org/0000-0001-6528-4436.

ments of petition, information and involvement in working groups and working bodies, and the same instruments, with certain specifics, are recognized in the parliamentary law of the latter three countries.

Keywords: authentic interpretation, parliament, public participation, legislative procedure

1. INTRODUCTION

Authentic interpretation of laws is an interpretation of certain legal provisions that, due to their lack of clarity or misinterpretation in their application in practice, is provided by the parliament as a legislator. Given that the parliament clarifies the original meaning of the legal provision for which it was prescribed, such an interpretation is considered as an integral part of the interpreted law from the moment it enters into force, with retroactive (*ex tunc*), and binding effect *erga omnes*.[1] The legislator gives an authentic interpretation of laws in a procedure to which the provisions of the parliamentary rules of procedure on the law-making procedure apply *mutatis mutandis*. However, in relation to the ordinary legislative procedure – which is usually conducted in two (exceptionally three) readings – a proposal for an authentic interpretation is discussed in just one reading. Some authors pointed out that the act of authentic interpretation of laws acts contrary to the principle of democratic pluralism, which should be based, *inter alia*, on the application of fundamental procedural guarantees of legitimacy of the legislative procedure; it is emphasized that the act of authentic interpretation "seeks to circumvent the regular legislative procedure, tries to promote specific political interests, without the necessary level of democratic control and without citizen participation".[2]

[1] Gordan Struić, "Vjerodostojno tumačenje zakona u hrvatskom parlamentarnom pravu od 1947. do danas," *Hrvatska i komparativna javna uprava* 16, no. 3 (2016): 556, https://doi.org/10.31297/hkju.16.3.3.

[2] Siniša Rodin, "Demokratsko-pluralistička kritika instituta tzv. vjerodostojnog tumačenja," *Informator* 53, no. 5337-5338 (2005): 1.

Furthermore, some authors pointed out, for example, that Article 90, paragraph 4 of the Constitution of the Republic of Croatia[3] (hereinafter: Constitution) provides that laws and other regulations shall not have retroactive effect; that the interpretation of legal provisions is not inherent in the legislature, but in the judiciary, which violates the principle of separation of powers (Article 4, paragraph 1 of the Constitution); that the legislator has no constitutional power to give authentic interpretation of laws, because power to give such interpretations is prescribed *explicite* exclusively by the parliamentary rules of procedure.[4] However, in contrast to the latter criticisms, which have already been analyzed in the Croatian legal literature,[5] and which have already been ruled[6] by the Constitutional Court of the Republic of Croatia (hereinafter: Constitutional Court), the question of public[7] participation in the procedure for authentic interpretation of

[3] The Constitution of the Republic of Croatia of 22 December 1990, Official Gazette 1990, No. 56, item 1092. Amendments to the Constitution were published in the Official Gazette 1997, No. 135, item 1944; 2000, No. 113, item 2224; 2001, No. 28, item 487; 2010, No. 76, item 2214; 2014, No. 5, item 93.

[4] Miljenko Giunio, "Ustavnost i vjerodostojnost autentičnog tumačenja zakona u hrvatskoj praksi," *Pravo u gospodarstvu* 44, no. 5 (2005): 3–34.

[5] For example, Teodor Antić, "Vjerodostojno tumačenje zakona," *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 36, no. 1 (2015): 619–644; Miljenko Giunio, "Ustavnost i vjerodostojnost autentičnog tumačenja zakona u hrvatskoj praksi," 3–34; Siniša Rodin, "Demokratsko-pluralistička kritika instituta tzv. vjerodostojnog tumačenja," 1–4; Gordan Struić, "Vjerodostojno tumačenje zakona u hrvatskom parlamentarnom pravu od 1947. do danas," 553–585.

[6] The Constitutional Court in decision of 14 November 2007 (No. U-I-2488/2004, Official Gazette 2007, No. 133, item 3832) expressed the view that Article 71 of the Constitution, which vests the legislative power in the Croatian Parliament, implies its power to determine which legislative acts (and in which form) it will adopt, and that the act of authentic interpretation is the so-called interpretive law. In addition, bearing in mind that the authentic interpretation of laws is an abstract, not a concrete interpretation that would refer to an individual case, such an interpretation does not encroach on the judiciary, which means that there is no violation of the principle of separation of powers. Also, the Constitutional court expressed the view that authentic interpretation, in principle, is about its apparent retroactive effect, because such an interpretation only determines the true meaning of the provisions of the law in force.

[7] In the absence of a generally accepted definition of the concept of public, it is worth noting that the Code of Practice on Consultation with the Interested Public in Procedures of Adopting Laws, Other Regulations and Acts of 21 November 2009 (Official Gazette 2009,

laws has not yet been in the focus of research attention, and it was mentioned only secondarily.[8]

In this context, the paper examines whether the positive Croatian parliamentary law[9] enables public participation in the procedure for authentic interpretation of laws and, if so, which legal instruments can be used to implement it in parliamentary practice. Namely, the parliament, "as a legislative body of the constitutional state, essentially represents the struggle for an effective form and instruments of publicity",[10] realizing its functions in public, following procedural rules provided by the parliamentary rules of procedure to ensure that the discussion of individual topics takes place in public, in conditions of real openness and public accessibility, with the possibility of participation of as many stakeholders as possible during all phases of the legislative process.[11] Having in mind the above, after the first, introductory part, the second part briefly outlines the normative framework of the procedure for authentic interpretation of laws, and the third part generally discusses the importance and roles of public participation in decision-making processes. The fourth part analyzes several relevant provisions of the Constitution, laws, and rules of procedure, with reference to a parliamentary practice based on available data

No. 140, item 3402) defines that interested public consists of "citizens, civil society organizations (informal civic groups or initiatives, associations, foundations, funds, private institutions, trade unions, associations of employers), representatives of the academic community, chambers, public institutions, and other legal entities performing a public service, or who might be affected by the law, other regulation or act which is being adopted, or who are to be included in its implementation". To include as many addressees as possible under the mentioned term, in this paper, the stated definition will be adhered to, and the term "public" will be used in the presented sense.

[8] See Gordan Struić, "Pitanje totalitarne naravi autentične interpretacije zakona kao relikta prošlosti," in *Identiteti – kulture – jezici, Godišnjak Filozofskog fakulteta Sveučilišta u Mostaru: Nasljeđa totalitarizama u suvremenom društvu*, ed. Dražen Barbarić et al. (Mostar: Filozofski fakultet Sveučilišta u Mostaru, 2018), 55–68.

[9] These are constitutional norms, norms of the so-called organic and ordinary laws, as well as the norms of the parliamentary rules of procedure. See Arsen Bačić, "Konstitucionalizam i parlamentarno pravo," *Vladavina prava* 3, no. 6 (1999): 129–155.

[10] Zvonko Posavec, "Javnost i demokracija," *Politička misao* 41, no. 1 (2004): 8.

[11] Gordan Struić, "Uloga i način uređenja javnosti u hrvatskom parlamentarnom pravu od 1947. do 1953.," *Pravni vjesnik* 33, no. 2 (2017): 102, https://doi.org/10.25234/pv/5111.

on the Croatian Parliament's website. After the consideration of relevant regulations of the three former Socialist Federal Republic of Yugoslavia (hereinafter: SFRY) countries which, similarly to the Republic of Croatia, regulate the procedure for authentic interpretation of laws by their parliament – the Republic of North Macedonia, the Republic of Slovenia, and the Republic of Serbia – the concluding remarks are presented in the sixth, final part of the paper.

2. PROCEDURE FOR AUTHENTIC INTERPRETATION

The power of the Croatian Parliament for giving an authentic interpretation of laws is not explicitly stated in the Constitution, but its *ius interpretandi* derives from Article 81, subparagraph 2 of the Constitution which prescribes its power to adopt laws[12] and Article 159 of the Rules of Procedure of the Croatian Parliament[13] (hereinafter: Rules of Procedure) which prescribes that the Croatian Parliament, on the basis of rights and powers established by the Constitution and by the Rules of Procedure, shall, *inter alia*, enact laws and give authentic interpretations of individual provisions of laws. The elaboration of the procedure for authentic interpretation is regulated by the provisions of Articles 208-210 of the Rules of Procedure. To that procedure, in accordance with Article 208, paragraph 2 of the Rules of Procedure, the provisions governing the legislative procedure shall apply accordingly,[14] with a total of four stages of

[12] Also, see the view of the Constitutional Court expressed in decision of 28 September 2004 (No. U-II-1265/2000, accessed December 11, 2020, https://sljeme.usud.hr/usud/praksaw.nsf/fOdluka.xsp?action=openDocument&documentId=C1256A25004A262AC1256F1E00350B68) and decision of 14 November 2007 (No. U-I-2488/2004, Official Gazette 2007, No. 133, item 3832).

[13] Rules of Procedure of the Croatian Parliament of 28 June 2013, Official Gazette 2013, No. 81, item 1709. Amendments to the Rules of Procedure were published in the Official Gazette 2016, No. 113, item 2469; 2017, No. 69, item 1610; 2018, No. 29, item 589; 2020, No. 53, item 1061; 2020, No. 119, item 2337; 2020, No. 123, item 2382.

[14] In accordance with the view of the Constitutional Court expressed in decision of 23 April 2008 (No. U-III-4827/2005, Official Gazette 2008, No. 55, item 1926), it is understood that the legal provisions are applied in accordance with the nature of a particular procedure, "which means that they do not always have to be applied nor do they have to

proceeding with the submitted proposal. In the first phase, a proposal for an authentic interpretation of the law is sent to the competent body to assess its validity; in the second phase, the opinions necessary to assess the validity of said proposal shall be submitted; the third phase consists of an assessment of validity; the fourth phase consists of a debate at a session of the Croatian Parliament (plenary session) and the adoption of its decision.[15]

Pursuant to Article 209, paragraph 1 of the Rules of Procedure, the procedure for authentic interpretation of laws begins with the submission of a proposal to the President of the Croatian Parliament. It shall contain the title of the specific law, as well as the specific provision whose interpretation is proposed, grounds for interpretation, sources of the needed means, and a draft text of the authentic interpretation. In doing so, said proposal must be submitted exclusively by authorized sponsors of laws, i.e. by any member of parliament (hereinafter: MP), deputy club, parliamentary working body, or the Government of the Republic of Croatia (hereinafter: Government). Subsequently, the President of the Croatian Parliament submits a proposal to the Legislation Committee, the competent working body,[16] and the Government (when the Government is not the proposer) to assess the validity of the proposal. In accordance with Article 209, paragraph 3 of the Rules of Procedure, the competent working body and the Government must submit their opinion on the proposal within 30 days, and if they fail to do so within the prescribed period, it shall be deemed that they agree to that proposal. After obtaining opinions on said proposal, or after the expiry of the

be applied literally". See also the view of the Constitutional Court expressed in decision of 23 November 2006 (No. U-III-2601/2004, accessed December 11, 2020, https://sljeme.usud.hr/usud/praksaw.nsf/fOdluka.xsp?action=openDocument&documentId=C12570D-30061CE53C1257230003DE270).

[15] Gordan Struić, "Postupak za autentično (vjerodostojno) tumačenje zakona u hrvatskom, makedonskom, slovenskom i srbijanskom parlamentarnom pravu i praksi," *Pravni vjesnik* 32, no. 3-4 (2016): 142.

[16] According to Article 3, subparagraph 2 of the Rules of Procedure, it means "any working body of Parliament that monitors, debates and assumes a position on issues of a particular topic under its competence (...)".

30-day period, the Legislation Committee shall assess[17] whether the proposal is well-founded, and inform the Croatian Parliament of its position within 30 days, which will finally debate on a proposal in one reading[18] and make a decision. Bearing in mind that the act of authentic interpretation of a law is the so-called interpretative law, in accordance with Article 254, paragraph 2 of the Rules of Procedure, the Croatian Parliament shall adopt a decision by the same type of majority vote by which that law, whose provision is interpreted, was enacted, and interpretation shall be published in the Official Gazette, and in the bulletin[19] of the Croatian Parliament.

Focusing only on the mentioned provisions, it would not be clear whether there is a place for public participation in the procedure for authentic interpretation of laws. So, it is necessary to consider other provisions of the Rules of Procedure and relevant regulations. But, prior to that, it must be examined whether – given that it is (only) an interpretation of the law by the legislator – it should be possible for the public to participate in this procedure. The answer to this question should be given after the insight into the very importance and role of public participation in the decision-making process.

[17] Each working body, including the Legislation Committee, shall make its decision "by majority vote if the majority of all members are present at the meeting" (Article 50, paragraph 1 of the Rules of Procedure), and this applies to the assessment of validity, and to the opinion on the proposal as well.

[18] As follows from the explanation in Final Draft of the Rules of Procedure of the Croatian Parliament of 19 June 2013 (accessed December 11, 2020, http://edoc.sabor.hr/DocumentView.aspx?entid=14368), the reason for conducting one reading – in relation to the ordinary legislative procedure with two (exceptionally three) readings – may be found in that the latter number of readings in authentic interpretation "would not, as a rule, have a particular impact". For a detailed description of the ordinary legislative procedure, see Articles 171-203 of the Rules of Procedure.

[19] Pursuant to Article 280, paragraph 2 of the Rules of Procedure, the website of the Croatian Parliament shall be considered its official bulletin.

3. IMPORTANCE AND ROLES OF PUBLIC PARTICIPATION

In the rich literature dealing with the importance and roles of public participation in the decision-making process, some authors[20] point out two main views on political participation and democracy. The first one is instrumental, in which participation plays only a marginal role which is reduced to the election of political leadership. Furthermore, it is argued that participation is resorted to, as a rule, only by a vocal minority, who cannot be trusted to represent us all,[21] and that it is based on an optimistic view of citizens motivated by their wishes to act for their own community, and that they can be educated to act for the common good.[22] On the other hand, the importance of public participation in the decision-making process is emphasized with regard to its educational role through personal development of individuals, integrative role through their stronger community affiliation, and real contribution to good governance,[23] leading to a significant increase in democratic legitimacy of the legal system.[24] In addition, public participation is considered to strengthen confidence in the legislature, increasing the possibility of influencing the quality of legal solutions with a consequential contribution to their more effective application in practice.[25]

At the same time, legitimate and effective democracy presupposes active citizenship that develops through involvement in public debates and

[20] See Ank M. B. Michels, "Citizen Participation and Democracy in the Netherlands," *Democratization* 13, no. 2 (2006): 323–339, https://doi.org/10.1080/13510340500524067.

[21] Anne Phillips, *(O)rađanje demokracije* (Zagreb: Ženska infoteka, 2001), 49.

[22] John F. Freie, "Participatory democracy," in *Encyclopedia of Community: From the Village to the Virtual World, Volume 1*, ed. David Levinson, and Karen Christensen (Thousand Oaks: Sage, 2003), 162.

[23] See Carole Pateman, "Participatory Democracy Revisited," *Perspectives on Politics* 10, no. 1 (2012): 7–19, https://doi.org/10.1017/S1537592711004877.

[24] Marijke Malsch, *Democracy in the Courts: Lay Participation in European Criminal Justice System* (Ashgate: Surrey, 2009), 3.

[25] Gordan Struić, and Vjekoslav Bratić, "Sudjelovanje javnosti u zakonodavnom postupku: primjer Odbora za financije i državni proračun Hrvatskoga sabora," *Hrvatska i komparativna javna uprava* 17, no. 1 (2017): 134.

political decision-making to determine social goals,[26] and the realization of such a model in practice can be achieved through a number of instruments, including referendums, civic initiatives, and petitions, as well as all other various contemporary forms of action that are based on the need to provide information, participation, counseling, and oversight.[27] In this context, the real link between democracy, participation, and the public becomes more visible, since the absence of an effective democracy, which is fulfilled, *inter alia*, by consensus and broad participation,[28] may prevent an effective public from identifying important or controversial issues in the process of implementation of its critical function, as well as in initiating the process of finding solutions, considering the offered options and their alternatives, and in striving to make compromises.

Therefore, it can be concluded that, despite the different views of some theorists on the importance and role of public participation in the decision-making process, there are advantages that arise from it. Also, the real application of the model of legitimate and effective democracy that presupposes the action of the public in socio-political life necessarily requires the existence and application of various legally regulated instruments that enable participation in decision-making processes; therefore, even in cases when a legislator provides an authentic interpretation of a specific norm, clarifying its true meaning for which it was guided in the time of prescribing. This undoubtedly achieves the necessary level of democratic control guaranteed and implied by public participation in decision-making processes, which is why it is worth to further examine whether such instruments exist in the positive Croatian parliamentary law.

[26] Pero Maldini, *Demokracija i demokratizacija* (Dubrovnik: Sveučilište u Dubrovniku, 2008), 147.

[27] Carole Pateman, "Participatory Democracy Revisited," 14.

[28] Pero Maldini, "Postkomunizam i postdemokracija: kriza demokracije i mjerila demokratičnosti," in *Demokracija i postdemokracija*, ed. Anđelko Milardović, and Nikolina Jožanc (Zagreb: Pan liber i Institut za europske i globalizacijske studije, 2013), 212.

4. PUBLIC PARTICIPATION AND AUTHENTIC INTERPRETATION

In recent years, a number of documents have been adopted at the international level in the form of codes, recommendations, etc., with principles aimed to create a supportive environment for public participation in decision-making, such as the Code of Good Practice for Civil Participation in the Decision-Making Process,[29] Recommendation CM/Rec(2009)1 of the Committee of Ministers to member states on electronic democracy (e-democracy)[30] or Guidelines for civil participation in political decision making.[31] In addition, a significant number of acts on that matter have been adopted in the Republic of Croatia as well, such as the Law on the ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,[32] the Code of Practice on Consultation with the Interested Public in Procedures of Adopting Laws, Other Regulations and Acts[33] or the Right of Access to Information Act[34] (hereinafter: RAIA).

Recent research findings on the legal framework for public participation in the legislative process through the activities of working bodies of the Croatian Parliament in the period of four consecutive parliamentary

[29] Council of Europe, Code of Good Practice for Civil Participation in the Decision-Making Process, Strasbourg, 1 October 2009, accessed December 11, 2020, https://rm.coe.int/16802eed5c.

[30] Council of Europe, Recommendation CM/Rec(2009)1 of the Committee of Ministers to member states on electronic democracy (e-democracy), Strasbourg, 18 February 2009, accessed December 11, 2020, https://rm.coe.int/09000016805d1b01.

[31] Council of Europe, Guidelines for civil participation in political decision making, Strasbourg, 27 September 2017, accessed December 11, 2020, https://rm.coe.int/090000168097e936.

[32] Law on the ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 8 December 2006, Official Gazette – International Treaties 2007, No. 1, item 2.

[33] Code of Practice on Consultation with the Interested Public in Procedures of Adopting Laws, Other Regulations and Acts of 21 November 2009, Official Gazette 2009, No. 140, item 3402.

[34] Right of Access to Information Act of 15 February 2013, Official Gazette 2013, No. 25, item 403. Amendments to the Right of Access to Information Act were published in the Official Gazette 2015, No. 85, item 1649.

convocations[35] show that the Constitution, the Rules of Procedure and the RAIA enable public participation in the legislative process by using petitions, information and consultation, involvement in working groups and working bodies, and the same legal instruments may be applied in the parliamentary procedure of adopting the Central budget.[36] With this in mind, it should be first examined whether the instruments of public participation in the legislative process and the budgetary process are applicable in the procedure for authentic interpretation of laws as well – especially given that, according to Article 208, paragraph 2 of the Rules of Procedure, the provisions pertaining to the procedure to enact laws shall be applied accordingly to the procedure for authentic interpretation of laws – or that procedure does indeed take place without the participation of citizens.

4.1. Instruments of public participation

Pursuant to Article 172, paragraph 1 of the Rules of Procedure, the right to propose a law belongs to any MP, deputy club, parliamentary working body, or the Government, i.e. the same circle of authorized applicants who have the right to submit a proposal for giving an authentic interpretation of laws. Although it follows that citizens and other representatives of the public do not have the right to propose bills, nor the right to submit a proposal for an authentic interpretation of laws, they may use their constitutional right to petition under Article 46 of the Constitution. Namely, the right to petition enables everyone to file their petitions, complaints, and proposals to the state and other public bodies, but also to receive their response. On this constitutional basis, they can formulate their proposal as an initiative for submitting a proposal for an authentic interpretation of laws and send it directly to the parliamentary working body,[37] or any other authorized submitter of such a proposal. Therefore,

[35] Gordan Struić, and Vjekoslav Bratić, "Sudjelovanje javnosti u zakonodavnom postupku: primjer Odbora za financije i državni proračun Hrvatskoga sabora," 147–149.

[36] Gordan Struić, and Vjekoslav Bratić, "Public participation in the budgetary process in the Republic of Croatia," *Public Sector Economics* 42, no. 1 (2018): 67–92.

[37] If it is submitted to the working body, in accordance with Article 44, paragraph 8 of the Rules of Procedure, the working body may hold a discussion at its session on the submitted initiative. If it is sent to the Croatian Parliament, the President of the Croatian Par-

the right to petition is not only an instrument of public participation in the legislative (and the budgetary) process, but also in the procedure for authentic interpretation of laws.[38]

Furthermore, citizens and other representatives of the public may exercise their right of access to information guaranteed by Article 38, paragraph 4 of the Constitution and by Article 6 of the RAIA, according to which the information is available to "any Croatian or foreign natural and legal person in accordance with the terms and conditions and the restrictions of this Act". Given that the objective of the RAIA consists in enabling and ensuring constitutionally guaranteed right of access to information and of its re-use "through openness and the public nature of the actions of public authorities" (Article 3), it is important to underline Article 10, paragraph 1 of the RAIA according to which public authorities – hence, the parliament as well – are obliged to publish, "in an easily browsable manner", laws and other regulations (related to their scope of activity) on their website, as well as their general enactments and adopted decisions affecting the interest of beneficiaries, draft laws and other regulations, etc. Also, it is worth to emphasize Articles 279-288 of the Rules of Procedure, according to which the Croatian Parliament "shall inform the public of the work of the Parliament and decisions made therein, and of all matters debated therein" (Article 279, paragraph 1), and the Rules on Public Access to Proceedings in the Croatian Parliament and its Working Bodies,[39] which regulate issues such as attendance by citizens, representatives of their associations, NGOs as observers at plenary sessions and sessions of working bodies, di-

liament will refer it to the chairperson of the competent working body, who shall be obliged to inform the applicant on the outcome of such initiative within a period not exceeding three months.

[38] Citizens, their organizations, and associations were explicitly prescribed by the Rules of Procedure the right to submit the initiative for an authentic interpretation of laws in the period from 1982 to 1992. However, following the adoption of the Amendments to the Rules of Procedure of the House of Representatives of the Parliament of the Republic of Croatia (Official Gazette 1992, No. 89, item 2308), their right to such an initiative was no longer prescribed by the Rules of Procedure, but arose from their constitutional right to petition.

[39] Rules on Public Access to Proceedings in the Croatian Parliament and its Working Bodies of 20 May 2005, Official Gazette 2005, No. 66, item 1286.

rect transmission and recordings of such sessions, the Parliament's website, etc. It should be also emphasized that the provisions on the right of access to information are not limited to legislative procedure, and the procedure for authentic interpretation, but generally apply to all parliamentary work.

Although some authors[40] firmly link the right of access to information in the legislative process with the right to public consultation, which is prescribed by Article 11, paragraph 1 of the RAIA – according to which all state bodies are required to "conduct public consultations prior to the adoption of acts and subordinate legislation, and in the adoption of general acts or other strategic or planning documents where these affect the interests of citizens and legal persons" – in the procedure for authentic interpretation of laws it would not be applicable, and the reasons for this can be found in the very nature of the institute. Namely, as it was pointed out in the introduction, with the authentic interpretation of laws, the parliament only clarifies the original meaning of a particular provision of the law, and it is considered as an integral part of the interpreted law from the moment it enters into force. Therefore, a proposal for an authentic interpretation of laws is not about amending, or enacting a new law, but about interpreting the provision of the adopted law that is its integral part. Thus, that instrument of public participation in the legislative process essentially could not be applied to the procedure for authentic interpretation of laws.

In the legislative process, the public can be involved in individual working groups and working bodies, as the Rules of Procedure (in Article 53, paragraph 1) provide for the possibility of establishing sub-committees and special working groups within the framework of the working body to consider topics within its competence, and to prepare proposals on these topics, as well as to compile reports and draft acts, and for that purpose it may include citizens as experts on specific issues. Furthermore, there is a possibility to include scientific and other organizations and experts to prepare a certain act or consider a certain issue within the scope of the working body, but only if the financial resources are

[40] See Gordan Struić and Vjekoslav Bratić, "Sudjelovanje javnosti u zakonodavnom postupku: primjer Odbora za financije i državni proračun Hrvatskoga sabora," 147–149; Gordan Struić and Vjekoslav Bratić, "Public participation in the budgetary process in the Republic of Croatia," 67–92.

provided for that (Article 52 of the Rules of Procedure). In addition, the working body may invite public employees, scientists, professionals, as well as other persons to meetings to obtain their opinions on topics that will be discussed at the session (Article 57, paragraph 1 of the Rules of Procedure), and up to six public employees, scientists, and professionals may be appointed by the Croatian Parliament to working bodies with all the rights that members of working bodies have, except the right to vote (Article 57, paragraph 3 of the Rules of Procedure). Finally, participatory elements can be noted within the institute of public hearing[41] (Article 52.a of the Rules of Procedure) which the working body may organize to obtain expert opinions, or to conduct a wider discussion on the draft act, certain solutions contained in a particular draft or valid act, or to clarify a particular issue of public interest. Bearing in mind that in the procedure for authentic interpretation the discussion is held at the session of the competent working body and the Legislation Committee, relevant provisions that regulate public involvement in working groups and working bodies in the legislative process are applicable in the procedure for authentic interpretation as well.

From what was stated above, it can be concluded that the positive Croatian parliamentary law enables public participation in the procedure for authentic interpretation of laws. Furthermore, it is worth noting that, almost entirely, the instruments of public participation in the legislative process are applicable in the procedure for authentic interpretation of laws, with the exception of public consultation which, due to the described nature of an authentic interpretation, would not be applicable in that procedure. However, the relevant regulations do not identify any other, special instruments of public participation in the procedure for authentic interpretation of laws. On this normative basis, using the information available on the Croatian Parliament's website, it would be worthwhile to refer to the parliamentary practice related to the issue of public participation in the procedure for authentic interpretation of laws.

[41] The institute of public hearing was introduced into the system of the Croatian parliamentary law with the adoption of the Amendments to the Rules of Procedure of the Croatian Parliament (Official Gazette 2018, No. 29, item 589).

4.2. Parliamentary practice

In the period of almost 30 years, i.e. since 1992, when the first authentic interpretation of laws[42] was adopted until today,[43] 35 acts regarding authentic interpretation of laws have been adopted. It should be emphasized that this is the total number,[44] of which the parliament passed 18 acts of authentic interpretation and 17 decisions by which it rejected to provide an authentic interpretation. Although these acts of authentic interpretation do not contain information on the applicants, some of this information is publicly available on the Croatian Parliament's website. From the e-Doc database (edoc.sabor.hr) it can be seen that data are available for 18 out of 35 acts regarding authentic interpretation of laws (51.43%), from the period of 5th convocation of the Croatian Parliament (since 2004) to the current, 10th convocation (2020). Having in mind this methodological note, from the available data it can be determined that the largest number of proposals was submitted by MPs (9 or 25.71%), followed by the Government (4 or 11.43%), and deputy clubs (4 or 11.43%), and one proposal was submitted by the working body (2.86%).

In the available draft acts of authentic interpretation of laws, no clear data were found on the applicant of the initiative for submitting a proposal for an authentic interpretation. In the Draft decision on not-giving an authentic interpretation of Article 41, paragraph 1, and Article 42 of the Law on Ownership and Other Real Property Rights,[45] the appli-

[42] Authentic interpretation of Article 48, paragraph 4 of the Labor Relations Act (Official Gazette 1990, No. 19, item 377; 1992, No. 19, item 426) of 4 June 1992, Official Gazette 1992, No. 34, item 870.

[43] Status on date: 11 December 2020.

[44] Only those acts of authentic interpretation of laws whose proposals were discussed and voted on were taken into consideration. Although the Croatian Parliament's e-Doc database contains the Draft decision of 23 May 2016 on giving authentic interpretation of Articles 110, 111 and 112 of the Security and Intelligence System of the Republic of Croatia Act (Official Gazette 2006, No. 79, item 1912; 2006, No. 105, item 2371) (accessed December 11, 2020, http://edoc.sabor.hr/DocumentView.aspx?entid=2002740), that document was not included in this analysis because it was not discussed and voted on, which is an integral part of the procedure for authentic interpretation of laws.

[45] Croatian Parliament, Draft decision of 27 May 2010 on not-giving an authentic interpretation of Article 41, paragraph 1, and Article 42 of the Law on Ownership and

cant (MP) stated that the direct reason for submitting the proposal was a specific case of two citizens, but from the explanation of the proposal it is not possible to deduce whether the citizens addressed the applicant (and in what way), or if it may have been done by someone else on their behalf, etc. Similarly, in the Draft decision on giving an authentic interpretation of Article 35 of the Pension Insurance Act,[46] the applicant (deputy club) cited an example of a citizen who suffered damage due to a misinterpretation of a provision of the law, but from the explanation of the proposal it was not possible to deduce whether this citizen addressed (and in what way) the applicant, or if it was done by someone else, etc. However, regardless of the fact that the proposals for an authentic interpretation did not provide clear information on the applicant of the initiative, the fact that the direct reason for the submission of a proposal was a specific case of citizens, together with the constitutional, legal and parliamentary procedural basis, indicates a very wide window of opportunity for real participation in this procedure.

On the other hand, there are certain examples from parliamentary practice that show that not all specific cases of individual citizens have ultimately resulted in a submission of a proposal for an authentic interpretation. In this context, available acts of parliamentary working bodies published on the Croatian Parliament's website with information on the work of parliamentary committees (www.sabor.hr) may serve as a valuable source of relevant information. Although they do not contain information that would show, for example, which instruments of participation, in addition to petitions, were used in each case – e.g. whether a special working group was established within the working body, which included citizens as experts for certain issues; whether scientific and other organizations and ex-

Other Real Property Rights (Official Gazette 1996, No. 91, item 1596; 1998, No. 68, item 817; 1999, No. 137, item 2122; 2000, No. 22, item 402; 2000, No. 73, item 1578; 2001, No. 114, item 1883; 2006, No. 79, item 1917; 2006, No. 141, item 3195; 2008, No. 146, item 4021; 2009, No. 38, item 837; 2009, No. 153, item 3751), accessed December 11, 2020, http://edoc.sabor.hr/DocumentView.aspx?entid=7223.

[46] Croatian Parliament, Draft decision of 28 May 2015 on giving an authentic interpretation of Article 35 of the Pension Insurance Act (Official Gazette 2013, No. 157, item 3290), accessed December 11, 2020, http://edoc.sabor.hr/DocumentView.aspx?entid=18645.

perts were involved and how; whether all appointed members of the working body (i.e. public employees, scientists, and professionals) participated in the discussion; and whether a public hearing was organized – these acts reveal information about the applicant of the initiative, its content, as well as the outcome. With this in mind, it is worth mentioning the example of a citizen who filed a submission to the War Veterans Committee requesting that the Committee, as an authorized applicant, submit a proposal for an authentic interpretation of Article 35 of the Act on the Rights of Croatian Homeland War Veterans and Their Family Members.[47] However, the Committee found that, due to the clarity of the provision of said article, there was no reason for authentic interpretation, but the "emphasis should be placed on the consistent implementation of Article 35 of the Act by the competent authorities",[48] so the Committee unanimously concluded not to submit a proposal for an authentic interpretation.

Another example is the initiative for submitting a proposal for an authentic interpretation of Article 22, paragraph 7 of the Croatian Radio-Television Act,[49] which was submitted by the interim director general of Croatian Radio-Television (HRT) to the Committee on information, informatization and media. The members of that Committee agreed that there is no need to initiate a procedure for authentic interpretation of Article 22, paragraph 7 of the Act, because it "clearly regulates the procedure for electing the president and three members of the HRT Supervisory Board",[50] so the Committee unanimously concluded that the initiative was not going to be accepted. As it was previously mentioned, the ini-

[47] Act on the Rights of Croatian Homeland War Veterans and Their Family Members of 30 November 2004, Official Gazette 2004, No. 174, item 3010. Amendments to the Act on the Rights of Croatian Homeland War Veterans and Their Family Members were published in the Official Gazette 2005, No. 92, item 1834; 2007, No. 2, item 184; 2007, No. 107, item 3140.

[48] Croatian Parliament, the Statement of 4 February 2009 of the War Veterans Committee on the Initiative and Petition on Violations of the Right to Priority Employment of Veterans of the Homeland War, accessed December 11, 2020, www.sabor.hr/hr/radna-tijela/odbori-i-povjerenstva/ocitovanje-odbora-za-ratne-veterane-na-inicijativu-i-predstavku.

[49] Croatian Radio-Television Act of 3 December 2010, Official Gazette 2010, No. 137, item 3515.

[50] Croatian Parliament, the report of 2 February 2011 on the HRT initiative for providing authentic interpretation of Article 22, paragraph 7 of the Croatian Radio-Television

tiative was submitted by an interim director general of a body founded by the Republic of Croatia, and has the status of a public institution,[51] and its importance stems from the fact that it is an example of addressing the authorized applicant for providing authentic interpretation by using the right to petition as one of the instruments of participation, as well as an example of acting of the working body in cases where considered provision is not unclear in its view so there was no reason for authentic interpretation.

However, even in the latter examples of non-acceptance of the initiative by the competent working body, the applicant has several options. For example, the applicant could turn to another authorized submitter of a proposal for an authentic interpretation (e.g. MP or deputy club), or resort to another instrument of public participation, such as encouraging the working body to organize a public hearing under Article 52.a of the Rules of Procedure, or even use some of the instruments of public participation in the legislative process to initiate certain amendments to the law whose provision is considered unclear. Moreover, in cases of using the latter instruments, the applicant would have the opportunity to initiate a different formulation of the content of the provision, shaping it more precisely than it would be possible in the procedure for authentic interpretation of laws.[52]

Act, accessed December 11, 2020, www.sabor.hr/hr/radna-tijela/odbori-i-povjerenstva/izvjesce-odbora-za-informiranje-informatizaciju-i-medije-o-52.

[51] See Article 1, paragraphs 1-2 of the Croatian Radio-Television Act of 3 December 2010. Having in mind that Article III, paragraph 2 of the Code of Practice on Consultation with the Interested Public in Procedures of Adopting Laws, Other Regulations and Acts of 21 November 2009 under the concept of the interested public include public institutions as well, this case is also an example of public participation in the procedure for authentic interpretation of laws.

[52] The Constitutional Court in decision of 14 November 2007 (No. U-I-2488/2004, Official Gazette 2007, No. 133, item 3832) expressed the view that the institute of authentic interpretation of laws "must remain within the limits of legal interpretation", from which it follows that it may not substantively amend the provisions of the law to which it refers.

5. COMPARATIVE LEGAL PERSPECTIVE

Comparative parliamentary law reveals various examples of the regulation of authentic interpretation of laws. For example, some countries establish this institute at the constitutional level, without any special provisions in their parliament's rules of procedure (e.g. Belgium[53] and Greece[54]), while some other countries do not explicitly mention parliamentary *ius interpretandi* in their constitutions, but they instead do it in their parliament's rules of procedure (e.g. Slovenia[55] and Croatia). Furthermore, there are countries that regulate this matter by particular law and rules of procedure (e.g. Serbia[56]), or by their constitution and rules of procedure (e.g. North Macedonia[57]), and some of them do not explicitly mention neither the *ius interpretandi* of the parliament nor special procedure for

[53] See the Belgian Constitution, coordinated on 17 February 1994, as amended, accessed December 11, 2020, www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf, and the Rules of Procedure of the Belgian House of Representatives of 2 October 2003, as amended, accessed December 11, 2020, https://www.lachambre.be/kvvcr/pdf_sections/publications/reglement/reglement_UK.pdf.

[54] See the Constitution of Greece of 11 June 1975, as amended, accessed December 11, 2020, www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf, and the Rules of Procedure of the Hellenic Parliament of 22 June 1987, as amended, accessed December 11, 2020, www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/Standing%20Orders%202.docx.

[55] See the Constitution of the Republic of Slovenia of 23 December 1991, as amended, accessed December 11, 2020, http://pisrs.si/Pis.web/pregledPredpisa?id=USTA1#, and the Rules of Procedure of the National Assembly of 2 April 2002, as amended, accessed December 11, 2020, http://pisrs.si/Pis.web/pregledPredpisa?id=POSL34#.

[56] See the Law on the National Assembly of 26 February 2010, accessed December 11, 2020, www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/skupstina/zakon/2010/9/1/reg, and the Rules of Procedure of the National Assembly of 28 July 2010, as amended, accessed December 11, 2020, www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/skupstina/poslovnik/2012/20/1/reg/.

[57] See the Constitution of the Republic of North Macedonia of 17 November 1991, as amended, accessed December 11, 2020, www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nspx, and the Rules of Procedure of the Assembly of the Republic of North Macedonia of 18 July 2008, as amended, accessed December 11, 2020, www.sobranie.mk/rules-procedures-of-the-assembly-ns_article-rules-of-procedure-of-the-assembly-of-the-republic-of-macedonia-precisten-tekst-2013.nspx.

authentic interpretation in its constitution and parliamentary rules of procedure, but certain interpretive rules derive from constitutional principles and practices (e.g. Italy)[58].

Given the difference in approach to the regulation of this matter, but also having in mind the fact that the procedure for authentic interpretation of laws in four republics of the former SFRY – Croatia, North Macedonia, Slovenia and Serbia – is regulated in a similar way by the rules of procedure of their respective parliaments,[59] it would be worthwhile to briefly review the relevant regulations of the latter three countries concerning the possibility of public participation in said procedure.

In accordance with Article 194, paragraph 1 of the Rules of Procedure of the National Assembly, and Article 107, paragraph 1 of the Constitution of the Republic of Serbia,[60] the right to submit a proposal for an authentic interpretation of laws belongs to every authorized proposer of the law: any MP, the Government, an assembly of an autonomous province, or at

[58] Teodor Antić, "Vjerodostojno tumačenje zakona," 627–628; Gordan Struić, "Postupak za autentično (vjerodostojno) tumačenje zakona u hrvatskom, makedonskom, slovenskom i srbijanskom parlamentarnom pravu i praksi," 135.

[59] See Gordan Struić, "Postupak za autentično (vjerodostojno) tumačenje zakona u hrvatskom, makedonskom, slovenskom i srbijanskom parlamentarnom pravu i praksi," 133–156. The institute of authentic interpretation of laws was first introduced by the Constitution of the Federal People's Republic of Yugoslavia (hereinafter: FPRY) of 31 January 1946 (Official Gazette of the FPRY 1946, No. 10, item 54), after which it was introduced in the Constitution of the People's Republic of Croatia of 18 January 1947 (Official Gazette 1947, No. 7, item 12), and then in the later Croatian constitutions (until 1990) and parliamentary rules of procedure. In other republics of the former SFRY, an authentic interpretation of laws was prescribed at the constitutional and procedural level as well, but since their independence, only four of the former republics of the SFRY retained this institute, while Montenegro (2010) and Bosnia and Herzegovina (2015) abandoned it. See Gordan Struić, "Vjerodostojno tumačenje zakona u hrvatskom parlamentarnom pravu od 1947. do danas," 576–577. In the parliamentary rules of procedure of these four countries which regulate the institute of authentic interpretation, all four previously described phases (*supra*, part 2 of this paper) of acting on proposal for an authentic interpretation of laws coincide.

[60] See the Constitution of the Republic of Serbia of 8 November 2006, accessed December 11, 2020, www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/skupstina/ustav/2006/98/1/reg.

least 30.000 voters.[61] A similar provision can be found in Slovenian Rules of Procedure of the National Assembly in Article 114, paragraph 1 which provides that only authorized proposers have the right to submit a proposal for an authentic interpretation of laws: the Government, any MP, the National Council, or at least 5.000 voters. However, a far wider circle of authorized proposers is provided by Article 175 of the Rules of Procedure of the Assembly of the Republic of North Macedonia which gives this right to any MP, the Government, the Constitutional Court, the Supreme Court, the Public Prosecutor, the Ombudsman, the mayor of the municipality, the mayor of the City of Skopje, as well as to the municipality council, but not to the citizens. Although the Serbian and Slovenian rules of procedure list a group of voters as one of the submitters of a proposal for an authentic interpretation, this right does not belong to an individual citizen,[62] and none of the rules of procedure of the three parliaments stipulates that individual citizens can file the initiative for submitting a proposal for an authentic interpretation. Such a possibility, similarly to Croatia, arises from their constitutional right to petition (Article 56 of the Constitution of the Republic of Serbia, Article 45 of the Constitution of the Republic of Slovenia, and Article 24 of the Constitution of the Republic of North Macedonia).

In addition to the general provisions on the publicity of the work of parliaments in their rules of procedure (in Serbia Articles 255-261; in Slovenia Articles 100-106; in North Macedonia Articles 225-234), and the constitutional right to access information (in Article 51, paragraph 2 of the Constitution of the Republic of Serbia, Article 39, paragraph 2 of the Constitution of the Republic of Slovenia and Article 16 of the Constitution of the Republic of North Macedonia), special attention should be paid to other normative guarantees that can be used by the public in the procedure of authentic interpretation of laws, within the work of parliamentary working bodies.

[61] The right to propose laws within their competence belongs to a Civic defender and the National Bank of Serbia as well (Article 107, paragraph 2 of the Constitution of the Republic of Serbia).

[62] However, a citizen, a group of citizens, institutions, and associations, in accordance with Article 133, paragraph 1 of the Rules of Procedure of the Assembly of the Republic of North Macedonia, may file an initiative to the authorized proposer for adoption of a law.

In Serbia, the Rules of Procedure of the National Assembly stipulate that the President of the Assembly may, upon the proposal of a working body, engage scientific or professional institutions, as well as individual scientists and professionals to consider certain issues within the competence of the National Assembly (Article 43); they have the right to participate, upon the invitation, in the work of working bodies (Article 74, paragraph 5). In addition to this general provision,[63] the Environmental Protection Committee may allow attendance or participation of citizens and their associations at a session to deliberate on certain environmental issues (Article 63, paragraph 2), and the Security Services Control Committee may consider citizens' proposals and petitions addressed to the National Assembly related to the work of security services (Article 66, paragraph 1, subparagraph 9). Similar to the Croatian Rules of Procedure, working bodies may organize public hearings to obtain information or expert opinions on proposed acts, or to clarify certain provisions from a proposed or valid act, or issues that are important for the preparation of a draft act or some other issue within the competence of the working body, or to monitor the implementation and application of the law, i.e. to realize the oversight function of the National Assembly (Article 83).

In the Slovenian National Assembly, there are also important mechanisms, which guarantee the possibility of participation within the working bodies. Pursuant to the Rules of Procedure of the National Assembly, if a representative of a civil society addresses a certain proposal, initiative or question to a competent working body, it shall be informed about it[64] (Article 41, paragraph 3), and it may invite experts and representatives of the interested public to obtain information which could be useful, as well as organize public presentations of their opinions and views (Article 46, paragraph 1). Also, the working body may invite them to a session to obtain their explanations, opinions, and views regarding any individual issue on the agenda (Article 51, paragraph 2). In addition to these gen-

[63] Almost identical provision is contained in Article 27, paragraph 14 of the Law on the National Assembly.

[64] If an external expert or a legal person participate in the drafting of the draft law, this information shall be included in the introduction of the draft, pursuant to Article 115, paragraph 3, subparagraph 8 of the Rules of Procedure of the National Assembly.

eral provisions, in the procedure for discussing EU affairs, the competent working body may also invite the public (experts, civil society, business, and associations) in cases when a certain issue on the agenda is related to their work (Article 154e, paragraph 2).

Similarly, according to the Rules of Procedure of the Assembly of the Republic of North Macedonia, the working body may invite to a session, *inter alia*, scientists, professionals, public employees and representatives of organizations, institutions and associations to obtain their views on certain issues on the agenda (Article 122, paragraph 2). Furthermore, the working body may organize public debates on a draft law of broader public interest (Article 145) and prepare a report on the outcome of the public debate, and the initiative to debate certain issues may be raised, among others, by citizens' associations (Article 124, paragraph 3). Besides that, special attention should be paid to external members of the working body. Namely, Article 119, paragraphs 2-3 stipulate that the working body may have two members who shall participate in the work of the working body without the right to vote. They are elected from among scientists and experts; one of them shall be elected upon a proposal made by the parliamentary majority and the other by the parliamentary minority, provided that they are not members of a political party. It is very similar to a Croatian parliamentary model from Article 57, paragraph 3 of the Rules of Procedure, which provides for the possibility of appointing public, scientific, and professional employees to working bodies who have all the rights of other members of working bodies except voting rights. However, in the Croatian model, there is a slightly larger number of external members (up to six), and candidates can be nominated by a much wider circle of authorized persons: from professional institutions, professional associations, and civil society associations, all the way to individuals (Article 57, paragraph 4).

The parliamentary law of the three considered countries of the former SFRY shows that instruments of public participation in the procedure for authentic interpretation of laws (right to petition, information and involvement through the work of parliamentary working bodies) coincide with those in the Croatian parliament, with noting that the Serbian and Slovenian rules of procedure specify a group of citizens (voters) as one of the authorized submitters of a proposal for an authentic interpreta-

tion of laws. Although some of the instruments contain certain specifics that differ from each other in three considered rules of procedure, such as the instrument of public involvement through the work of working bodies – which includes e.g. the possibility of organizing public hearings in Serbia (Article 83), or public presentations of experts' opinions and views in Slovenia (Article 46), or external members of the working body elected from among the scientists and experts in North Macedonia (Article 119) – there are common elements, such as the possibility of inviting experts and scientists to a session of the working body in all three rules of procedure (Article 122 in North Macedonia, Article 43 in Serbia, and Article 51 in Slovenia).

6. CONCLUSIONS

Starting from the understanding of some authors that the act of authentic interpretation of laws is contrary to the principle of democratic pluralism, which "seeks to circumvent the regular legislative procedure, tries to promote specific political interests, without the necessary level of democratic control and without citizen participation",[65] the aim of this paper was to examine whether the positive Croatian parliamentary law enables public participation in the procedure for authentic interpretation of laws and, if so, which legal instruments can be used to implement it in parliamentary practice. On this basis, especially bearing in mind that the question of public participation in the procedure for authentic interpretation of laws has not yet been the focus of research attention, and it was mentioned only secondarily in the literature, it was important to consider the legal framework for the procedure for authentic interpretation of laws, as well as to explain the importance and role of public participation in decision-making processes. It was pointed out that public participation has a number of advantages, and that the real application of the model of legitimate and effective democracy requires the existence and application of legal instruments that enable public participation in the decision-mak-

[65] Siniša Rodin, "Demokratsko-pluralistička kritika instituta tzv. vjerodostojnog tumačenja," 1.

ing process, and, therefore, in the procedure of authentic interpretation of laws.

After analyzing the provisions of the Constitution, Rules of Procedure and RAIA, it was found that the positive Croatian parliamentary law enables public participation in the procedure for authentic interpretation of laws through instruments of petition, information and involvement in working groups and working bodies. All these instruments coincide with those in the legislative process, with the exception of public consultation, which – due to the very nature of the institute of authentic interpretation of laws – is not applicable in the procedure for authentic interpretation, but in the legislative (and budgetary) procedure. Although publicly available proposals of acts of authentic interpretation of laws did not provide clear data on the initiators of such proposals, from the described examples, it can be concluded that certain cases of individual citizens were indeed a direct reason for the submission of a proposal by the authorized applicant. Furthermore, in publicly available acts of working bodies related to certain initiatives, no data were found that would reveal, for example, which instruments of public participation, in addition to petitions, were used in individual cases, but at the same time, these acts can reveal information about the applicant of the initiative, its content, as well as its outcome. Examples from parliamentary practice show that not all initiatives resulted in the submission of a proposal for an authentic interpretation of laws by authorized applicants. However, the applicant who did not succeed with the initiative can: refer to another authorized proposer, use another instrument, or simply take the initiative to amend the law whose provision is considered unclear. It follows that the positive parliamentary law provides a wide-open legal window of opportunity for the public to have influence on an unclear provision, both in the direction of its interpretation and its amendment, and such a broad possibility of participation in parliamentary reality has a strong potential to create a stimulating environment for involving as many stakeholders as possible in the process of decision-making.

In view of the above, it can be concluded that the current Croatian rules of procedure on the authentic interpretation of laws contain a solid legal basis that does not require any significant intervention. Therefore, it would not be necessary, or even desirable, to amend it by prescrib-

ing all possible legal instruments of public participation in the procedure of authentic interpretation of laws. Namely, the latter approach would unnecessarily burden the text by repeating the valid provisions of the Constitution, the Rules of Procedure, or RAIA, resulting in legal over-norming and other unfavorable outcomes indicated by the rules of nomotechnics.[66] In this regard, it is worth emphasizing the importance of the Uniform Rules on the Methodology and Legislative Technique for the Drafting of Acts Enacted by the Croatian Parliament.[67] The purpose of these rules is to ensure a uniform methodology and a nomotechnical harmonization of the wording of parliamentary acts in order to eliminate potential irregularities leading to insufficient clarity, and misinterpretation in their application, which could, consequently, reduce the need to resort to the authentic interpretation of laws.[68]

Finally, the paper referred to the regulation of this matter in the parliamentary law of the three republics of the former SFRY, which, as well as Croatia, regulate the institute of authentic interpretation of laws: North Macedonia, Slovenia, and Serbia. After reviewing the relevant regulations of the parliamentary law of the three latter countries, it was concluded that the public participation in the procedure of authentic interpretation of laws may be achieved by using the right to petition, information and involvement through the work of parliamentary working bodies. This means that said instruments of public participation in the procedure for authentic interpretation of laws coincide with those in the Croatian parliament, with noting that the Serbian and Slovenian rules of procedure specify a group of citizens (voters) as one of the authorized submitters of a proposal for an authentic interpretation. Following the above, the possibility of public participation in the procedure for authentic interpretation of laws is not only a Croatian parliamentary *specificum*, but is also present

[66] For example, increasing the text of regulation and its opacity in application, causing monotony of apperception, and even confusion and doubt. Mihajlo Vuković and Đuro Vuković, *Znanost o izradi pravnih propisa: nomotehnika* (Zagreb: Informator, 1997), 135.

[67] Uniform Rules on the Methodology and Legislative Technique for the Drafting of Acts Enacted by the Croatian Parliament of 19 June 2015, Official Gazette 2015, No. 74, item 1410.

[68] Gordan Struić, "Vjerodostojno tumačenje zakona u hrvatskom parlamentarnom pravu od 1947. do danas," 582.

in comparative law. Although there are a few more issues on this topic that deserve attention – such as the closer comparison of the instruments of participation in this procedure in the four countries of the former SFRY that regulate this institute, and especially their parliamentary and constitutional court practices, with further possibility of examining some other countries whose parliamentary law and practice recognize this institution as well – these issues should be covered by special research which goes beyond the scope and purpose of this paper.

REFERENCES

Antić, Teodor. "Vjerodostojno tumačenje zakona." *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 36, no. 1 (2015): 619–644.

Bačić, Arsen. "Konstitucionalizam i parlamentarno pravo." *Vladavina prava* 3, no. 6 (1999): 129–155.

Freie, John F. "Participatory democracy." In *Encyclopedia of community: from the village to the virtual world, Volume 1*, edited by David Levinson, and Karen Christensen, 162. Thousand Oaks: Sage, 2003.

Giunio, Miljenko. "Ustavnost i vjerodostojnost autentičnog tumačenja zakona u hrvatskoj praksi." *Pravo u gospodarstvu* 44, no. 5 (2005): 3–34.

Maldini, Pero. *Demokracija i demokratizacija*. Dubrovnik: Sveučilište u Dubrovniku, 2008.

Maldini, Pero. "Postkomunizam i postdemokracija: kriza demokracije i mjerila demokratičnosti." In *Demokracija i postdemokracija*, edited by Anđelko Milardović, and Nikolina Jožanc, 209–239. Zagreb: Pan liber i Institut za europske i globalizacijske studije, 2013.

Malsch, Marijke. *Democracy in the courts: lay participation in European criminal justice systems*. Ashgate: Surrey, 2009.

Michels, Ank M. B. "Citizen participation and democracy in the Netherlands." *Democratization* 13, no. 2 (2006): 323–339. https://doi.org/10.1080/13510340500524067.

Pateman, Carole. "Participatory democracy revisited." *Perspectives on politics* 10, no. 1 (2012): 7–19. https://doi.org/10.1017/S1537592711004877.

Phillips, Anne. *(O)rađanje demokracije*. Zagreb: Ženska infoteka, 2001.

Posavec, Zvonko. "Javnost i demokracija." *Politička misao* 41, no. 1 (2004): 5–10.

Rodin, Siniša. "Demokratsko-pluralistička kritika instituta tzv. vjerodostojnog tumačenja." *Informator* 53, no. 5337-5338 (2005): 1–4.

Struić, Gordan. "Vjerodostojno tumačenje zakona u hrvatskom parlamentarnom pravu od 1947. do danas." *Hrvatska i komparativna javna uprava* 16, no. 3 (2016): 553–585. https://doi.org/10.31297/hkju.16.3.3.

Struić, Gordan. "Postupak za autentično (vjerodostojno) tumačenje zakona u hrvatskom, makedonskom, slovenskom i srbijanskom parlamentarnom pravu i praksi." *Pravni vjesnik* 32, no. 3-4 (2016): 133–156.

Struić, Gordan. "Uloga i način uređenja javnosti u hrvatskom parlamentarnom pravu od 1947. do 1953." *Pravni vjesnik* 33, no. 2 (2017): 101–122. https://doi.org/10.25234/pv/5111.

Struić, Gordan. "Pitanje totalitarne naravi autentične interpretacije zakona kao relikta prošlosti." In *Identiteti – kulture – jezici, Godišnjak Filozofskog fakulteta Sveučilišta u Mostaru: Nasljeđa totalitarizama u suvremenom društvu*, edited by Dražen Barbarić, Miljenko Brekalo, Mate Buntić, Karsten Dümmel, Gordana Iličić, Miro Jakovljević, Katica Krešić, Ivica Musić, Marko Odak, Jelena Sabljić-Vujica, and Ugo Vlaisavljević, 55–68. Mostar: Filozofski fakultet Sveučilišta u Mostaru, 2018.

Struić, Gordan, and Bratić Vjekoslav. "Sudjelovanje javnosti u zakonodavnom postupku: primjer Odbora za financije i državni proračun Hrvatskoga sabora." *Hrvatska i komparativna javna uprava* 17, no. 1 (2017): 131–152.

Struić, Gordan, and Bratić Vjekoslav. "Public participation in the budgetary process in the Republic of Croatia." *Public Sector Economics* 42, no. 1 (2018): 67–92.

Vuković, Mihajlo, and Vuković Đuro. *Znanost o izradi pravnih propisa: nomotehnika*. Zagreb: Informator, 1997.

REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLIV
YEAR 2021, ISSUE 1, pp. 155–179
DOI: https://doi.org/10.31743/recl.9953

INVESTING ON THE POLISH MARKET OF CONDO-HOTELS AND APART-HOTELS – SELECTED LEGAL ISSUES

*Ewelina Badura**

ABSTRACT

The institutions of a condo-hotel and apart-hotel are not defined in Polish legislation. However, ownership issues of such facilities are not entirely outside statutory regulations. Legal diversity, the absence of an unambiguous definition and of transparent statistical data, combined with the interchangeable use of the terms "condo-hotel" and "apart-hotel" by investors and operators of such facilities may raise concerns about the proper functioning of the market for this type of investment in Poland. The risks of investing in condo-hotels and apart-hotels in Poland can be divided into several basic categories.

Keywords: rental, real property, condo-hotel, apart-hotel, risk

1. INTRODUCTION

Investing in real property is a popular form of investment in Poland, which is partly a result of low interest rates on bank deposits and the last crisis, which discouraged many investors from playing on the stock exchange[1]. In February 2020 neither property buyers nor lessors could predict

* Dr. Ewelina Badura, Assistant Professor, Institutes of Law, College of Economics, Finance and Law, Department of Real Estate and Tax Law, Cracow University of Economics; correspondence address: ul. Rakowicka 27, 31-510 Kraków, Poland; e-mail: badurae@uek.krakow.pl; https://orcid.org/ 0000-0002-5514-6299.

[1] Anders Åslund, *The Last Shall Be the First: The East European Financial Crisis* (Washington, Dc: Peterson Institute for International Economics, 2010), 53–55.

the Coronavirus pandemic. In many countries, including Poland, the operations of hotels and other short-term rental facilities were suspended for several months. It may be expected that this situation will significantly affect the developing short-term rental market[2].

Polish residential rental market is relatively under-developed compared to other countries of the European Union. Like in other Member-States from the so-called Eastern Block, the residential market is dominated by owner-occupancy with a relatively underdeveloped rental market, which hampers migrations from poorer regions to fast – developing cities.

Strong emphasis on property ownership, as opposed to renting, also limits the mobility of workers and makes it difficult for young people to find housing. At the end of 2018 and at the beginning of 2019 approximately 84.2% of the population in Poland lived in their own property (compared to the total number of dwellings in a given area). In Germany, for example, the owner-occupancy rate was 51.5%. The situation is a result of the legal status of the rental market, which in Poland is poorly regulated and as such does not offer a good alternative to ownership.

On the other hand, short-term rental has become very popular in recent years. Portals offering booking services such as Booking or Airbnb allow their users to find accommodation not only in conventional hotels, inns or B&Bs, but also in attractively located private apartments. We can observe the growing popularity of condo-hotels, where individual rooms for rent belonging to different owners are managed by the so called property manager. The majority of condo-hotels and holiday apartments are located at seaside and mountain towns[3].

The primary aim of this article is to identify potential risks related to investing in the Polish market of short-term rentals. Furthermore, the article presents arguments in favor of following the example of other countries that have introduced legal regulations in this area[4]. In order to come up

[2] April 8, 2020 https://ec.europa.eu/eurostat/documents/2995521/10294612/2-08042020-AP-EN.pdf/d624aabc-eca8-029c-868b-f80efec5b89a.

[3] Ira Gary Peppercorn and Claude Taffin, *Rental Housing. Lessons from International Experience and Policies for Emerging Markets* (Washington Dc: The World Bank, 2013), 109–115.

[4] See for instance European Commission; "A European agenda for the collaborative economy," COM (2016) 184 final.

with an appropriate policy concerning short-term rental the authorities at the local level should have the powers to adopt legal regulations that meet local social and economic needs of their communities[5]. The desired solutions should ensure the protection of public interest while safeguarding freedoms and safety of the residents.

2. THE SOURCES OF THE CONDO AND APARTMENT SYSTEMS

In the condo-hotel system an investor purchases an apartment in a hotel building and concludes with a developer a lease agreement for it, on the basis of which the owner of the apartment derives income. Such projects are usually developed by large companies specializing in the hotel industry. A developer, as opposed to a traditional hotel operator, does not become the owner of the entire property, but sells separate apartments. In the next step the property developer leases the apartments from the owners and, taking advantage of its own infrastructure such as restaurants, spa and wellness, which operate in the building, runs a hotel.

The condo-hotel system, as a form of ownership of residential premises was well-known in ancient Egypt and Greece, where it was addressed to those who could not afford their own apartment[6]. In Western Europe it became popular after the Second World War, as a response to the increased demand for housing and the need for solutions more economical than ownership. The most dynamic development of condominiums took place in the United States[7], where it represents a valid alternative to a prevailing model in which the entire building has a single owner[8]. The condominium model is a combination of two rights. The first right is the right to separate ownership of the part of the building and the other is the right to

[5] Dianne Dredge, "*The impact of regulatory approaches targeting collaborative economy in the tourism accommodation sector*," *Impulse paper*, no. 9 Aalborg University (2016): 3, 24.

[6] George M. Armstrong jr., "Louisiana Condominium Law and the Civilian Tradition," *Louisiana Law Review* 46, no. 1 (1985): 71–72.

[7] Robyn Taylor, "Why Condo Hotels are a Hot Concept," *National Real Estate Investor* (2005): 89.

[8] Karolina Chrabąszcz, "Condoinvestments as an alternative form of capital allocation," *Scientific Papers of the Małopolska University of Economics in Tarnów* 24, no. 1 (2014): 49.

co-ownership of common areas (such as corridors, staircases, lifts, the roof, and the area surrounding the property).

There are two most common legal regimes concerning condominiums in Europe[9]. Under the first regime, the owner acquires two separate, but directly related rights. The first one is the right to ownership of the premises and the other one is the right to co-ownership of the common areas. Such regulations exist in Belgium, Greece, Portugal and Poland. Under the other regime all the owners of the units are also co-owners of the building and the plot and each of them has a special right to the premises (Austria, Holland, Germany and Switzerland). In principle, in both legal regimes common areas are managed by their co-owners[10]. In the apart-hotel model an investor purchases a property and concludes with a developer a lease agreement, deriving income on its basis[11]. This model also pertains to hotels, dining facilities, and spa services, as well as to typical residential buildings with a reception but without a restaurant or recreational facilities.

Condo-hotels and apart-hotels first appeared in Mediterranean countries, and then spread to other parts of the continent. These systems as alternative investment methods have been popular on the international market for over 20 years. Condo-hotels and apart-hotels are based on the concept of concluding two agreements: a property purchase agreement and a property lease agreement. However, these systems differ from one another[12]. The "condo" system describes ownership issues, and the "apartment" system deals with functional issues, therefore additional subcatego-

[9] Real Property Law and Procedure in the European Union, General Report, European University Institute (EUI) Florence/European Private Law Forum Deutsches Notarinstitut (DNotI) Würzburg, 2005, https://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/GeneralReport.pdf.

[10] Cornelius Van Der Merwe, *European Condominium Law* (Cambridge: Cambridge University Press, 2015), 9 et al.

[11] James F. Downey, "The Aparthotel: A Useful Tool for Investors and Developers," *Cornell Hotel and Restaurant Administration Quarterly*, no. 32 (1991): 53–55.

[12] The difference between condo-hotels and apart-hotels concerns, among others, property management. Rooms in condo hotels are usually managed by the developer. On the other hand, apartments in apart-hotels are usually not managed by a developer, but by a specialized external company. The difference between these systems also relates to costs.

ries of products such as: condo-apartments and condo-hotels can also be distinguished on the Polish market.

2.1. Development of condo and apartment systems in Poland

In Poland the equivalent of condominiums are housing communities, however, the article focuses on apart-hotels, as well as condo-hotels. They have emerged as a result of transferring the condo model to the hotel market and are treated as a combination of an investment and "secondary residence". In Poland, the development of condo-hotels and apart-hotels have so far been concentrated mainly in tourist destinations such as Gdańsk, Sopot and Zakopane. However, there may be more such apartments outside large cities as well[13]. It is important to distinguish the two basic real estate markets: the investment market, which includes the transfer of ownership rights and related rights and the rental market, which relates to the conclusion of agreements setting out mutual rights and obligations relating to the use of another's unit. Although the condo-hotels and apart-hotels markets are relatively young they are in a phase of rapid development.

First mention of condo-hotels and apart-hotels appeared on the Polish real estate just as it started to develop, at beginning of the 1990s. However, these options did not meet with interest of potential investors. It was mainly due to the fact that the tourist sector was in its infancy in Poland and property was largely seen as means to satisfy the basic need related to housing. Few people recognized the opportunity to derive profits from such an investment. Another factor that hampered the development of condo-hotels and apart-hotels in Poland was the fact that they were associated with the concept of time – sharing, which was not legally regulated in Poland until the introduction of the Act on timeshares in 2011[14]. Still, in the Polish legal system timeshare refers to services related to holiday stays

[13] Report: Hotel and condo hotel market in Poland, Emmerson Evaluation 2020: https://www.emmerson-evaluation.pl/wp-content/uploads/2020/04/hotel-and-condo-hotel-market-in-poland-2020-report-pdf.pdf.

[14] Timeshare Act of 16 September 2011, Journal of Laws 230.1370. [Ustawa z dnia 16 września 2011 o timeshare, Dz. U. 2011 no. 230 poz. 1370].

and property exchange and does not cover the issues related to ownership or the manner of managing property[15].

2.2. Short-term rental popularity increase in Poland

The accession of Poland to the European Union in 2004 led to many changes, also on the real estate market. One of them was the emergence of many medium and long – term investors, accompanied by the accessibility of mortgages, growth in wealth and easier access to capital and industry know-how for property developers[16]. It resulted in a boom on the real estate market in the years 2006-2007. Real property became to be more frequently seen as a source of passive income and a safe investment instrument and purchasing property in popular holiday destinations in Poland as well as in Spain and Croatia became a common practice for investors. Since 2007 the sector has been dynamically developing, particularly in the biggest seaside resorts such as Sopot, Władysławowo, Kołobrzeg, Międzyzdroje, Świnoujście and in popular Mazurian cities such as Mikołajki, Olsztyn, and in the mountainous regions of Southern of Poland such as Zakopane, Wisła, and Karpacz[17].

The financial crisis of 2008-2009 led to a downturn on the real estate market, including short-term rentals. Investing in condo-hotels and apart-hotels in that period carried a lot of risk. The slowdown on the basic housing market was the main reason for a search for new investment opportunities by developers. Condo-hotels became an alternative investment product. The market of condo-hotels and apart-hotels was not covered by strict legal regulations, unlike the activities of development companies on the residential market, regulated by the Act on Protection of the Rights

[15] Kamil Zaradkiewicz, "Timesharing – a special relation of property law," in *Private law system*, vol. 4, *Property law*, ed. Edward Gniewek (Warsaw: C.H. Beck, 2012), 167.

[16] Hans Joachim Dübel, Władysław Jan Brzeski, and Ellen Hamilton, *Rental Choice and Housing Policy Realignment in Transition: Post-Privatization Challenges in the Europe and Central Asia Region*, Policy Research Working Paper, World Bank, no. 3884 (2006): 42 et al.

[17] Report: Hotel and condo hotel market in Poland, Emmerson Evaluation, 2020, https://www.emmerson-evaluation.pl/wp-content/uploads/2020/04/hotel-and-condo-hotel-market-in-poland-2020-report-pdf.pdf.

of Buyers of Residential Units and Single-Family Houses[18] (the so-called Developers Act). The development of investment in short-term rental was also supported by optimistic assumptions regarding the demand for accommodation in connection with the organization of the Euro 2012 football tournament in Poland and the prospect of high returns on hotel operations in connection with this mass event[19]. The market of condo-hotels and aparthotels continued to grow in the following years.

Until spring 2020, the short-term rental market in Poland was steadily developing[20]. Aparthotels appeared in Poland as early as in the 1980's, with residential buildings that, compared to the prevalent standard in that period, were of relatively high standard. At that time, they could be found mainly at the seaside and in mountain towns. In large Polish cities apart-hotels began to appear at the turn of the twenty-first century and presently they are very popular. The majority of such projects are located in large Polish cities such as Warsaw, Gdansk and Wroclaw. In addition, there are about twice as many new projects in holiday resorts[21]. Many apart-hotels can also be found in Krakow, Poznan, Zakopane and Sopot. Construction projects of condo-hotels and apart-hotels are to a large extent financed from investors contributions or the capital raised by the sale of bonds, as opposed to the money coming from developer's own funds or mortgages.

---

[18] Act of 11 September 2011 on the protection of the rights of buyers of a dwelling or a single-family house, Journal of Laws of 2019, item 1805, as amended. [Ustawa z dnia z dnia 16 września 2011 r. o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego, Dz. U. z 2019 r. poz. 1805].

[19] The impact of the organization of the UEFA EURO 2012 TM European Football Championship on the Polish economy – summary of research results commissioned by the special purpose vehicle of the Minister of Sport and Tourism [Wpływ organizacji Mistrzostw Europy w piłce nożnej UEFA EURO 2012 TM na polską gospodarkę – podsumowanie wyników badań zleconych przez spółkę celową Ministra Sportu i Turystyki], PL.2012 Sp. z o.o., https://bip.msit.gov.pl/download/2/2360/Zalacznik_2_-_Raport_impact_-_podsumowanie.pdf and https://www.emmerson-evaluation.pl/wp-content/uploads/2020/04/hotel-and-condo-hotel-market-in-poland-2020-report-pdf.pdf.

[20] Report: Hotel and condo hotel market in Poland, Emmerson Evaluation, 2020, https://www.emmerson-evaluation.pl/wp-content/uploads/2020/04/hotel-and-condo-hotel-market-in-poland-2020-report-pdf.pdf.

[21] Katarzyna Bucholc-Srogosz, "Condohotels on the Polish real estate market," *Scientific Notebooks of the AJD Administration Institute in Częstochowa* 2, no. 14 (2016): 241–249.

3. SHORT-TERM RENTAL IN EUROPE – REGULATIONS IN SELECTED COUNTRIES

In many cities in the world the law imposes numerous restrictions on short-term rental. It is often regulated at a local level and the laws between states and even cities within the same state[22]. This is mainly due to the fact that short-term rental is perceived differently by different decision-makers and the regulations take into account different social and economic situations in a given state or city.

3.1. France

The Law for a Digital Republic in France[23] has granted municipalities with the powers to determine the rules and manner of registering short-term rental in their area[24]. This right can be exercised by the cities with a population of over 20,000 residents, such as Paris[25]. The rules governing short-term rental depend on the category of the apartment. It may be classified as primary residence, the secondary residence (Fr. *résidence secondaire*) or a tourist apartment (Fr. *meublés de touriste*)[26].

---

[22] World Tourism Organization, New Business Models in the Accommodation Industry – Benchmarking of Rules and Regulations in the Short-term Rental Market, UNWTO, Madrid, 2019.

[23] Vide: Loi n° 2016-1321 du 7.10.2016 no. 1, www.legifrance.gouv.fr.

[24] Rules for short-term rental as well as penalties for non-compliance with short-term rental limits were introduced in 2018 by ELAN Act, ELAN. Loi n ° 2018-1021 du 23.11.2018 portant évo- lution du logement, de l'aménagement et du numérique (Loi ELAN), JORF no. 0272, 24.11.2018, no. 1, (The law on the evolution of housing, land management and digital technology – ELAN). This law also defines the new type of short-term rental "mobile rental", www.legifrance.gouv.fr.

[25] Study on the assessment of the regulatory aspects affecting the collaborative economy in the tourism accommodation sector in the 28 Member States (580/PP/GRO/IMA/15/15111J) https://op.europa.eu/en/publication-detail/-/publication/ff1e669e-526f-11e8-be1d-01aa75ed71a1/language-en/format-PDF/source-70757466.

[26] Aneta Kaźmierczyk, "Issues of short-term rental in light of EU and member states regulations," *PWPM – Review of International, European and Comparative Law*, vol. XVII (2019): 189.

Under French law the property that is the primary residence for its owner can be designated for short-term rental for the maximum period of 120 days a year, and a fine in the amount of up to 10,000 Euros can be imposed on the owner who exceeds this period. The owner is supposed to live in such a property for the remaining part of the year. Rented apartments are subject to obligatory registration. In the event where the owner fails to live in the apartment for 8 months, the property loses its status of the primary of residence and is classified as the secondary residence, covered by different regulations. In order to register short-term rental it is necessary to obtain permission for converting residential premises into commercial premises[27]. Renting out an apartment classified as a secondary residence without authorization is subject to a fine of up to 50,000 Euros.

3.2. Spain

The provisions of the Spanish act Ley de Arrendamientos Urbanos (LAU)[28] protect the tenants and give the property owners more freedom regarding renting out holiday apartments. Under the provisions of "Ley de Propiedad Horizontal"[29], the majority of three/fifths of the co-owners of the building may decide to limit or prohibit short-term rentals in their property. Condominium may also impose extra charges on owners renting their apartments to tourists. What is more, since 2019 online booking sites[30] such as Airbnb, Homeaway, Booking[31] to name but a few, are obliged to supply the tax authorities with information about the identity of owners of the apartments, their legal title to the apartment, the identity

[27] Ibid., 190.

[28] More information: Real Decreto-ley 7/2019, de 1 de marzo, de medidas urgentes en materia de vivienda y alquiler. https://www.boe.es/buscar/doc.php?id=BOE-A-2019-3108.

[29] More information: https://www.conceptosjuridicos.com/lph-articulo-3/.

[30] OECD (2019), An Introduction to Online Platforms and Their Role in the Digital Transformation, OECD Publishing, Paris https://doi.org/10.1787/53e5f593-en.

[31] Miquel-Àngel Garcia-López, Jordi Jofre-Monseny, Rodrigo Martínez Mazza and Mariona Segú, "Do short-term rental platforms affect housing Markets? Evidence from AirBnb in Barcelona," *IEB Working Paper* no. 2019/05, Institut d'Economia de Barcelona, 2019. http://hdl.handle.net/2445/140501.

of the tenants, the revenue, contact information, the dates of rent, and even dates and methods of payment.

Barcelona[32] has adopted a special urban plan PEUAT ("Especial Plan Urbanístico de Alojamientos Turísticos de Barcelona")[33], under which the city is divided into four zones. Legal regulations have limited the number of apartments for short-term rental and curbed illegal rent. The municipality imposed many fines on the owners and operators of such apartments. A special plan "Plan Especial de Regulación del Uso de Hospedaje"[34], was adopted in 2019 also in Madrid. It covers only the units that are rented for over 90 days per year and also provides for the division of the city into four zones.

In 2018 Valencia adopted the Act on Tourism and Hotels ("Ley de Turismo y Hospitalidad")[35] imposing restrictions on short-term rentals. This regulation imposed many limitations regarding the right to tourist license such as the requirement for the apartment to be located on the ground or first floor. Apartments designated for short-term rental may not be located on the same floor as private residential units and they may not represent more than 50% of all the apartments in the property. In practice, the only apartments that may be designated for short-term rental are the ones that are located on the ground floor or located over a shop.

[32] Study on the assessment of the regulatory aspects affecting the collaborative economy in the tourism accommodation sector in the 28 Member States (580/PP/GRO/IMA/15/15111J) https://op.europa.eu/en/publication-detail/-/publication/74984f87-526a-11e8-be1d-01aa75ed71a1/language-en/format-PDF/source-70757488.

[33] https://ajuntament.barcelona.cat/pla-allotjaments-turistics/es/.

[34] More information: April, 2019 https://transparencia.madrid.es/portales/transparencia/es/Medio-ambiente-y-urbanismo/Urbanismo/Planeamiento-urbanistico/Plan-Especial-de-regulacion-del-uso-de-servicios-terciarios-en-la-clase-de-hospedaje/?vgnextfmt=default&vgnextoid=b71cbc8d3c9f4610VgnVCM1000001d4a900aRCRD&vgnextchannel=eae9508929a56510VgnVCM1000008a4a900aRCRD.

[35] Consolidated text: Ley 15/2018, de 7 de junio, de turismo, ocio y hospitalidad de la Comunitat Valenciana. https://www.boe.es/buscar/pdf/2018/BOE-A-2018-8950-consolidado.pdf.

3.3. USA

Regulations of short-term rentals in the USA vary to a large extend between states[36]. Strict regulations in New York ban short-term rentals of less than 30 days, unless at the same time a long-term tenant or the landlord lives in the apartment. In such a case the owner may not fit any locks as the guests must have free access to all the rooms. In practice it is illegal to even advertise short-term rentals and the violators are subject to a fine of up to 7500 dollars. Single-family houses are excluded from scope of these regulations but there are relatively few of those in New York.

San Francisco was one of the first cities to have introduced regulations on short-term rental. The provisions limit the number of days for which an apartment may be rented out. What is more, the owners have to register business activity in the scope of short-term rental. The city authorities hold a list of all registered landlords, who have to report the status of accommodation every quarter. The entire apartment may be rented only for the maximum period of 90 days per year. Similarly to New York, the owners may rent a spare room for an unlimited period on condition that they occupy the property at the same time[37].

In Los Angeles property owners may rent their apartment only on condition that they occupy it and violators are subject to a fine. The landlords are obliged to register their activity, pay taxes and keep records. Short-term rent may not exceed the period of more than 120 days a year and high fines are imposed if this limit is exceeded. In Washington DC the regulations on short-term rental are also quite strict. The owners may rent only one house in which they live and they are obliged to register their activity. Those who want to rent the entire property must obtain an additional annotation "for vacation". The maximum number of days for which they can rent out an apartment is 90 days and fines for exceeding this limit are very high[38].

---

[36] Kelly Barron, Edward Kung, and Davide Proserpio, *The Effect of Home-Sharing on House Prices and Rents: Evidence from Airbnb*, 2020. Available at SSRN: https://ssrn.com/abstract=3006832.

[37] Ibid.

[38] Ibid.

3.4. Germany

Under the Act on the Improvement of Tenancy Law German lands[39] (Act on the "Improvement of Tenancy Law"[40]) may adopt regulations that prohibit the use of residential units for non-residential purposes if there is a shortage of housing stock[41]. In a groundbreaking judgment the Federal Constitutional Court ruled that shortage of housing stock constitutes the grounds for the lands to ban short-term rent on their area[42].

Under the Gesetz über das Verbot der Zweckentfremdung von Wohnraum[43] "ZwVbG"[44] in Berlin residential property may not overused for the purposes of short-term rental. Between 2014 and 2016 short-term rent was banned in Berlin entirely but in 2016 the ban was lifted as non-constitutional[45]. Since 1 May 2016 the ban is limited to renting out entire apartments through booking sites. Only single rooms can be rented out on condition that the rented area does not exceed 50% of the size of the entire apartment. The landlord has to live in the apartment and have a license to rent out the room. In the case of breach of these regulations the landlord risks eviction or a fine up to 500,000 Euros[46].

---

[39] Christoph Busch, "Regulating Airbnb in Germany – status quo and future trends," *Journal of European Consumer and Market Law*, vol. 8, no. 1 (2019): 39 – 41.

[40] Gesetz zur Verbesserung des Mietrechts und zur Begrenzung des Mietanstiegssowie zur Regelung von Ingenieur- und Architektenleistungen (Mietrechtsverbesserungsgesetz – MRVerbG) of 4.11.1971, Rental Law Improvement Act.

[41] Kaźmierczyk, "Issues of short-term rental," 192.

[42] More information: http://www.kanzlei-wenderoth.de/app/download/5798903892/BVerfG+1975+Verfassungsm%C3%A4%C3%9Figkeit%2C+Genehmigung.pdf.

[43] Study on the assessment of the regulatory aspects affecting the collaborative economy in the tourism accommodation sector in the 28 Member States (580/PP/GRO/IMA/15/15111J) https://op.europa.eu/en/publication-detail/-/publication/47969b0d-526f-11e8-be1d-01aa75ed71a1/language-en/format-PDF/source-70757501.

[44] Gesetz über das Verbot der Zweckentfremdung von Wohnraum; of 29 November 2013 r. GVBI.2013, 626 "ZwVbG", The law prohibiting the misuse of dwellings. Last amendment of 9.04.2018.

[45] Kaźmierczyk, "Issues of short-term rental," 193.

[46] Vide: §4 I 7 ZwVbGO.

3.5. Poland

The institutions of a condo-hotel and apart-hotel are not defined in the Polish legislation. The issue of legal separation of specific premises or hotel units is of key significance for the definition of the condo system. It can hence be concluded that condo-hotels in this respect fall within the definition of self-contained dwelling units or units for other purposes as set out in Article 2 of the Unit Ownership Act[47]. Regarding the apartment-hotels, the provisions of the Polish Civil Code are applicable as far as they refer to ownership or joint ownership of real property[48].

The status of a hotel as a commercial property comes with legal obligations and restrictions[49]. Although such premises can be freely traded, it is not possible to register for permanent residence in such a property. Moreover, such properties are usually subject to higher real estate taxes and, if applicable, higher fees related to perpetual usufruct.

An important role in separating individual residential premises or hotel units is granted by the legislator to a starosta[50], who issues a certificate confirming that the premises meet the technical and legal requirements for independent residential units or premises for other purposes[51]. This may be particularly important in the context of the regulation on technical conditions for the buildings and their location such as, inter alia[52], the minimum floor area of a dwelling unit at 25m2. The principle purpose of this amendment was to protect the housing market against the emergence of the so-called "micro-apartments", i.e. apartments with a smaller area than that specified by the law[53]. At the same time, this regulation,

[47] Act of 24 June 1994 on the ownership of premises (i.e. Journal of Laws of 2019, item 737, as amended).

[48] Aneta Kaźmierczyk, *Common property of premises owners. Legal and substantive issues* (Warsaw: C.H. Beck, 2015), 539 + LXIII.

[49] Aneta Kaźmierczyk, "Certificate of independence of premises," *Rejent*, no 1 (2013): 11–38.

[50] The head of the second tier of a three tier self government system.

[51] Ibid.

[52] Regulation on the technical conditions to be met by buildings and their location from April 12, 2002, i.e., Journal of Laws of 2019, item 1065.

[53] Under the current regulations in force apartments with the area below 20 square meters are not permissible. For thos reason, sometimes such premises are sold as commercial premises.

depending on the legal status of the residential premises, may have an impact on the possibility of carrying out condo projects, as these terms are commonly identified with very small residential units. These regulations require investors to exercise due diligence in determining the future use of the property.

The categories of a condo-hotel or an apart-hotel are also absent in Polish official statistics, as they have not been identified in the statistics of the Polish Central Statistical Office (GUS) to date[54]. However, such premises are usually included in the statistics on the construction of residential units or hotels. They are not covered by the provisions defining the conditions for providing hospitality services or by the provisions of law specifying the categorization of hotel facilities[55], i.e. the Polish Act on Tourist Events and Related Tourist Services[56] and the Regulation of the Minister of Economy and Labor on hotel facilities and other accommodation facilities[57]. The possible division of condo-hotels into specific categories depends upon meeting the criteria set out in the above regulations, which in practice is very difficult in the case of facilities based on a typical housing scheme.

The investment aspect of the purchase of the shares in a condo-hotel so far has not been regulated in the provisions on the investment on the financial market in Poland. Taking into account the fact that a significant proportion of the investment offers include guarantees of a return rate, this area should attract the interest of institutions responsible for the security of financial transactions. The purchasers in this area are entitled to protection only under the general rules of the Polish Civil Code (contractual and tortious liability). Legal diversity, the absence of an unambiguous definition and of transparent statistical data, combined with the interchangeable use

[54] Act of 29 June 1995 on official statistics (i.e. Journal of Laws of 2020, item 443, as amended). https://stat.gov.pl.

[55] These hotel facilities include:1) hotels and motels; 2) guesthouses – specify; 3) campsites (camping sites), camping sites; 4) excursion houses; 5) youth hostels; 6) shelters.

[56] Act of 24 November 2017 on tourist events and related tourist services (i.e., Journal of Laws of 2019, item 548, as amended).

[57] Regulation of the Minister of Economy and Labor of 19 August 2004 on hotel facilities and other facilities in which hotel services are provided (consolidated text: Journal of Laws of 2017, item 2166, as amended).

of the terms "condo-hotel" and "apart-hotel" by investors and operators of such facilities may raise concerns about the proper functioning of the market for this type of investment in Poland.

4. SELECTED LEGAL RISKS RELATED TO INVESTING IN CONDO-HOTELS AND APART-HOTELS IN POLAND

The risks of investing in condo-hotels and apart-hotels in Poland can be divided into several basic categories. The first group concerns financial risk, which increases when the investment is financed only from the purchasers' payments or the sale of bonds[58]. The second group of risks is related to security issues. Investments in commercial premises are not subject to the regulations of the Polish Developer's Act, which requires, inter alia, a contract in the form of a notarial deed and the entry in the land and mortgage register[59]. In the absence of such safeguards, in the event where the construction is not completed, the purchaser may lose the money they had invested. Another category of risks concerns the profitability of such an investment. It frequently transpires that the anticipated large profits are unattainable as developers fail to take into account the costs of property management and maintenance. Another group of risk is related to the lack of transparent terms of cooperation, often involving the lack

[58] Communique of the Polish Financial Supervision Authority on alternative investments in real estate. of 25.09.2019. https://www.knf.gov.pl/o_nas/komunikaty?articleId=67218&p_id=18.

[59] Art. 23 [Entry of the buyer's claim resulting from the development contract into the land and mortgage register]

1. The development agreement is the basis for entering the claims referred to in paragraph 1 into the land and mortgage register. 2.

2. In the land and mortgage register kept for the property on which the development project is to be carried out or carried out, the buyer's claim for the construction of the building, the separation of the dwelling and transfer of ownership of the premises and the rights necessary to use the premises to the buyer or transfer to the buyer shall be disclosed. the buyer of real estate together with a detached house or perpetual usufruct of real estate and ownership of a detached house constituting a separate real estate or transfer of a fraction of the real estate property, together with the right to exclusive use of a part of the real estate serving housing needs.

of clear rules for developers in their dealings with financial intermediaries and brokerage houses, often linked to banks. Such risks are also related to the absence of transparent principles determining the liability of individual entities towards the purchaser[60]. Industry experts effectively encourage customers to invest their savings in apart-hotels and to take out loans for this purpose.

Presently Polish legal regulations do not specify basic requirements, such as the type of the property that can be subject to short term rental in the field of condo-hotels and aparthotels[61]. There are no legal regulations that would grant the local governments the authority to control the risks related to such leased units. This results in the emergence of the so called "grey-zone hostels" that are not even covered by fire safety control and may pose a serious danger for the tenants and other residents of the building[62]. Another important issue is the frequent avoidance of taxes by owners, which leads to measurable losses to municipal budgets. Moreover, the lack of control of such premises hits the residents of the buildings where they are located, who may be exposed to disturbances and thus to the interventions of the security services. Therefore, the need for regulation in this area results primarily from the lack of control over the leased premises.

Polish law does not distinguish short-term rental from lease[63]. Thus, a short-term rental agreement is tantamount to a fixed-term lease agreement governed by the provisions of the Polish Civil Code and the Act on the Protection of Tenants' Rights. As there is no separate regulation concerning a short-term rental agreement, there is also no limit of the number of days for which the premises are rented and no limit of the number of premises which may be subject to such an agreement. There are no legal regulations applicable to apart-hotels and condo-hotels. At the same time, there is no clear distinction between private and business rentals.

---

[60] Bogusława Gnela, *Consumer contract in Polish civil and private international law* (Warsaw: Wolters Kluwer Polska, 2013), 190 et seq.

[61] Ryszard Strzelczyk, *Real Estate Law* (Warsaw: C.H. Beck, 2019), 415–423.

[62] Act of 24.08.1991 on fire protection (iJournal of Laws 2019.1372), [Ustawa z dnia 24 sierpnia 1991 r. o ochronie przeciwpożarowej, Dz.U. 1991 no. 81 poz. 351].

[63] Vide: art. 659-692 of the Civil Code. Katarzyna Siwiec, *Lease of commercial space and commercial premises – a review of the most important issues from the point of view of lease parties* (Warsaw: C.H. Beck, 2015), 1 et seq.

Another important issue is the problem of contradictory tax interpretations and justified concerns related to settling the income from the lease of investment apartments. Moreover, there is no certainty as to the official interpretation of the nature of premises in new hotel facilities[64], which may make it impossible to divide the property into separate units and establish land and mortgage registers for them. In such a situation, individual investors would be faced with the necessity to acquire shares in the entire property instead of the separate units with their own land and mortgage register.

Moreover, despite many other risks related to short-term rental, it is worth pointing to five problem areas that are important regardless of the country or city. The first one relates to health and safety. It is a broad category that encompasses many issues such as cleanliness, parking, fire protection, and other aspects that are regulated in the hotel industry but remain unregulated in the case of short-term rentals. Another risk relates to the delineation of units designated for short-term rental. As shown above, some cities allow short-term rent without limitations, while others restrict it to designated areas and there are cities where it is entirely banned.

Another issue is the introduction of licenses in order to limit the area with short-term rentals and their number. No less important is the issue of taxation. The last issue that brings all the above elements together is the enforceability of the regulations. One thing is to introduce specific regulations and another to be able to effectively enforce them. The cities must impose restrictions that are enforceable. It also means that the limitations must be consistent with other regulations in force. What is more, they should not be excessively complicated or overly restrictive. Unenforceable provisions in the area of short-term rental are detrimental to the social and economic structure of urban residential areas.

It is worth considering the introduction of an obligation to register the premises leased to tourists and the introduction of restrictions on the rental of apartments for tourists by specifying the maximum number of days per year and the maximum number of units that can be used by one owner for short-term rental. Restrictions introduced in Berlin

[64] Provincial Administrative Court in Poznań, Judgment of October 24, 2019, Ref. No. IV SA / Po 459/19, LEX No. 2736026.

(to give just one example) allow property owners to rent only one room in an apartment where one lives.

It would also be advisable to adopt regulations setting out the obligation to ensure the safety of tourists during their stay, e.g. the information on evacuation procedure in the event of fire and compliance with basic sanitary requirements. It is also necessary to introduce regulations on liabilities of the owner of the premises towards the guests and permanent residents of the building, e.g. the owner's liability in case of his/her failure to comply with the booking agreement or penalties for the disorderly conduct of the guests.

5. NEW INITIATIVES IN THE FIELD OF SHORT-TERM RENTAL

The Polish Ministry of Sport and Tourism has prepared a draft of the so-called "White Paper on the regulation of the system of tourism promotion in Poland", with an aim to regulate, among other things, the system of financing tourism, as well as a range of issues related to hospitality and accommodation services, in particular the issue of short-term rental[65]. In the report on the preliminary consultations on this project many entities (e.g. National Association of Tourist Agents, Federation of Guide Associations, Chamber of Commerce of Polish Hotels, Pomeranian Regional Tourist Organization, Polish Tourist and Sightseeing Society (PTTK)) drew attention to the urgent need for changes. They call for the urgent changes that would pertain to all entities operating accommodation facilities, including short-term rentals, in order to liquidate inequality regarding the legal status of conventional hotels and short-term rentals.

Another important issue that emerged from pre-consultations is the need to set up a database of all establishments providing hotel services and short-term rentals as well as the need for a mandatory registration of all establishments providing accommodation services, including short-term rentals. Attention was also drawn to the need to regulate short term

[65] Report on the pre-consultation of the White Paper Regulation of the Tourist Promotion System in Poland, 2020: https://www.gov.pl/web/rozwoj/raport-z-prekonsultacji-projektu-bialej-ksiegi-regulacji-systemu-promocji-turystycznej-w-polsce.

occasional lettings by individuals by introducing limits on the number of days per year and to exclude them from business activities as a result. The need to regulate the legal situation of a building consisting of premises intended for short-term lease, i.e. the legal status of both apart-hotels and condo-hotels, was also noted. During the pre-consultation it was also pointed out that it should be mandatory to enter the units designated for short-term rent in the 'Register of Other Facilities', which would also be accessible to the relevant authorities in the event of a need to notify the owner of an event such as flooding, technical failure, fire, intervention of the relevant services, etc. Attention was also drawn to the issue of public order violations, which should remain within the scope of responsibility of the relevant authorities, and to the fact that all establishments providing accommodation services, regardless of their type, category, or license, should be registered in the records kept by the municipality and should have their own registration number, included in every listing particularly if it is placed online.

In September 2019, the Polish Office of Competition and Consumer Protection (UOKiK) and the Polish Financial Supervision Authority (KNF) issued a warning against the risks involved in investing in apart-hotels and condo-hotels[66]. The UOKiK concerns were related, among other things, to the manner of financing such projects and the issue of security of such transactions. According to the provisions of the Developer's Act, the contract must be concluded in the form of a notarial deed, and the purchaser's claim is entered in the land and mortgage register. The money should be held in an escrow account. However, these provisions apply only to residential units and single-family houses. The safeguards they provide do not extend to commercial premises, exposing such investments to a particular risk. Developers do not apply the provisions of the Developer's Act to the sale of apart-hotels and hence, in the event of a collapse of the project and unfinished construction the investors may suffer a huge loss.

In the light of the above it is necessary that potential investors exercise caution and thoroughly analyze the project and potential risks. The oper-

[66] More information: September, 2020: https://www.uokik.gov.pl/aktualnosci.php?news_id=15799.

ations of apart-hotels and condo-hotels are largely seasonal, which means that the returns are far from guaranteed. What is more, the costs related to servicing the facility, the debt, or tax obligations must also be taken into account. Short-term rental is at the moment largely unregulated in respect of the construction process, protection of the purchasers, tax issues and various issues related to tourism and the protection of tenants.

6. IMPORTANCE OF THE CJEU JUDGMENT OF SEPTEMBER 22, 2020, C-724/18

On 22 September 2020 the European Court of Justice issued a judgment C-724/18 that is of great significance for short-term rental, holding that the EU states have the right to limit short-term rent[67]. The judgment was a result of the prejudicial question filed by *Cour de cassation* (French cassation court). Cali Apartments and HX each own a studio apartment Paris. The municipal police established that they offered the apartments for short-term rental without a relevant permit. *Tribunal de grande instance de Paris* with which *procureur de la République* (the Prosecutor for the Republic) filed the application for interim relief under Article L. 631-7 of the French Construction and Housing Code[68] ordered *Cali Apartments* and *HX* to pay a fine of 5,000 Euros and 15,000 Euros respectively and ordered that the use of the properties in question be changed back to residential.

Cour d'appel de Paris (the court of appeal) held that the judgment was final. Cali Apartments and HX filed cassation appeal with the *Cour de cas-*

[67] Judgment of the Court (Grand Chamber) of 22 September 2020 (requests for a preliminary ruling from the Cour de cassation – France) – Cali Apartments SCI (C-724/18) and HX (C-727/18) v Procureur général près la cour d'appel de Paris and Ville de Paris (Joined Cases C-724/18 and C-727/18), OJ C 35, 28.1.2019. http://curia.europa.eu/juris/document/document.jsf?text=&docid=233725&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=17108522.

[68] According to this regulation, the declaration to restore the premises to its previous condition, as provided for in the second paragraph of Article L 631-7-1, is made by the owner of the premises or his representative, or by the person presenting proof of possession entitling to restore the premises to its previous use.

sation (cassation court), claiming that the judgments were issued in violation of the principle of the priority of the EU law[69]. The parties claimed in their appeal that the judgments failed to demonstrate that the restriction of freedom of services resulting from the national regulations is justified by overriding reasons in general interest[70] and that it has not been demonstrated that the objective pursued may not be achieved by less restrictive measures. Furthermore, the appellants held that the restriction in the form of the obligation to have a relevant license does not meet the criteria falling from the requirements of Directive 2006/123/EC[71].

The European Court of Justice ruled that 'the authorization scheme' to rent out apartments to tourists does not violate the principle of the free movement of services. The ECJ held that prevention of shortages of housing for long-term rental represents a primary general interest which justifies such regulation. It means that the primary aim of the regulation is to establish the mechanism to prevent the shortage of housing for long-term rental and increasing tension on real estate markets, which constitutes an overriding reason in the public interest. On the other hand, the relevant French regulations are proportionate to the objective pursued as they are limited to the specific activity i.e. renting out the property. What is more, the ECJ held that the objective could not be achieved by less restrictive measure.

7. CONCLUSIONS

Although the market of condo-hotels and apart-hotels is still relatively young, it will probably continue to develop quickly. Its diversity results in great uncertainty as to the applicable provisions of law in this area. It is therefore necessary to introduce uniform regulations in order to ensure

[69] Stanisław Biernat, "Zasada pierwszeństwa prawa unijnego po Traktacie z Lizbony," *Gdańskie Studia Prawnicze*, vol. XXV (2011): 47–61.

[70] Vide: art. 9 directive 2006/123/WE of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68.

[71] Vassilis Hatzopoulos and Sofia Roma, "Caring for sharing? The collaborative economy under EU law," *Common Market Law Review*, vol. 57, no. 1 (2017): 100.

better protection of the rights of the contracting parties[72]. It also seems justified to change the regulations pertaining to housing communities (the Act on the Ownership of Premises) by granting them the power to decide by a resolution whether or not they consent to short-term rentals[73] in condo and aparthotels. Under the current laws, the courts revoke the resolutions prohibiting short-term rental on the grounds that such resolutions excessively restrict ownership rights. It cannot be assumed that negative phenomena will take place and only when they do occur can legal measures be taken to counter them. However, the issue of housing communities goes far beyond the scope of this article.

The regulations in force do not allow to impose higher fees on the owners of short-term rentals as the relevant regulations of the Act on Ownership apply only to commercial premises and they do not cover the premises registered as units for residential purposes even if they are actually leased with a commercial purpose. Another important reason why short-term rental in condo-hotels and apart-hotels should be regulated is, last but not least, the need to prevent the gentrification of cities and the need to introduce controls over the quantity and quality of the apartments used for rental purposes.

To sum up, despite various advantages, short-term rental of apartments can be a dangerous phenomenon. Landlords often lack protection also due to the absence of relevant insurance. They are exposed to risks related to their business activity and fail to address them. Tenants and neighbors are exposed to noise and other disturbances. Frequently, they also have to make extra payments or pay increased rent. In the face of the absence of relevant regulations, it is necessary to adopt a comprehensive approach related to short-term rental.

Considering the above and the judgment of the ECJ, I believe that the responsibility to examine if a given "authorization system" addresses the shortage of apartments for long-term rental. Another issue that

[72] The owners have the right to appeal against an unfavorable resolution of the housing community on the grounds of its non-compliance with the law or the agreement of the owners of the premises or if it violates the principles of proper management of the common property or otherwise violates his/her interests.

[73] E.g. Court of Appeal in Łódź, Judgment of 10 February 2017, Ref. No. ACa 961/16, LEX.

should be taken into account is the profitability of commercial short-term rental compared to long-term rental. It should also be established if the obligation of compensation can be met in a given area based on reasonable and transparent market conditions. In the light of the above it must be stated that preventing shortages of property for long-term rental constitutes an important public interest and provides sufficient grounds for state intervention. It is worth remembering that neither freedom of business activity nor ownership rights are absolute and as such they may be subject to certain limitations[74]. Member States may establish certain "authorization system" for short-term rental operators on condition that the system is non-discriminatory and justified by overriding reasons in the general interest.

However, the introduction of restrictions cannot be arbitrary, as it must be justified and comply with the principle of proportionality of the measures taken to the protected interest. The ECJ judgment is paving the way for the Polish legislator to regulate short-term rental in order to ensure fair competition, protection of the recipients of services, and by the same token limit risks related to investing in short-term rentals. The postulated solution is to adopt relevant legal regulations on the local and national level, which would reduce the risk related to investing in short-term rentals and have a positive impact on further development of this institution.

REFERENCES

Armstrong, George M. jr. "Louisiana Condominium Law and the Civilian Tradition." *Louisiana Law Review* 46, no. 1 (1985): 65–86.

Åslund, Anders. *The Last Shall Be the First: The East European Financial Crisis*. Washington, Dc: Peterson Institute for International Economics, 2010.

Barron, Kelly, Edward Kung, and Davide Proserpio. *The Effect of Home-Sharing on House Prices and Rents: Evidence from Airbnb*. 2020.

Biernat, Stanisław. "Zasada pierwszeństwa prawa unijnego po Traktacie z Lizbony." *Gdańskie Studia Prawnicze*, vol. XXV (2011): 47–61.

[74] Under the applicable provisions of Polish law, there are also restrictions on the possibility of using premises intended for residential purposes for other (commercial) purposes.

Dübel, Hans Joachim, Władysław Jan Brzeski, and Ellen Hamilton. *Rental Choice and Housing Policy Realignment in Transition: Post-Privatization Challenges in the Europe and Central Asia Region*, Policy Research Working Paper, World Bank, no. 3884 (2006).

Bucholc-Srogosz, Katarzyna. "Condohotels on the Polish real estate market." *Scientific Notebooks of the AJD Administration Institute in Częstochowa* 2, no. 14 (2016): 241–249.

Busch, Christoph. "Regulating Airbnb in Germany – status quo and future trends." *Journal of European Consumer and Market La*w, vol. 8, no. 1 (2019): 39–41.

Chrabąszcz, Karolina. "Condoinvestments as an alternative form of capital allocation." *Scientific Papers of the Małopolska University of Economics in Tarnów* 24, no. 1 (2014): 47–58.

Dredge, Dianne. "The impact of regulatory approaches targeting collaborative economy in the tourism accommodation sector." *Impulse paper*, no. 9 Aalborg University (2016): 3–88.

Downey, James F. "The Aparthotel: A Useful Tool for Investors and Developers." *Cornell Hotel and Restaurant Administration Quarterly*, no. 32 (1991): 53–55.

Garcia-López, Miquel-Àngel, Jordi Jofre-Monseny, Rodrigo Martínez Mazza, and Mariona Segú. "Do short-term rental platforms affect housing Markets? Evidence from AirBnb in Barcelona." *IEB Working Paper* no. 2019/05, Institut d'Economia de Barcelona, 2019.

Gnela, Bogusława. *Consumer contract in Polish civil and private international law*. Warsaw: Wolters Kluwer Polska, 2013.

Hatzopoulos, Vassilis, and Roma Sofia. "Caring for sharing? The collaborative economy under EU law." *Common Market Law Review*, vol. 57, no. 1 (2017): 81–121.

Kaźmierczyk, Aneta. *Common property of premises owners. Legal and substantive issues*. Warsaw: C.H. Beck, 2015.

Kaźmierczyk, Aneta. "Issues of short-term rental in light of EU and member states regulations." *PWPM – Review of International, European and Comparative Law*, vol. XVII (2019): 180–198.

Kaźmierczyk, Aneta. "Certificate of independence of premises." *Rejent*, no. 1 (2013): 11–38.

Peppercorn, Ira Gary, and Claude Taffin. *Rental Housing. Lessons from International Experience and Policies for Emerging Markets*. Washington, Dc: The World Bank, 2013.

Siwiec, Katarzyna. *Lease of commercial space and commercial premises – a review of the most important issues from the point of view of lease parties*. Warsaw: C.H. Beck, 2015.

Strzelczyk, Ryszard. *Real Estate Law*. Warsaw: C.H. Beck, 2019.

Taylor, Robyn. "Why Condo Hotels are a Hot Concept." *National Real Estate Investor* (2005).

Van Der Merwe, Cornelius. *European Condominium Law*. Cambridge: Cambridge University Press, 2015.

Zaradkiewicz, Kamil. "Timesharing – a special relation of property law." In *Private law system* vol. 4, *Property law*, edited by Edward Gniewek, 165–180. Warsaw: C.H. Beck, 2012.