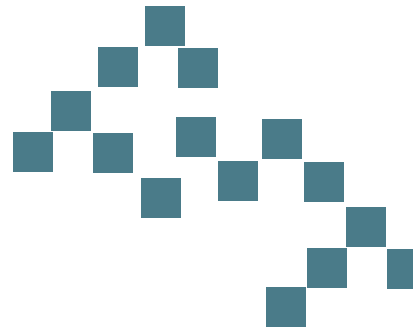
e-ISSN 2545-384X

REVIEW OF EUROPEAN AND COMPARATIVE LAW

Volume 45 2021/2

REVIEW
OF EUROPEAN AND COMPARATIVE LAW

Volume 45 2021/2



Wydawnictwo KUL
Lublin 2021

Cover design
Agnieszka Gawryszuk

Typesetting
Jarosław Łukasik

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e-ISSN 2545-384X

The original version is the electronic version.

Wydawnictwo KUL, ul. Konstantynów 1 H
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http://wydawnictwo.kul.lublin.pl

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VOLUME XLV
YEAR 2021, ISSUE 2, pp. 7–34
DOI: https://doi.org/10.31743/recl.11337

SUPERVISION AND CONTROL OVER THE ACTIVITIES OF PUBLIC BENEFIT ORGANIZATIONS IN THE ASPECT OF CENTRALIZATION

*Izabela Bentkowska-Furman**

ABSTRACT

The main aim of this article is to look at supervision and control of public benefit organizations in Poland regarding to civil society organizations in Europe and the national supervisory systems relevant to these organizations. Also considered is the legal system in the UE, which provides recommendations for NGOs operating in its Member States. This text focuses on changes in the supervision and control over the activities of public benefit organizations in the aspect of centralization in Poland, resulting from the powers of new government administration bodies, including in particular the entitlements of the Head of the Public Benefit Committee. The aim of the research is to present and analyse the current legal solutions in the field of supervision and control over public benefit organizations in Poland and to compare the legal status with the situation before the fundamental amendment to the Act on Public Benefit and Volunteer Work.

Keywords: civil society, public benefit organization, non-governmental organization, supervision, control

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1. INTRODUCTION

The concept of a modern democratic state includes a specific model of the relationship between the state and society. It is based on the assumption of the existence of impassable limits for state interference in the area of rights and fundamental civil liberties, while maintaining the right proportions between group and public interest[1]. The legal framework for civil society organizations typically permits organizations to be created in different forms to pursue private or public benefit aims. In most countries in Europe benefits are extended to public benefit organizations, based on their purposes and activities. In return it is required they are subject to a higher level of governance and accountability[2]. The state also has special powers to control and supervise such organizations. By providing benefits, the state seeks to promote certain designated activities, usually related to the common good and the organizations pursuing such activities are given many different labels i.e. "charities" or "public benefit organizations"[3].

An important element in the construction and functioning of civil society is the existence and efficient operation of those organizations that are not part of state structures but pursue public benefit objectives, especially in countries that are still strengthening democratic societies like Poland. An important element in the process of building civil society in Poland was the Act on Public Benefit and Volunteer Work of April 24, 2003 (i.e. Journal of Laws of 2020, item 1057, hereinafter the Act on Benefit), which was the implementation of the state subsidiarity principle. "The preamble to the Constitution of 1997 includes a description of Poland's systemic path, along with the emphasis on the independence and democratic experiences, an indication of universal constitutional values and the basic principles organizing the life of the state community, such as: democra-

[1] Jolanta Blicharz, *Administracja publiczna i społeczeństwo obywatelskie w państwie prawa* (Wrocław: Prace naukowe WPAiE Uniwersytetu Wrocławskiego, 2012), 55.

[2] David Moore, Katerina Hadzi-Miceva and Nilda Bullain, "Europe: Overview of Public Benefit Status. A Comparative Overview of Public Benefit Status in Europe," *The International Journal of Not-for-Profit Law* 11, no. 1 (November 2008), https://www.icnl.org/resources/research/ijnl/a-comparative-overview-of-public-benefit-status-in-europe-2.

[3] Moore, Hadzi-Miceva, and Bullain, "Europe: Overview of Public," https://www.icnl.org/resources/research/ijnl/a-comparative-overview-of-public-benefit-status-in-europe-2.

cy, respect for individual rights, cooperation between authorities, social dialogue and the principle of subsidiarity (subsidiarity)"[4]. It should be emphasized that these values, and the aforementioned principle of subsidiarity, are at the same time fundamental assumptions of the functioning of the Communities and the European Union (Article 5 of the EC Treaty[5] and Article 2 of the TEU).

The starting point for the analysis is the statement that the activities of non-governmental organizations, including public benefit organizations, are related to the decentralization process. It indicates the existence of a democratic state in the contemporary Polish model of administration as a decentralized model with centralized elements of administration. Decentralization and centralization are continuous in nature and are processes with changing trends. Their stages are the result of successive public administrative reforms and have strong political connotations[6]. It should be emphasized that the intensification of centralization tendencies means, at the same time, limiting the degree of decentralization, but maintaining the proportions between these two models of administration "according to the principle: as much decentralization as possible, as much centralization as necessary"[7].

The main aim of this article is to look at supervision and control of public benefit organizations in Poland regarding to civil society organi-

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[4] Polish Constitutional Tribunal, Judgment of 5 May 2005, Ref. No. K18/4, s. 43, Journal of Laws 2005, item 744.

[5] Polish Constitutional Tribunal, Judgment of 5 May 2005, Ref. No. K18/4, s.43, Journal of Laws 2005, item 744., in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community Treaty establishing the European Community *Official Journal C 325, 24/12/2002 P. 0033 – 0184 (December 2002).* And art. 5 TEU "The use of Union competences is governed by the principles of subsidiarity and proportionality". Consolidated versions of the Treaty on European Union. Official Journal C 326, 26/10/2012 P. 0001 – 0390 (October 2012).

[6] Rafał Budzisz, Barbara Jaworska-Dębska and Ewa Olejniczak-Szałowska, "Wprowadzenie," in *Decentralizacja i centralizacja administracji publicznej. Współczesny wymiar w teorii i praktyce*, ed. Rafał Budzisz, Barbara Jaworska-Dębska and Ewa Olejniczak-Szałowska (Warsaw-Łódź: Wolters Kluwer-Wydawnictwo Uniwersytetu Łódzkiego, 2019), 13–14.

[7] Budzisz, Jaworska-Dębska, and Olejniczak-Szałowska, "Wprowadzenie," 13–14.

zations in Europe and the national supervisory systems relevant to these organizations. Also considered is the legal system in the European Union, which provides recommendations for NGOs operating in its Member States. The article begins with the description of the status of a public benefit organization that fall within the scope of the broadly understood concept of civil society. European guidelines on the framework of state supervision and control of NGOs, including public benefit organizations in the European Union, will be described. Then, Polish regulations on the control and supervision of public benefit organizations in relation to legal solutions in other countries, will be analysed. The cognitive assumptions of this text focus on changes in the supervision and control over activity of public benefit organizations in the aspect of centralization, resulting from the powers of the new government administrative bodies, including in particular the entitlements of the Head of the Public Benefit Committee. The aim of the research is to present and analyse the current legal solutions in the field of supervision and control over public benefit organizations and to compare the legal status with the situation before the fundamental amendment to the Polish Act on Public Benefit and Volunteer Work of 2017[8]. Therefore, the article poses the following thesis: the changes contained in the amendment to the legal provisions lead to an increase in centralization in the field of supervision and control over public benefit organizations, and the introduced changes in the law result in a tightening of the control mechanism in Poland. In order to verify the thesis, traditional research methods of legal sciences were used, including the dogmatic (formal-dogmatic) method. The selected research method will allow to achieve the assumed research aim, which is the analysis and interpretation of the currently applicable legal provisions in the field of selected aspects of supervision and control over public benefit organizations. The historical and comparative method was also used, which by analysing changes in legal norms and relating them to solutions in other countries, will allow to achieve the assumed research aim. Summarizing, the selection of dogmatic research methods in order to verify the thesis will

[8] Journal of Laws of 2020, item 1057.

allow for the analysis of legal provisions in terms of static, and the historical and comparative methods in their dynamic approach[9].

2. SEPARATION OF THE PUBLIC BENEFIT ORGANIZATIONS

At the outset, it should be noted that public benefit organizations fall within the scope of the broadly understood concept of civil society, which is defined in various ways. "Civil society refers to the space for collective action around shared interests, purposes and values, generally distinct from government and commercial for-profit actors"[10]. "A civil society is a non-governmental and non-profit group that helps the society at large function while working to advance its own or others' well-being.(…). A strong civil society can protect individuals and groups against intrusive government and positively influence government behaviour"[11]. These definitions indicate the separation of organization from government. It should be emphasized that public benefit organizations in particular should be considered in relation to the state. "The idea that civil society should be understood as, by definition, separated from and opposed to the operations of the state and official public institutions has various disadvantages, not the least of which is that it inhibits appreciation of the complex interrelationships between state and society"[12]. According to Edmund Wnuk-Lipiński, civil society may emerge when three conditions are met: "(1) The existence of a public space allowing the free organization of emerging social forces, (2) the existence of social communication channels that are not controlled by the state, (3) the existence of free markets where goods and services are exchanged with protection of private property. If the public sphere is not

[9] Compare to Tomasz Barankiewicz, "Współczesne metody badania prawa," *Studia Prawnicze KUL*, no. 1 (2010): 116 and Dawid Van Kędzierski, "Metodologia i paradygmat w polskich szczegółowych nauk prawnych," *Transformacje Prawa Prywatnego* I, no. 3 (2018): 18. See art. 2. pts. 2 Act on Social Employment of June 13, 2003 (i.e. Journal of Laws of 2020, item 176).

[10] WHO, https://www.who.int/social_determinants/themes/civilsociety/en/.

[11] https://definitions.uslegal.com/c/civil-society/.

[12] Michael Kenny, "Civil society," in *Encyclopedia Britannica*, (May 2016), https://www.britannica.com/topic/civil-society.

available for the free self-organization of social forces, as it happens when it is controlled by the state undemocratically, then it is impossible to emerge autonomous organizations and associations in relation to the state, which constitute the institutional expression of civil society"[13]. Generally we can say, that civil society refers to all forms of social action carried out by individuals or groups who are not managed by the State. Moreover "a civil society organisation is an organisational structure whose members serve the general interest through a democratic process, and which plays the role of mediator between public authorities and citizens"[14].

The practical approach to civil society refers to the so-called third sector. The simplest and most common definition of the third sector is that it is not part of the government, any profits are usually reinvested for social, environmental or cultural aims, and participation is largely voluntary. The term indicates a space for social, economic and political activities that offer an alternative to both state command and free market economies[15]. What's more, unlike the state and the market economy, the third sector is something that can scarcely be subjected to detailed planning or regulated without it losing some of its qualities such as voluntary participation, value-based motivation, and independence from more institutionalized power structures[16]. Non-governmental organizations (NGOs) are now recognized as key third sector actors on the landscape of development, human rights, humanitarian action, environment, and many other areas of public action[17]. Among these organizations, we distinguish organizations with

[13] See: Edmund Wnuk-Lipiński, "Społeczeństwo obywatelskie a demokratyzacja," in *Zachowania polityczne*, T. 2, ed. Russel J. Dalton and Hans-Dieter Klingemann (Warsaw: PWN, 2010), 312.

[14] https://eur-lex.europa.eu/summary/glossary/civil_society_organisation.html.

[15] Catherine Alexander, "Third Sector," in *The Human Economy, a citizens' guide*, ed. Keith Hart, Jean-Louis Laville and Antonio David Cattani (Cambridge: Polity Press, 2010), 213–224.

[16] See: Olaf Corry, "Defining and Theorizing the Third Sector," in *Third Sector Research*, ed. Rupert Taylor (New York: Springer, ISTR, 2010), 11–20.

[17] David Lewis, "Nongovernmental Organizations, Definition and History," in *International Encyclopedia of Civil Society*, ed. Helmut K. Anheier and Stefan Toepler (New York: Springer, 2010), https://link.springer.com/referenceworkentry/10.1007%2F978–0–387–93996–4_3.

a special status, "public benefit organizations" (PBO) that pursue public benefit activities.

The practice of distinguishing PBOs is deeply rooted in European society. For example codification of the common law system dates back to 1601 to The English Statute of Charitable Uses, whose purpose was to enumerate charitable causes[18]. The list in the preamble to the 1601 statute has nevertheless formed the foundation of the modern definition of charitable purposes, which has developed entirely through case law[19]. "Over time, the notion of public benefit was expanded beyond the relief of poverty to include caring for the sick and other purposes. In the Charity Act from 2011 For the purposes of the law of England and Wales, a charitable purpose is a purpose which falls within section 3(1)[20] and which is for the public benefit (must be for the public benefit if it is to be a charitable purpose). "In the civil law tradition, foundations – which were dedicated to a public benefit purpose – existed in Europe already in the fifth century BC. Today, most civil law countries extend tax preferences to both foundations and associations, contingent upon public benefit purposes"[21]. Today, e.g. in the Hungarian Act CLVI on Public Benefit Organisations (1997 as amended 1998)[22] we can find the definition of public benefit activity: the following targeted activities included in the founding document of the organization, directed towards the satisfaction of the common inter-

[18] Moore, Hadzi-Miceva, and Bullain, "Europe: Overview of Public," https://www.icnl.org/resources/research/ijnl/a-comparative-overview-of-public-benefit-status-in-europe-2.

[19] A purpose falls within this subsection if it falls within any of the following descriptions of purposes i.e. the prevention or relief of poverty; the advancement of education; the advancement of religion; the advancement of health or the saving of lives; the advancement of citizenship or community development; UK Public General Acts, Explanatory Notes The Charities Act Commentary on Sections 1/3, Charities Act 2011, https://www.legislation.gov.uk/ukpga/2011/25/part/1/chapter/1/crossheading/charitable-purpose.

[20] Section 3–4 Charity Act 2011 Part 1 Chapter 1, Charitable purpose https://www.legislation.gov.uk/ukpga/2011/25/part/1/chapter/1/crossheading/charitable-purpose.

[21] Moore, Hadzi-Miceva, and Bullain, "Europe: Overview of Public," https://www.icnl.org/resources/research/ijnl/a-comparative-overview-of-public-benefit-status-in-europe-2.

[22] Translated by the International Centre for Not-for-Profit Law, https://www.legislationline.org/documents/id/8136.

ests of the society and the individual[23]. The Polish Act on Public Benefit and Volunteer Work regulates the principles of public benefit activity by non-governmental organizations in the field of public tasks and cooperation of public administration bodies with non-governmental organizations[24]. Therefore, it is necessary to explain the meaning of the scope of the concept of public benefit activity, which in the legal sense following Jolanta Blicharz, means socially useful activity, carried out by non-governmental organizations in the field of public tasks implementation[25]. Socially useful activity is activity that is carried out in the interest of society, and socially useful goals are those which, in the opinion of the Supreme Administrative Court, "serve the general society"[26]. Public benefit activity may be a paid activity, but it is not in principle an economic activity[27]. It may be conducted as a free activity or as a paid activity[28].

[23] § 26 Hungarian Act CLVI on Public Benefit Organisations (1997 as amended 1998), https://www.legislationline.org/documents/id/8136.

[24] See art. 1.1 p.1 of the Act on Public Benefit and Volunteer Work of April 24, 2003 (Journal of Laws of 2020, item 1057).

[25] Blicharz, *Komentarz*, https://sip.lex.pl/#/commentary/587239519/117633/blicharz-jolanta-komentarz-do-ustawy-o-dzialalnosci-pozytku-publicznego-i-wolontariacie-w-ustawa...?keyword=jolanta%20blicharz&cm=SFIRST.

[26] Supreme Administrative Court, Judgment of 6 March 1992, Ref. No. SA/Wr 139/92, *Przegląd Orzecznictwa Podatkowego*, no. 3 (1992): 146. Cezary Kosikowski does not agree with this position: "Assuming that socially useful goals are goals that serve the general society, the Supreme Administrative Court itself fell into a trap. How to understand "the general society", or maybe only the majority? Is it about the totality of "potential" or "real social addressees" [...]" – see: Cezary Kosikowski, "Gloss to the judgment of the Supreme Administrative Court of 6 March 1992 (SA / Wr 139/92)," *Przegląd Orzecznictwa Podatkowego*, no. 1 (1993): 43. As: Jolanta Blicharz, "Czy cel gospodarczo użyteczny może być wyłącznym celem statutowym fundacji," in *Administracja publiczna pod rządami prawa. Księga pamiątkowa z okazji 70-lecia urodzin prof. zw. dra hab. Adama Błasia*, ed. Jerzy Korczak (Wrocław: Kolonia Limited, 2016), 26.

[27] Within the meaning of the provisions of the Act of March 6, 2018 – Entrepreneurs' Law (Journal of Laws of 2019, items 1292 and 1495 and of 2020, item 424), with the exception of art. 9.1 of Act on Benefit.

[28] Art. 6–7 of Act on Benefit.

In contemporary Europe countries choose public benefit purposes that reflect their needs, values, and traditions[29]. Polish law lists almost forty public benefit activities[30].

Countries in Europe choose two different legal solutions in defining public benefit status. In the first solution the framework law does not specifically define public benefit status, for example in Bulgaria (it means that there is one law that regulates both associations and foundations, and the public benefit status extends to these legal forms). The provisions cover the full range of regulatory issues related to public benefit status (definition of public benefit status, criteria for obtaining it and the obligations imposed by it). It is important that the tax regulations introducing benefits (tax law) for PBOs are conducted in parallel with the introduction of this status (in Bulgaria the difference in introducing the regulations was two years)[31] An alternative approach is to adopt specific, separate rules on "public benefit" (in countries where associations, foundations and other entities that can obtain this status are subject to separate rules). Such a solution (having one separate act on the PBO status) was adopted, for example by Hungary (1997), Latvia (2004) and Poland (2003)[32]. In the aspect of

[29] "In the Netherlands, for example, the public benefit purposes developed in fiscal jurisprudence include purposes that are ecclesiastical, based on a philosophy of life, charitable, cultural, scientific, and of public utility. German tax law includes public health care, general welfare, environmental protection, education, culture, amateur sports, science, the support of persons unable to care for themselves, and churches and religion. In France, the tax law defines public benefit to include, among others, assistance to needy people, scientific or medical research, amateur sports, the arts and artistic heritage, the defense of the natural environment, and the defense of French culture. In Hungary, separate public benefit legislation lists 22 purposes, including health preservation, scientific research, education, and culture". David Moore, "Public Benefit Status: A Comparative Overview in Comparative Approaches to Civil Society," *The International Journal of Not-for-Profit Law* 7, no. 3 (2005), https://www.icnl.org/resources/research/ijnl/public-benefit-status-a-comparative-overview.

[30] Art. 4.1 of the Act on Public Benefit and Volunteer Work of April 24, 2003 (Journal of Laws of 2020, item 1057).

[31] See more: Moore, Hadzi-Miceva, and Bullain, "Europe: Overview of Public," https://www.icnl.org/resources/research/ijnl/a-comparative-overview-of-public-benefit-status-in-europe-2.

[32] Moore, Hadzi-Miceva, and Bullain, "Europe: Overview of Public," https://www.icnl.org/resources/research/ijnl/a-comparative-overview-of-public-benefit-status-in-europe-2.

authority over the public benefit organization can be found: the tax authorities (i.e. Denmark, Finland, Germany[33], Greece, Ireland, the Netherlands, Portugal and Sweden), single Ministry i.e. in Bulgaria, the Ministry of Justice (certification and supervision) or courts i.e. France, Hungary, Poland[34]. A non-governmental organization in Poland obtains the status of a public benefit organization upon its entry into the National Court Register (KRS)[35]. Along with obtaining the status of a public benefit organization by an NGO, it enjoys various privileges. They are, among others the right to receive 1% of personal income tax, with the proviso that these funds may be used only for public benefit activities[36] or the right to free information on public radio and television about the organization's activities[37]. On the other hand, are imposed additional obligations in terms of reporting both substantive as well as financial[38].

[33] In Germany, the local tax authorities are responsible for granting public benefit status and for verifying that requirements for retaining this status are met.

[34] Moore, Hadzi-Miceva, and Bullain, "Europe: Overview of Public," https://www.icnl.org/resources/research/ijnl/a-comparative-overview-of-public-benefit-status-in-europe-2.

[35] A non-governmental organization and entities listed in art. 3.3 pts 4 of the Act on Benefit, which are subject to the entry into the National Court Register, acquire the status of a public benefit organization at the moment of entering into this register information on meeting the requirements referred to in art. 20, on the terms and in the manner specified in the Act on the National Court Register of August 20, 1997 (i.e. Journal of Laws of 2019, item 1500). See also art. 22.1 and art. 22.2 of the Act on Benefit.

[36] Article 27 of the Act on Benefit and the Act on Personal Income Tax of July26, 1991 (Journal of Laws of 2018, item 1509, as amended) as well as the Ordinance of the Head of the Public Benefit Committee on publishing information by public benefit organizations in the field of 1% of personal income tax of October 24, 2018 (i.e. Journal of Laws, item 2053).

[37] Article 26 of the Act on Benefit and the Ordinance of the National Council of Radio Broadcasting and Television on the procedure related to free information in the programs of public radio and television broadcasting units about free public benefit activities conducted by public benefit organizations (Journal of Laws of 2014, item 283, as amended).

[38] Act on accounting of September 29, 1994 (i.e. Journal of Laws of 2019, item 351), Ordinance of the Minister of Finance on keeping simplified revenue and cost records by some non-governmental organizations and associations of entities local government of October 22, 2018 (Journal of Laws item 2050), Ordinance of the Minister of Finance on the obligation to audit financial statements of public benefit organizations of November 13, 2018 (Journal of Laws item 2148), Ordinance of the Head of the Public Benefit Committee on the templates of the annual substantive report and the simplified annual substan-

In most continental European countries, recognizing a certain organization to be of "public benefit" indicates:

1. that the organization has obtained a "status" and not that it has been registered as a separate legal form.
2. public benefit status is granted after the organization has been registered as a legal entity (most commonly in the form of an association or a foundation).
3. if the public benefit organization ceases to fulfil the conditions for having this status, it would lose the status and the benefits associated with it, but it could still continue to operate.
4. public benefit status is generally considered to be voluntary[39].
5. public benefit status is an issue of fiscal regulation (the legal framework must link public benefit status directly to preferential tax treatment or other forms of government support)[40].
6. PBOs are generally subjected to additional supervision.

3. SUPERVISION AND CONTROL OVER PUBLIC BENEFIT ORGANIZATIONS. GENERAL RECOMMENDATIONS

At the beginning of the considerations concerning the supervision and control over public benefit organizations, general limits on them should be indicated. On the one hand, PBOs must comply with the law and be free from abuse, and on the other hand, they must operate efficiently and independently. The former Program Director of *Central and Eastern Europe for the International Centre for Not-for-Profit Law* described these boundaries as follows "Public benefit organizations – as recipients of direct and/or indirect subsidies from the government – will naturally be subject to greater government scrutiny. The purposes of this scrutiny are to protect the public from fraud and abuse by NGOs, and to ensure that public sup-

tive report on the activities of public benefit organizations of October 24, 2018 (Journal of Laws item 2061) for reports from the financial year started in 2018.

[39] Moore, Hadzi-Miceva, and Bullain, "Europe: Overview of Public," https://www.icnl.org/resources/research/ijnl/a-comparative-overview-of-public-benefit-status-in-europe-2.

[40] Moore, "Public Benefit Status," https://www.icnl.org/resources/research/ijnl/public-benefit-status-a-comparative-overview.

port is linked to public benefits. In positive terms, the goals of supervision are to support good management, appropriate to the size of the organization; and to ensure that the organization is accountable to its members, beneficiaries, and users, as well as the public. The degree of supervision should be proportionate to the benefits provided, and not so intrusive as to compromise the organization's independence"[41]. The legal framework establishing legitimacy of State supervision in Europe has been established by the European Convention on Human Rights (ECHR) of the Council of Europe[42]. Article 11 ECHR[43] guarantees the freedom of assembly and association and is of particular importance in issues of governmental supervision[44]. "State involvement may only restrict rights when provided by law, accompanied by sufficient guarantees against abuse, and when it is necessary in a democratic society to protect the interests involved"[45].

As a result of the multilateral meetings held in Strasbourg in 2001 and 2002 Fundamental Principles on the Status of Non-governmental Organisations in Europe and Explanatory Memorandum (2002) were defined[46]. Having regard to article 11 of the European Convention on Human Rights which provides that "everyone has the right to free-

[41] Moore, "Public Benefit Status," https://www.icnl.org/resources/research/ijnl/public-benefit-status-a-comparative-overview.

[42] 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.

[43] Art.11.1 ECHR "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests".

[44] Art.11.2 ECHR "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

[45] Lia C.R.M. Versteegh, "Civil Society under the Treaty of Lisbon: Relationship between National Public Benefit Organizations and European Union Policy?," *Nonprofit Policy Forum* 2, no. 2, Article 4 (2011): 14.

[46] Art. 66–71 Fundamental Principles on the Status of Non-governmental Organisations in Europe and Explanatory Memorandum (2002) Strasbourg, 13 November 2002.

dom of peaceful assembly and to freedom of association with others"[47] and the European Convention on the Recognition of the Legal Personality of International Non-governmental Organisations (ETS No. 124)[48] have been adopted the present Fundamental Principles on the Status of Non-governmental Organisations in Europe in article 66–71. In the aspect of supervision the rules are as follows:

– NGOs may be regulated in order to secure the rights of others, including members and other NGOs, but they should enjoy the benefit of the presumption that any activity is lawful in the absence of contrary evidence.
– NGOs should not be subject to any power to search their premises and seize documents and other material there without objective grounds for taking such measures and prior judicial authorisation.
– Administrative, civil and/or criminal proceedings may be an appropriate response where there are reasonable grounds to believe that an NGO with legal personality has not observed the requirements concerning acquisition of such personality.
– NGOs should generally be able to request suspension of administrative action requiring that they stop particular activities. A refusal of the request of suspension should be subject to prompt judicial challenge.
– In most instances the appropriate sanction against an NGO will merely be the requirement to rectify its affairs and/or the imposition of an administrative, civil or criminal penalty on it and/or any individuals directly responsible. Penalties shall be based on the law in force and observe the principle of proportionality.
– In exceptional circumstances and only with compelling evidence, the conduct of an NGO may warrant its dissolution.

Recommendation CM/Rec (2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in

[47] Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950 as amended 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.

[48] Council of Europe, European Convention on the Recognition of the Legal Personality of International Non-governmental Organisations, Strasbourg, 24 April 1986.

Europe[49] provides basic principles for NGOs[50]. Recommendations do not distinguish among NGOs with a public benefit status and NGOs without a public benefit status. "As a consequence, a special legal form for NGOs with a public benefit status is not required, neither is accreditation nor case-by-case recognition of the public benefit character of the NGO"[51]. The Recommendation contains the basic principles on NGO supervision in sections 67–74. As we can read:

67. The activities of NGOs should be presumed to be lawful in the absence of contrary evidence.
68. NGOs can be required to submit their books, records and activities to inspection by a supervising agency where there has been a failure to comply with reporting requirements or where there are reasonable grounds to suspect that serious breaches of the law have occurred or are imminent.
69. NGOs should not be subject to search and seizure without objective grounds for taking such measures and appropriate judicial authorisation.
70. No external intervention in the running of NGOs should take place unless a serious breach of the legal requirements applicable to NGOs has been established or is reasonably believed to be imminent.

[49] As we can read in the explanation of this act: "During their Third Summit (Warsaw, 17 May 2005), the Heads of State and Government of the Council of Europe member States made specific reference to the role of NGOs as an essential element of civil society's contribution to the transparency and accountability of democratic government. In so doing, they decided to enhance the participation of NGOs in Council of Europe activities. A Group of Specialists on the legal status of NGOs (CJ-S-ONG) held two meetings in 2006 and on 10 October the Committee of Ministers adopted Recommendation (2007)14 on the legal status of non-governmental organisations in Europe. The Conference of INGOs was a member of the Group of Specialists and actively contributed to the drafting of the text. The Recommendation defines the minimum standards to be respected concerning the creation, management and the general activities of NGOs in member states of the organisation", https://www.coe.int/en/web/ingo/legal-standards-for-ngos.

[50] For example in relation to public authority: number 5 "NGOs should not be subject to direction by public authorities" or number 10 "Acts or omissions by public authorities affecting an NGO should be subject to administrative review and be open to challenge by the NGO in an independent and impartial court with full jurisdiction".

[51] Versteegh, "Civil Society under the Treaty," 13.

71. NGOs should generally be able to request suspension of any administrative measure taken in respect of them. Refusal of a request for suspension should be subject to prompt judicial challenge.
72. In most instances, the appropriate sanction against NGOs for breach of the legal requirements applicable to them (including those concerning the acquisition of legal personality) should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil or criminal penalty on them and/or any individuals directly responsible. Penalties should be based on the law in force and observe the principle of proportionality.
73. Foreign NGOs should be subject to the provisions in paragraphs 68 to 72 above only in respect of their activities in the host country.
74. The termination of an NGO or, in the case of a foreign NGO, the withdrawal of its approval to operate should only be ordered by a court where there is compelling evidence that the grounds specified in paragraph 44[52] (…) above have been met. Such an order should be subject to prompt appeal.

4. ENTITIES AUTHORIZED IN THE FIELD OF SUPERVISION AND CONTROL OVER NON-GOVERNMENTAL ORGANIZATIONS

As we read in *Public Benefit Status: A Comparative Overview*: "The identity of the PBO regulator varies widely from country to country. In some cases, the registration/certification body also regulates; such is the case in England (the Charity Commission) and Bulgaria (the Central Registry of the Ministry of Justice). Elsewhere, specific government bodies play a regulatory role. In Hungary, for example, where a PBO has received funding from the state budget, the State Audit agency may monitor the use of the funds. In Romania, a special government department monitors asso-

[52] The legal personality of NGOs can only be terminated pursuant to the voluntary act of their members– or in the case of non- membership-based NGOs, its governing body – or in the event of bankruptcy, prolonged inactivity or serious misconduct.

ciations and foundations with public utility status"[53]. As regards the issues of supervision and control over non-governmental organizations in Poland (apart from the judiciary) competence in this area rests with[54]:

– National Labour Inspectorate in the field of inter alia, supervision and control of compliance with labour law, control of employment legality[55].
– Sanitary Inspection in the implementation of tasks in the field of public health, in particular by supervising the conditions of, inter alia, occupational hygiene in workplaces, in the field of preventive sanitary supervision, ongoing sanitary supervision or control of compliance with regulations specifying hygiene and health requirements[56].
– Offices of fiscal control in carrying out tax audit, the aim is to check to see whether the controlled entities fulfil their obligations under the tax law[57].
– The Supreme Chamber of Control in the field of control of non-governmental organizations when they use property or public funds and perform tasks commissioned by public administrative bodies. Therefore, The Supreme Chamber of Control can control the activities of organizational units and entities (entrepreneurs) when they use state or municipal property or funds and fulfil their financial obligations towards the state: in the scope of using state property or local government, e.g. in a situation where they benefit from individual assistance, guarantees or a state guarantee, local government or benefit from public aid subject to monitoring[58].

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[53] Moore, "Public Benefit Status," https://www.icnl.org/resources/research/ijnl/public-benefit-status-a-comparative-overview.

[54] https://poradnik.ngo.pl/nadzor-ngo-kontrole.

[55] On the basis of the Act on the National Labour Inspectorate of April 13, 2007 (i.e. Journal of Laws. of 2019, item 1251).

[56] On the basis of the Act on the State Sanitary Inspection of March 14, 1985 (i.e. Journal of Laws of 2019, item 59).

[57] On the basis of the Act Tax Ordinance of August 29, 1997 (i.e. Journal of Laws of 2020, items 1325, 1423) and the Act on fiscal control of September 28, 1991, (i.e. Journal of Laws 2016, item 720, 1165, 2261).

[58] On the basis of Act on the Supreme Chamber of Control of December 23, 1994 (i.e. Journal Of Laws of 2020, item 1200).

– The Regional Audit Chamber is entitled to control non-governmental organizations in the scope of their use of subsidies granted from the budget of local government units[59].

Also:

– Minister competent for the scope of activities and purposes of the foundation.
– District chief (starosta) or the president of a city with district competence for the seat of the foundation or association.
– Voivode (provincial governor) in relation to associations of local government units.

Within this catalogue should also be indicated, in reference only to organizations with the status of public benefit organizations, the Head of the Public Benefit Committee, who took over the supervisory powers of the minister competent for social security rights in the correct use of special rights granted to public benefit organizations, and the Director the National Freedom Institute – Centre for Civil Society Development. In the justification to the government's draft act on the National Freedom Institute – Centre for Civil Society Development (Sejm Document No. 1713 of 4 July 2017), the need to create a new executive agency to support civil society institutions was indicated. The Institute is managed by the Director. The established National Freedom Institute is to implement the state policy in the field of civil society development based on the principles of openness, competitiveness and transparency. "It is to support the development of civil society in Poland, and not to solve the problems of the third sector"[60]. This document also indicates the need for greater and at the same time partnership cooperation between ministries and in the field of organizing cooperation between public administration bodies and entities operating in the field of public benefit, and in the creation of programs supporting the development of civil society, taking into account the points of view and experience of individual ministries[61]. Hence the justified need for a new collective body of government the Public

[59] Pursuant to the provisions of the Act on regional audit chambers of October 7, 1992 (i.e. Journal of Laws of 2019, item 2137.

[60] Sejm Document No 1713. of 4 July 2017, 6.

[61] Sejm Document No 1713. of 4 July 2017, 12.

Benefit Committee (hereinafter referred to as "The Committee"), which was created as a result of the amendment of the Act on Public Benefit and Volunteer Work of 24 April 2003 and introduced by the Act on the National Freedom Institute – Centre for Civil Society Development of 15 September 2017 (Journal of Laws of 2017, item 1909). At the same time, a new body of government administration was established in the act, the Head of the Public Benefit Committee. It should be noted that the Head of the Public Benefit Committee is at the same time the head of the collective body composed of representatives of ministries, and on the other hand, he is a separate government administration body with its own competences and a member of the Council of Ministers[62]. All these newly created bodies have their own competences in the field of the operation of non-governmental organizations, including public benefit organizations. For comparison the Charity Commission for England and Wales is the non-ministerial government department that regulates registered charities in England and Wales and maintains the Central Register of Charities. In the exercise of its functions the Commission is not subject to the direction or control of any Minister of the Crown or of another government department[63]. The collegial Charity Commission supervise the charities, has also a range of powers to amend charities legal structures and intervene following mismanagement and abuse[64]. In Latvia PBOs are supervised by the SRS (State Revenue Service) in cooperation with the Public Benefit Commission. The compliance of PBO activities

[62] According to art. 147.4 of the Constitution of the Republic of Poland "The Council of Ministers may also include head of the committees specified in statutes and art. 149 of the Constitution "To the Head of the Committee referred to in art. 147 par. 4, the provisions relating to the minister managing a department of government administration of the Polish Constitution shall apply accordingly. The Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended.

[63] Art. 13 Part II The Charity Commission and the Official Custodian for Charities, Charities Act 2011, UK Public General Acts 2011, https://www.legislation.gov.uk/ukpga/2011/25/part/2.

[64] Richard Fries, "The Charity Commission for England and Wales," in *Comparative Corporate Governance od Non-Profit Organizations*, eds. Klaus J. Hopt and Thomas von Hippel (Cambridge: Cambridge University Press, 2010), 896–913.

with the law, just like it is in the majority of other European countries[65] is supervised through two major information sources – annual financial reports containing financial information and annual performance reports (previous year performance reports and future activity plans), that contain qualitative or descriptive information[66]. The Public Benefit Commission in is a collegial institution, which equal numbers shall include officials, as well as representatives of associations and foundations[67]. The Commission in Latvia shall provide the State Revenue Service with a justified opinion on the conformity of associations, foundations or religious organisations to the essentials of public benefit organisation activities, as well as the conformity of the use of property and financial means thereof to the provisions of the Public Benefit Organisation Law[68].

In the light of art. 1a. of the Act on Benefit, the Public Benefit Committee in Poland is a government administrative body competent in matters of public benefit and voluntary work. Competencies include: programming, coordinating and organizing cooperation between public administration and actors of public benefit. To the Head of the Committee who, pursuant to art. 34c. 1 of the Act on Benefit manages the work of the Committee, the legislator grants a wide range of supervisory powers with regard to PBOs. They are contained in Chapter 4 of the Act on Benefit and the implementing provisions to the act include:

– Ordinance of the Head of the Public Benefit Committee on the conducting of control of public benefit organizations of October 24, 2018 (Journal of Laws 2018 item 2054), specifying the conditions, manner and procedure of conducting control of public benefit organizations;
– Ordinance of the Head of the Public Benefit Committee on model offers and framework forms of contracts for the implementation of

[65] Moore, Hadzi-Miceva, and Bullain, "Europe: Overview of Public," https://www.icnl.org/resources/research/ijnl/a-comparative-overview-of-public-benefit-status-in-europe-2.

[66] Santa Voitkane and Ingrida Jakusonoka, "Assessment of the Financial Performance Transparency of Public Benefit Organisations," *Economics and Culture* 16, no.1 (2019): 49.

[67] Section 6 art.1, Public Benefit Organisation Law 2006 as emended, https://likumi.lv/ta/en/en/id/90822-public-benefit-organisation-law.

[68] Section 6 art. 2, Public Benefit Organisation Law 2006 as emended, https://likumi.lv/ta/en/en/id/90822-public-benefit-organisation-law.

public tasks and templates of reports on the performance of these tasks of October 24, 2018 (Journal of Laws of 2018, item 2057);
– Ordinance of the Head of the Public Benefit Committee on the templates of the annual substantive report and the simplified annual substantive report on the activities of public benefit organizations of October 24, 2018 (Journal of Laws of 2018, item 2061).

It should be noted that under these entitlements, the Head of the Public Benefit Committee took over the competences of the minister competent for social security, with the significant difference that acting in the field of tasks in the area of civil society, including the area of activities of public benefit organizations is the main and priority task of the new government administration body.

The Head of the Committee according to art. 29 par. 2 the Act on the Benefit may order the control himself and also at the request of the organ of the administration - public authority. Also after the amendment, at the request of NGO or entities referred to in art. 3 par. 3 Act on the Benefit ie.eg. church organization or association of local governments. It is therefore an extension of entities authorized to apply for inspection. The Head of the Committee may entrust the control pursuant to art. 29 par. 3 to voivode and after the amendment of the Act of Benefit to the Director of the National Freedom Institute, based on the personal authority of the Head of the Committee indicating to controlled public benefit organization and a legal basis to make such control[69].

The ordinance of the Head of the Public Benefit Committee on carrying out control of public benefit organizations of 2018 specifies the detailed conditions, manner and procedure for conducting controls of public benefit organizations, including the model authorization to conduct controls. Apart from the usual procedure, it also allows for a simplified control procedure[70]. Far-reaching changes were introduced in the situation of conducting ad hoc controls. Before the amendment to the regulations, they were admissible only in the scope of considering complaints and motions and examining the manner of implementing post-control

[69] Article 29.1 of the Act on Public Benefit.

[70] Par. 2 Ordinance of the Head of the Public Benefit Committee on the conducting of control of public benefit organizations of October 24, 2018 (Journal of Laws 2018 item 2054).

recommendations. In the current wording of par. 21 of the Ordinance of 2018, simplified control is performed in cases justified by the nature of the case or the urgency of carrying out the control activities, in particular if necessary for:

1) preparation of information for the Head of the Public Benefit Committee;
2) check the information contained in complaints and requests;
3) examining the manner of implementing post-control recommendations contained in the post-control statement.

Therefore, the Head of the Committee has the entitlement to order control over the PBO, which is not covered by the plan, and his decision in this respect is discretionary. The simplified control is carried out in accordance with the provisions on ordinary controls, with the exception of the provisions on the control program[71], which defines, inter alia, scope and subject of the audit[72] and the 7 - day notice period notice for control[73]. This deadline does not apply to simplified checks[74]. In the wording of the repealed provisions, the lack of notification concerned only controls resulting from complaints or requests[75]. In the light of the current regulations, PBOs are in a worse position in this respect than entrepreneurs who may be subject to unannounced controls only in strictly defined cases[76].

[71] Par. 22 Ordinance of the Head of the Public Benefit Committee of October 24, 2018 on the conducting of control of public benefit organizations (Journal of Laws 2018 item 2054).

[72] Par 2.3 Ordinance of the Head of the Public Benefit Committee of October 24, 2018 on the conducting of control of public benefit organizations (Journal of Laws 2018 item 2054).

[73] Par. 7.1 Ordinance of the Head of the Public Benefit Committee of October 24, 2018 on the conducting of control of public benefit organizations (Journal of Laws 2018 item 2054).

[74] Par. 7. 2 Ordinance of the Head of the Public Benefit Committee of October 24, 2018 on the conducting of control of public benefit organizations (Journal of Laws 2018 item 2054).

[75] Par. 5. 2 Ordinance of the Head of the Public Benefit Committee of October 24, 2018 on the conducting of control of public benefit organizations (Journal of Laws 2018 item 2054).

[76] Art. 48. 1–2 and 11 pts. 1–12 of the Act of March 6, 2018 – Entrepreneurs' Law, i.e. Journal of Laws 2019 item 1292).

The scope of Head of Committee control resulting from art. 28 of the Act on Benefits includes:

– paid-for-benefit activities conducted by the organization and economic activity, as well as accounting separation of these activities,
– fulfillment of the criteria set out in Art. 20–22 of the Act of Benefit (these articles describe what conditions must be met in order to register and maintain the status of a PBO),
– is the organization collect 1% funds correctly and does it run a 1% campaign in accordance with the provisions of the Act.

After the inspection is completed, the persons conducting the inspection prepare a post-inspection statement[77]. The post-inspection statement includes an assessment of the resulting actual state from the findings contained in the inspection protocol, including a description of the identified deficiencies, taking into account the reasons for their creation, scope, effects and persons responsible for their creation, as well as the deadline for removing deficiencies, not shorter than 30 days from the date of delivery of the post-inspection statement[78]. In the light of the new regulations The Director of the National Institute within statutory powers may apply to the registry court for the removal of an organization (status of a public benefit organization) from the National Court Register, in the case of:

1) failure to remove the deficiencies specified in the post-inspection statement or to refrain from submitting to inspection by a public benefit organization;
2) gross violation of the provisions of law found as a result of the control referred to in art. 29 (control of the Head of the Committee)[79].

The Director of the National Institute applies to the registry court for the removal of an organization in the event of non-compliance with the requirements specified for PBO by a public benefit organization, as a result of a control[80].

[77] Art. 31.4 Act of the Benefit.
[78] Art. 32 Act of the Benefit.
[79] Art. 33.2 Act of the Benefit.
[80] Art. 33.3 Act of the Benefit.

5. CONCLUSIONS

In conclusion one must agree that "public benefit organizations are transparent and accountable, the state has legitimate interests in requiring information about how public subsidies are being spent, including both financial information (e.g., annual financial statements, or an accounting of the use of assets obtained from public sources and supposedly used for public benefit), and programmatic information (e.g., a report on activities undertaken in the public interest)"[81]. As we read in the already developed a decade ago *in Recent Public and Self-Regulatory Initiatives Improving Transparency and Accountability of Non-Profit Organisations in the European Union* "public regulation and self-regulation initiatives go hand in hand in Europe: a move towards increased state supervision can be observed parallel with a greater desire for self-regulation by NPOs"[82], with a simultaneous tendency to gradually increase supervision over non-governmental organizations[83]. In relation to i.e. the foundations in Europe "countries have a minimum level of supervision, however the form and extent of

[81] David Moore, "Public Benefit Status: A Comparative Overview in Comparative Approaches to Civil Society," *The International Journal of Not-for-Profit Law* 7, no. 3 (2005), https://www.icnl.org/resources/research/ijnl/public-benefit-status-a-comparative-overview.

[82] *Self-Regulatory Initiatives Improving Transparency and Accountability of Non-Profit Organisations in the European Union*, 18, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/doc_centre/terrorism/docs/initiatives_improving_transparency_accountability_npos_avr09.pdf.

[83] "Strengthening supervision and investigation powers. Several countries have revised and clarified the roles of supervision agencies and introduced rules to increase inter-agency cooperation. While the Charity Commission stands out as a single agency with specific investigative powers over NPOs, comparable models have been introduced in civil law countries as well. A case in point is the Ministry of Labour and Social Affairs and the Council of Public Benefit Organisations in Poland" (now The Head of The Committee), "which have considerable power to investigate the operation of PBOs. Recent amendments to the NPO law in Bulgaria increased the ability of the Central Registry, and the Ministry of Justice, to monitor PBOs and increased its role in sharing information with other state agencies regarding PBOs under its supervision. In addition, powers to share information and cooperate in investigation have been extended along with the introduction of higher accountability standards for NPOs (in Austria) and a central registration database in Austria and Hungary" in: *Self-Regulatory Initiatives Improving Transparency and Accountability of Non-Profit Organisations in the European Union*, 21, https://ec.europa.eu/home-affairs/sites/homeaffairs/

supervision varies greatly. Foundations are usually subject to supervision by the tax authority, and most countries have supervisory agencies with powers to inspect and intervene in management decisions in the case of mismanagement and dissolve a foundation in specific cases"[84]. Already in 2011 Poland was indicated among others in the group of countries, in which the authorities have much greater powers to among other things, undertake inspections on site; intervene in case of management failure; order the board to take a specific action[85]. The latest amendments to the regulations on the supervision and control of PBOs go even further towards tightening these mechanisms, among others by increasing the powers of new central administration bodies. In the justification of the draft Act on the National Freedom Institute it was stated that the new act is a "competence act but does not result in centralization" and its entry into force "will not centralize the support system for non-governmental organizations in Poland"[86]. But it should be emphasized that, first of all, the competences of the minister competent for social security in aspect of control and supervision PBOs were transferred to newly created bodies of central government administration: the Head of the Public Benefit Committee and also to the Director of National Freedom Institute – Centre for Civil Society Development. The authorized body in this case is a political body of the central government administration. The Head of the Committee is now the deputy prime minister of the Polish government. The new collegial body in Poland, the Committee is composed of representatives of all ministries, and include only representatives of the authorities. The Director

files/doc_centre/terrorism/docs/initiatives_improving_transparency_accountability_npos_avr09.pdf.

[84] *Exploring transparency and accountability Regulation of Public-benefit Foundations in Europe*, European Foundation Centre, 2011, 19, https://efc.issuelab.org/resource/exploring-transparency-and-accountability-regulation-of-public-benefit-foundations-in-europe.html.

[85] Warranted inspections are permitted in Bulgaria, Hungary, and Sweden and unwarranted inspections in Austria, Poland, and Turkey. In France, public-benefit foundations are subject to inspection if they raise funds from the public and their donors claim tax benefits. *Exploring transparency and accountability Regulation of Public-benefit Foundations in Europe*, European Foundation Centre, 2011, 19, https://efc.issuelab.org/resource/exploring-transparency-and-accountability-regulation-of-public-benefit-foundations-in-europe.html.

[86] Sejm Document No1713 of 4 July 2017, 14.

of the National Freedom Institute – Centre for Civil Society Development is appointed by The Head of the Committee and the representatives of non-governmental organizations are in the minority in the opinion-making Council of the Institute[87].

Secondly, the new bodies have been granted broad powers, inter alia in the field of controls, including in particular the possibility of carrying out ad hoc controls[88], which significantly affect the autonomy of PBOs. Changes in the control of public benefit organizations in Poland introduced the possibility to control these organizations in a wide range, including carrying out ad hoc controls. The Head of the Committee may order unforeseen and unannounced PBO controls. Its decision in this respect is discretionary and excludes the provisions of the regulation concerning ordinary control (within the scope of the Program, including the date informing about the inspection and the scope of the inspection)[89]. The controller during the inspection, has also extensive powers, inter alia, to demand documents (providing documents necessary for the inspection) or to conduct inspections[90].

Even before the changes in the BPOs law, no large-scale public consultations were conducted in the opinion of the of non-governmental organizations themselves, significant changes to the provisions on the operation of non-governmental organizations[91], including those relating to control, were made without the principle of universality and transparency of consultations. Letter informing about the ongoing consultations on the projects, without the draft about regulation on conducting control of public

[87] Art. 9. 1 by the Act on the National Freedom Institute – Centre for Civil Society Development of 15 September 2017 (Journal of Laws of 2017, item 1909).

[88] Sejm Document No 1713 of 4 July 2017, 15.

[89] Par. 21 Ordinance of the Head of the Public Benefit Committee of October 24, 2018 on the conducting of control of public benefit organizations (Journal of Laws 2018 item 2054).

[90] Par. 10–11 Ordinance of the Head of the Public Benefit Committee of October 24, 2018 on the conducting of control of public benefit organizations (Journal of Laws 2018 item 2054).

[91] Position of the Polish National Federation of NGOs on the draft Ordinance of the Head of the Public Benefit Committee issued to the Act on Public Benefit and Volunteer Work, Warsaw, September 24, 2018.

benefit organizations and failure to meet the required deadlines for taking the position of interested entities[92], misled the organizations concerned and made it difficult for them to participate in its consultations[93]. Therefore, it seems reasonable to suppose that the lack of this justification for the change in the provisions on the competences in the field of control over PBOs "was dictated by the will to tighten the applied control mechanisms"[94], increase the scope of interference and the possibility of verifying the correctness of the activities of public benefit organizations.

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[92] According to art. 20 of Resolution No. 190 of the Council of Ministers of October 29, 2013 - Work regulations of the Council of Ministers (Official Journal of the Republic of Poland 2013, item 979 as amended).

[93] Position of the Polish National Federation of NGOs on the draft Ordinance of the Head of the Public Benefit Committee issued to the Act on Public Benefit and Volunteer Work, Warsaw, September 24, 2018, http://ofop.eu/sites/ofop.eu/files/Pogram_Rzeczniczy/stanowiska/rozporzadzenia_do_ustawy_opp_-_24.09.18.pdf.

[94] Position of the Polish National Federation of NGOs on the draft Ordinance of the Head of the Public Benefit Committee issued to the Act on Public Benefit and Volunteer Work, Warsaw, September 24, 2018, http://ofop.eu/sites/ofop.eu/files/Pogram_Rzeczniczy/stanowiska/rozporzadzenia_do_ustawy_opp_-_24.09.18.pdf.

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REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLV
YEAR 2021, ISSUE 2, pp. 35–56
DOI: https://doi.org/10.31743/recl.10651

COLLECTIVE WORK AS AN INSPIRATION FOR LEGAL QUALIFICATION OF COMPUTER-GENERATED WORKS – COMPARATIVE ANALYSIS OF THE INSTITUTION FROM POLISH AND FRENCH COPYRIGHT LAW PERSPECTIVE

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ABSTRACT

The paper focuses on the question whether the institution of collective work could be used as an inspiration in order to regulate the legal situation of computer-generated works. Technological progress makes the creation of art by artificial intelligence with only minimal human participation an increasingly popular phenomenon. For this reason, world literature more and more often discusses how to legally qualify algorithmic creativity. An interesting idea, proposed in January 2020 by French Superior Council of Literary and Artistic Property is to regulate the issue alike the institution of a collective work. The study of the nature of computer-generated creativity on the example of the Endel musical start-up conducted in this paper will help to understand the complexity of the problem of algorithmic creativity. It will be also a valuable introduction to the analysis of the institution of collective work in Polish and French law. This comparative study will be important in the context of assessing the French proposals for the legal qualification of algorithmic creativity and examining to what extent the model of the collective work can be applied to computer-generated works in Polish copyright law.

Keywords: Collective work, Artificial Intelligence, copyright, French proposals

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1. INTRODUCTION

It is estimated that there is a 50% chance that in 2040 artificial intelligence[1] will equal human intelligence, and the probability will rise to 90% in 2075[2]. Nowadays, AI enters our everyday life. This technology is also increasingly used in art. Neuron networks as a mathematical representation of the human nervous system[3] can act like a human being and learn to paint, write or compose. Moreover, with the emergence of new artistic initiatives, the way of perceiving the role of AI, previously defined as a tool for creating a work, and today as an independent creator, is changing. This new trend and greater independence of AI appearing as ability to make creative, difficult to predict and non-obvious choices about the elements of the work contributes to the uprising of practical legal problems.

There is currently a lively discussion on whether it is necessary to grant legal protection to computer-generated works and if so, what kind of protection will be the most appropriate. According to the Polish Copyright Act[4], moral and economic rights can be assigned exclusively to human beings. Nevertheless, it should be repeated after D. Flisak, who rightly notices that in the content of Art. 1 of the Act, the creativity is not *expressis verbis* attributed to human and there is no clear indication that the subject of copyright must only be an expression of the creative activity of a human being[5]. Since the requirement of human creation in the Polish Copyright Act is not literally indicated, it is worth considering

[1] Hereinafter: AI.

[2] Vincent C. Müller and Nick Bostrom, "Future Progress in Artificial Intelligence: A Survey of Expert Opinion," in *Fundamental Issues of Artificial Intelligence*, ed. Vincent C. Müller (Berlin: Synthese Library, Springer, 2014), 14, accessed February 20, 2021, https://www.nickbostrom.com/papers/survey.pdf.

[3] Anna Kasperska, "Problemy zastosowania sztucznych sieci neuronalnych w praktyce prawniczej," *Przegląd Prawa Publicznego*, no. 11 (2017): 25.

[4] Act on copyright and related rights of 4 February 1994, Journal of Laws 2019, No. 1231 as amended. English version available on the WIPO website: https://www.wipo.int/edocs/lexdocs/laws/en/pl/pl010en.pdf, accessed December 11, 2019, hereinafter Polish Copyright Act.

[5] Damian Flisak, "Czy robotowi przysługują prawa autorskie? Wywiad z dr Damianem Flisakiem," interview by Magdalena Miernik, 2017, accessed August 27, 2020,

whether AI's work could be treated as the subject of copyright. At this point, for the purposes of further analysis, it should be assumed that computer-generated art meets the premises of originality[6], individuality[7] and fixation which will allow us to proceed the consideration who should be granted copyright due to its involvement in the process of making of the work.

The recent report prepared by the French Superior Council of Literary and Artistic Property[8] introduced a new proposal concerning legal protection of AI's works, considered as possible modification of the Intellectual Property Code in France. By using the model of collective work which nature largely resembles the specificity of the process of AI's works creation, the balance between artistic and economic dimension could be reached. Importantly, the use of this construction could simplify and clarify from the legal point of view the complexity of the creative process and diversified involvement of many people at various stages of AI work's creation.

The aim of this article is to present a new proposal concerning legal qualification of AI's works based on collective work construction introduced in France and discuss its possible application in the Polish copyright

https://lookreatywni.pl/baza-wiedzy/czy-sztuczna-inteligencja-zmieni-prawo-autorskie-wywiad-z-dr-damianem-flisakiem/.

[6] The results of machines' work are more and more often qualified as creative and innovative as well as exceeding the skills and abilities of machines' creators. See: Jared Vasconcellos Grubow, "O.K. Computer: The Devolution of Human Creativity and Granting Musical Copyrights to Artificially Intelligent Joint Authors," *Cardozo Law Reviev* 40, no. 1 (2018): 404–405; James Wagner, "Rise of the Artificial Intelligence Author," *Advocate* 75, no. 4 (2017): 531.

[7] Due to technological development, the criterion of individuality can be considered as problematic in the context of potential acceptance of the non-human beings 'creativity. Many scholars point out that works created by AI do not reflect the personality of its creator because the creator in this case is a machine. However, the individual character of the work can be identified through the prism of its distinctness from the others works. See: John Pavlus, "Clever Machines Learn How to Be Curious," 2017, accessed December 13, 2019, https://www.quantamagazine.org/clever-machines-learn-how-to-be-curious-20170919/.

[8] "Mission Intelligence Artificielle Et Culture," Conseil Supérieur De La Propriété Littéraire Et Artistique, 2020, point 2.2.1., accessed May 08, 2020, https://www.wipo.int/export/sites/www/about-ip/en/artificial_intelligence/call_for_comments/pdf/ms_france_cspla_fr.pdf.

regime. Part I of this article will provide a brief presentation of functioning of one start-up based on autonomous AI from the legal point of view in order to indicate the properties which characterize the process of creating computer-generated works. In part II and III an analysis of collective work's construction in Polish and French copyright law will be conducted. The comparative study will allow to consider the structure of this institution and check similarities and differences in the way it is regulated in Polish and French copyright acts. Lastly, in part IV the proposals prepared by French Superior Council of Literary and Artistic Property will be evaluated. The main purpose of this final part is to answer the question to what extent the structure of a collective work is appropriate for regulating the issue of AI works and how the proposals made in French Copyright law could be translated in Polish Copyright law – the *lege ferenda* postulates will be formulated.

2. THE NATURE OF COMPUTER-GENERATED ART

Technological changes, minimizing the role of humans in generating art by AI and complexity of this process is reflected in the German start-up Endel, which in 2019 released an application for creating music by AI based on individual user data such as biometric data – pulse, conditions of weather, time of day and location. Using this information, the AI generates reactive, personalized "soundscapes"[9] which help to focus or relax. The German start-up attracted the attention of Warner Music Group – an American international entertainment and music label. This interest resulted in a multi-billion dollar[10] contract to record a total of 20 Warner Music albums. The cooperation is described by the developers of the application as a breakthrough, because the generation of songs took place without human intervention. Indeed, humans did not participate in the act of generating music, the machine did

[9] "Endel to release 20 algorithm- powered albums to help you sleep, focus & relax," accessed March 27, 2020, https://endel.io/presskit/Endel-PressRelease-20MusicAlbums.pdf.

[10] Hayleigh Bosher, "Warner Music signs distribution deal with AI generated music app Endel," 2019, accessed March 27, 2020, http://ipkitten.blogspot.com/2019/03/warner-music-signs-distribution-deal.html.

the creative task – "Dmitry Evgrafov, Endel's composer and head of sound design, says all 600 tracks were made with a click of a button."[11] However, it should be specified that humans had been involved at every stage of process not participating in the last, final act of music creation[12]. It's worth to note that without his/her involvement this act of music composition by AI would not be possible. The presentation of human participation should begin with indicating that a given machine, in order to compose, must be constructed and in that purpose the involvement of engineers[13] and technology specialists is necessary[14]. Secondly, AI must be properly programmed – in that respect the work of programmers needs to be highlighted. In order to obtain the appropriate results, data training is carried out, after an introduction of specific data related to expected final effects. At this stage the important role is played by data trainers who oversee the training process and correct errors in recognizing and learning data[15]. In the case of Endel's compositions human involvement also consisted of chopping up the audio, mastering it for streaming as well as writing the track titles[16].

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[11] Dani Deahl, "Warner Music signed an algorithm to a recorded deal- what happens next?," 2019, accessed March 27, 2020, https://www.theverge.com/2019/3/27/18283084/warner-music-algorithm-signed-ambient-music-endel.

[12] Bosher, "Warner Music signs," accessed March 27, 2020, http://ipkitten.blogspot.com/2019/03/warner-music-signs-distribution-deal.html, "The Endel-Warner deal is a step forward in that there are no human collaborators in the generation of the new sounds. Nevertheless, a human - aside from obviously creating the AI - also had to, input sounds and data into Endel. Interestingly Stavisky (CEO, founder of Endel) describes the work as being "generated based on different combinations of inputs" rather than created. Some of these inputs, or instrumental stems, were created by Endel's co-founder and sound designer Dmitry Evgrafov. Each sound is then allocated metadata according to certain parameters which the app can read and use to generate a soundscape. So, whilst it might seem that the sounds are created with a click of a button, Stavisky explained that it took "1.5 years of work developing our algorithm and creating and tagging the stems".

[13] Amy X. Wang, "Warner Music Group Signs an Algorithm to a Record Deal," 2019, accessed August 31, 2020, https://www.rollingstone.com/pro/news/warner-music-group-endel-algorithm-record-deal-811327.

[14] Jim Hughes, "The Key Roles of AI Engineers," 2019, accessed August 27, 2020, https://engineeringmanagementinstitute.org/key-roles-ai-engineers.

[15] Kasperska, "Problemy zastosowania sztucznych sieci," 25–27.

[16] Deahl, "Warner Music signed an algorithm," accessed March 27, 2020, https://www.theverge.com/2019/3/27/18283084/warner-music-algorithm-signed-ambient-music-endel.

The complexity of the creative process and the participation of so many people who have a greater or lesser influence on the final result requires appropriate financial outlays, proper preparation, supervision and organization. Moreover, from the legal point of view, appropriate agreements should be concluded with the authors of individual elements, such as computer programs or databases, regarding the possibility of using them on the basis of a license or the acquisition of economic rights. Therefore, a key role is played by producers who organise the project and finance it, acquire ownership or buy the licenses to use the software, databases as well as lyrics or titles for songs creates by AI and thus obtain the copyright to these items. The final effect does not consist of the elements like software, or training data set but is the result of their functioning. However, the use of them is necessary for the work to be created. Consequently, when characterizing the nature of computer-generated art, it should be pointed out that human involvement is essential for the work to be created. However, in most cases this involvement cannot be qualified as creative and this is why the attribution of authorship to works produced by AI to humans cannot be considered. Nonetheless, as stated, human contribution to the creation of the work is essential, the example of the producer's involvement which rather than creative, should be qualified as organisational could be given. The use of deep learning technology, which determines the unpredictability of the final result, contributes to even greater independence of AI in creating due to the complexity of the machine's neural networks[17]. However, the producer makes an important logistic, control and financial contribution and consequently has considerable impact on the creative process which is distinguished by multiple stages and the involvement of many people, between whom there is no agreement regarding the final result of the creative process. Therefore, copyright law faces the challenge of how to qualify this human activity, which is not based on creative but on financial, technical and organizational commitment. In the literature, due to these justifications, it is proposed to introduce a new related law or

[17] Shlomit Yanisky-Ravid, "Generating Rembrandt: Artificial Intelligence, Copyright and Accountability in the 3A Era: The Human-like Authors are already here: A New Model," *Michigan State Law Review* no. 4 (2017): 686.

sui generis protection[18] which would well reflect the role of the producer. These proposals, however, also have many opponents who point that an excessive focus on the economic aspects of creativity and insufficient protection of artistic values as well as potential promotion of mass production of computer-generated works may devalue human creativity and question the foundations of copyright[19]. For this reason, the project proposed in France, which can be interpreted as a golden mean between the economic and artistic implications of the legal qualification of AI products should be presented.

3. CONSTRUCTION OF COLLECTIVE WORK IN POLISH COPYRIGHT LAW FROM THE COMPUTER-GENERATED ART PERSPECTIVE

According to article 11 of the Polish Copyright Act "The producer or publisher shall have the author's economic rights in a collective work and in particular the rights in encyclopedias or periodical publications, and the authors shall have economic rights in their specific parts which may exist independently. It shall be presumed that the producer or publisher have the right to the title." Firstly, it is necessary to indicate how the collective work is defined and what are its characteristics. The essence of this construction is the combination of many creative contributions from different people who are not bound by any agreement. Each of them creates a separate part, independently of others involved in the creation process. All these elements will contribute to the final effect. The key role is played by the producer or

[18] See: Jane C. Ginsburg, "The Author's Place in the Future of Copyright," *Proceedings of the American Philosophical Society* 153, no. 2 (2009): 147–159; Damian Flisak and Ireneusz Matusiak, "Ab homine Auctore Ad Robotum Auctorum," in *Opus auctorem laudat. Księga jubileuszowa dedykowana Profesor Monice Czajkowskiej-Dąbrowskiej*, ed. Krystyna Szczepanowska-Kozłowska, Ireneusz Matusiak, and Łukasz Żelechowski (Warsaw: Wolters Kluwer, 2019).

[19] Eduard Treppoz et al., "Droit d'auteur sur les œuvres générées artificiellement," AIPPI, Question 15, accessed August 31, 2020, https://www.aippi.fr/upload/2019%20Londres/DROIT_DAUTEUR_-_Rapport_definitif.pdf.

publisher who initiates and organizes the work[20] which is the sum of separate parts that may or may not be the subject of copyright. If so, these rights remain with the authors of separate parties, despite their inclusion in a collective work, unless otherwise agreed between the producer / publisher and the creator which is confirmed in the judgement of Court of Appeal in Warsaw from 1999: The publisher acquires the copyrights to the individual parts in a derivative way, by concluding contracts with the authors of the parts [21].

Comparing the observations already made to algorithmic creativity, it should be stated that the individual elements determining the shape of the final work are basically created independently by different people, not bound by the agreement. The creative process can progress thanks to the producer, responsible for combining the effects of their work together and handing over the elements already produced for further development. In the case of AI works, the issue is different, although there is no simple combination of elements- it is not necessary to combine all the components into a uniform whole. In the case of machine activity, it would rather take the form of a sequence of elements the use of which would contribute to the creation of the final work. Each of these elements, from the algorithm, through software, the use of machine learning techniques and data training to the generation function, would be necessary for the creation of a work, and a fundamental role in the context of the selection of these elements and providing financial and organizational facilities would be played by the producer/publisher.

Referring to the already cited article 11 collective works are encyclopedias and periodical publications but it should be noted that this is not an exhaustive list, but an example which gives an overview of the nature of this institution. More important than the qualification of a work is the confirmation of presence of a person acting like producer and involved in the creating process of a multi-component work[22]. Therefore, his role, as

[20] Appellate Court in Warsaw, Judgement of 26 January1995, Ref. No. I ACr 1037/94, LEX no. 535044.

[21] Appellate Court in Warsaw, Judgement of 18 November 1999, Ref. No. I ACa 792/99, LEX no. 535049.

[22] Damian Flisak, "Prawo autorskie i prawa pokrewne. Komentarz do art. 11," in *Prawo autorskie i prawa pokrewne. Komentarz*, ed. Damian Flisak (Warsaw: Wolters Kluwer - LEX, 2015), argument 7.

well as the duties and powers should be analyzed. In article 11 of the Polish Copyright Act there is no definition of producer/publisher. It is just indicated that he has the economic right to collective work as well as the right to the title. However, it is necessary to answer the question whether the producer is a natural person, as it is assumed in relation to the author, pursuant to Article 8[23], or is it both a natural and legal person. According to article 15 of the Polish Copyright Act, the producer is the one whose surname or business name is disclosed on the objects on which the work was fixed what proves that it can be not only a natural person, but also a legal person pursuant to §1 of article 43[5] of Polish Civil Code[24].

The producer performs an initiating and ordering function – he is involved in combining separate creative contributions[25]. His main task is therefore to mediate in the process of creating a work consisting of many components. He has a "multifaceted"[26] role based not only on involvement in the preparation of the work in the financial and organizational dimension, but also in supporting creative works, bearing risk and responsibility for its results[27]. When comparing the scope of the producer's tasks based on the regulations from Article 11 to the example of creating music by AI as part of the Endel start-up, it should be stated that these tasks are similar. In the case of the Endel start-up, producers from Warner Music were obliged to conclude contracts for the purchase of software, lyrics or titles for individual songs. They decided about the final shape of the composi-

[23] Article 8 of Polish Copyright Law: 1. The owner of the copyright shall be the author unless this Act states otherwise. 2. It shall be presumed that the author is the person whose name has been indicated as the author on copies of the work or whose authorship has been announced to the public in any other manner in connection with the dissemination of the work. 3. In order to exercise his/her copyright the author, as long as he/she does not disclose his/her authorship, shall be represented by the producer or the publisher and in the absence thereof – by the competent collective management organization.

[24] The civil code, Act of 23 April 1964, Journal of Laws 2019, No. 1145,495; 2020 No. 875, English version: https://supertrans2014.files.wordpress.com/2014/06/the-civil-code.pdf, accessed August 27, 2020.

[25] Appellate Court in Warsaw, Judgement of 26 January 1995, Ref. No. I ACr 1037/94, LEX no.535044.

[26] Flisak, "Ustawa o prawie autorskim," argument 1.

[27] Polish Supreme Court, Judgement of 15 November 2002, Ref. No. II CKN 1289/00, reported in: OSNC Journal 2004, no. 3, pos. 44.

tions, supervised the course of the creative process and made appropriate financial outlays[28].

The authors of individual works that make up the collective, according to Polish Copyright law work retain the copyrights, including economic rights, to their works, but it is also possible to transfer them to the producer or publisher by means of an appropriate agreement. The publisher /producer acquires *ex lege* copyrights to the entirety of a collective work, which means to the selection, ordering and linking of work's individual parts. Consequently, the important task is to select the material previously prepared and combine it in a certain way. The essence of the collective work's construction is the creation on the publisher/producer's side of the right to exploit the collection of works as a whole.[29] He may dispose of the entire work, but he has no right to decide on the legal status of individual parts of it, if a specific part is protected by copyright and economic rights have not been transferred to him. When it comes to shaping the legal situation of the producer compared to the authors of individual component parts, it is necessary to conclude the employment contracts or license agreements with them that will allow the use of a specific element in a collective work.

The producer or publisher acquires the economic rights to the collective work at the time it is fixed, and his relation to the resulting product can be compared to the author's power over his work[30]. It should be assumed that granting a publisher/ producer of economic copyrights *ex lege* results, firstly, from his contribution to the preparation of a collective work, which is not only financial and organizational, but often has the character of his own creative work; secondly – from the risk and responsibility[31]; thirdly –

[28] See: Bosher, "Warner Music signs," accessed March 27, 2020, http://ipkitten.blogspot.com/2019/03/warner-music-signs-distribution-deal.html.

[29] Wojciech Machała, "Prawo autorskie i prawa pokrewne. Komentarz do art. 11," in *Prawo autorskie i prawa pokrewne. Komentarz*, ed. Rafał Sarbiński, and Wojciech Machała (Warsaw: Wolters Kluwer - LEX, 2019), argument 5.

[30] Dorota Sokołowska, "Utwory zbiorowe w prawie autorskim," *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej*, no. 1 (2001): 95.

[31] Polish Supreme Court, Judgement of 15 November 2002, Ref. No. II CKN 1289/00, reported in: OSNC Journal 2004, no 3, pos. 44.

from practical reasons related to difficulties in identifying the co-authors of the collective work[32].

4. CONSTRUCTION OF COLLECTIVE WORK IN FRENCH COPYRIGHT LAW – A COMAPARATIVE ANALYSIS

The aim of this part of the article is to present in a comparative way the French regulations of a collective work in relation to Polish regulations. The characteristics of the collective work, the role of the producer / publisher as well as the rights of the authors of the individual parts that make up the collective work will be discussed. According to article L113–2 of the French Intellectual Property Code[33]: "Collective work shall mean a work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created" and according to article L113–5 "A collective work shall be the property, unless proved otherwise, of the natural or legal person under whose name it has been disclosed. The author's rights shall vest in such person." A collective work is a combination of multiple contributions from different authors, described as a plural work in which the individual contributions merge into the whole in view from which they are made[34]. The combination made on the initiative of a natural or legal person who publishes, edits and discloses it under his name. Contrary to Polish law, the content of the article does not provide examples of collective works, which allows the presumption that the scope of this provision may be greater and cover more types of works. However, it should be recalled that

[32] Marlena Jankowska, "Ustawa o prawie autorskim i prawach pokrewnych. Komentarz do art. 11," in *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, ed. Piotr Ślęzak (Warsaw: C.H. Beck - Legalis, 2017).

[33] English version available: https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.pdf, accessed August 28, 2020.

[34] André R. Bertrand, "Auteur et titulaires des droits d'auteur," in *Droit d'auteur*, ed. André R. Bertrand (Paris: Dalloz action, 2010), 204.

the enumeration in Article 11 of the Polish Copyright Act is only exemplary and does not constitute any limitation for qualifying as a collective work a work other than an encyclopedia and a periodical publication.

It is worth to point out that contrary to the Polish Copyright Act the term producer, in the French Intellectual Property Code is not literally used in the case of collective work. In articles L113–2 and L113–5 the term *natural or legal person* is employed. In doctrine, in that respect, the terms like initiator, producer, editor and advertiser are also used interchangeably[35] which proves that the semantic scope of this article, despite the lack of direct use of the term the producer/publisher refers to the type of tasks performed by him.

Commitment should be assessed firstly from the perspective of initiating the work. According to article L113–2 the natural or legal person initiates the creation of the collective work which means that this person should contribute to the commencement of the works, supervise their execution, ensure compliance of the results achieved with the intended effect, support the project in terms of financial and organizational aspects[36], but also combine individual elements and introduce appropriate amendments justified by the harmonization of the entire piece.[37] Moreover, a natural or legal person is responsible for editing, publishing and disclosing the work under his/her direction and name. Importantly, the person ensures proper reproduction of the work and its delivery to the public. The authors of individual elements have creative freedom but within the limits set by the initiator[38] who controls the process of creating the work[39] and this is the reason why collective work is described by many scholars as "py-

[35] Bertrand, "Auteur et titulaires," 206.

[36] Bertrand, "Auteur et titulaires," 206.

[37] The Court of Cassation, Civil Chamber 1, Judgement of 16 December 1986, Ref. No. 85–10.838., Published in Bulletin.

[38] Bertrand, "Auteur et titulaires," 208.

[39] Although the obligation to exercise control over the process of creating a work is not directly expressed in the legal text, such a requirement has been formulated by the doctrine and jurisprudence. Jean Cedras, "La qualification des oeuvres collectives dans la jurisprudence actuelle," *Revue juridique de l'Ouest*, no. 2 (1995): 140.

ramidal" or "hierarchical"[40]. It should be noted that French construction is more focused on the producer's task - pointing out that the producer comes up with the initiative to create a work and later publishes, edits and discloses it. In Polish law, the role of a producer in relation to a collective work is not defined in the Copyright Act. It is necessary to refer to the literature to find out that, similarly to French law, a producer is a person actively involved in the process of preparing a work site and bearing financial and organizational risk related to production and distribution[41]. According to J. Barta and R. Markiewicz, it is the producer's responsibility to indicate the conceptual framework, organize, coordinate and support in the financial aspect the intellectual work of the team[42]. As a consequence, the scope of the producer's tasks, although indicated otherwise, looks similar. In France, both in the doctrine and jurisprudence, enumeration of a producer's tasks is treated as an example, because many collective works are not subject to, for example, editorial activities. In this way, many works meeting all the criteria for a collective work but involving a different activity of the producer as collective works could not be qualified[43]. For this reason, the lack of enumeration of the producer's competences in Polish legislation and outlining their tasks in the doctrine and jurisprudence seems to be more justified. This observation is interesting in the context of algorithmic creativity. It may happen that the producer, although initiating the process, will not perform the editorial activity, simply combining individual elements that will later be disclosed and published.

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[40] Nathalie Cazeau, "Le titulaire des droits d'exploitation sur une œuvre collective peut –il librement la faire évoluer ?," 2007, accessed August 28, 2020, https://www.village-justice.com/articles/titulaire-droits-exploitation-oeuvre-collective,3008.html; Cedras, "La qualification," 140.

[41] Marlena Jankowska, "Ustawa o prawie autorskim i prawach pokrewnych. Komentarz do art. 15," in *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, ed. Piotr Ślęzak (Warsaw: C.H. Beck - Legalis, 2017), argument 1.

[42] Janusz Barta and Ryszard Markiewicz, "Prawo autorskie i prawa pokrewne. Komentarz do art.11," in *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz* ed. Janusz Barta and Ryszard Markiewicz (Warsaw: Wolters Kluwer, 2011), 140.

[43] André Lucas, Henri-Jacques Lucas and Agnès Lucas-Schloetter, « Traité de la propriété littéraire et artistique, » 4th ed., (Paris: Lexis Nexis, 2012), supra note 73,215.

The Polish legislator decides to grant producer economic rights to the entire work. According to article L113–5 collective work becomes the property of the natural or legal person under whose name it has been disclosed. The author's rights shall vest in such person. The producer is granted the copyrights because of his/her intellectual and material involvement in the creation of the work. However, the issue of the adequacy of the wording contained in this French provision is widely discussed. As the author's rights shall be vested in natural or legal persons, the question whether the legal person could be considered as author within French Intellectual Property Code meaning should be asked. According to the French conception of copyright, only a natural person can be considered as the author because of his/her capacities to create within copyright meaning[44]. Therefore, granting of moral and economic rights to the legal person who initiates the collective work and coordinates the work and the subsequent publication of its effects should be considered as a legal fiction.[45] Moreover, the French conception of moral person as copyright owner in the collective work case should not be confused with the notion of author intended for natural persons[46]. It should be unequivocally stated that the wording of the Polish article relating to the collective work is more precise and dispels any potential doubts by granting economic rights to the work to the producer or publisher and not granting moral rights, which are always reserved for the author of the work (human being).

In France, the copyright to the entire work and, in the case of concluding the relevant agreements, the economic rights to individual parts are transferred to the producer. At the same time the authors of individual parts retain moral rights to them.[47]The main reason why they cannot take advantage of an undivided right to the work produced is lack of the cooperation between them in the creation process and the leading role of

[44] The Court of Cassation, Civil Chamber 1, Judgement of 15 January 2015, Ref. No. 13–23.566, Published in Bulletin.

[45] Cedras, "La qualification," 136.

[46] Cedras, "La qualification," 136.

[47] The Court of Cassation, Civil Chamber 1, Judgement of 15 April 1986, Ref. No. 84–12.008, Published in Bulletin.

producer who takes responsibility for the entire work and under whose name the work is published.[48]

In order to sum up, it should be stated that the concept of a collective work is similar in both legislations and its main assumptions are the same, considering the nature of the collective work, the role of the producer and the rights of the authors of individual parts. There are some differences when it comes to determining the types of collective works in Polish law and the tasks of the producer in the case of French law, however, it is necessary to specify that the analysis of doctrine and jurisprudence leads to similar conclusions in these contexts, both in Polish and French law. The only significant difference is dissimilar wording regarding the granting of copyright to the producer of the collective work. French law allows the creation of a legal fiction and the author's rights are vested in moral or legal person, which leads to the acquisition of moral and economic rights. Polish law is limited to granting only economic rights to a work to the producer/publisher and it must be admitted that this is a better solution. Moreover, it should be stated that the structure of a collective work and the manner of its regulation in both jurisdictions correspond to the nature of the computer-generated works.

5. COMPUTER-GENERATED WORKS AS COLLECTIVE WORKS ACCORDING TO FRENCH COPYRIGHT LAW PROPOSALS – CAUSES, PREMISES AND CONSEQUENCES

According to the report prepared by the Superior Council of Literary and Artistic Property in January 2020, the model of the collective work could be applied to the computer-generated works. There are several reasons for this concept. Firstly, this construction presents a more economical approach to copyright, less focused on the creator himself but still rooted in copyright grounds. Secondly, the collective work is derogatory from the classic rules of ownership, since the rights arise, independently of any transfer, in favor of the producer who, in a vertical creative process,

[48] The Court of Cassation, Civil Chamber 1, Judgement of 18 October 1994, Ref. No. 92–17.770, Published in Bulletin.

directs the creation and publishes it under his name[49]. The structure of the collective work is close to the specificity of algorithmic creativity due to the complexity of the process of creating the work, the involvement of many people and the leading role of the producer. Therefore, in the French report "Mission Intelligence Artificielle Et Culture" it is proposed to add a fourth paragraph to Article L. 113–2 of the French Intellectual Property Code in order to define the work created by AI as "the creation generated by an artificial intelligence and to the realization of which there was no human being contribution". Indeed, such provision should be introduced with the aim to indicate the assumptions of the new institution. Since humans do not take part in the realization of the work, there is therefore no one who could be considered as the author[50]. If, however, it is assumed that such a work should be protected, it is necessary to consider who should be granted these rights. In this regard it is proposed to amend article L.113–5 and the new content would be as follows: "The collective work and the work generated by an AI are, unless proven otherwise, the property of the natural or legal person under whose name they are disclosed. This person is vested with copyright"[51].

This proposal needs some observations to be made. Firstly, the definition of a computer-generated work is not based on the definition of a collective work, even though the proposal of article 113–5 treats both institutions in the same way by granting copyright to natural or legal person under whose name they are disclosed. This may introduce some misunderstanding of the institution of a computer-generated work and questions as to whether these institutions are similar to each other or not, since the definition of computer-generated works does not mention the similarity to the structure of a collective work, and later both these institutions in terms of producer rights are treated the same. On the other hand, it should be noted that despite the similarities between a collective work and

[49] "Mission Intelligence Artificielle Et Culture," p. 2.2.1.

[50] In France, there is a humanistic concept of copyright, which treats the work as the fruit of human creativity, the source of which is the human intellect. In that respect just moral person could be treated as author. See: The Court of Cassation, Civil Chamber 1, Judgement of 15 January 2015, Ref. No. 13–23.566, Published in Bulletin; "Mission Intelligence Artificielle Et Culture," p. 2.1.2.

[51] "Mission Intelligence Artificielle Et Culture," p. 2.2.1.

a machine-generated work which were pointed out in the previous part of this article, the latter type, due to the progressing automation, is less and less dependent on the creative involvement of human beings. It may also be that the programmer will prepare the software and only this will be enough for the machine to create a work. So, the creation of the work would not consist of many stages but one significant that would be supervised by a natural/legal person. In fact, therefore, the role of the person under whose name the publication will take place will be important, but due to the increasing autonomy of machines, this process does not have to be as multi-stage as it is in the case of a collective work. Thus, an overly casuistic definition and direct comparison to a collective work would not be advisable. It is justified to resign from enumerating examples of computer-generated works and tasks of a natural or legal person due to the complex and difficult to predict process of creating a computer-generated work and its various types.

Moreover, there is no indication that the copyright is acquired by the producer, but by a natural or legal person under whose name the work is published as it was in the case of a collective work. It should be pointed out that it is the right move. The wording used in the report is more comprehensive and universal – in many cases that person will act as producer but it may happen that a person who does not demonstrate activities appropriate for the producer will be granted the copyright to the work. Nevertheless, it must not be forgotten that regarding the role of a natural / legal person in the context of collective work, the description of the activity and lexical field used in the doctrine and jurisprudence indicate that such a person could be treated as producer / publisher. Therefore, it should be considered whether, in relation to computer-generated works, it would be possible to consider the term natural or legal person under whose name the work is published in a broader context, not referring only to the role of the producer/publisher. If so, we could consider the involvement of users who, on the basis of a license or purchase, acquire the copyright to a specific version of artificial intelligence and use it to produce specific works that later can be published under their name.

When asking the question whether the regulation of the legal situation of computer-generated works in the manner presented in France may be appropriate, it should be answered that the proposed changes adequate-

ly capture the nature of algorithmic creativity, and the lack of excessive casuistry prepares the law for further technological changes in culture. The proposed definition properly separates works created by machines with a significant creative participation of humans from those created without human involvement. The role of the person under whose name the work could be published is also rightly noticed, assuming that she/he makes a significant contribution to the creation of the work, not necessarily in a creative way, and should be granted copyright.

When trying to apply the French propositions to the Polish juridical framework, it should be pointed out that the definition of the computer-generated work could be introduced following the definition proposed in the French report which a little casuistic nature allows for the preparation of the law for further technological changes in art. In the same or a new article, as proposed in the French version, it should be decided who could be granted the copyright for the work. At the same time, it must be considered whether to do so in conjunction with an already existing regulation on collective works or separately. In the case of Polish law, the provisions concerning this institution are contained in one article, while in the French they are divided into two. Perhaps, due to inspiration only by the regulation of a collective work, provisions on computer-generated works in Poland should be included in a separate article. When it comes to acquisition of copyrights it's worth to note that the statement made in the French proposal that a natural or legal person is vested with copyrights to the work could not be applied in Poland and we should lean toward the current wording of article 11 of the Polish Copyright Act and apply similar solutions, clearly specifying that such a person may acquire only economic rights to the work. Otherwise, it would conflict with the fundamental principles of copyright law as the moral rights are reserved for natural persons and result from their creative engagement.[52]

[52] Moral rights can be acquired only be a human being – a natural person – the creator of the work. As S. Ritterman noted: The fiction of the emergence of moral rights for the benefit of people not related to the work by a personal bond, seems to me both theoretically and practically unacceptable" See: Stefan Ritterman, *Komentarz do ustawy o prawie autorskim* (Cracow: W.L. Anczyca i Spółki, 1937), 170.

6. CONCLUSIONS

The use of AI in art is becoming more and more popular. In world literature it is emphasized that due to technological progress and through the prism of the ability to learn independently and self-development of computer programs[53], the role of humans in the creative process carried out by AI is decreasing and over time will become minimal[54]. Computer-generated works are often difficult to distinguish from those created by humans, and the process of their creation is often associated with substantial investments. Consequently, they should be granted copyright protection while not forgetting about the economic dimension. In that respect the concept proposed by the French Superior Council of Literary and Artistic Property could be considered. Firstly, the inspiration of collective work provision is a new solution and an answer to divided opinions about the granting of copyright to programmers or users. It does not contradict the foundations of copyright law – it does not assign copyright to a machine or seek creative human involvement. It considers his/her organizational commitment, financial outlays, control activities and the fact that the work is published under a given name. When analyzing what the protection of computer-generated works based on the structure of a collective work could bring, it should be emphasized that it is a combination of protection of the artistic values of works with economic aspects of creation. Copyright law in many cases focuses on the person of the creator and not on the subject of copyright[55]. On the other hand, related rights or the sui generis system puts a lot of emphasis on the economic aspects of art[56], often ignoring the care of artistic context. For this reason, the construction of a collective work through the prism of algorithmic creativity is a combination of both of these directions. Importantly, it highlights the role of the person under whose name the work would be published

[53] Magdalena Kubasiewicz, "Czym jest machine learning – technologia, która rewolucjonizuje świat?," 2020, accessed March 20, 2020, https://www.intellect.pl/blog/machine-learning-co-to/?PageSpeed=noscript.

[54] Robert C. Denicola, "Ex Machina: Copyright Protection for computer-generated works," *Rutgers University Law Review* 69 (2016): 269.

[55] "Mission Intelligence Artificielle Et Culture," p. 2.1.2

[56] Eduard Treppoz et al. "Droit d'auteur sur les œuvres,".

and who would show commitment to the creation of a work that can be compared to the role of a producer in a collective work. In this regard the qualification inspired by the regulations of a collective work will note technological changes in the arts and will provide adequate protection for computer-generated works. It would be worthwhile for the Polish legislator, considering the issues of protecting algorithmic creativity, to take a closer look at the French proposals.

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REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLV
YEAR 2021, ISSUE 2, pp. 57–75
DOI: https://doi.org/10.31743/recl.10733

THE POWERS OF THE SUPERVISORY BODY IN THE GDPR AS A BASIS FOR SHAPING THE PRACTICES OF PERSONAL DATA PROCESSING

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ABSTRACT

The purpose of this article is to analyse the competences of the supervisory authority provided for in the General Data Protection Regulation (GDPR) as a tool to shape the practice of personal data processing. This article verifies the thesis that the status of the supervisory authority formed in the GDPR, taking into account the authority's independence, makes it possible to exercise the authority thoroughly, which is the basis for shaping personal data processing practice. Supervisory authorities have a wide range of powers to carry out the duties assigned to them. This is guaranteed by their independence. The exercise of powers resonates with all entities that fall under the jurisdiction of those authorities. The decisions of the authorities become the subject of interest of both the literature and personal data administrators. The powers connected with imposing administrative penalties might play a particular role. Their imposition causes that entities which are in similar circumstances may expect to be subject to the same penalties. In order to avoid this situation, they tend to adapt their practices to the model adopted in the decision. Opinions and recommendations, as well as codes of conduct approved by the supervisory authorities for particular sectors, which are a benchmark for administrators in those sectors, play an important preventive role.

Keywords: GDPR, supervisory, authorities, data, processing

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1. INTRODUCTION

Personal data is one of the basic elements of the functioning of a globalised world[1]. Technological developments entail the processing of an ever-increasing amount of information[2]. The effectiveness of a law depends on its ability to be enforced. The EU legislator has established independent supervisory authorities as guardians of GDPR enforcement. The aim of this article is to analyse the powers of the supervisory authority provided for in the GDPR as a tool to shape the practice of processing personal data. It is verified that the status of the supervisory authority as developed by the GDPR, taking into account its independence, allows for the reliable exercise of its powers, which forms the basis for the development of personal data processing practice.

2. THE SUPERVISORY AUTHORITY IN THE PERSONAL DATA PROTECTION SYSTEM IN THE EUROPEAN UNION

Article 51 of the GDPR introduces the institution of supervisory authorities. The EU legislator requires Member States to put in place a mechanism of such a form that one or more *independent public authorities are responsible for monitoring the application of this Regulation, in order to protect the fundamental rights and freedoms of natural persons with regard to the processing and to facilitate the free flow of personal data within the Union.* This solution is not new. A similar obligation is imposed on Member States by Article 28 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals

[1] See: Zana Pedic, "Interconnectivity and differences of the (information) privacy right and personal data protection right un the European Union," *Review of Comparative Law* 30, no. 3 (2017): 125.

[2] Recital 6 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of data and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ EU. L. of 2016 No. 119, p. 1) (GDPR or Regulation).

with regard to the processing of personal data and on the free movement of such data[3].

An attempt has been made in the literature to clarify the basic duty of supervisory authorities, namely, to monitor the application of GDPR. U. Góral indicates that monitoring is a concept that may indicate a passive or active attitude. In order to interpret this concept, reference should first be made to other language versions of the Regulation. *In the French version of the Regulation, the word surveiller is used, which can mean both 'watchful' and 'inspects'. A similar understanding of duty can be found in other language versions: German (für die Überwachung der Anwendung), English (for monitoring the application) or Spanish (supervisar la aplicación)* [4]. This justifies the assumption that it is the task of the supervisory authority to take active action in respect of the possibilities granted by the Regulation and national legislation.

Another issue under examination is the possibility for the national legislator to choose how to shape the supervisory authority. The doctrine indicates that this solution is an example of institutional autonomy for Member States, which have the freedom to shape their own administrative institutions. The supervisory authorities may be either collegiate or single-member. Their structure may be established in such a way that there is a single authority competent for the territory of the entire Member State, or in such a way that, in addition to such a central authority, there are a number of authorities which are competent for areas of the country which are separated at the level of administrative law, such as provinces or states. In Germany, for example, the supervisory authorities operate not only at federal level but also at the level of individual land[5].

At the same time, it should be noted that in the Regulation, in Article 51(2) of the GDPR, the EU legislator imposed an obligation on supervisors to *contribute to the consistent application of this Regulation throughout*

[3] (OJ L. of 1995 No. 281, p. 31, as amended) (Directive).

[4] Urszula Góral and Paweł Makowski, "Artykuł 51. Organ nadzorczy," in *GDPR. General regulation on personal data protection. Commentary*, ed. Dominik Lubasz and Edyta Bielak-Jomaa (Warsaw: Wolters Kluwer Polska, 2018), 908.

[5] Paweł Litwiński, "Komentarz do artykułu 51," in *EU Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of data. Commentary*, ed. Paweł Litwiński (Warsaw: Legalis el., 2018).

the Union. It seems that the need to draw the attention of the EU legislator to the need for consistent application of the GDPR stems from the recognition of the risk of different application of the GDPR in the territory of individual Member States, which could ultimately lead to different interpretations of the same legal act at the level of individual Member States.

This Article concerns solutions adopted at the level of EU legislation, in particular GDPR. These solutions in the Polish legal order have been specified in detail by the Act of 10 May 2018 on the protection of personal data[6], which has been subject to comprehensive analysis in the available literature[7]. The supervisory authority within the meaning of the Regulation is, pursuant to Article 34 paragraph 2 of the Data Protection Act, the President of the Personal Data Protection Office.

The regulation allows the authorities of the state supervisory bodies for the processing of personal data in churches and religious associations to be shaped differently at the level of national legal systems. In view of Article 91(2) of the Regulation, churches and religious associations may in certain cases be subject to supervision by an independent supervisory authority, which may be separate from the state authority. However, where such a body is not established, the supervisory tasks will be carried out by a state authority[8].

The autonomy of churches and religious associations is also implemented by the provision of Article 91(1) of the Regulation, according to which, if at the time of entry into force of the GDPR, churches and religious associations apply specific rules for the protection of personal data,

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[6] Journal of Laws of 2019, item 1781 (Data Protection Act).

[7] Cf: Michał Czerniawski and Maciej Kawecki, ed., *Personal Data Protection Act. Commentary* (Warsaw: C.H. Beck, 2019); Anna Dmochowska and Aleksandra Piotrowska, *Personal Data Protection Act. Commentary*, (Warsaw: C.H. Beck, 2018); Paweł Litwiński, ed., *Personal Data Protection Act. Commentary* (Warsaw: C.H. Beck, 2018); Dominik Lubasz, ed., *Personal Data Protection Act. Commentary* (Warsaw: C.H. Beck, 2019); Justyna Kurek and Jolanta Taczkowska-Olszewska, *Protection of personal data as a realization of tasks in the area of state security* (Warsaw: C.H. Beck, 2020).

[8] Natalia Zawadzka, "Artykuł 91. Istniejące zasady ochrony danych obowiązujące kościoły i związki wyznaniowe," in *GDPR. General regulation on personal data protection. Commentary*, ed. Dominik Lubasz and Edyta Bielak-Jomaa (Warsaw: Wolters Kluwer Polska, 2018), 1116–1117.

such rules may continue to apply after adjustment to the requirements of the GDPR. In the absence of such prior regulations, the provisions of the Regulation are fully applicable.

A dispute has arisen in Polish literature as to whether the Catholic Church has such separate regulations in the Polish legal order. P. Fajgielski[9] is of the opinion that such regulations apply. The opposite view – according to which there are no such regulations in the internal law of the Catholic Church – was expressed in a monography edited by D. Lubasz and E. Bielak-Jomaa[10]. The essence of the dispute in question comes down to whether the Catholic Church, in order to be covered by the exemption provided for in Article 91(1) of the GDPR, should have a normative system which would comprehensively regulate the processing of personal data. It seems that we should agree with the view expressed by Mr Fajgielski. In order to be covered by this exemption, it is necessary to apply specific rules for the protection of individuals with regard to the processing of their data. The Catholic Church has such rules in a normative manner[11]. The fact that such regulations may not be complete seems to be legally irrelevant in the light of the problem in question. It means, therefore, that the Catholic Church is subject to separate rules in Poland with regard to the processing of personal data to the extent that they were applied when the GDPR entered into force, provided that those rules were adapted to the provisions of the Regulation.

[9] Paweł Fajgielski, "Artykuł 91. Istniejące zasady ochrony danych obowiązujące kościoły i związki wyznaniowe," in *General Data Protection Regulation. Personal Data Protection Act. Commentary*, ed. Paweł Fajgielski (Warsaw: Wolters Kluwer Polska, 2018), 693–694.

[10] Natalia Zawadzka, "Artykuł 91. Istniejące zasady ochrony danych obowiązujące kościoły i związki wyznaniowe," in *GDPR. General regulation on personal data protection. Commentary*, ed. Dominik Lubasz and Edyta Bielak-Jomaa (Warsaw: Wolters Kluwer Polska, 2018), 1114–1115.

[11] Paweł Fajgielski, "Artykuł 91. Istniejące zasady ochrony danych obowiązujące kościoły i związki wyznaniowe," in *General Data Protection Regulation. Personal Data Protection Act. Commentary*, ed. Paweł Fajgielski (Warsaw: Wolters Kluwer Polska, 2018), 693–694.

3. INDEPENDENCE OF THE AUTHORITIES

In accordance with Article 52(1) of the GDPR, *each supervisory authority shall, in carrying out its tasks and exercising its powers under this Regulation, act with complete independence.* This independence is not established in order to confer a privileged position on the authorities but as a guarantee of their ability to carry out the tasks assigned to them. It is reflected in existing CJEU case law on data protection authorities, which indicates that *supervisory authorities should act objectively and impartially when carrying out their duties. To this end, they should be outside any external influence, including the direct or indirect influence of the State or Länder, and not only outside the influence of the controlled authorities*[12]. These views, as developed in the case law, are reflected in the doctrine where, on the basis of considerations of the CJEU's jurisprudence, it is accepted that the *independence of a State authority means that the State guarantees that the legal authority can carry out certain tasks without interference from other actors*[13]. The question arises of how such independence can be achieved.

The EU legislator in Article 52 of the Regulation points to several aspects of independence. Firstly, Article 52(2) of the GDPR provides that the member of such a body must be free from outside influence when making decisions. It should be assumed that it would be contrary to EU law, for example, to subject a personal data protection authority directly to the supervision of one of the ministers responsible for the administrative department, which includes personal data protection. This view seems to be confirmed by the literature, which argues that*, against a background of independence from the authorities of the Member States, probably the biggest practical implication of the ban on being bound by instructions will be that personal data protection authorities cannot be subordinated or even supervised by other state bodies. In other words, they cannot be linked to other management or supervisory ties*[14].

[12] CJEU Judgment of 9 March 2010, European Commission v Federal Republic of Germany, Case C-518/07, ECLI:EU:C:2010:125, 25.

[13] Krzysztof Rokita, "Independence of personal data protection authorities in the General Data Protection Regulation," *European Judicial Review*, no. 7 (2016): 4.

[14] Krzysztof Rokita, "Independence of personal data protection authorities in the General Data Protection Regulation," *European Judicial Review*, no. 7 (2016): 9.

The concept of 'external influence in decision-making' is vague. It seems that the basic tool for exerting influence is the possibility of issuing binding instructions. However, exerting influence also has other shades, because there are soft tools of exerting influence which a member of the body would have to take into account, such as influence on re-election, the possibility of appeal or influence on setting remuneration. It seems that it is not possible to exclude any external influence when taking specific actions. It should therefore be clarified which aspects of external influence are legally relevant in this respect. As a matter of principle, these issues are left to the national legislator with the reservation that the national legislator will be held accountable for the implementation of the directives of independence in accordance with procedures provided for by European Union law.

The EU legislator reserves the limits of this independence, indicating that the activities of supervisory authorities should be subject to substantive review by the courts and to organizational review by the relevant public administration bodies in the various national systems. According to recital 118 of the GDPR, *the independence of supervisory authorities should not mean that they cannot be subject to mechanisms of control or monitoring in terms of expenditure or judicial review.* This recital is reflected in Article 52(5) of the GDPR. This means that the systemic independence of the supervisory authorities does not lead to them being taken out of the hands of the national administration. On the contrary, these authorities are part of it. However, it seems that, in order to ensure the full independence of the authorities, it is necessary to use mechanisms which, in a given Member State, in a given normative arrangement, will guarantee that the decisions taken by these authorities will be independent of external influences. In this respect, the national legislator is obliged to balance two issues - the need for organizational control and its systemic independence.

4. A CATALOGUE OF POWERS OF THE SUPERVISORY AUTHORITIES

The powers conferred on the supervisory authorities by the Regulation are intended to fulfil the tasks assigned to them. The catalogue of powers set out in Article 58 of the GDPR. It is broad and commentators have

identified five categories[15]: (i) powers of investigation; (ii) powers of resolution; (iii) powers of authorization[16]; (iv) advisory powers; (v) powers to report violations of the GDPR to the judiciary and the power of supervisory authorities to participate in legal proceedings[17].

The Regulation describes in detail the powers of the supervisory authorities in Chapter VI Section 2 "Competence, tasks and powers". The detailed description of the powers of the authorities already at the level of European law is directly linked to the objective of the GDPR - consistent and effective implementation throughout the European Union. This would not be possible without equipping supervisory authorities with broad competences at the level of Union law. The aim of the solution adopted is to ensure that all supervisory authorities have the same tasks and competences in key areas.

The catalogue of rights is closed - this position is presented in the literature[18]. It seems necessary to use the directives indicated by the EU legislator in recital 129 of the Regulation to interpret the individual powers and to exercise those powers by the supervisory authorities. This recital identifies key issues related to the exercise of powers by data protection authorities. These authorities are obliged to act on the basis and within the limits of Union law and the law of the Member States. The activities of the supervisory authorities - in accordance with the directives set out in recital 129 - should be carried out efficiently, objectively and fairly. The recital stresses the need to apply the principle of proportionality in

[15] A similar division is presented in Paweł Litwiński, "Komentarz do artykułu 58," in *EU Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of data. Commentary*, ed. Paweł Litwiński (Warsaw: Legalis el., 2018).

[16] Piotr Drobek, "Personal Data Breach Notification in the European Union and Poland – Selected Aspects," in *Geographic Information Systems Conference and Exhibition "GIS ODYSSEY 2016", 5th to 9th of September 2016, Perugia, Italy, Conference proceedings*, eds. Agnieszka Bieda, Jarosław Bydłosz, and Anna Kowalczyk (Zagreb: Croatian Information Technology Society – GIS Forum, 2016), 97.

[17] This power is also separated in Urszula Góral and Paweł Makowski, "Artykuł 58. Uprawnienia," in *GDPR. General regulation on personal data protection. Commentary*, ed. Dominik Lubasz and Edyta Bielak-Jomaa (Warsaw: Wolters Kluwer Polska, 2018), 943.

[18] Paweł Litwiński, "Komentarz do artykułu 58," in *EU Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of data. Commentary*, ed. Paweł Litwiński (Warsaw: Legalis el., 2018).

the exercise of the powers of the authorities, subject to the provisions that proportionate action is also to ensure compliance with the Regulation. The GDPR also introduces the obligation to hear the person concerned before an individual measure is taken against him or her. These directives are of a general nature. The authorities should take action with these recommendations in mind.

The model of broad powers conferred on independent supervisory authorities gives them a strong mandate to shape how the rules on the processing of personal data will be interpreted in practice[19]. This mandate is implemented both through hard powers, in particular the possibility of imposing sanctions, and soft powers, such as the possibility of issuing recommendations. The activities undertaken and communicated by the supervisory authorities are monitored by data controllers and data protection officers. In order to comply with the requirements or practices of the supervisory authorities, the controllers adjust their data processing processes. A careful look at the individual groups of powers will allow conclusions to be drawn on how these processes may be adjusted as a result of the exercise of powers by the supervisory authority.

(A) Powers in the conduct of proceedings

The powers in the scope of conducted proceedings, correlated with the task provided for in Article 57(1)(h) of the Regulation, are defined in Article 58(1) of the Regulation by indicating that the supervisory authority has the following powers: (i) to require the controller and the processor to provide all information necessary for the supervisory authority to carry out its tasks; (ii) to conduct investigations in the form of data protection audits; (iii) to review the certifications granted under the Regulation; (iv) to notify the controller or processor of a suspected breach of the Regulation; (v) obtaining from the controller and the processor access to all personal data and all information necessary for the supervisory authority to carry out its tasks; (vi) obtaining access to all premises of the controller

[19] Urszula Góral and Paweł Makowski, "Artykuł 58. Uprawnienia," in *GDPR. General regulation on personal data protection. Commentary*, ed. Dominik Lubasz and Edyta Bielak-Jomaa (Warsaw: Wolters Kluwer Polska, 2018), 942.

and the processor, including the processing equipment and means in accordance with the procedures laid down in Union or Member State law.

The powers indicated in Article 58(1) of the GDPR shall constitute a catalogue of powers of a control nature[20]. The doctrine indicates that these are activities which consist of examining whether the activities of a controlled entity correspond to the state of affairs required by law and of drawing conclusions if deviations from this state of affairs are found[21]. For the full implementation of control tasks, the power to order the provision of all necessary information is important. It is not possible to carry out effective control without such a power. It is important that *the scope of the information requested in a particular case is decided by the supervisory authority, and the addressee of the request has no possibility to question the scope of the information requested*[22]. This means that considerable discretion is left to the authority in this respect. The question of how this power is to be exercised is not specified in the text of the Regulation and is left to the legislators of the Member States to decide in accordance with the rules laid down in their national orders[23].

The form in which the authorities will carry out proceedings is defined by the EU legislator as an 'audit'. It is indicated in the literature that the audit is a set of activities which aim to examine and confirm the correctness of the operations conducted on personal data and their compliance with the Regulation. A characteristic feature of the audit is that it is carried out by an entity external to the organisation which is the subject of

[20] Urszula Góral and Paweł Makowski, "Artykuł 58. Uprawnienia," in *GDPR. General regulation on personal data protection. Commentary*, ed. Dominik Lubasz and Edyta Bielak-Jomaa (Warsaw: Wolters Kluwer Polska, 2018), 944.

[21] Paweł Litwiński, "Komentarz do artykułu 58," in *EU Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of data. Commentary*, ed. Paweł Litwiński (Warsaw: Legalis el., 2018).

[22] Paweł Litwiński, "Komentarz do artykułu 58," in *EU Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of data. Commentary*, ed. Paweł Litwiński (Warsaw: Legalis el., 2018).

[23] Urszula Góral and Paweł Makowski, "Artykuł 58. Uprawnienia," in *GDPR. General regulation on personal data protection. Commentary*, ed. Dominik Lubasz and Edyta Bielak-Jomaa (Warsaw: Wolters Kluwer Polska, 2018), 945.

the audit[24]. In recital 129 of the Regulation, it is indicated that *the powers to conduct investigations in relation to access to premises should be exercised in accordance with the specific requirements of the Member State's rules on procedure, such as the requirement to obtain prior judicial authorisation.* This means that investigations should be carried out by the supervisory authorities in accordance with the standards laid down in the legislation of each Member State.

This group of powers is important in the framework of control proceedings. However, the results of the exercise of these powers are not usually communicated to the public in the form of statements or communications from the supervisory authority. Only the results of the inspections carried out, e.g. in the form of decisions, may be subject to judicial consideration and thus contribute to the development of personal data processing practice. However, the stage described in this subchapter is an essential element of the procedure.

(B) Powers of a corrective character

In order to ensure effective enforcement of the Regulation by supervisory authorities, they have been equipped with a catalogue of remedial powers that can be exercised by those authorities on entities on which the GDPR imposes certain obligations. According to Article 58(2) of the GDPR, these powers are: (i) to issue warnings to the controller or processor regarding possible breaches of GDPR rules by planned processing operations; (ii) to issue reprimands to the controller or processor in case of a breach of GDPR rules by processing operations; (iii) to require the controller or processor to comply with the data subject's request under his rights under the GDPR; (iv) to require the controller or processor to adapt processing operations to the GDPR and, where appropriate, to indicate the manner and timing; (v) ordering the controller to notify the data subject of the data breach; (vi) imposing a temporary or total restriction of processing, including a prohibition on processing; (vii) ordering the rec-

[24] Paweł Litwiński, "Komentarz do artykułu 58," in *EU Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of data. Commentary*, ed. Paweł Litwiński (Warsaw: Legalis el., 2018).

tification or erasure of personal data or the restriction of processing, and ordering the notification of these actions to recipients to whom the personal data have been disclosed; (viii) withdrawing certification, or requiring the certification body to withdraw certification, or requiring the certification body not to certify if its requirements are not, or are no longer, fulfilled; (ix) imposing, in addition to or instead of other administrative measures, a financial penalty, depending on the circumstances of the specific case; (x) ordering the suspension of data flows to a recipient in a third country or to an international organization.

It appears from the catalogue presented above that supervisory authorities have a number of measures of a sovereign nature through which they can enforce the Regulation[25].

The first measure is a warning. The literature indicates that a warning may be addressed to an administrator or processor when there has not yet been a breach of the Regulation, but there is a risk that such a breach may occur. It seems that this measure will not be of a sovereign nature, but will provide a basis for determining whether the administrator or processor was aware of a specific risk of GDPR infringement[26].

The second type of measure is a reprimand. A reprimand may be applied in case of a breach of GDPR. It is doubtful when the authority should apply a warning and when other, more severe types of measures should be applied to the administrator or processor in the event of a breach of the Regulation. In the doctrine, following recital 149 of the Regulation, it is argued that a reprimand may be applied if the infringement is minor or if the financial penalty would impose a disproportionate burden on an individual[27]. The possibility of applying a reprimand will therefore depend on the supervisory authority's assessment of the specific facts for each case.

[25] Marlena Sakowska-Baryła, "Komentarz do artykułu 58," in *General Data Protection Regulation. Commentary*, ed. Marlena Sakowska-Baryła (Warsaw: Legalis el., 2018).

[26] Paweł Litwiński, "Komentarz do artykułu 58," in *EU Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of data. Commentary*, ed. Paweł Litwiński (Warsaw: Legalis el., 2018).

[27] Paweł Litwiński, "Komentarz do artykułu 58," in *EU Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of data. Commentary*, ed. Paweł Litwiński (Warsaw: Legalis el., 2018).

A third type of corrective measure is the possibility of ordering the controller or processor to adapt the processing to the Regulation. The literature indicates that the *supervisory authority may indicate in the content of the order how it should be enforced and when the order should be enforced. The use of this possibility is left to the discretion of the supervisory authority*[28]. Other types of warrants provided for in Article 58(2) of the GDPR (e.g. an order to comply with the data subject's request under his rights under the GDPR; an order to notify the data subject of a data breach) are specific to this general power.

The key power conferred on the supervisory authorities is the possibility to impose administrative penalties as provided for in Article 83 of the Regulation. This power plays a key role in the application of the Regulation due to the possibility to impose penalties for non-compliance with the GDPR of up to EUR 20,000,000 or up to 4% of its total annual worldwide turnover in the previous financial year. These penalties shall be effective, proportionate and dissuasive in accordance with Article 83(1) of the GDPR[29]. This power may be exercised instead of or in addition to the measures provided for in Article 58 of the GDPR. The provision of Article 83 of the Regulation sets out in detail the rules for imposing and setting administrative penalties. In particular, administrative penalties should be effective, proportionate and dissuasive (Article 83(1) of the Regulation). The amount of the penalty depends on individual factors, including the degree of infringement, intentionality, nature, seriousness and duration of infringements (Article 83(2) of the GDPR). The imposition of administrative penalties is one of the most difficult tasks that data protection authorities face. Which of the data processing practices of the controllers will be sanctioned by the supervisory authorities influences what modifications other controllers will implement. Decisions in this regard should therefore be taken by the supervisory authorities with caution.

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[28] Paweł Litwiński, "Komentarz do artykułu 58," in *EU Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of data. Commentary*, ed. Paweł Litwiński (Warsaw: Legalis el., 2018).

[29] Dominika Tykwińska-Rutkowska, "6.3. Dyrektywy wymiaru administracyjnych kar pieniężnych," in *Documentation of the GDPR in medical institutions*, ed. Aneta Sieradzka and Dominika Tykwińska-Rutkowska (Warsaw: Legalis el., 2019).

An additional difficulty with this entitlement arises from the ambiguity of the criteria that are relevant for determining the amount of the administrative penalty. It is interesting that the EU legislator, in recital 129 of the regulation, has set out in quite a detailed manner the formal conditions which should be met by measures of a sovereign nature issued by supervisory authorities. *Each legally binding measure of a supervisory authority should be in writing, have a clear and unambiguous character, indicate the supervisory authority which issued the measure and the date of issue, bear the signature of the head or member of the supervisory authority authorised by him, give reasons for the measure and inform about the right to an effective remedy.* At the same time, the EU legislator shall not preclude the introduction of additional formal requirements provided for by national legislation. The transfer of the above considerations to the Polish legal system leads to the conclusion that the above-mentioned list of elements which should constitute the content of a binding measure of the supervisory authority corresponds in principle to the requirements of an administrative decision specified in Article 107(1) of the Act of 14 June 1960 Code of Administrative Procedure[30]. Binding measures of the supervisory authority may be subject to control by independent judicial authorities in the Member State of the supervisory authority which applied the measure. It is left to the national legislator to ensure effective implementation of this Directive.

It seems that this group of powers is crucial in shaping the practice of processing personal data. The decisions of the supervisory authorities are, as a rule, published on the websites of the supervisory authorities, which makes them the focus of doctrine. Courts are then involved in the shaping of these decisions, and they verify the exercise of individual powers by the supervisory authorities on the merits. Ultimately, however, the application of sanctioning measures in certain circumstances to a particular entity results in other entities that are in similar circumstances can expect the same sanctioning measures. In order to avoid this situation, they are willing to adapt their practices to the model adopted in the settlement.

[30] Act of 14 June 1960 Code of Administrative Procedure (i.e. Journal of Laws of 2017, item 1257, as amended).

(C) Authorisation powers

The supervisory authorities have been given authorisation powers in order to carry out the tasks assigned to them. The nature and scope of these powers are specifically provided for in the provisions of the Regulation, which do not concern the status of supervisory authorities but the duties of administrators and processors. Among these powers, it is worth mentioning the following authorisations: (i) authorisation of processing (Article 36(5) of the Regulation); (ii) issuing opinions and approving draft codes of conduct (Article 40(5) of the GDPR); (iii) accrediting certification bodies; (iv) granting certification; (v) authorising administrative arrangements (Article 46(3)(b) of the GDPR); approving corporate rules (Article 47 of the GDPR). These authorisations shall be granted in accordance with the procedures provided for by the legislation of the Member States and taking into account those provisions of the Regulation which may be directly applicable[31]. These authorisations play an important role in the practice of supervisory authorities and the processing of personal data. A particularly important issue is the possibility of approving codes of conduct for individual industries. As a rule, these codes of conduct are prepared by the representatives of a given sector (e.g. insurance, health, or banking). The data processing practices described there and technological solutions adapted to the specificity of a given sector make it possible to respond in a clear way to important practical problems, especially at the interface between the value of the right to privacy and the efficiency and profitability of a company. Once approved by the supervisory authorities, these codes play an important role within the various sectors, by mitigating the legal risks associated with the implementation of personal data processing solutions.

(D) Advisory powers

The advisory power is directly related to the advisory tasks foreseen for supervisory authorities. These tasks will, in principle, be carried out in

[31] Marelna Sakowska-Baryła, "Komentarz do artykułu 58," in *General Data Protection Regulation. Commentary*, ed. Marlena Sakowska-Baryła (Warsaw: Legalis el., 2018).

the manner and on the basis of measures envisaged by the Member States. It is the responsibility of national legislators to allocate such powers and resources to the supervisory authorities that they can carry out their advisory and educational tasks as far as possible.

As regards advisory powers, the EU legislator draws attention to two of them: (i) to advise the controller in accordance with the prior consultation procedure (Article 36 of the GDPR); (ii) to issue opinions intended for the GDPR parliament, the government of a Member State or other institutions and bodies and the public at large on any matter relating to personal data protection.

The first of these powers is detailed and relates to the procedure relating to with an assessment of the data protection implications of processing operations (Article 35 GDPR). The second power is of a more general nature and gives the supervisory authorities broad powers of opinion on all matters relating to the protection of personal data. This right is evidence of a paradigm shift in thinking about the protection of personal data in such a way that this issue is becoming one of the key issues in the public debate in the information society, and the supervisory authorities should have the means to speak out in such a debate.

From the point of view of the effective functioning of the Regulation, it is desirable for these powers to play an important role in shaping the processing of personal data on the part of controllers and processors[32]. It is advisable that a possible wide area be covered by the recommendations of the supervisory authorities in such a way as to mitigate the legal and technological risks associated with these processes on the part of the controllers and data processing entities. It is up to the supervisory authorities to select the subjects and means of issuing opinions in a way that will guide the data processing processes in a safe and rational manner. In this regard, it should be borne in mind that there are situations in which the right to privacy may, in certain situations, give way to other values, such as the need to obtain information quickly about the health of the person closest to them, or the need to combat money laundering and terrorist financing.

[32] Monika Młotkiewicz, "Cooperation between data protection official (ABI) and GIODO - development perspectives," *Information in Public Administration*, no. 3 (2017): 10–13.

(E) The power to report GDPR infringements to the judiciary and the power of supervisory authorities to participate in court proceedings

The power set out by the EU legislator in the structure of Article 58(5) of the GDPR shall confer on the supervisory authority the power to *bring an infringement of this Regulation before a judicial authority and, where appropriate, to initiate or otherwise participate in legal proceedings in order to enforce the application of this Regulation.* The national legislator shall be required to guarantee this possibility. It should therefore be at the level of national legislation that the legal bases establishing the modalities and conditions under which contacts between those entities should take place should be introduced. The power provided for in Article 58(5) of the GDPR is linked to Article 84 of the Regulation, which provides for the possibility for the national legislator to introduce sanctions other than those provided for in the GDPR for infringements of the Regulation. The national legislator has the right to introduce provisions governing criminal liability for the breach of the Regulation. However, as a rule, the procedure related to the possibility of committing a crime is not carried out by personal data protection authorities. Such a procedure will be carried out by the authorities specified in national legislation as part of criminal procedures. The provision discussed in this point gives supervisory authorities the power to inform such authorities about the possibility of committing an offence. It seems that this group of powers should, in the light of the issue under consideration, be identified as a power which is subsidiary to a group of powers of a sanctioning nature.

5. CONCLUSIONS

The supervisory authorities are equipped with a wide range of powers to carry out the tasks entrusted to them. The independence of these authorities is a guarantee of their sound implementation. The exercise of these powers resonates with all those who fall within the competence of these authorities. The decisions of the authorities become a matter of interest for the doctrine and the controllers of personal data. Powers related to the imposition of administrative penalties may be of particular

importance. Their application results in entities which find themselves in circumstances similar to those of the sanctioned entity can expect to apply the same sanctions. In order to avoid this situation, they are willing to adapt their practices to the model adopted in the decision of the authority. Opinions and recommendations, as well as codes of conduct approved by the supervisory authorities for individual industries, which are a reference point for administrators operating in these industries, play an important preventive role.

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REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLV
YEAR 2021, ISSUE 2, pp. 77–103
DOI: https://doi.org/10.31743/recl.11456

LEGAL AND ETHICAL GROUNDS OF PROFESSIONAL SECRECY OF A LAWYER IN SELECTED EUROPEAN UNION COUNTRIES AND IN THE UNITED STATES OF AMERICA

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ABSTRACT

The subject of the article is professional secrecy in practicing the legal profession in American law, with the indication of some differences resulting from separate laws of different states, and in the European Union – taking into account a few exemplary countries. Its sources were described – both legal and ethical, as well as the definition and construction. Confidentiality has been included in the objective and subjective aspect, taking into account different views in the doctrine as to its scope. Bearing in mind the basic right from which professional secrets derive – the right to privacy – the article also includes some of its aspects related to confidentiality.

Keywords: right to privacy, professional secrecy, confidentiality

The role of professional secrecy reflects the importance of privacy and discretion in social life. In today's globalized world and the rapid development of technology, information – the flow of which is exceptionally efficient – and its non-disclosure aspect are becoming increasingly challenging. This pace should be compatible with the pace of change of law.

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Jurisdictions in the United States and Europe varies essentialy in their approach to the privilege afforded to attorneys to shield the disclosure of confidential information related to the lawyer-client relationship. The adequate protection of clients interest, especially in times of multilateral agreements and international agreements, requires a proper understanding of the differences between privilege rules in the US and the EU.

The aim of the article is to present the institution of legal professional secrecy in the legal systems of the United States and the European Union – in general, and to outline the differences and possible similarities in the structure of this issue. The essential areas are: the subject, the object, the way in which the secrecy binds the parties and the duration of the binding. The combination of the above issues results in an attempt to assess the legal legitimacy of professional secrecy using, in particular, the dogmatic and legal method. The Polish legal system has been deliberately excluded from consideration, as it will be the subject of a separate publication.

1. INTRODUCTION

The basic element of professional secrecy is information. According to the Merriam-Webster Dictionary information is knowledge obtained from investigation, study, or instruction, or something (such as a message, experimental data, or a picture) which justifies change in a construct (such as a plan or theory) that represents physical or mental experience or another construct[1]. There is no legal definition of information in the legislation. However, it appears in the context of public or classified information, which is related in turn to the principle of openness. These definitions can only serve as a guide to the discussion of professional secrecy. In the abovementioned contexts, the information is held by the state and its organs, and the laws, the subject of which they constitute, define the limits of their availability to the citizen. In the context of professional secrecy, the information is, in some measure, the property of the citizen, and therefore the individual – in this case the representative of the profession of public

[1] https://www.merriam-webster.com/dictionary/information, accessed February 22, 2021.

trust or his client – consequently the guarantees of his protection will be contained in other acts. It seems that everyone should understand a secret in an intuitive way, and although it probably is, its precise definition is necessary for the effective protection of the right to privacy.

2. LEGAL AND ETHICAL GROUNDS OF PROFESSIONAL SECRECY OF A LAWYER IN SELECTED EUROPEAN UNION COUNTRIES

The concept of professional secrecy in the practice of law in the European Union is that a person who needs professional legal care must be sure that his or her legal affairs will not be disclosed to third parties and that the information will not be used against this entity. Individuals looking for a legal representative will feel free to pass on relevant information, only if the confidentiality of the relationship is respected. Such assurance is intended to foster the proper preparation of a lawyer to defend his client and to strengthen his legal position. Regardless of the type of information disclosed, an individual must have a particular sense of security in relation to a representative of the legal profession. This approach is a prerequisite for a properly functioning legal system and a well-protected public interest. This confidentiality is also referred to in the European nomenclature as a professional secret or as a lawyer`s privilege, which is based on his obligation to keep all information disclosed by the client confidential in the context of the client-lawyer relationship. As a rule, the lawyer is required to refuse to disclose information not only to the general public but also to the court, state authority and any other institution. This rule also applies to correspondence and legal advice[2]. The term "professional secrecy" is commonly used in the system of continental law, while in the common law system we can expect the use of the term "attorney-client privilege".

In Europe the privilege protecting lawyer-client relationship is called the legal professional privilege – otherwise LPP. The doctrine has been first

[2] Dirk Van Gerven, ed., *Professional secrecy of lawyers in Europe* (Cambridge: Cambridge University Press, 2013), 1–10.

defined in *AM & S* a judgement in 1982[3] and its scope has been clarified in *Akzo Nobel Chemicals and Akcros Chemicals v Commission* ("Akzo")[4]. That being said, the legal professional privilege applies only to written communications between attorneys and clients for the purpose of exercising the client's right to defense. What is more, lawyers to whom European privilege applies must be independent, which means that they are not bound to their clients by a relationship of employment. Under this ruling, there is no possibility to extend LPP to communications written by in-house lawyers, unless it is used exclusively for the purpose of legal advice from an outside lawyer in the exercise of the right of defense. What is more, the LPP applies only to an attorney that is admitted to the bar of the European Union Member State[5].

Unfortunately, there is no uniform definition of professional secrecy in the European Union. Its concept is slightly different depending on the Member State. However, the point of reference is the idea of confidentiality, seen as essential to ensure a complete and unhindered exchange of information between the client and the legal advisor. Professional secrecy is supposed to be a guarantee, that a lawyer will not disclose it, and will not be forced to disclose information covered by professional secrecy. If such regulatory provisions are lacking, then the client will be significantly restricted in the enforcement of his rights through a suitably prepared expert. Such trimming of the information would have severely damaged the professional representation and, consequently, would not allow the individual to fully realize constitutionally guaranteed freedoms and rights.

As the definition construed by The Council of Bars of Law Societies of Europe's Code of Conduct for European Lawyers states, it is the core of a professional lawyer's job to be the recipient of the information, based on the value of confidentiality, without which there can be no trust. Maintaining specific client information in secret is, therefore, the most crucial duty of the legal profession. This serves not only to protect the interests of

[3] Case C-155/79, *AM & S Europe Limited v Commission of the European Communities*, 18th of May 1982.

[4] Joined cases T-125/03 & T-253/03, *Akzo Nobel Chemicals and Akcros Chemicals v Commission of the European Communities*, 17th of September 2007.

[5] Ibid.

the client, but also to fulfill a public role in protecting the interests of public authorities and the justice system. Confidentiality, as it serves the public interest, also benefits the protection afforded by the state[6].

The privilege of confidentiality extends not only to the widely understood client-lawyer relationship, but also serves in various court proceedings. The right to a fair trial has been among others expressed in article 6 of the European Convention on Human Rights and Fundamental Freedoms. This right should be respected either when the individual is obliged to do something or when there are asserted claims. This right is construed as the right to access to the courts in both civil and criminal proceedings. Consequently, the party is also entitled to be represented by a professional representative.

The privilege also extends, as I have mentioned, to the so-called legal advice. This is due to the fact that information relating to legal advice benefits from the protection of professional secrecy. Furthermore, a Member State may exclude disclosure of information from the authorities if this information was the subject of communication with a lawyer or lawyers. It is, therefore, clear from the directive that any legal aid will be protected by a lawyer's privilege, regardless of whether that aid ultimately leads to a legal dispute. Additional reinforcement for the privilege of confidentiality may be article 8 of the European Convention on Human Rights and Fundamental Freedoms, which guarantees respect for private and family life and the secrecy of correspondence. Moreover, the European Court of Human Rights has confirmed some sufficiency of this provision as the basis for the existence and the validity of professional secrecy[7].

A lawyer's privilege may be waived in a democratic state solely for the protection of public security or the national economy, as well as for the prevention of violation of law or for the protection of life, health, morals, freedoms and human and civil rights. The inclusion of the authorities in this sphere of confidentiality is admissible only, if it is consistent with the generally applicable law and is related to one of the situations mentioned above and is necessary to achieve these objectives. This necessity is defined in such a way that entering into the sphere of confidentiality

[6] Supra note 34.

[7] *Petri Sallinen et. Al. V Finland*, www.echr.coe.int/hudoc, (Apr. 23, 2015).

will be justified under the principle of proportionality and will respond to the legitimate needs of society. Furthermore, any exceptions to the rule of confidentiality must be interpreted restrictively and the purpose of the infringement should be justified. In the opinion of the European Court of Human Rights, any correspondence also benefits from the privilege of confidentiality, and any interference in its content must be substantiated[8]. Moreover, acquiring such correspondence constitutes a violation of the lawyer's privilege and article 8 of the European Charter of Human Rights[9]. It should be noted that, in its decisions, the Court pointed out that even in situations where interference seems justified on the basis of an important social interest, this activity should not prejudice the lawyer's privilege. However, if such an infringement occurs, it may be possible to file a lawsuit in this case.

It is noteworthy that the conflict between professional secrecy and the public interest often occurs. The European Court of Human Rights pointed out that in such a case the balance and the appropriate proportions between the values indicated should be respected and that any restrictions of confidentiality should be applied in exceptional circumstances and only in order to protect public interest as a more important value in a particular case. Unfortunately, in European practice, the view is that a legal professional is entitled to disclose information covered by professional secrecy, if it is directed towards protection of a value defined as the highest one[10].

The Code of Conduct for European Lawyers, adopted by the Council of Bars and Law Societies of Europe on 28 October 1988 is a key act for establishing ethical rules for the exercise of the legal profession in the European Union. The Code of Ethics has been amended 3 times and the last change is dated 2019[11]. The text of the act is currently binding on the lawyers of all member countries regardless of the form of their association in a Member State, and the guidelines contained therein form the basis of the deontological rules for European legal professions.

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[8] *Campbell v. UK*, series A, no 137, www.echr.coe.int/hudoc, (Apr. 28, 2015).

[9] *Foxley v. UK*, www.echr.coe.int/hudoc, (Apr. 28, 2015).

[10] Ibid.

[11] https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf, accessed February 24, 2021.

The most important for the protection of professional secrecy is Point 2.3., which covers the Confidentiality issue. Its content shows that confidentiality has been recognized as the essence of the legal profession, which the relationship with the client is based on. In the light of this rule, the lawyer must give the client a feeling that he can be entrusted with keeping confidential everything that the individual using legal services would not entrust to anyone else.

Without existence of the confidentiality, there can be no trust in the relationship between a lawyer and a client. Confidentiality is therefore the fundamental right as well as the duty of a lawyer, and the obligation to act is unlimited in time. The doctrine also points to the need to deal with this rule by those who work with a lawyer providing access to confidential data[12].

Preceding the abovementioned Rule – Point 2.2 deals with the Trust, Righteousness and Honesty of a lawyer. The authors of the Code depend on the relationship between the nature of the lawyer and his or her attitude to guarantee honor, honesty and integrity as the core values of the legal profession.

In 1976, a report summarizing the position of legal professional secrecy in Europe at that time was published, known as the Edward Report. This report was revived in a way and expanded with new insights in 2003. The report stresses that there are different sources of professional responsibility in different European countries. These include in particular constitutions and statutes. The report mentions several countries in the European Union, among others: Ireland, France, Belgium, Luxembourg, Italy, the Netherlands, Germany and Denmark[13].

In case law countries such as Ireland, the legal privilege of confidentiality is a rule derived from judgments as one of the fundamental features of justice and the letter of law. Professional secrecy exists for the client and

[12] Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, accessed February 22, 2021, https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf.

[13] Edward's Report, *The professional secret, confidentiality and legal professional privilege in Europe*, accessed April 29, 2015, http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/update_edwards_repor1_1182333982.pdf.

may be the power of his decision repealed. As the House of Lords points out in one of its 1996 decisions, the legal privilege of confidentiality is one of the fundamental rights that derives from the rules of public policy and not merely the particular rule used in a particular case to determine which of the evidence is admissible and which information may be disclosed. Judges of the House of Lords took into account the client's right to confidential communication with his legal advisor[14]. In another 1999 judgment concerning the waiver of professional secrecy by the amended provisions of the Code of Civil Procedure, the court decided that such a waiver may take place only by an earlier provision, never later. Despite the strong protection of professional secrecy in the case law, in practice it began to be successively weakened. An example of the waiving of professional secrecy can be given in cases where it is necessary for a government department or government agency to disclose it. The authors of the report also point out that precisely in the system of case law the source of professional confidentiality should be sought primarily in criminal law. However, such acts also protect the rule of confidentiality. According to Section 19 of the Police Act and Evidence in criminal proceedings of 1986, a police officer is not competent to read the evidence if it has reasonable grounds to believe, that it may be covered by professional secrecy[15].

To illustrate the obligation of secrecy of a lawyer, it is worth pointing out a number of European Union states covered by the report. In countries where the legal system of the continental type is in force, professional secrecy is rooted primarily in the constitution or acts of the rank of statute. An example may be France's legislation, where, in article 226–13 of the Penal Code, the legislator has placed a provision on professional secrecy: whoever is bound by professional secrecy, occupation, position or temporary assignment or assignment, discloses confidential information, is subject to penalty of deprivation of liberty for up to one year and a fine of EUR 15000.

In Belgium, Luxembourg, Italy and the Netherlands, the rule of discretion is also based on penal codes. The professional secrecy in Italy appears

[14] Judgment of the House of Lords, 19 October 1995, *Regina v. Derby Magistrates Court Ex Parte B*.

[15] Ibid.

to be particularly well-guarded, where the Code of Criminal Procedure protects the lawyer from the obligation to testify in criminal matters in the context of professional secrecy. In Denmark, the duty of professional discretion arises directly from the law on the functioning of the judiciary (procedural part). From the point of view of weakening the protection of confidentiality in the lawyer relationship, it is worth pointing out the importance of judicial practice, where professional secrecy benefits legal protection as long as the court decides not to revoke it.

Among the countries of the European Union not covered by this report is f.e. Greece, where Article 371 of the Penal Code regulates sanctions for breach of the rules of professional secrecy. A lawyer cannot testify to circumstances covered by professional secrecy. The lawyer may be fined or imprisoned for up to one year for unlawful disclosure of a professional secret. It is a peculiar phenomenon in the context of disciplinary sanctions for similar offenses in other European countries. It is worth noting, that the negative consequences of a disciplinary offense are more likely to be related to restriction than to penalties in criminal law.

While it is irrefutable in the doctrine that the basic function of professional secrecy is to protect the right to privacy of an individual, there is a dispute as to whether the lawyer's privilege actually serves to ensure the proper functioning of the judiciary and the public interest.

As in most other European countries, the privilege of a lawyer is to protect the individual, but it does not include the right to dismiss a lawyer from professional secrecy, even though the individual himself has entrusted his representative with this confidential information. This rule applies both in civil and criminal proceedings. An interesting solution is to allow a lawyer to testify with the consent of the professional self-government. While in most European countries this is a court or other body before which the proceedings are pending, in Greece this decision remains with the appropriate executive body of the Council of Lawyers or the chairman of the Council. Exceptionally, a lawyer may be questioned in connection with the representation of the client, as long as this is the case connected with co called "important reasons". Interestingly, D. Van Gerven distinguishes in this case the situation of allowance to testify and the violation of the lawyer's privilege. While the first situation may arise, as noted above, with the consent of the relevant Council, the abrogation of the privilege of

lawyer even in the case of said consent is unacceptable. The only limitation for this privilege seems to be Article 232 of the Greek Penal Code, which explicitly expresses the obligation to disclose relevant information to the authorities whenever they involve a crime. In addition, Article 371 paragraph 4 of the Code indicates that a breach of a lawyer's privilege will not be considered unlawful and cannot be sanctioned accordingly if it is intended to fulfill another obligation or to protect another important public or private interest that could not be achieved in a different way[16]. Greek lawyers, in turn, are obliged to belong to the local councils of professional councils – law councils. This, therefore, entails conducting professional activity in accordance with the Code of Professional Ethics.

In the second section of the report an attempt was made to answer the question, whether professional discretion is absolute in the countries covered. As a rule, in most EU countries, the bar is limited. Only Iceland, Spain and Liechtenstein have admitted that its protection is absolute. The third part of this report deals with the directions of the development of professional secrecy. The authors of the report agree that during the twenty-five years of its functioning in the European Union, the aim was rather to significantly limit the protection of professional secrecy. Corruption, drug-related crime and terrorist attacks intensified in recent years has had a huge impact on this.

At the end of the deliberations on professional secrecy in EU law, it is worth mentioning that any qualified lawyer in the European Union who meets certain requirements may become a so-called community lawyer. This is made possible by Directive 98/5 / EC of the European Parliament and of the Council, which aims to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the professional qualifications were obtained[17].

[16] Ibid.

[17] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

3. LEGAL AND ETHICAL GROUNDS OF PROFESSIONAL SECRECY OF A LAWYER IN THE UNITED STATES OF AMERICA

The basis of the existence of a lawyer's secrecy in the United States legal system is certainly confidentiality. Confidentiality is, in turn, one of the principles of a client-lawyer relationship and includes the following legal aspects: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality. Both the attorney-client privilege and the principle of secrecy of information obtained from the client are the rules applicable in the court proceedings, where a legal professional can be called upon to be a witness.

It is necessary to distinguish frequently confused confidentiality from the rule of confidentiality. Confidentiality is an idea in which the above-mentioned principles of attorney practice are established in the United States system of law, whereas the confidentiality principle is only one of them and has a different source and scope than the other two. The rule of confidentiality is rooted in legal ethics and requires the attorney to keep everything he learned in relation to client representation confidential. On the other hand, the attorney-client privilege, while enjoying the protection provided by the deontological rules, is primarily a product of common law and guarantees protection of the content of communication between a lawyer and a client, but does not include commonly known facts and information[18].

It is also worth noting that the primary difference between the attorney-client privilege and the work-product doctrine is the value and purpose of the confidentiality of the information. An attorney-client privilege protects this part of the content of the communication that directly affects the resolution of the dispute and is used against the opponent, which in the latter case is extremely rare. It may be considered that the principle of secrecy of information obtained from a client is protected by its content, while the attorney-client privilege – despite its content[19].

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[18] Edward J. Krauland and Troy H. Cribb, "The attorney-client privilege in the United States. An age-old principle under modern pressure," *Symposium Issue of The Professional Lawyer* 37 (2003): 3.

[19] *KW Muth Co. v. Bing-Lear Mfg. Group L.L.C.*, 219 F.R.D. 554, 566 (E.D. Mich. 2003).

The so called called "in-house privilege" may also be an aspect worth mentioning here.

Whether privilege protects an in-house lawyer's communications depends on the primary intention of the communication. If the objective is legal advice, then the communication is privileged, as long as it is confidential, taking into account lawyer-client relationship. Alternatively, if the lawyer is acting as a business negotiator or advisor – as the in-house lawyers frequently have multiple roles – then the communication may not be privileged[20].

Despite the importance of all aspects of confidentiality in the scope of the lawyer's secrecy, for the purposes of the comparative law of this trial, I focus mainly on the principle of confidentiality and the privilege of lawyers.

As I have mentioned, the source for the first aspect of legal confidentiality in the United States is legal ethics. Because of its importance in the legal profession in the United States, reflections on its significance and evolution are worth mentioning here.

In modern democratic societies, whose functioning is based on the law in force, lawyers play an important role as guardians of justice as well as human rights and fundamental freedoms. Representatives of the legal professions have a special responsibility to maintain an adequate standard of justice. The basis of this responsibility lies in the rules of professional ethics, the observance of which is their duty to the client, the judiciary and society as a whole. The rules of professional etiquette reveal their presence in both the law and the custom, rules of law practice, and in judicial decisions.

It is impossible to overlook the importance of the US Constitution, which may also be the source of these regulations, as found in the Sixth Amendment, in which each defendant has the right to be represented by a lawyer and, in the case of ineffective representation, the amendment provides the basis for professional liability. In addition, the First Amendment guarantees freedom of expression, which enables the lawyer to seek the cli-

[20] https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017–18/november-december/attorney-client-privilege-inhouse-counsel/, accessed February 22, 2021.

ent and advertise his services. The clause of the appropriate legal procedure in the Fourteenth Amendment is a specific impediment to the conduct of the prosecutor and the professional liability body.

The principal and direct source of the deontological duties of lawyers in the United States is the Model Rules of Professional Conduct[21]. This is a set of rules of conduct of representatives of legal professions, accompanied by a commentary. The authors of the codex, however, have stated that, in view of the abstract nature of the moral principles, lawyers may have problems with their interpretation and implementation in specific situations. To this end, special institutions are set up in each state to answer questions from the legal professionals at all times. They create state committees or local law councils. For example, the New York State Local Council supported the creation of a Professional Ethics Commission, where lawyers can direct written inquiries.

As noted by J. B. Brooks, both legal professions and local councils show great interest in building the values that underpin legal professions. They notice the importance of the legal profession and therefore seek to increase the ethical requirements[22].

The author stresses that the implementation of these ideas is certainly supported by legal acts or deontological codes, as they set the rules and sanctions for their violation. However, shaping the ethical values of a future lawyer should take place at the stage of university education, in which young adolescents develop moral attitudes. He also criticizes the lack of professional ethics lectures in some American colleges, which results in incomplete education in the legal profession. From reflections of J.B. Brooks it can be inferred, that for possible deontological shortages in education he blames the higher education system, not the trainees themselves.

The deontological rules define the moral rules of behavior, whose calculation can be found in the widely understood literature.

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[21] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/, accessed February 22, 2021.

[22] James B. Brooks, "Legal ethics," *The Yale Law Journal* 19, no. 6 (1910): 1–10.

As W.H. Simon states, the legal professionals should act in such a way as to promote the idea of justice[23]. In turn, D. Luban advises lawyers to guard against human dignity rather than destroy it[24]. As noted by S. Pepper, lawyers should provide clients with access to the legal acts on which they base their actions and refrain from moral judgments about their clients' affairs and actions[25]. According to C. Fried, the most important value of a lawyer in relation to a customer is loyalty, which should be displayed at every opportunity and regardless of the client's needs. The interest of the individual is to be a priority for the lawyer higher than the interest of the general public[26].

In the literature it is also noted that a lawyer, by providing legal advice, should openly express his moral values[27], which is a manifestation of the integrity of the client. Moreover, too little attention is paid to legal ethics in the context of the legal profession itself and, above all, the individual characteristics of the profession: talent to practice, temperament, values. It is noteworthy, that the human personality is not plastic and can be molded by the law, and the deontological principles should be expressed in the form of psychologically-contained rules, which will allow an answer not only to the question "what lawyer should do?". But also "what lawyer should be?". The aim of these rules is to answer the question: "Who can be called a perfect lawyer?". In addition to determining the typical moral characteristics, that a lawyer should possess, it is worthwhile to work out specific responses such as: no negative reaction to criticism or satisfaction with representation of the injured client[28].

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[23] William H. Simon, *The practice of justice: A theory of lawyer's ethics* (Cambridge: Harvard University Press, 1998), 138.

[24] David Luban, *Legal ethics and human dignity* (Cambridge: Cambridge University Press, 2007), 66.

[25] Stephen Pepper, "The lawyer's amoral ethical role: A defense, a problem, and some possibilities," *Legal Research Paper Series* 11, no. 4 (1986): 613–617.

[26] Charles Fried, "The lawyer as a friend: The moral foundations of the lawyer-client relation," *The Yale Law Journal* 85 (1976): 1060–1066.

[27] Robert K. Vischer, "Legal advice as moral perspective," *Georgetown Journal of Legal Ethics* 19, Issue 1 (2006): 225–229.

[28] Alasdair Macintyre, *After virtue: A study in moral theory*, 3rd ed. (Notre Dame, Indian: University of Notre Dame Press, 1981), 171.

A slightly different view is presented by G. Postema, who claims that the requirement for a lawyer to obey different rules puts him in an uncomfortable position, which involves oscillating between strictly professional and moral instructions. Since professional instructions are strictly defined, measurable, and thus affecting the evaluation of the work performed, the lawyer will show, according to the author, a tendency to reject moral rules, and even a cynical approach to them[29].

Despite the emerging doubts in the doctrine as to the correctness of establishing specific moral rules, the vast majority of the ABA act is considered to be the closest to the ideal, as already mentioned, Model Rules of Professional Conduct. Although, in its content there is no direct mention of human rights, this act is undoubtedly based on them, since they constitute the basis for the development of moral rules in order to manage the behavior of the state as the authority, the society and the individual as well. By comparison, professional ethics standards focus on individual decision. However, both have a common source of mechanisms for the implementation of moral rules. Both norms derived from human rights and those based on professional ethics, as the chief rule in contacts lawyer-client, consider dignity as the main rule in lawyer-client relations[30].

The first nationwide law regulating professional ethics, issued by the American Bar Association in 1908, Canons of Professional Ethics, has remained in power for over 60 years. Thirty-two of these principles were based on the Code of Professional Ethics established by the Alabama Board in 1887. This, in turn, was borrowed from George Sharswood's lectures, published in 1854, Professional Ethics and from David Hoffman's 1836 reflections contained in the Legal Studies. Both the Supreme Court and members of the ABA Commission for Legal Acts recognized canons from 1908 as a great achievement due to their compactness, clarity, precision and elaboration in a way that did not allow for frivolous breaches of professional ethics[31]. The canon law was concerned primarily with the maintenance of unity and impartiality in the administration

[29] Gerald J. Postema, "Moral Responsibility in Professional Ethics," *New York University Law Review* 55 (1980): 77–82.

[30] Luban, *Legal ethic*, 65–95.

[31] Ibid., 160.

of justice as the "cornerstone of democracy". These ethical rules came at the right moment and were a response to President Roosevelt's famous speech at a Harvard University meeting in 1905, where he accused the legal profession of abandoning moral values to pursue the lucrative undertakings of large corporations. This statement led to the ABA Committee meeting in 1906 to prepare a draft of a set of ethics rules. It is assumed that without the networks of law firms, for whom the economic outcome was more important than the moral principles and the critical attitude of the then-president, perhaps codes of professional ethics would never have been created[32].

The Canons have been changed many times over the past 60 years, however, these modifications were chaotic and disorderly, but also random and fragmentary. A new perspective on the rules of professional ethics was proposed by L. Powell – ABA president, then appointed as a judge of the Supreme Court. Thanks to his initiative, steps were taken to create a Special Committee on Ethical Standards to evaluate the performance of the legal profession in the United States in terms of moral rules. The Committee, however, was, first of all, to propose a radical change to the Canons[33]. Five years later, in 1969 ABA accepted the Committee recommendation and adopted the Model Code of Professional Responsibility. While the Canons were a relatively short list of the most important principles of professional ethics, the Code laid down detailed rules of conduct, taking into account contemporary law practice, and disciplinary rules. In addition, unlike the Canons, which did not explicitly refer to human rights, the concept of human dignity, the dignity of the individual, emerged in the Code of Professional Responsibility. In the Preamble of the Code there is such a direct reference: the existence of a free and democratic society is based on the belief that justice comes from the letter of law and respect for the dignity of the individual and his self-government. It is highly probable

[32] Ibid., 162.

[33] see: Michael S. Ariens, "American legal ethics in an age of anxiety," *St. Mary's Law Journal* 40, no. 2 (2008): 430; Center for Professional Responsibility, *A legislative History: The Development of the ABA Rules of Professional Conduct 1982–2013* (Chicago: American Bar Association Book Publishing, 2013), vi–viii.

that this sentence comes from talks conducted at this time in the international arena.

For example, the International Covenant on Civil and Political Rights, adopted in 1966 by the UN General Assembly, just three years before the adoption of the Code, indicates that dignity and equality in law are intrinsic values of every human being and the basis of freedom, justice and peace in the world. Apart from the appearance of the concept of dignity in the Preamble, the Code did not directly invoke human rights anywhere in the act, and it treated morality less expansively than in the case of the Canons. In this act, morality was invoked in relation to justice and the higher goals of the legal profession, while the Code equates this value with refraining primarily from lies and theft.

The current act, which is a deontological set for American lawyers, is called the Model Rules of Professional Conduct and was last amended in April 2020[34]. Although they are not binding law, they are intended to be a particular model for state regulators – all fifty states with District Columbia have adopted ethic rules to a similar extent – to form consistent rules for practicing the legal profession

Returning to the consideration of professional secrecy in practicing the profession of lawyer in the United States, it should be emphasized once again that the rule of confidentiality is primarily an ethical obligation for a lawyer, as stated in section 1.6 of the Model Rules of Professional Conduct. The scope of this rule is much broader than the scope of the attorney-client privilege, as it covers everything the lawyer has learned in connection with legal advice. In the light of this rule, a lawyer is not allowed to disclose information obtained in connection with the representation of the client, unless the client agrees or the disclosure of information is a prerequisite for an adequate and effective defense of his interests or if the provisions of the MRPC allow it. The scope of the confidentiality rule is clearly defined and delineates the boundaries around information that is relevant to representation, and therefore anything that could have any connection with the case conducted by a lawyer. In addition, the ex-

[34] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/, accessed February 22, 2021.

ceptions to this rule are interpreted by the courts narrowly, and in case of doubt – in its favor[35].

Attorney-client privilege is the oldest of the evidential privileges that protect the confidentiality of information. It was recognized and used during the reign of Elizabeth I. At that time, its purpose was to prevent the taking of oaths and testify against a person using legal services. It was believed that such testimony, taking into account the need to maintain loyalty to the client, would have been a stain on the attorney's honor and taken to him as a gentleman. In those days, however, the privilege was granted to him, not to the person to whom he provided services, and in fact he had little in common with the present privilege[36]. Nowadays, the privilege is the prerogative of the client. He is, therefore, not the lawyer, entitled to it – he can raise it and revoke it.

Fundamental acts, which are the source of the attorney-client privilege, are the Rules of Evidence – both at the federal and state level. Federal Rules of Evidence apply and are enforceable by federal courts, while State Evidence Rules are enforceable in individual states. Due to the fact that in most states of the United States the attorney-client privilege in the evidence law is similar to the federal law, it was precisely the provisions of the evidence law at the national level that I used as the basis for consideration.

The existence of evidence privileges in law is in constant opposition to the main goal of the trial, which is to establish the truth, and any protection of essential information from disclosure must be very clearly outlined. Confidentiality is an exception in the Anglo-American law that requires anyone who has the knowledge to disclose the content of the process necessary to achieve the objectives of the process. The application of this rule is further treated as a realization of the public interest, which leads to the resignation from the suppression of truth, which in turn is the purpose of the privilege itself. The attorney-client privilege should be applied within the limits of the assumption that it represents and cautiously enough

[35] Susan P. Koniak, "The law between the Bar and the State," *North Carolina Law Review* 70, no. 5 (1991): 1431–1432.

[36] Ibid., 60.

to minimize the achievement of procedural objectives[37]. In American doctrine, it is noted, that the fundamental right of an individual is unlimited access to any existing evidence. The basic premise is the existence of a general obligation to testify about everything that is known to the witness in a given case, and any exceptions to this rule should be applied in a clearly exceptional manner. This view was confirmed by the Supreme Court, among others. in the 1950 and 1974 judgments, stating that exceptions to the rules of evidence in law should be taken into account in a prudent and restrictive manner, as they impede the determination of truth in a trial, and thus infringe the principle of substantive truth[38].

Despite the existence of the principle of narrow application of the attorney-client privilege, it turns out that courts do not always comply with it. On the one hand, there is a need to disclose in the process all relevant facts. On the other hand, the need to protect the confidentiality of the client's relationship with the lawyer is increasingly recognized[39]. It is important to maintain a balance between these values. Introducing such a balance in the process, in my opinion, inevitably strengthens the position of the attorney-client privilege as an exception to the procedural rule of striving to establish the truth.

In 1996, the Supreme Court warned federal courts to use the attorney-client privilege in a restrictive way and did not extend its scope or create new privileges[40]. It is worth noting that in legal practice it often happens that lawyers are surprised at how narrowly outlined the attorney-client privilege is, forgetting that it is not absolute.

The scope of the attorney-client privilege is, as I said, relatively narrow. It protects the communication between the lawyer and the client. As the Supreme Court of the United States stated in its 1992 ruling, also silence or concealment may be acts of privilege. An example of such a situation may be, for example, tacit consent expressed by not submitting

[37] John H. Wigmore and John T. McNaughton, *Evidence in trials at common law* (Boston: Little, Brown and Company, 1961): 400–450.

[38] see: *United States v. Bryan*, 339 U.S. 323 (1950); *United States v. Noxon*, 418 U.S. 683 (1974).

[39] Edna S. Epstein, *The attorney-client privilege and the work-product doctrine* (Chicago: American Bar Association Book Publishing, 2007), 13.

[40] *Jaffee v. Redmond*, 518 U.S. 1. (1996).

an objection, or the act of nodding the head as a sign of accepting a proposal[41]. The privilege, however, does not protect the information contained in the content of that communication. Therefore, while the very core of information is not protected, the so-called "surroundings" – such as the opinions provided by the client about this information – is already covered by the protection[42]. Moreover, the information itself does not acquire the character of protected communication from the fact of its analysis or paraphrasing by a lawyer or client[43]. It is worth noting, however, that the very fact of providing this unprivileged information to the lawyer remains under protection. Consequently, in a situation where the client communicates with a lawyer in connection with a given case and at the same time consults an advisor from another field (e.g. a tax advisor) in the same matter, the content of the communication remains privileged[44].

The constantly evolving jurisprudence is essential in assessing the scope of the legal privilege in question. The courts are willing to extend the scope of its application to any legal advice the lawyer has provided to the client in connection with mutual communication, which is contrary to the historical perception of a privilege which, from the outset of its identification in Anglo-American law, protected legal advice exclusively in a derivative manner and therefore only to the extent that this advice coincides with the previously obtained content of the privileged communication[45].

Currently, as I mentioned earlier, the attorney-client privilege, paradoxically, does not belong to the lawyer, but to the client. Nevertheless, due to the fact that the client is often a layman, unaware of the nuances of the functioning of the privilege and its proper enhancement, it is possible for a lawyer to raise the privilege on his behalf. In practice, therefore, the lawyer has a privilege that is still the exclusive right of the individual using his services.

Therefore, in a situation where the services of a lawyer are used by one person, the decision on whether to increase the privilege belongs to

41 *U.S v. White*, 970 F. 2d 328, 334, 36 Fed. R. Evid, Serv. 657 (7th Cir. 1992).
42 *U.S. v. James*, 708 F.2d, 40, 44 n.3 (2d Cir. 1983).
43 *Colton v. U.S.*, 306 F. 2d 633, 639 (2d. Cir. 1962).
44 *Willnerd v. Sybase*, Inc. 2010, West Law: 5391270.
45 *U.S. v. Rakes*, 442 F. 3d (1st Cir. 2006).

him. A possible conflict may arise only when such a right is held by several people, some of whom want to keep the attorney-client privilege in force, and the rest want to revoke it. An example is the situation where – in the case of representing a company – its representative may waive the attorney-client privilege, even if his predecessors had a different view on this matter. Another important example is the possibility of raising or revoking the privilege by the legal successor of the authorized entity. American case law recognizes such as, for example, a bankruptcy trustee[46]. In the event that control of the firm is transferred to a new management group, the authority of the privilege is also transferred to the new entity. Despite the above, in the case of purchasing an enterprise, the privilege does not become the buyer's right. In the light of the current case law, it cannot be sold as it does not belong to any category of assets[47].

It seems obvious that anyone who can raise a privilege can also revoke it. In the Grand Jury proceedings it was ruled in 1977 that the attorney-client privilege belongs to the client and not to a lawyer who cannot withdraw or revoke it, even if the will of the represented individual is against it[48]. In situations where the client explicitly forbids lawyer from disclosing privileged information, such disclosure will be ineffective. Consequently, the content of the communication will not be able to serve the purpose for which it was disclosed. It is true, however, that once disclosed information is already in the consciousness and memory of those who have access to it. Therefore, any cases of the so-called inadvertent disclosure of information covered by the privilege cannot be a pretext for using it, if the client to whom the privilege belongs does not consent to its use[49]. Although the attorney-client privilege belongs to the client, it is *de facto* the lawyer who raises it on behalf of and for the represented entity, also in the absence of the client. There is an assumption in United States case law that a lawyer, even in the absence of expressed instructions from the client, will adequately use the privilege on his behalf. If, however, the client questions the lawyer's right to act within the scope of the privilege, he must express

[46] *CFTC v. Weintraub*, 471 U.S. 343 (1985).
[47] *Zenith Electronics Corp. v. WH-TV Broadcasting Corp*., 395 F.3d 416, 420 (7th Cir. 2005).
[48] *In re Grand Jury Proceedings*, 73 F.R.D. 647 (M.D Fla. 1977).
[49] *United States v. Camacho*, 368 F3d 1182, (9th Cir. 2004).

such will clearly. Otherwise, all actions of the lawyer aimed at waiving the attorney-client privilege on behalf and for the benefit of the client will be considered valid[50].

In some cases, there may also be a conflict between the former and the current legal representative when summoned by the court to increase the bargaining power of the lawyer in the absence of the client. As the New York Court of Appeals noted in 1982, a prudent lawyer should act very cautiously, given that any action to disclose information that is subject to a privilege may be viewed as a form of waiver. As the privilege may in this case lose its validity, the prudence requires that the lawyer undertake only those actions that will not lead to involuntary and unintentional disclosure of confidential information[51].

As noted by J.H. Wigmore, four conditions should be indicated, which – if met cumulatively – give the possibility of recognizing the evidential privilege: the communication between the client and the lawyer must be based on the assumption and the expectation that it will remain confidential. Confidentiality is a prerequisite for building the right, satisfactory, and effective relationship between the client and the lawyer. The indicated legal representation must meet, according to the opinion of the society, the conditions of a relationship requiring special legal protection. The damage resulting from the disclosure of the confidential content of the communication between the client and the lawyer must outweigh the benefits of waiving the privilege to resolve the dispute[52].

As noted by the Massachusetts State Court, only full and unrestricted knowledge of all facts can be the basis of an appropriate and valid legal service. Otherwise, the value of such service is questionable. In addition, the public good, resulting from an adequate, trustworthy representation of the client by a lawyer, overrides any possible detriment to the course of the trial, resulting from the non-admission of the evidence in question by the court[53].

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[50] *United States v. Bump*, 605 F.2d 548 (10th Cir. 1979).

[51] *Schnell v. Schnall*, No. 80 Civ. 2442 (GLG), 550 F. Supp. 650 (S.D.N.Y 1982).

[52] Wigmore and McNaughton, *Evidence in trials*, 520–530.

[53] *United States v. United Shoe Machinery Corporation*, 89 F. Supp. 349 (D. Mass 1950).

Another justification for the existence of the abovementioned conditions is that, by promoting full freedom in communication, the privilege supports voluntary subordination, thereby fostering effective enforcement. The ultimate consequence of not upholding unfettered freedom of communication is providing untrustworthy legal advice and the inability to direct the client's intentions in a way that enables him to act in accordance with applicable law[54].

As stated by the Court in its ruling from 1981, in order to ensure the compliance of legal services with the law, it is necessary to cover them with full protection against disclosure. At present, the privilege protects not only the content of the communication from the client to the lawyer, but also the content of legal advice provided by the client[55]. It is important not only for the participants in the relationship, but also for the public to communicate in the course of the provision of legal services in confidence. The privilege itself is more effectively exercised by the lawyer himself, if his knowledge of the structure of the privilege is greater than that of the client. The doctrine also notes that bidirectionality of the privilege allows for easier understanding of its rules by a layman, for the clarity of its use by a lawyer, and the accessibility of its use by courts[56].

J.H. Wigmore assessed all evidence privileges in a utilitarian manner. By analyzing the attorney-client privilege, he considered whether in fact the necessity of covering a given content with a privilege was more important than establishing the truth in the court proceedings. The view expressed in doctrine and jurisprudence is that the evidential privileges are a realization of the right to privacy, which, with a few exceptions, must be respected and legally protected. These rules indicate that a lawyer cannot disclose the contents of the information entrusted by the client to the court in the event of disclosure. As such, the American Bar Association has repeatedly suggested that the privilege should include the name client-attorney privilege instead of attorney-client privilege, thus indicating the prin-

[54] *Natta v. Hogan*, 392 F. 2d 686. (1986).

[55] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[56] Edna S. Epstein, *The attorney-client privilege and the work-product doctrine* (Chicago: American Bar Association Book Publishing, 2007), 9.

cipal subject to whom it applies[57]. The practical consequence of the use of the privilege is that there is no compulsory or voluntary disclosure of any information that the client has given secretly to an attorney for legal advice. The privilege, therefore, functions in opposition to coercion and, in addition, functions in two directions: it protects both "spoken word" and "written word" coming from the client or directed to him. The justification for its existence in the legal order is the need to preserve the acquired information in confidence in order to provide effective legal advice. If, therefore, the client receives legal advice in the belief that his openness will be used against him in the future, the legal advice provided will be based on a half-truth, which may in turn result in non-compliance[58]. The Supreme Court of the United States also noted that the confidentiality of a client-lawyer relationship is a guarantee of safe and appropriately granted legal advice, and that, securing a certain entity from infringing its personal rights, it protects the interests of the public and the whole of justice[59]. Despite the fact that the privilege is a prerogative of the client, a legal professional must inform the individual of his ability to use it and protect it by using his knowledge and professional practice.

4. CONCLUSION

Confidentiality of client communications, loyalty and integrity are kind of the anchor of the attorney's confidentiality – as a value – in both the European Union and the United States. Certainly, there are similarities and differences with reference to ethical regulations in civil law and common law systems. An attorney`s obligations of confidentiality is a core of the client-lawyer relationship and is supported with ethical rules regulating legal profession in both compared systems. Without an adequate safeguarding of the value of trust, the client is not able to fully and sufficiently provide information relevant to the defense of his interests. Therefore,

[57] Ibid.

[58] *Fisher v. United States*, 425 U.S. 391 (1976).

[59] *Hunt v. Blackburn*, 127 U.S. 774 (1888).

the individual cannot be sure that the lawyer will represent him effectively, knowing all the necessary details.

In the US, attorney-client privilege applies to any communication between client and a lawyer for the aim of providing legal services in terms of his employment. The protection does not, however, include either the communication if the third party is involved or non-legal roles of the lawyers. Moreover, the privilege does not cover the intention to commit crime and fraud.

In the EU countries Legal Professional Privilege covers written communications concerning the right of defense, including documents prepared exclusively for the aim of seeking legal advice. In both cases, the privilege is applicable at the time, when legal advice is sought or received. As for the written ethical rules, common law codes are more formal and constitute rules rather than standards, while the EU codes are shaped in more general terms.

The construction of the privilege serves similar but not identical purposes in both systems. While in the United States the privilege is set to encourage full and frank communication between lawyers and their clients, In EU countries it mostly exists to protect client`s right of defense. First of all, in the United States the court cannot force lawyers to disclose information obtained through communication with their client. This is the price the American system pays for the protection of the individual's privacy. Increased protection of the secrecy is thus at the expense of the justice system. Neither the client nor the lawyer can be penalized for refusing to disclose the data indicated. If, despite the above, the court order forces the attorney to disclose the privileged content of the communication, it is possible to file a motion in a separate proceeding for the annulment of the judgment, by which the court made the order[60]. At times, however, the courts try to circumvent the privilege, by seeking, at all costs, the grounds for a disclosure or, in other words, for giving up or for inadvertent disclosure, which for them is a certain loophole for the implementation of the principle of seeking truth in a trial. The occurrence of the indicated cases of disclosing a secret by the interested

[60] http://nnedv.org/downloads/NNEDV_CI_Primer_on_Privilege_2015.pdf, accessed March 2, 2020.

person himself, even when it is done unintentionally and accidentally, results in waiver of the privilege. Any disclosure of information protected by a privilege to unauthorized persons leads to the loss of the protection granted by the privilege. Therefore, both the lawyer and his client must be careful not to make the privilege lose its force by reckless action. A European privilege, in turn, may be waived in a democratic country merely for the protection of public security or the national economy, as well as for the prevention of violation of law or for the protection of life, health, morals, freedoms and human and civil rights. The engagement of the authorities in this sphere of confidentiality is admissible only, if it is coherent with the generally applicable law and is connected with one of the situations mentioned above and is necessary to achieve these aims. In other words, the infringement of the sphere of confidentiality will be legitimate and rationalized only under the principle of proportionality and will respond to the legitimate needs of society. Moreover, any exceptions to the rule of confidentiality must be interpreted restrictively and with the justification of such "violation".

The most important difference in the structure of the privilege is the specific power over it. While in the European Union it is essentially the privilege and management it belongs to the lawyer, in the US it is in the client`s possession. It seems that it is the American structure of the privilege that brings the institution of confidentiality closer to the ideal. It is the essence of the principle of freedom, which should be a priority in this type of relationship. In my opinion, this rule is also more honest – the individual has self-determination according to his own needs, but also bears the consequences of his actions. Moreover, on the basis of this system, it is unacceptable to waive the legal secrecy for the benefit of the administration of justice. In American jurisprudence, such proceedings would be regarded as an admission to the weakness of the justice system and its methods of obtaining evidence. The protection of the confidentiality of an individual in law is the effect of a compromise between private and public interest. Therefore, reconsideration of the hierarchy of these goods cannot take place. It should be noted that US legal secrecy is not absolute, but the courts are reluctant to revoke it in the process.

In my opinion, European laws could be inspired by some of the indicated regulations of American law, serving – through this – to improve

the institution of professional secrecy in the performance of the lawyer profession, and thus the well-being of individuals as well as the common good of society.

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REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLV
YEAR 2021, ISSUE 2, pp. 105–129
DOI: https://doi.org/10.31743/recl.11442

EMPLOYMENT OF ADOLESCENTS AND CHILDREN IN THE ASPECT OF POLISH EDUCATIONAL REFORM – CHOSEN LEGAL PROBLEMS

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ABSTRACT

The employment of adolescents is an extremely important phenomenon, although doctrine rarely discusses it. This solution enables young people to gain qualifications early and promises long and successful cooperation for the employer. It should be remembered, however, that at such a young age the most important sphere of life is not work, but education and appropriate psycho-physical development. Bearing in mind the delicacy of children and adolescents, it is necessary to create legal constructions which will protect young people from too early collision with problems connected with work such as: stress, exhaustion, and pressure.
The notion of adolescence is constantly intertwined with the notion of child and it is not easy to judge when these terms are used. This article intends to discuss these terms, and to present them through the applicable laws. In addition, the article presents research on the employment of adolescents and children in Poland based on reports from the National Labour Inspectorate.
The legislator had a difficult task - to create appropriate regulations which would not only make work possible, but at the same time properly secure the already mentioned most important spheres of life of adolescents and children. This task undoubtedly becomes even more difficult when the change of other legal acts forces a rush to regulate such a delicate legal sphere. The aim of this article is

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to present advantages and disadvantages of current legal constructions based on the analysis of regulations and statistics.

Keywords: adolescents, children, child employee, adolescent, worker

1. INTRODUCTION

The subject of performed research is Polish legislation referring to adolescents and children currently in force. It is a vast matter but above all it is very sensitive, thus it requires a diligent analysis and an objective, interdisciplinary approach.

In the report "*Global estimates of child labour 2012–2016*" The International Labour Organisation has estimated that in 2016 there were 218.0 million children between the ages of 5 and 17 years old worldwide. Of all children aged 5–14 employed worldwide, about 53.3% are in Africa, 36.6% in Asia Pacific, 6.5% in America, 2.8% in Europe and Central Asia, and 0.7% are in Arab countries[1]. In Europe and Central Asia, as many as 76.6% of the working children in the region work in agriculture.[2]

Child labour is not always in fact a compulsory phenomenon- more than once it turns out to be a manifestation of human maturity and self-discipline of a young person who tries to achieve independence and shape responsibility through taking consequences for own actions while earning money. There are also many negative sides to child labour. When the burden is excessive, it has a negative impact on their physical and mental health. Less physical fitness, immaturity and lack of ability to predict the consequences result in accidents[3]. Violence, coercion and punishment have often been used to mobilise children to work, resulting in anxiety and depression. Many times during such work, children are exposed to the influence of very strong emotions related, for example to

[1] International Labour Office, *Global estimates of child labour, 2012–2016*, Geneva 2017, accessed December 18, 2020, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_586125.pdf.

[2] Ibidem.

[3] Stanisław Lachowski, *Praca dzieci wiejskich a ich rozwój fizyczny i stan zdrowia* (Lublin: IMW, 1999), 15.

slaughtering their favorite animal[4]. Work also negatively affects the social aspect of the child, because he or she is repeatedly deprived of childhood, time to develop interests, carelessness, while burdening him with excessive duties.[5]

A young person is defined in the legislation as a child or an adolescent in reference to age, not only because of a lack of a proper permissions for taking independent decisions and actions emerging from certain legal effects but mainly for psycho-physical maturity which stays in a process of dynamic evolution as to a particular age defined by the legislator. To not to put it under psychologists or behaviourists criticism, it should be said that the applied threshold is a census only for a legislative reference and does not evaluate mental and physical qualities.

Certain changes referring to legal aspects of working children and adolescents in the Polish legislation were made in recent years. They caused many interpretational disputes that refer to definition of an adolescent, among others. This article tries to answer questions that arose during interpretation of new legal rules which refer to workers under 18 years old not only from labour law perspective but also more widely, in a matter of protection of them under constitutional law. A starting point for effective understanding of this legal aspect is a constitutional model definition in a matter of citizens rights and freedoms of these persons, including the right to work.

2. CHILD AS A LEGAL TERM

The term *'child'* is not defined in Polish legislation. Art. 70 par. 1 of the Polish Constitution from April 2 1997[6] establishes a responsibility for education until 18 years old, in art. 62 par. 1 it gives the active voting right after achieving 18 years old, and in art. 65 par. 3 forbids full time employ-

[4] Ibidem, 16.

[5] Ibidem, 16.

[6] The Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended.

ment of children until being 16 years old. It should then be claimed, that a child is a person below 18 years of age.[7]

The age limit that is written in the Constitution is explicitly stated in art. 1 of the Convention on the Rights of the Child of the United Nations[8] that was ratified by Poland July 7 1991. According to this article, a child is any person that is under the age of 18 years, unless achieving majority earlier- this implies a consent between international and national law. A correlation with positive national law.

There is a connected concept of the *'welfare of the child'* with the term *'child'* in the legislation. Definition of the child itself does give a possibility for understanding of a subject matter of rights, and every other regulation referring to it. Taking into consideration the way of forming of norms in the Convention the term child is not the key for creation of norms but its welfare. In art. 3 par. 2 of the Convention there was implemented a rule according to which parties act to provide protection and care for a child in a way that is required for its own good when taking into consideration rights and obligations of parents, legal guardians or other persons legally responsible for them, who should take every necessary step, both legislative and administrative.[9]

There are no *'welfare of the child'* attributes in the Polish Constitution. Such considerations were severally raised by the Constitutional Tribunal of Poland. In the case K18/02 from April 28 2003 the Tribunal stated that *"Constitution (...) does not define on its own elements of the welfare of the child. (...) the welfare of the child is a general constitutional clause, which reconstruction should be done in reference to constitutional axiology and general assumptions of the system."*[10] *It seems that the clause 'welfare of the child' is a classical clause of the first type. As such, it consists within itself a right for a legislative body to perform, basing on criteria that are outside of the law indi-*

[7] Elżbieta Hanna Morawska, "Ochrona praw dziecka w świetle art. 72 Konstytucji RP: uwagi na tle orzecznictwa Trybunału Konstytucyjnego," *Kwartalnik Prawa Publicznego* 7, no. 4 (2007): 127.

[8] United Nations General Assembly Convention on the Rights of the Child of 20 November 1989 Journal of Laws 1991, No. 120, item 526.

[9] Ibidem.

[10] Polish Constitutional Tribunal, Judgment of 28 April 2003, Ref. No. K 18/02, Journal of Laws 2003, No. 83 item 772.

vidual evaluation in reference to specific situation. In other words, for the first type clause a body that applies a law is authorised to decide about a legal problem depending on evaluation of the situation that appears in a particular case. Then, it is an individual evaluation in aspect of which a body that applies that law may take into consideration common views in reference to what acts for good and what not for the 'welfare of the child', in example but that decision is case-by-case dependent".[11] *"It is without prejudice to the principle of proportionality that the best interests of the child should be a guiding principle of the Constitution and family law, which lies at the heart of all regulations concerning the child, as well as court rulings and decisions interfering with his or her essential interests."*[12] *"The 'Welfare of the child' is a core for all rules referring to a child's rights. It is an instrument for binding norms interpretation and a directive for lawmaking and application of a law, a standard for decision making process in child cases and for settlement of collisions of a child and other persons rights, parents especially."*[13]

Both above mentioned terms- the child and its welfare act together and inseparably and only in this set are fundamental for the lawmaking process that provides protection of rights of a child. The protection is determined in two levels, theoretical which links with the subject matter of a child, and factual which is shaped through application of these rights. There is an important assumption that rights of a child belong to human rights group which is underlined by placement, form and significance of provisions referring to children in the Constitution.

3. CHILD AS A CITIZEN IN THE CONSTITUTION

The Constitution of the Polish Republic, as the supreme legal act is the basis for the State's regime. It sets rules according to which all legal

[11] Morawska, "Ochrona praw dziecka," 131–132.

[12] Polish Constitutional Tribunal, Judgment of 27 May 2002, Ref. No. K 20/01, Journal of Laws 2002, No. 78, item. 716, also Polish Supreme Court, Judgment of 11 October 2013, Ref. No. I CSK 697/12, unreported.

[13] Por. Mirosław Baum and Wanda Stojanowska, *Władza rodzicielska pozamałżeńskiego i rozwiedzionego ojca. Studium socjologiczno-prawne* (Warsaw: Akademia Pedagogiki Specjalnej im. Marii Grzegorzewskiej, 2000), 32.

acts in Poland are created. It is a guarantor for many rights and freedoms under presented the articles, and points special attention on a child and its protection. It happens in alignment with International Acts that are observed in the Polish legal system. Many articles of the Supreme Act pay attention to children and families by establishment of institutions that guarantee them special help and protection. It determines rules for inferior regulations whose goal is to normalize every aspects of general provisions from the Constitution.

The Constitution implements fundamental legal rules for organization of legal order that takes into consideration rights and freedoms of an individual. According to the International Law, a child is a human until the age of 18.[14] Polish law lacks a definition of a child, and because of that the International Legal definition is applicable.

Source for all rights is a dignity that is described in art. 30 of the Constitution. It is inborn, inalienable and creates a source for freedoms and rights for a human and citizen. It is inviolable and its observation is obligatory for public authorities.[15] According to the Tribunal evaluation, the dignity itself is *"(...) a level of reference for a value system, around which the Constitution was built and the legal order in the Country as a whole at the same time."*.[16] The dignity then, is a basic element of the whole system of Constitutional rights and freedoms.

According to article 34 paragraph 1 of the Constitution *'Polish citizenship shall be acquired by birth to parents being Polish citizens. Other methods of acquiring Polish citizenship shall be specified by statute'*[17], so a child becomes a citizen in the moment of being born. It needs to be noticed that children as other natural persons that are under Polish Republic authority use rights provided in the Constitution under art. 37 par.1. In the case *P12/99* the Tribunal noticed that, according to international standards,

[14] United Nations General Assembly Convention on the Rights of the Child of 20 November 1989 Journal of Laws 1991, No. 120, item 526.

[15] The Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended.

[16] Polish Constitutional Tribunal, Judgment of 4 April 2001, Ref. No. K 11/00, Journal of Laws 2001, No. 32 item 386.

[17] The Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended.

meaning of the term *'being under Polish Republic authority'* needs to be considered under a territorial aspect, including exceptions. According to that, for protection of rights of a child on the basis of the Constitution a requirement for having Polish citizenship by that child does not matter, however there are some Constitution based exceptions to that.[18]

The Polish Constitution covers rights and freedoms catalogue and rights of children which are treated particularly. Basic regulation, having significant meaning in shaping the rights of a child, is pointed in the doctrine art. 72 of the Constitution which provides a basic guaranty of those rights. In literature of the subject a discussion is present not only about tasks or responsibilities of public authorities (...) and even not about the State responsibilities but about the Polish Republic. *"It needs to be linked with a gravity that the Constitution creators stressed for problems of children."*[19]

Art. 72 of the Constitution imposes a responsibility on Poland to provide protection of the rights of a child, and it requires an immediate action in case of emergence of a threat for that rights. Fulfillment of the responsibility from paragraph 1 must be in accordance with fundamental principles of the Constitution that are included in the rights and freedoms catalogue. In that case, it links directly with the proportionality principle which refers to all rights and freedoms from the catalogue, and this implicates rights and freedoms of a child.[20] That rule sets limitations between intervention of authorities in family life, personal and private area. Requirements that are an instruction for proportionality preservation are included in art. 31 par. 1 of the Constitution.[21] Constitutional law doctrine pays attention on proportionality application for establishment of limitations which are to be a determining level of State intervention. Firstly, *"limitations of rights and freedoms of a child may be set only in a way of a statute (...). Secondly, they may be set if they are 'necessary in a democratic state', for protection of a public*

[18] Piotr Winczorek, *Komentarz do Konstytucji RP z dnia 2 kwietnia 1997 r.* (Warsaw: Liber, 2000), 96.

[19] Winczorek, *Komentarz*, 96.

[20] Polish Constitutional Tribunal, Judgment of 15 November 2000, Ref. No. P 12/99, Journal of Laws 2000, No. 100, item 1085.

[21] The Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended.

interest which is set in protection of such values as: public security, public order, natural environment, public health, public morality, and freedoms and rights of other persons. Also, violation of proportionality rule is to be evaluated under three criteria which are, a degree of utility of such restrictions for performance of a target for which they were dedicated, then under necessity that is understand as an obligation of necessity for setting such restrictions for a protection of a public interest that they are linked with, and finally through proportionality in a strict sense which means preservation of a correct proportion between effects of implemented regulation and burdens that are implemented on a citizen due to that."[22]. The Tribunal in the verdict from January 12, 2000 P 11/98 took a voice for a problem of setting limitations of rights and freedoms of a child pointing that a target for covering that topic is an answer for a question whether *"'the same target (effect) was not possible to be achieved by using different restrictions, less harmful to a citizen because less (much lower) intervening with one's rights and freedoms."*[23]

Art. 72 par. 1 first sentence of the Constitution points clearly that the State has a responsibility to provide a protection to all children without any limitations. To gather data in that aspect, it is necessary to check the above mentioned Convention on the Rights of the Child. The second sentence of this article shifts it as "beyond level", i.e. it indicates that due to the nature, physical and mental development of a child, as well as the inability to cope with themselves, all children, without exceptions are subject to appropriate protection, in the same manner as every human being, without exclusion to parents or public authorities *"(...) has a right to demand from public legal authorities protection of a child against violence, cruelty, exploitation and demoralisation."*.[24] Paragraph 2 of the mentioned article is a continuation of that thought and general assumptions in that matter but it refers to obligation to provide care and help to children that were deprived of parental care, by public authorities. Now, attention should be paid on subjects which are mentioned in the articles. They are

[22] Morawska, "Ochrona praw dziecka," 129.

[23] Polish Constitutional Tribunal, Judgment of 12 January 2000, Ref. No. P 11/98, Journal of Laws 2000, No. 3, item 46.

[24] The Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended.

two in each case: a child and public legal authorities. A doctrine separates them significantly on primary subject which is a child because for its protection these regulations were created, and secondary subject that are public legal authorities which must implement these rules according to their destination.[25] *"Constitution-maker treating a child as a subject sets according to that an imposition directed to public legal authorities and persons responsible for a child."*.[26] Art. 72 par. 4 of the Constitution obliges public legal authorities to appoint a Children's Ombudsman. On the power of the Constitution this body is raised to the rank of Constitutional bodies, which means that it is fundamental. It is worth noticing that it is the highest body in a rank dedicated to protection of children's rights only.

Pursuant to article 65 par. 3 of the Constitution there was implemented a prohibition for full time employment of children under 16 years of age. This rule is a guaranty for protection of rights of children that stems from art. 72 of the Constitution, and in this case against economic exploitation mainly. According to the Constitution, it does not require to achieve majority for full legal rights to be employed full time during a moment of being 18 years old. The only condition is age.

4. ADOLESCENT AS A WORKER IN POLISH LABOUR LAW

Until amendmens from 2017 there was a model of education system from September 1 1999 that created primary, middle and high schools.[27] In reference to present changes, there is a need to cover also the previous system before 1999 when the education system observed eight classes of primary school and no middle school. At that time, The Labour Code in Section IX, prohibited employment of persons below 16 years old, and for the people who fulfilled this condition it was possible after finishing primary school, with some exceptions included.

[25] Ibidem.

[26] Stanisław Stadniczeńko, "Ochrona praw dziecka wynikająca z art. 19 Konwencji o prawach dziecka oraz art. 72 Konstytucji RP," *Zeszyty Naukowe Państwowej Wyższej Szkoły Zawodowej im. Witelona w Legnicy*, no. 22(1) (2017): 16.

[27] Act of 7 September 1991 on the education system Journal of Laws 1991, No. 95, item 425, as amended.

The Constitution in art. 65 par. 3 clearly establishes that it is forbidden to employ children under age 16, and points that a proper regulation will set forms and a character of employment. It was discussed in doctrine, whether a regulation should cover exceptions from full time employment or cases where part time employment is permitted. After amendment from September 1, 1999 which created middle schools, and thus age of finishing school was 16 years old, the changes were dynamic. According to art. 15 par. 2 of the Act on the Educational System (which was binding at that time) *"child's education responsibility starts at the time of beginning in a school year of a calendar year which a child becomes 7 years old and lasts until the end of a middle school but not longer than after becoming 18 years old."*. Following presented rules, there were crucial changes in the Codes regulations. Prohibition of employment covered persons had not become 16 years old, and graduation from middle school was a condition for employment of an adolescent, but it also had exceptions.[28] While considering the legal status at that time, an assumption was developed that the Polish legislator intends to pursue the goal set out in Recommendation No. 146 of the International Labor Organization *"Members should adopt as their goal a gradual increase of the minimum age for admission to employment or work to 16 years old."*[29] According to mentioned recommendation, Member States obligated themselves to take actions having as a target gradual increase of minimal year that is allowed for taking up a job having by in mind a total liquidation of children's work. In a case of a State that a minimum year for taking up a job is lower than age 15 it is required to take immediate actions leading to increase of that year to age of 15.

According to a fact that the Act on the Educational System was amended in 2017, among others by changes in art. 2^{30}, the eight years model of a primary school was again implemented into the system. In that legal aspect, rules that regulate employment of children from Section IX

[28] Zbigniew Góral, "O dopuszczalności pracy dzieci w polskim prawie pracy w świetle prawa międzynarodowego i europejskiego," *Monitor Prawa Pracy*, no. 6 (2004), accessed March 2, 2019, https://czasopisma.beck.pl/monitor-prawa-pracy/artykul/dopuszczalnosci-pracy-dzieci-w-polskim-prawie-pracy-w-swietle-prawa-miedzynarodowego-i-europejskiego/.

[29] Góral, "O dopuszczalności pracy dzieci,".

[30] Act on the education system of 7 September 1991 Journal of Laws 1991, No. 95, item 425, as amended.

of the Labour Code had to be amended. In 2019 an amendment was implemented, and it lowered above mentioned threshold from 16 to 15 years of age. Presented change does not lead to performance of the Recommendation No. 146 of the International Labour Organization. Subject matter of the amendment was basing only on the age change. The legislator preserved every standard pointing on prohibition of full time employment of children, permission for light work, and employment on a contract. Notion of an adolescent was extended to an additional year by giving 15 years olds an attribute for taking a job unless primary school was finished.

The Labour Code in art. 22§2 and §3 states that: *"§ 2. Anyone over the age of 18 can be an employee. Under the conditions specified in Section nine, anyone under the age of 18 may also be an employee."* Art. 22§2 of the Code, in reference to the art. 190 that legislator sends us, states that an employee may be a person that is 18 years old, and also a person that is 15 years old and did not become 18 years old.[31] Key point condition for employment of an adolescent is also graduation from an eight year primary school as well as presentation of a medical certificate which confirms that the work does not harm an adolescent's health. It is necessary to underline there a distinction between term compulsory schooling and educational obligation. First of them lasts until graduating from a primary school which is in principle until being 15 years old, and second lasts until being 18 years old.[32]

'An adolescent may personally come into work relationship but its capability to perform this action was limited by object matter because in principle that person may take up a job but only as a preparation into a profession, and exceptionally to gain earnings basing on employment contract, only for light work and on conditions which allows for performance of educational obligation. An adolescent may be employed full time by an employment contract for preparation into profession, and for gaining earnings only for light work and in time schedule that allows for fulfillment of educational obligation.'[33] Rules of the Labour Code which regulate a perpetual binding time of a contract

[31] Ibidem.

[32] Arkadiusz Sobczyk, *Kodeks pracy. Komentarz* (Warsaw: C.H. Beck, 2020), 847.

[33] Iwona Anna Wieleba, *Zatrudnianie dzieci w celu zarobkowym według polskiego prawa pracy* (Lublin: Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, 2014), 98–99.

apply to it, and they are mentioned in the art. 195 and 196 of the Code. Also, it needs to be stressed that contract for employment and contract for preparation into profession are not identical. They differ with an object of the performed work, among others. In the case of a contract for preparation into profession an object is referring to acquirement of qualifications, and for a perpetually binding contract it is a salary and work primarily.[34] It needs to be pointed that a reference to a perpetually binding agreement implies that adolescents are taken under special protection because that type of a contract is the most stable and the most legally secured in the Polish Legal System. In art. 195 §2 of the Labour Code we can find a reference to the Minister's Council resolution (in this case it is the resolution of the Ministers Council from 28.05.1996 in reference to preparation of adolescent to work and the rewarding of them) which allows an employer to employ adolescents for own needs to teach them a profession and sign with them a fixed term contract.[35]

When it comes to legal ability to work as a worker that is regulated by the art. 22 §3 of the Labour Code, an adolescent that, according to the Civil Code has only limited legal capacity, may come into legal relationship with an employee on its own, and without required permission of a legal guardian. To sum up, art. 22 §2 need to be considered with a link to art. 190 §2 of the Code, thus working legal capacity has an adolescent that is under the age of 15 years old.

The Code finds exceptions in art. 191 from the mentioned requirement of being 15 years old, and points on three possibilities based on an age and graduation from a primary school.

As a first, a possibility to employ is possible for a person that graduated from a primary school but did not become 15 years old, with limits of the rules for preparation into a profession of adolescents. This limitation does not apply to persons that graduated from an eight years primary school but they are starting their employment in the same calendar year as becoming 15 years old. In that situation they are employed on the rules related to adolescents.

[34] Teresa Liszcz, *Prawo pracy* (Lublin: Wolters Kluwer, 2019), 562.

[35] Ordinance of the Council of Ministers of 28 May 1996 Journal of Laws1996, No. 60, item 278, as amended.

The second possibility covers persons that did not graduate from an eight year primary school and are not 15 years old. The legislator leaves the possibility for employment in order to prepare and teach them a profession, and within the rules that apply to adolescents. Due to fact that it is a specific exception that permits taking a job before graduating from a primary school, it requires certain conditions to be met. Firstly, it may be only if a legal guardian gives a permission, and a psychological clinic gives a positive opinion. Additionally, as an obligatory factor, it is required to get permission of a headmaster of a primary school to perform educational obligation outside of the school, that is located in an area of the employee's living.

We can find in the third group rules to persons that are 15 years old but they did not graduate from a primary school. In this case also a contract for preparation into a profession applies in a form of preparation into a profession, on the proposal of a legal guardian but only if conditions from art. 191 § 2(6) are met, which are: adoption into a centre that prepares for a profession and is based in a primary school or acquiring headmaster permission to perform an educational obligation outside school, that is located in the area of employee's living.[36]

In case of a person that is 15 years old but did not graduate from a primary school and fulfills educational obligation it is possible to come into an employment contract for preparation into a profession after finishing profession preparation course in a form of preparation into performance of a certain job.

It needs to be stressed the role of a legal guardian which gives consent for that contract, or makes a proposal personally. This is a significant difference in relation to an adolescent that personally makes the mentioned decisions.

Adolescent as an employee may come into working relationships in a matter of acquiring profession preparation. Target of such agreement lays within preparation for future job as a qualified craftsmen or a worker. Professions that are in the scope of that education are mentioned in the National Education Minister's Regulation from November 23, 2011

[36] Władysław Patulski and Anna Kamińska-Pietnoczko, "Zatrudnianie młodocianych," in *Kodeks pracy. Komentarz*, ed. Wojciech Muszalski (Warsaw: C.H. Beck, 2019), 687.

in the case of classification of professions of vocational schools.[37] Presently, teaching of a profession lasts from 24 to 36 months. It may come to shortening or lengthening it for no longer than 12 months, and only under certain circumstances which are: pregnancy or a lack of promotion to the next class. The Labour Code protects adolescents and children especially.

According to the art. 200 (1) § 1 *"A young person may be employed on the basis of an employment contract to perform light work"*.[38] Rules do not define directly the term *'light work'*, they only point on certain aspects. Further rules mention that employment which is light work cannot collide with fulfilment of the compulsory schooling obligation, and also cannot cause a threat to the childs health. Additionally, no work that is part of forbidden works for adolescents can be considered as a light work. Key point here is a doctor of an occupational medicine who gives permission after evaluation that aligns with the rules from art. 200 (1) of the Code, whether an employer may list in a catalogue of light works a job proposed by his own. Medical diagnosis targets into evaluation whether proposed works are not too heavy for psycho-mental health and development of an adolescent worker.

Preparation for performance of a specific profession is regulated in the §15- 18a of the Ministers Council Regulation from May 28 1996 relating to professional preparation of adolescents and rewarding of them.[39] Main goal of this form is to *"prepare adolescents to work in a character of a competent worker."*.[40] Preparation may last from 3 to 6 months with exception for Voluntary Labour Corps where this time may be extended until graduation from a primary school but not longer than 12 months, and cannot exceed 18 months in total.[41]

[37] Ordinance of the Minister of National Education of 23 December 2011, Journal of Laws 2012, item 7.

[38] The Labor Code Act of 26 June 1974, Journal of Laws 1974, No. 24, item 141, as amended.

[39] Ordinance of the Council of Ministers of 28 May 1996 Journal of Laws 1996, No. 60, item 278, as amended.

[40] Liszcz, *Prawo pracy*, 566.

[41] Ordinance of the Council of Ministers of 28 May 1996 Journal of Laws 1996, No. 60, item 278, as amended.

Art. 200(2) of the Labour Code points also to special working hours of an adolescent. Weekly working hours cannot exceed 12 hours during period of school classes, and they cannot exceed 2 hours daily for a particular day that school classes are present.[42] In § 3 of this provision the legislator makes a distinction, namely an adolescent until 16 years old may work maximally 6 hours a day without any exception of exceeding it. Art. 202 § 2 is an elaboration of that thought because it points that an adolescent until 16 years old may work maximally 8 hours a day.

The Labour Code regulates also in art. 205 vacation leave for adolescents. It is noticed that present legal regime is less favourable for an adolescent than for an adult in a matter of the first vacation leave. After working for 6 months an adolescent gets a right to the first vacation leave in a matter of 12 working days, and after a year of work an adolescent gets 26 days. If that right was acquired before being 18 years old (even if it is in the same calendar year as 18 anniversary) then it comes to limitation of that days to correspond with workers that worked less than 10 years, and it consists of 20 days. In reference to days off in further working years the article sends us to the art. 157 § 2. One specific rule for adolescents' days off is an order for an employer to provide vacation leave during days free from school classes, which are school holidays. According to the art. 205 § 4 of the Labour Code, *"The employer is obliged to grant unpaid leave during school holidays at the request of a young person being a student of a school for employees; total leave, together with annual leave, cannot exceed 2 months. The period of unpaid leave is counted into the period of work on which the employee' rights are based."*.[43] Having in mind the fact that usually adolescents take up a job at the moment of beginning of new semester, and winter holidays are in many times before 6 months of work for them, there were introduced days off in advance, on the basis of the art. 205 § 3, and it bases on providing that day off even before acquiring a right to it. The purpose is to fulfil rules from art. 205 of the Labour Code that refers to employer's responsibility to provide days off for adolescents during school days off. In situation when days off are not used art. 157(1) § 1 of the Code applies. An employee may

[42] Ibidem.

[43] The Labor Code Act of 26 June 1974, Journal of Laws 1974, No. 24, item 141, as amended.

use days off before the end of the contract, and if this does not happen, then according to the Supreme Court Statement from March 29 2001, an equivalent is to be paid in accordance to the Labour Code.[44]

5. CHILD AS AN EMPLOYEE IN THE PRESENT LEGAL REGIME

After analysis of the provisions of the Labor Code regarding the employment of adolescents, the legal status of the so-called a child in Polish labor law, regulated under art. 304^5 of the Labour Code cannot be omitted. This provision was implemented into the Polish Law due to accession of the Directive 94/33 (EC) from July 22, 1994 relating to protection of adolescents in work on the European level.[45] Art. 304^5 permits a person to work or to take other gainful activities before being 16 years old but only under strict rules. Firstly, a child can take up a job or other activities for an object that leads cultural, artistic, sports or commercial activity. It is a closed catalogue. Additionally, in contradiction with an adolescent's employment there is needed legal guardian approval. Also, it is under approval of certain bodies that are present in a particular Member State. In the matter of Poland, it is an appropriate job inspector who, after receiving specific application from a subject that a child is going to work for may give permission. In a situation of tasks that cause threat to life, physical health, psycho-mental of a child, or causes threat to fulfillment of school obligation by that child, such inspector rejects the application.

By pointing at cultural, artistic, sport or commercial activity, the legislator distinguished a specific group that definitely did not cause harm to children's health and their psycho-mental growth. It is worth noting by taking into consideration axiological analysis that this approach has been shaped many years before, and during legislative actions related to the La-

[44] Polish Supreme Court, Judgment of 29 March 2001, Ref. No. I PKN 336/00, unreported.

[45] Directive 94/33 (EC) of 22 July 1994 on the protection of young people at work. Accessed August 3, 2020, http://orka.sejm.gov.pl/Drektywy.nsf/all/31994L0033/$File/31994L0033.pdf.

bour Law. In 1932 the Convention nr 33 of the International Labour Organization was adopted in Geneva.[46]

In this legal act it was permitted to apply exceptions toward children that are taking part in public spectacles and in production of cinematographic movies, in a character of actors or a supernumerary *"with a profit for art, science and education(...)"*.[47]

Z. Góral in his consideration asks a question *"whether performance of work or other gainful activities by children up to 16 years old for subjects that are involved in cultural, artistic, sport or commercial activity may take a form of employment (in a form of the employment contract), or it may only be in a form of a non-employment contract (especially in a form of a civil contract)."*[48].

According to I. A. Wieleba, this article refers only to gainful activities basing on civil contracts.[49] Substantially, this provision should not refer to employment contracts because, according to art. 22 §2 of the Labour Code such ability to work acquires a person that is 18 years old, and adolescents have this ability but can only take up a job only within the rules in Section IX of the Code. Indeed, article 304^5 of the Labour Code is not presented in this section. The legislator does not categorize activity for a subject that is involved in cultural, artistic, sport or commercial actions as light work.[50] It comes to a particular age fallacy. This article did not change during amendment, so when age requirement was changed from a threshold of 16 years old. Presently, such ability possesses a person that is 15 years old who is categorised as an adolescent.

As a response to Interpellation nr 257799 in the case of complication of adolescents' employment, due to a lack of amendment of implementing

[46] Polish Supreme Court, Judgment of 29 March 2001, Ref. No. I PKN 336/00, unreported.

[47] International Labor Organization, Convention No 33, on the age of admission of children to work in non-industrial professions. Accessed April 13, 2019, http://www.mop.pl/doc/html/konwencje/k033.html.

[48] Góral, "O dopuszczalności pracy dzieci,".

[49] Wieleba, *Zatrudnianie dzieci*, 101.

[50] Góral, "O dopuszczalności pracy dzieci,".

regulations after changes in the Labour Code[51] among others, art. 190 and 304^5 of the Code have different character in the matter of performed activity. An adolescent, according to art. 190 does not perform a gainful job but acquires knowledge and skills in profession, and a child that performs different gainful job basing on the art. 304^5 does a regular job. Additionally, an adolescent performs a preparation for a profession on the basis of the Section IX of the Labour Code, therefore the legislator points that full protection of rights was created, and which regulates employment of adolescents. In the case of children below 16 years old this argumentation is unequivocal- they perform a work on the basis of civil contracts and the Civil Code does not set any protection of that group, therefore a permission from an appropriate labour inspector allows for settlement of conditions of employment with an object that runs artistic, cultural, sport or commercial activity. Mentioned solution is then, the instrument for children's protection.

There needs to be paid attention to the fact that there is a lack of consequences in the legislator actions. Although art. 190 of the Labour Code sets a person that is 15 years old as an adolescent, and allows that person to make their own decisions about possible employment, then during regulation of a working time in art. 202 § 2 it divides adolescents on a group of 15–16 years old, and over 16 years old. It needs to be asked a question in this moment- why adolescents were divided for older and younger? Acquiring knowledge and professional skills is desirable for all adolescents. Also, all of them attend on school classes while acquiring education to their professions. Why then, only persons that are 16 years old are taken under legal protection by the State?

Additionally, independence of an adolescent that is 15 years old in aspect of the ability to work are strengthened by art. 191 § 2(1)- 2(7) in a situation when employment is upon decision of a legal guardian because some requirements were not met.

[51] Response to interpellation No. 25779 on complications in employing minors, incl. due to the lack of amendments to executive regulations following changes to the Labor Code. Accessed August 23, 2020, http://www.sejm.gov.pl/-Sejm8.nsf/InterpelacjaTresc.xsp?key=B55HRK.

6. ADOLESCENT'S AND CHILDREN'S EMPLOYMENT IN THE NATIONAL LABOUR INSPECTORATE REPORTS

When looking for the answer on the question why in practice art. 190 and 304^5 of the Labour Code established two different age limits, it is worth checking annual reports of the Main Labour Inspector working in the National Labour Inspectorate that are available on their webpage. In reference to the Amendment of the Labour Code Act in 2004 when art. 304^5 was implemented, competences of the Inspectorate were extended because it became a body that gives and removes permissions for performance of certain jobs by children until being 16 years old which is essential to perform a job stated in the article. There were 124 applications considered, 119 permissions were given and for 5 cases applications were rejected.[52] The effect of the Amended Code finds its place also in reports of the Inspectorate, because since 2004 there is no topic for adolescents' employment. Crucial attention is given to applications considerations. Unfortunately, there are no statistics for adolescents' work.

The 2005 report provides statistics only for applications to perform gainful activities by children up to 16 years old, analogically to the previous report. The amount of noted applications increased to 424 where 417 of them were approved and 7 rejected.[53] Applications were referring mostly to employment during rehearsals, theatre and opera performances, rarer for commercial and movie plays.[54]

In the 2006 report, it was stated that there were 245 applications for employment of a child up to 16 years old, but after running a control check there were 398 of them, and 392 of which were approved and 6 rejected[55]; in 2007 there were 201 applications, and after the National Labour Inspec-

[52] Chief Labor Inspector's report on the activities of the National Labor Inspectorate – 2004. Accessed May 19, 2019, http://www.bip.pip.gov.pl/pl/bip/px_spr_gip_04_rozdz_03.pdf, 34.

[53] Chief Labor Inspector's report on the activities of the National Labor Inspectorate – 2005. Accessed May 19, 2019, https://www.pip.gov.pl/pl/f/v/34002/spr%2005%2004a.pdf, 33.

[54] Ibidem.

[55] Chief Labor Inspector's report on the activities of the National Labor Inspectorate – 2008. Accessed May 19, 2019, https://www.pip.gov.pl/pl/f/v/33044/s%2008%2002.pdf, 25.

torate investigations there were 376 approvals,[56] then in 2008 there were 214 applications noted and 464 approvals given by the Inspectorate.[57]

The 2008 report content covers a summary section that mentions obeying the Labour Law rules in reference to adolescents. According to the mentioned data, the Inspectorate ran 726 controls of employers who employ adolescents.[58] Amount of working adolescents was estimated at 3914, whereas employers that had been taken under control, were employing 25 thousand workers in total. Major breaches were noted in the topic of the lack of permitted jobs schedule for adolescents for profession preparation- 43% examined. It points to an increase in comparison to 2007 where that amount was 36%.[59] 29% of employers that had been controlled did not run time sheets for permitted jobs in a matter of preparation to an profession.[60] It was claimed that many times adolescents have not been taken under proper preparation which employer must provide in the matter of: missing preliminary medical examination- 437, and also 566 cases for missing medical certificate confirming work's lack of harmful impact on development and safety of an adolescent (they were noted in 22% of controlled employers); lack of preliminary training- 256 adolescents (13% of employers).[61] To sum up, the Inspectorate claimed that mentioned breaches for most of the time are coming from ignorance and rarer, from negligence. It was also said that some of employers are doing it consciously to reduce costs. Although 4 years passed, the Inspectorate's remark about

[56] Chief Labor Inspector's report on the activities of the National Labor Inspectorate – 2004–2007. Accessed May 19, 2019, https://www.pip.gov.pl/pl/f/v/33660/spr%2007-rozdz2.pdf, 21.

[57] Chief Labor Inspector's report on the activities of the National Labor Inspectorate – 2008. Accessed May 19, 2019, https://www.pip.gov.pl/pl/f/v/33044/s%2008%2002.pdf, 25.

[58] Chief Labor Inspector's report on the activities of the National Labor Inspectorate – 2007. Accessed May 19, 2019, https://www.pip.gov.pl/pl/f/v/33660/spr%2007-rozdz2.pdf, 21.

[59] Chief Labor Inspector's report on the activities of the National Labor Inspectorate – 2008. Accessed May 19, 2019, https://www.pip.gov.pl/pl/f/v/33044/s%2008%2002.pdf, 25.

[60] Chief Labor Inspector's report on the activities of the National Labor Inspectorate – 2008. Accessed May 19, 2019, https://www.pip.gov.pl/pl/f/v/33044/s%2008%2002.pdf, 79.

[61] Ibidem.

the lack of proper implementation of the Labour Code rules from Section IX did not change and points at lowering adolescents salary.[62]

What is interesting, is the fact that in the 2009 report the Inspectorate once again returned to presentation of statistics for providing applications for children's work up to 16 years old without mentioning adolescents. It stems from the presented data that 178 applications were noted which covered 547 children, 543of which were approved and only 4 rejected.[63] The same scheme was presented for the 2010 report where the amount of applications was noted for 271, and referring to 682 children. There were 9 rejections and all others were approved.[64]

The reports for 2011, 2012 and 2013 are built within the same scheme by mentioning only the topic of applications. According to data, there were 270 applications which covered 755 children, and all of them were approved in the year 2011[65], 518 of which 824 permissions for work were given and 1rejection provided in the year 2012,[66] 292 applications for work permission of which 732 permissions were given and one rejection noted.[67]

The 2014 report covered the greatest amount of approved permissions for work for children up to 16 years old. There were 1482 applications, and 2246 decisions on that basis- 2238 were positive.[68] Unfortunately, this

[62] Ibidem.

[63] Chief Labor Inspector's report on the activities of the National Labor Inspectorate – 2009. Accessed May 19, 2019, https://www.pip.gov.pl/pl/f/v/32622/r02.pdf, 30.

[64] Chief Labor Inspector's report on the activities of the National Labor Inspectorate – 2010. Accessed May 19, 2019, https://www.pip.gov.pl/pl/f/v/32579/r02.pdf, 32.

[65] Chief Labor Inspector's report on the activities of the National Labor Inspectorate – 2011. Accessed May 20, 2019, https://www.pip.gov.pl/pl/f/v/32576/sprawozdanie%20 2011.pdf%20#page=17, 31.

[66] Chief Labor Inspector's report on the activities of the National Labor Inspectorate – 2012. Accessed May 20, 2019, https://www.pip.gov.pl/pl/f/v/32530/d%2002%20 dzialalnosc%20kontrolna%20i%20prewencyjna%20informacje%20ogolne.pdf, 32.

[67] Chief Labor Inspector's report on the activities of the National Labor Inspectorate – 2013. Accessed May 20, 2019, https://www.pip.gov.pl/pl/f/v/100996/sprawozdanie2013. pdf#page=13, 30.

[68] Chief Labor Inspector's report on the activities of the National Labor Inspectorate – 2014. Accessed May 20, 2019, https://www.pip.gov.pl/pl/f/v/133794/sprawozdanie%20 2014.pdf#page=13, 29.

is the last of the Inspectorate's reports which clearly, and with specific distinction of this rules provide data about adolescents' and children's work.

There is noticed a shift in presented data area performed by the Inspectorate as well as increase of children's work up to 16 years old. Probably it may be an effect of rising social awareness. In reference to adolescents a significant problem is a lack of obedience of rules from Section IX of the Labour Code due to high costs and no economic profits.

It seems that we acquired almost utopian argumentation towards protection of children up to 16 years old due to lack of that protection by the law, and by treating adolescents as a fairly safe group at the same time. Above mentioned reports give a signal that adolescent's employment is full of negligence and breaches.

There can be also found in data from reports about children's work, and precisely speaking amount of permissions given for that work. What about inspection of that work? As a response to interpellation there was given an argument that art. 304[5] is absolutely justified and fair because it guarantees a control by the Inspectorate. What is more, it is required for that wording of the article because there are no other legal rules that would guarantee a protection. It needs to be asked the question then, whether solutions that are present right now are sufficient? Why the State is not providing reports? How a parent, who is to decide whether his child should take up a particular job, should have a certainty that the State provides his child protection in the working environment?

In presented reports a tendency for breaches in reference to adolescents' employment increases proportionally to permissions for children's work. However, no mechanism for combating of this event appeared. At the same time, the change for adolescents age gives only greater opportunity to employers for more breaches and negligence, because they are to work with even younger humans, less conscious and less developed mentally and physically in many cases.

7. CONCLUSIONS

To settle the presented doubts, there needs to be noted in the first place the purpose that Poland sets as a target when implementing Recom-

mendations No. 146 of the International Labour Organization: *'Members should set as their goal gradual increase of minimum year that is permitted for work to 16 years old.'*.[69] The amendment lowering age to 15 certainly does not lead to realization of this assumption.

There cannot be skipped in this place the international definition of a child that was implemented in our State and which states that a child is every person up to 18 years old.[70] A question arises in this context- why the legislator led to privileging children up to 16 years old through the Labour Code rules form? Why, by creation a term of an adolescent that covers persons between 15 and 18 years old the legislator also in this place gives greater privileges and additional protection to adolescents up to 16 years old by permission for 8 hours work daily, just the same as for an adult. Certainly, one of the first answers would be referring to the Constitution and more precisely, to art. 65 par. 3 which prohibits permanent employment for children up to 16 years of age. Then, what is the status of persons that are 16 years old- are they employees who, due to their maturity do not need additional protection?

Undoubtedly, the Constitutional Tribunal is right for claiming that: *"'welfare of the child' is a core of all rules towards children rights. It is the instrument for existing rules interpretation but also a directive towards new law creation and its application. It is also a criterion for evaluation of decisions related to children and settlement of colliding interests of a child and other entities, parents especially."*[71] However, was the welfare always taken into consideration during creation of the present norms?

First of all, there needs to be set a reference to adolescents' diversity by removing provisions that sets 16 years old as less privileged group that should work longer. These persons are still a part of adolescents group, and do not acquire an adult status and are still children, according to the presented definition. Adolescents, no matter if 15 or 16 years old during taking up a job learning a profession still attend to school during that time. Limited amount of hours is for protection of their psycho-mental health,

[69] Góral, "O dopuszczalności pracy dzieci,".

[70] United Nations General Assembly Convention on the Rights of the Child of 20 November 1989 Journal of Laws 1991, No. 120, item 526.

[71] Por. Baum and Stojanowska, *Władza rodzicielska*, 32.

reduction of overload, and for giving them a possibility to attend to school which also requires a preparation. This is established in art. 197 of the Labour Code which obliges an adolescent to educate. There is no justification then, for that distinction.

In reference to art. 304^5 there needs to be claimed that leaving an age of 16 years old is completely incomprehensible because it creates collisions in the practice. In the present legal status, it comes to an event which can be characterized as a double legal subjectivity of a 15 years old human. One person acquires at the same age the ability to work and is treated as an adolescent, basing on art. 190 of the Code, and according to art. 304^5 that person is still a child who requires a legal guardian for making a decision. Explanation of that, although based on protection of a child argumentation, does not trigger that in the presented practice. There need to be made an amendment of the rule by implementation of an age of 15 years old. An additional desirable step is a change to the type of agreements that children are coming into by their legal guardians. Because the Code does not protect children during their work a hybrid concept of civil agreements with additional instruments of child protection should be withdrawn. It needs to be implemented that contracts with children are regular employment contracts and rules from the Section IX do apply.

D*e lege lata* needs to control adolescent work through established bodies for that purpose, to limit potential negative consequences for their health by performed work.

To sum up, rules related to adolescent's work are set in andifferent section of the Labour Code, which is Section IX. This fact points to a special protection of children's work in the Polish Law, which stems above all, from the Constitution and International Legal Acts such as the Children Rights Convention or International Labour Organization conventions. Rules that apply to children's work characterise more severe surveillance and requirements for safety. All aspects that are regulated by rules are for creation of total protection against exploitation, exhaustion, and for fulfillment of educational obligation. However, the last amendment raises a lot of doubts and questions that needs to be further investigated by the legislator for more efficient protection of a worker below 18 years of age, which is presented now.

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REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLV
YEAR 2021, ISSUE 2, pp. 131–152
DOI: https://doi.org/10.31743/recl.12246

STATE RESPONSIBILITY FOR CLIMATE CHANGE DAMAGES

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ABSTRACT

The state's liability for damages in the field of climate change remains one of those areas of international law that has not yet been comprehensively regulated. At present, the Warsaw International Mechanism for Loss and Damage, specific to the norms of international climate law, is not an alternative to the general principles of international law regulating responsibility and compensation issues of the states in the sphere of international climate law. The application of customary international legal mechanisms of responsibility of states in relation to climate damage can be a kind of challenge. Both the damage itself and elements such as causation or the possibility of attributing responsibility to the state pose a significant challenge in the sphere of climate protection. On the other hand, it is impossible not to notice that properly applied norms of general international law make it possible to overcome the difficulties arising from the specificity of the responsibility of countries for climate change. The latest jurisprudence of the International Court of Justice in environmental matters creates a framework for the settlement and implementation of possible liability for damages in the area of climate change.

Keywords: climate change, climate liability, state responsibility, climate change damages

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1. INTRODUCTION

The responsibility of states in the field of environmental protection poses a significant challenge. Although the issue has been present from the very beginning of the formation of international environmental law, it still has not been comprehensively regulated. The need to determine the principles of state responsibility in the area of climate change seems particularly urgent. This is because they are described as the most substantial damage caused by human beings to other human beings in the entire history of our species[1]. This may be surprising, especially when the issue of climate change is becoming one of the leading concerns of both domestic and international law[2]. In the context of responsibility for climate change, the focus is on the obligations of highly developed countries, to developing countries, which not infrequently bear a disproportionate share of the damages and risks associated with climate change relative to their contribution to the greenhouse effect[3]. In this context, it is necessary to analyze the applicability of the general principles of international legal liability of states for environmental damage to climate change-related damage, as well as the effectiveness of specific liability regimes in this area that are evolving under the new emerging field of international environmental law - climate protection law[4].

[1] Janina Ciechanowicz-McLean, "Prawno-ekonomiczne aspekty zmian klimatu," in *Zmiany klimatu a społeczeństwo*, eds. Leszek Karski and Irena Grochowska (Warsaw: C.H. Beck, 2010), 341.

[2] David A. King, "Climate Change Science: Adapt, Mitigate or Ignore?," *Science* 303, no. 5655 (2004): 176.

[3] Jutta Brunnée and Stephen J. Toope, "Climate Change: Building a global legal regime," in *Legitimacy and Legality in International Law. An International account*, ed. Jutta Brunnée and Stephen Toope (Cambridge: Cambridge University Press, 2010), 128.

[4] Janina Ciechanowicz-McLean, *Prawo ochrony klimatu* (Warsaw: Powszechne Wydawnictwo Prawnicze, 2016), 11–12.

2. RESPONSIBILITY OF SUBJECTS OF INTERNATIONAL LAW FOR ENVIRONMENTAL DAMAGE – PRELIMINARY ISSUES

The responsibility of subjects of international law is an area of international law that has not yet been codified[5]. It does not mean, however, that this very important problem of international relations does not exist in international law. It is quite the contrary, as evidenced by numerous analyses of the doctrine as well as a large number of decisions of international courts, which in the field of international legal responsibility of states were able to identify in this area the norms of customary law and successfully apply them[6]. The International Law Commission distinguishes between[7] responsibility for torts under international law and liability for acts not prohibited by international law. In the traditional view, the responsibility of states is connected with a situation, in which as a result of committing an illegal act (as a result of violation of an international obligation by the state) a new legal relationship is created[8], whose content is regulated by secondary norms regulating the consequences of state action that is not in line with legal norms[9]. International legal liability for acts not prohibited by international law is exercised entirely on the basis of primary legislation. It becomes important in this context to analyze the liability of states for non-prohibited acts in the context of obligations having a treaty basis or arising from international custom. The key role in respect of responsibility for transboundary environmental damage, including climate damage, will be played here by the obligation to ensure that actions taken by the state within its jurisdiction and control will not adversely affect other states and territories beyond state jurisdiction. The distinction drawn above between

[5] Władysław Czapliński, *Podstawowe zagadnienia prawa międzynarodowego. Zarys wykładu* (Warsaw: Wydawnictwo Uniwersytetu Warszawskiego, 2009), 155; see also Ciechanowicz-McLean, *Prawo ochrony klimatu*, 153.

[6] Ewa Czech, *Szkoda w obszarze środowiska i wina, jako determinanty odpowiedzialności administracyjnej za szkodę* (Białystok: Trans Humana, 2008), 33.

[7] Ciechanowicz-McLean, *Prawo ochrony klimatu*, 153.

[8] Anna Zbaraszewska, "Prawnomiędzynarodowa odpowiedzialność za szkody transgraniczne w środowisku – problem prewencji," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 70, no. 2 (2008): 117.

[9] Zbaraszewska, "Prawnomiędzynarodowa odpowiedzialność za szkody," 117.

responsibility for torts under international law and liability for acts not prohibited by international law seems in practice to be of lesser importance than is attributed to it by the International Law Commission and part of the doctrine. For example, former President of the International Court of Justice Rosalyn Higgins states that a tort of international law may be the mere fact of allowing damage to occur[10].

The obligation to make reparation for damage resulting from a violation of the norms of international law is considered as one of the fundamental principles of this law. In the classic formula adopted by the Permanent Court of International Justice, it means the obligation to restore the state before the damage occurred[11]. Being an attempt at a comprehensive formulation of the principles of state responsibility in international law, the Articles on the liability of states for acts contrary to international law, constituting a non-binding proposal of the International Law Commission, in Article 31 par. 1 speak about the need to fully repair the damage. The damage itself is understood broadly and takes into account both material and non-material dimensions[12]. A similarly broad interpretation has been adopted by the International Law Commission with respect to the concept of reparation, which can encompass restitution as well as compensation, rehabilitation and even guarantees of non-repetition of violations[13].

With respect to environmental damage, the principles of legal international responsibility of states appear to serve two basic functions. First, they reinforce first-level norms derived from numerous international treaties and custom in the area of environmental protection and environmental damage prevention. Second, they enable states to pursue claims arising out of violations of international law norms in the area of environmental pro-

[10] Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, 2nd ed. (Oxford: Clarendon Press, 2003), 165; see also Christina Voigt, "State Responsibility for Climate Change Damages," *Nordic Journal of International Law* 77 (2008): 8.

[11] Permanent Court of International Justice Ruling Factory at Chorzow (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

[12] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, https://www.refworld.org/docid/3ddb8f804.html, accessed January 31, 2021.

[13] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 34.

tection[14]. The effectiveness of the implementation of these two functions, which is assessed quite critically in the doctrine, remains an open question[15]. The disaster at the Chernobyl nuclear power plant is an example cited in the literature. Despite the obvious damage resulting from the lack of precautionary rules at the plant, the states that suffered in the disaster did not file claims against the USSR. The reason for this was both political (the states that suffered the most were those that were politically dependent on the Soviet Union) and legal doubts about the practical feasibility of such claims[16]. It is worth noting, however, that nowadays it is unlikely that a disaster of this scale will not be responded to by the affected states. Precedents are already appearing. Although the plaintiffs are individuals, the claims are based on public international legal norms. This justifies the high likelihood of damage claims in the specific area of climate law.

3. SPECIFIC BASES FOR STATES' RESPONSIBILITY FOR CLIMATE DAMAGE

In addition to the norms of customary law codified in the work of the International Law Commission, the norms of States' compensatory liability for damages resulting from climate change can also be identified within the specific regime of international climate law. If the norms regulating the exercise of States' compensatory liability for damages resulting from climate change function within its framework, norms of this type would exclude or limit the possibility of applying the general principles of States' compensatory liability[17]. However, it would be relatively difficult to derive the theses from the norms of international climate law that they

[14] Voigt, "State Responsibility," 3.

[15] Francisco Orrego Vicun, "Institut de Droit International – Resolution on Responsibility and Liability: Responsibility and liability for Environmental Damage under International Law: Issues and Trends," *Georgetown International Environmental Law Review* 10 (1998): 279.

[16] Voigt, "State Responsibility," 3.

[17] Bruno Simma and Dirk Pulkowski, "Of Planets and the Universe: Self Contained Regimes in International Law," *European Journal of International Law* 17, no. 3 (2006): 529.

constitute an example of a classic self-contained regimes[18], nevertheless, certain elements related to the implementation of state responsibility may find their source in these norms. Opinions appear in the doctrine that the United Nations Framework Convention on Climate Change, along with other treaties relating to climate protection and decisions of the Conference of the States Parties, is sufficiently operative to exclude the application of liability instruments based on custom, in particular the principle prohibiting the use of the territory of the state in a way that would generate negative cross-border impacts[19]. However, such opinions do not seem to be sufficiently justified at present.

In the context of the specific grounds for the implementation of international legal responsibility in climate protection, a special role is played by the Paris Agreement[20], and especially the Warsaw International Mechanism for Loss and Damage contained therein, which was adopted during the Conference of the States Parties to the Convention in Warsaw (COP19). In accordance with the assumptions of the Bali Action Plan adopted in 2007, efforts have been made to create a mechanism to ensure full, effective and sustainable implementation of the Convention[21]. This mechanism was intended as a response by developed countries to the challenges faced by developing countries in the area of climate change adaptation, and as a political cost of engaging developing countries in climate change mitigation processes[22]. The shape of this instrument of international climate law was determined at the Conference of the States Parties to the Convention in Lima in 2014 (COP20).

The arrangements for the Warsaw International Mechanism for Loss and Damage were introduced into the Paris Agreement adopted in 2015 in

[18] Małgosia Fitzmaurice and Catherine Redgwell, "Environmental Non-Compliance Procedures and International Law," *Netherlands Yearbook of International Law* 31 (2000): 35.

[19] Alexander Zahar, "Methological issues in climate law," *Climate Law* 5, no. 1 (2015): 25–34.

[20] Paris Agreement to the United Nations Framework Convention on Climate Change FCCC/CP/2015/10/Add.1.

[21] Decision 1/CP.13 par. 1.

[22] Decision 1/CP.13 par 1b i 1c, see Benoit Mayer, "Climate Change Reparations and the Law and Practice on State Responsibility," *Asian Journal of International Law* 7 (2017): 195.

Article 8. The introduction of the Warsaw International Mechanism for Loss and Damage into the Paris Agreement is undoubtedly a success for developing countries, whose scope of responsibilities with respect to mitigation actions in the Paris Agreement has been significantly expanded[23].

The conditions for the application of the Warsaw Mechanism in the context of the effects of COP21, within the framework of which the Paris Agreement was adopted, result firstly from the Agreement itself, but also, and it is worth mentioning, from Decision 1/CP.21 concerning the adoption of that Agreement, which constitutes an extremely important tool for interpreting that Agreement[24]. Article 8 of the Paris Agreement emphasizes the role and importance of preventing, reducing and remedying loss and damage associated with the adverse effects of climate change, associated extreme meteorological events, slow-onset events. It also emphasizes the roles of sustainable development in preventing and reducing losses[25]. It identifies areas for collaboration, broadening understanding, action, and support, and provides a framework for working with experts [26]. On the other hand, however, with all due resoluteness, but also with some disappointment in the context of the objectives declared during the preparatory work on the functioning of the Mechanism, on the grounds of Article 8 of the Agreement, it does not, at this stage of its implementation and development, create any binding obligations in terms of liability for damages[27]. The reservation concerning the current stage of implementation of the mechanism mentioned in article 8 of the Agreement is important insofar as paragraphs 2 and 3 of article 8 of the Agreement provide a legal basis for work on the strengthening and development of the mechanism,

[23] Maciej Nyka, "Trade related instruments of promotion of human right to the environment in international climate law," in *Právo na životné prostredie a nastroje jeho presadzovania*, ed. Soňa Košičiarová (Trnava: Trnavská univerzita. Právnická fakulta, 2016), 176.

[24] Mary Jane Mace and Roda Verheyen "Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement," *Review of European Community & International Environmental Law* 25, no. 2 (2016): 204.

[25] Paris Agreement to the United Nations Framework Convention on Climate Change art. 8 (1).

[26] Paris Agreement to the United Nations Framework Convention on Climate Change art. 8 (4–5).

[27] Decision 1/CP.21, par. 51.

also in the direction of the possible creation of conditions for the realization of compensation liability on the basis of this norm.

In the context of Decision 1/CP.21 on the adoption of the Paris Agreement, paragraphs 47–51 play an important role in the context of the Warsaw Mechanism. Here, too, we find provisions on the continuation of work on the development of a compensation mechanism within the specific regime of international climate protection law. Its purpose is to create an organizational structure and procedures for the efficient management of climate-related risks. On the other hand, also in the case of this document, it is impossible to find elements that would suggest the possibility of implementing liability for damages on the basis of its content and the Paris Agreement. The Warsaw Mechanism must be treated rather as serving the promotion of good practices, or creating recommendations, than creating conditions for the realisation of compensation claims[28]. This issue was resolved in point 51 stating that Art. 8 of the Agreement is not related and does not create a basis for liability and compensation.

As stated above, the norms of international climate law do not provide grounds for claims for compensation for damages caused by the effects of climate change. Perhaps as part of the evolution of the system based on the Paris Agreement, the Warsaw International Mechanism for Loss and Damage it will gain such an opportunity. Its evolution is inscribed both in the spirit and in the text of this agreement. And in the face of more and more evident damage resulting from climate change, the development of this mechanism towards the creation of a specific mechanism for pursuing compensation claims in relations between countries seems to be a logical direction. The above assumption is also justified because the creation of an alternative to the liability mechanisms of states based on general principles would, on the one hand, increase the effectiveness of the possibility of realizing such claims, and, on the other hand, would also allow their quantitative, generic or subjective limitation. This is a key issue if we take into account the potential scale of damages and claims.

[28] Florentina Similinger and Benoit Mayer, "Legal Responses to Climate Change Induced Loss and Damage," in *Loss and Damage from Climate Change Concepts, Methods and Policy Options*, eds. Reinchard Mechler, Laurens M. Bouwer, Thomas Schinko, Swenja Surminski, and JoAnne Linnerooth-Bayer (Cham: SpringerOpen, 2019), 196.

4. STATE LIABILITY FOR CLIMATE DAMAGE CARRIED OUT ON GENERAL PRINCIPLES

The impossibility of exercising states' liability for damages in the area of climate change under the specific mechanisms of international climate law by no means precludes the pursuit of such claims. They can be pursued under traditional mechanisms that have been known to international law for years. And while international courts and tribunals have not yet adjudicated climate claims arising in state-to-state relations, it would be wrong to claim that they are not adequately equipped to do so, or that there is no legal or factual basis for such disputes to arise. In fact, courts and tribunals have resolved interstate disputes in the area of international environmental law, and also have a track record in the area of compensation claims.

The articles on the responsibility of states for acts contrary to international law prepared by the International Law Commission in Article 2 provide for two conditions for the recognition of state action as contrary to international law, which will give rise to state responsibility. The first essential condition is the imputability of the act or the omission to the state. In the context of liability for climate damage, the implementation of this condition may give rise to certain practical difficulties. It must be remembered that climate change is the result of the sum of actions taken by all jurisdictions accumulating over the decades basically since the industrial revolution. Moreover, anthropogenic emissions coexist with emissions resulting from natural processes, and their separation is possible only conventionally and imprecisely. It should also be remembered that anthropogenic emissions for the most part do not result from the activities of states *per se*, but from entities operating on their territory. On the other hand, international legal liability, including liability in the area of environmental protection or climate law, may arise both as a result of actions taken by the state and as a result of omissions[29]. The obligation of due diligence requires the state to counteract, control the activities carried out on its territory and also, in international legal terms, to assume some responsibility for cross-border impacts resulting from the activities of private

[29] Maria Magdalena Kenig-Witkowska, *Międzynarodowe prawo środowiska. Wybrane zagadnienia systemowe* (Warsaw: WoltersKluwer, 2011), 140.

entities located on the territory of the state[30]. Obligations of a procedural nature incumbent on the state to implement the principle of prevention were identified by the International Court of Justice in the Pulp Mills case[31]. The possibility of attributing liability to the state for environmental damage caused by private entities operating within its territory precisely in the event of a breach of good governance standards was identified by International Court of Justice Judge Shahabuddeen in his dissenting opinion in Nauru vs. Australia[32].

The International Law Commission, in its 2001 articles on the prevention of transboundary damages, identifies the conditions under which state action can be considered to manifest due diligence. The ILC's Special Rapporteur, P.S. Rao, in his second and third reports, identifies the definitional elements of due diligence, i.e.: (1) a State should have a legal system and material means sufficient to guarantee the fulfilment of its international obligations; (2) a State should establish and maintain an adequate administrative apparatus to enable it to fulfil these obligations; (3) the degree of due diligence required may vary according to the degree of development and technical awareness of individual States; (4) industrialized and technologically advanced States may be expected to take more far-reaching preventive measures; 5) each State, irrespective of its level of development, must monitor the risky activities carried out in its territory; 6) the degree of diligence required must be proportionate to the degree of risk involved in the type of hazardous activity in question; 7) the damage must be foreseeable; 8) the State must know or ought to have known that activities entailing the risk of significant transboundary damage are being carried out in its territory; 9) the greater the degree of unacceptable damage, the greater the diligence required to prevent transboundary damage must be[33].

[30] James Crawford and Simon Olleson, "The Nature and Forms of International Responsibility," in *International Law*, eds. Malcolm D. Evans (New York: Oxford University Press, 2003), 79.

[31] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14.

[32] Certain Phosphate Lands in Nauru, (Nauru v Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992 p. 240.

[33] Zbaraszewska, "Prawnomiędzynarodowa odpowiedzialność za szkody," 121–122.

The second condition identified by custom and reaffirmed in article 2 of the Articles on Responsibility of States is the possibility of a breach of an international legal obligation. This obligation may arise from the norms of customary law, but also, it should be emphasized, the norms of international climate law increasingly often contain precise obligations, which seem to be able to provide a substantive legal basis for compensation claims. Relatively often, when resolving disputes in the area of environmental protection, the prohibition arising from international custom to conduct activities whose negative effects will affect the territory of another state, or areas beyond the jurisdiction of states, is used as a substantive legal basis. This restriction, which implements the Latin maxim *sic utere tuo, ut alienum non laedas*, is much more rooted in the civil law tradition[34], than international environmental law, where it has been identified for a relatively short time[35]. This principle of customary law is nowadays reflected in a number of acts of international law[36], e.g. the Stockholm Declaration[37], Rio de Janeiro Declaration[38], or directly in acts of international climate law - the United Nations Framework Convention on Climate Change[39]. Two primary obligations under the principle of refraining from engaging in activities that have a negative transboundary impact are identified. The first concerns the obligation of states to prevent, reduce and control pollution and environmental damage. The second refers to the obligation to cooperate internationally in the area of reducing environmental risks by notifying hazards, negotiating and, where appropriate, carrying out environmental impact assessment procedures[40].

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[34] Ciechanowicz-McLean, *Prawo ochrony klimatu*, 153; Kenig-Witkowska, *Międzynarodowe prawo środowiska*, 139.

[35] Patricia Birnie and Alan Boyle, *International Law & the Environment*, 2nd ed. (Oxford: Oxford University Press, 2002), 104.

[36] see Kazimierz Kocot, *Prawnomiędzynarodowe zasady sozologii* (Warsaw-Wrocław: Polskie Wydawnictwa Naukowe, 1977); Janina Ciechanowicz-McLean and Maciej Nyka, *Environmental Law* (Gdańsk, Warsaw: Wolters Kluwer, 2016), 114; Kenig-Witkowska, *Międzynarodowe prawo środowiska*, 139.

[37] Principle 21.

[38] Principle 2.

[39] United Nations Framework Convention on Climate Change A/RES/48/189.

[40] Ciechanowicz-McLean and Nyka, *Environmental Law*, 116.

The jurisprudence of the principle of avoiding negative transboundary impacts was first formulated in 1941 in the famous case of Trail Smelter, in a dispute between the United States and Canada. Analyzing the obligations of states in the field of preventing transboundary emissions, the Arbitration Tribunal stated that states have no right to use their territory or allow it to be used in a way that would cause property or personal damage, if these impacts are serious and the existence of the damage is confirmed with clear and convincing evidence[41]. This principle, and the conditions for implementation of states' responsibilities arising from the Trail Smelter case, were subsequently reaffirmed in the Corfu Channel Case[42]. Here, the International Court of Justice held that it is the duty of every state not to allow its territory to be used in a way that conflicts with the powers of other states[43]. In the context of environmental protection, in its Advisory Opinion on the Legality of the Use of Nuclear Weapons, the International Court of Justice stated that the environment is not an abstract concept, but constitutes a living space and determines the quality of life and health of human beings, including future generations. The general obligation to ensure that actions taken by states within their jurisdiction and control respect the environment of other states and areas beyond the limits of state jurisdiction is now part of the body of international environmental law[44]. In a similar vein, this reflection was repeated in the Gabcikovo-Nagymaros case where the International Court of Justice held that the duty to prevent transboundary environmental damage as formulated in the Trail Smelter judgment is now part of international environmental law[45].

[41] Trail Smelter (United States, Canada), 3 UNRIAA, p. 1905, 1952.

[42] Corfu Channel, United Kingdom v Albania, Judgment, Merits, [1949] ICJ Rep 4.

[43] Corfu Channel, United Kingdom v Albania, Judgment, Merits, [1949] ICJ Rep 4.

[44] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226 par 29.

[45] Gabčikovo-Nagymaros Project, Hungary v Slovakia, Judgment, Merits, [1997] ICJ Rep 7.

5. THE LEGAL AND MATERIAL BASES FOR THE IMPLEMENTATION OF THE RESPONSIBILITY OF STATES IN THE FIELD OF ENVIRONMENTAL PROTECTION

The fact that, at the present stage of its development, there are no procedural or institutional foundations for the realization of the compensation liability of states within the framework of the Warsaw Mechanism, does not make the norms of international climate law incapable of finding within their framework material-legal grounds for compensation claims. Although the violation of the principle of refraining from transboundary impacts results from the norms of customary international law, alternative obligations on the basis of which it is possible to establish the existence of an obligation to protect the climate by the state appear, for example, in the United Nations Framework Convention on Climate Change or in the Paris Agreement. As a consequence of their violation, it becomes possible to initiate second-degree norms resulting from international custom concerning the implementation of liability.

In the context of the above-mentioned considerations regarding the exercise of due diligence by the state, it is worth pointing to the possibility that states violate Article 2 of the Convention, which provides for taking preventive measures related to the stabilization of emission levels in order to limit climate change[46]. The literature also points to Article 4(2)(a) of the Framework Convention on Climate Change as the source of obligations of highly developed countries to take action in the area of climate change[47]. Similarly, the Paris Agreement may constitute a source of responsibility of the states parties, for example, in the area of implementation of ambitious actions declared by the states in order to achieve the goal of the convention listed in article 2. These obligations may concern the state's contribution to the reduction of CO2 emissions (article 4), or the implementation of adaptation goals (article 7).

[46] Voigt, "State Responsibility," 5.
[47] Voigt, "State Responsibility," 6.

6. CLIMATE DAMAGE AS A SPECIFIC TYPE OF ENVIRONMENTAL DAMAGE

International environmental law has not developed a single, common and consistent definition of the environment[48]. This is due to the presence of fragmentation in international law, which can also be observed in the specific area of international environmental law[49], and sectoriality of international environmental law regulations. This is a significant disadvantage if we take into account the fact that international environmental law is defined based on the objective criterion of the regulation[50]. From among the doctrinal definitions that have emerged, given the role of the Stockholm Conference for developments in the operation of international environmental law and, within it, international climate law, it is worth referring to the definition created by Secretary-General U'Thant in the 1969 report Man and His Environment. According to the definition contained therein, the environment is defined as the physical and biological surrounding of a human being, regardless of whether it is a natural or man-made environment.

The concept of climate change is equally important to the issue of liability for damages caused by climate change. It has been defined in the United Nations Framework Convention on Climate Change as changes in the climate caused directly or indirectly by human activity that alters the composition of the earth's atmosphere and that are distinguished from the natural variability of the climate observed over comparable periods of time[51]. The adverse effects of climate change, which for purposes of considering the liability for damages of states must be equated with damage, are defined in the Convention as changes in the physical environment or biota caused by climate change that have a significant adverse effect on the composition, resilience or productivity of natural, controlled ecosys-

[48] Maria Magdalena Kenig-Witkowska, *Międzynarodowe prawo środowiska, Wybór i wprowadzenie Maria Magdalena Kenig-Witkowska* (Warsaw: Wolters Kluwer, 2009), 16.

[49] Karen Scott, "International environmental governance: managing fragmentation through institutional connection," *Melbourne Journal of International Law* 12 (2011): 3.

[50] Maciej Nyka, *Instrumenty ograniczania wpływu handlu a środowisko. Studium z prawa międzynarodowego* (Warsaw: Difin, 2018), 39.

[51] Art. 1 pt. 3.

tems or on the functioning of socioeconomic systems or on human health and welfare[52]. The definitions cited above indicate the broad spectrum of potential damages that may be considered for international climate compensation liability. They also give some idea of the size of potential compensation claims in this area.

7. THE PROBLEM OF ESTABLISHING A CAUSAL RELATIONSHIP AND ATTRIBUTING THE OCCURRENCE OF CLIMATE DAMAGE

An issue often raised in analyses relating to the feasibility of climate damage liability is that of causation. This is, in fact, a key issue, the resolution of which seems to be at least as important as the possibility of attributing liability. At the beginning of the consideration of the causal link between the behavior of states and the occurrence of damage, it should be emphasized that models and reports relating to the risks associated with climate change and the types of activity causing these changes were already known in general terms in the 1980s. The Intergovernmental Panel on Climate Change, established by the UN General Assembly in 1988[53] has so far prepared five summary reports, which constitute a compendium of scientific knowledge about the causes and effects of climate change.

Another problem and challenge may be that when basing claims on general international law standards of liability, the ability to attribute specific damage to a particular state action is extremely difficult[54]. Similarly, the distinction between damage caused by natural phenomena and damage caused in fact by the same phenomena, but of greater intensity, frequency or scale, resulting from anthropogenic emissions is extremely hard[55]. This is due to the presence of synergies in the context of emissions and the nonlinear impact of these emissions on the occurrence of

[52] Art. 1 pt. 1.

[53] Protection of global climate for present and future generations of mankind United Nations General Assembly Resolution of 6th December 1988 A/RES/43/53.

[54] Kenig-Witkowska, *Międzynarodowe prawo środowiska, Wybór i wprowadzenie Maria Magdalena Kenig-Witkowska*, 139.

[55] Mayer, "Climate Change Reparations and the Law," 204.

adverse effects of climate change[56]. Therefore, it may become a problem to demonstrate the direct and specific impact of the state's actions or omissions on climate change, especially on the resulting damage. It must be remembered that Art. 31 (2) of the articles on the liability of states for acts contrary to international law, and in fact the commentary to this article indicates the exclusion of damages in which the cause of the occurrence is too distant and the causal link is not direct[57]. On the other hand, the jurisprudence of international courts seems to indicate something quite different. In the Naulilaa case, the Arbitration Panel indicated that even the relatively distant negative consequences of an attack on Portugal's colonies could be foreseen[58]. In the Corfu judgment, the Tribunal considered that the probability of occurrence of damage [59] related to the lack of response from the Albanian authorities, was sufficient.

In the context of problems with indicating a causal relationship, it is also worth pointing to the specificity of cases settled on the basis of the norms of international environmental law. In the case of *Southern Bluefin Tuna.* The International Tribunal for the Law of the Sea made a very interesting use of the precautionary principle. Its use in the assessment of the dispute between Japan and New Zealand and Australia resulted in the lack of the need to prove beyond any doubt the existence of a link between actions and possible damage, in particular when we are dealing with a cause-and-effect relationship which is complicated[60].

8. INTERNATIONAL LEGAL CHALLENGES TO ESTIMATING CLIMATE DAMAGES

An extremely interesting issue related to the realization of the compensation liability of states for climate damage is the issue of the method of es-

[56] Kenig-Witkowska, *Międzynarodowe prawo środowiska, Wybór i wprowadzenie Maria Magdalena Kenig-Witkowska*, 139.

[57] art. 31, pt. 10 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries.

[58] The Naulilaa Case 2 R. Int'l Arb. Awards 1011 (1949).

[59] Corfu Channel, United Kingdom v Albania, Judgment, Merits, [1949] ICJ Rep 4.

[60] ITLOS Case No 3 (Official Case No) (1999) 38 ILM 1624.

timating the amount of claims. The doctrine rightly argues that the issue of measurability of damages caused to the environment as a result of climate change is one of the more interesting problems related to compensation of such damages, and their legal assessment depends on the findings of natural and economic sciences in terms of the effects of climate change on the environment of the Earth[61]. Past practice of international courts and tribunals indicates that most environmental damage valuation processes involve small and non-catastrophic changes in the condition of individual environmental elements[62]. Damages on a global scale, and climate damage can be treated as such, are so far beyond the jurisdiction of these courts.

Reflection on the choice of an international court indicates that the most intuitive one would be the International Court of Justice operating within the structures of the United Nations. The International Court of Justice has rarely ruled on issues relating to the assessment of damages. Among the three cases in which the Court addressed this issue, only one referred to the problem of compensation for environmental damage. That case was decided in early 2018 and seems to point to a plausible way to estimate damages that could be applied to climate damage. In Costa Rica vs Nicaragua[63], concerning compensation for unlawful interference into water courses, the International Court of Justice upheld the obligation to redress the damage in the form of compensation resulting from the previous jurisprudence. Already in the above-mentioned case of the Factory in Chorzów, the Permanent Court of International Justice pointed to the fact that compensation should remove all effects of illegal activity[64]. The principle of full compensation for environmental damage was identified by the ICJ in the Pulp Mills case, where the Court also recognized the possibility of remedying the harm by paying compensation[65]. On the other hand, in the same judgment, the Court stipulated that compensation in such cases should not be punitive. The principle of full compensation for damage in the context of climatic damage may be subject to important

[61] Ciechanowicz-McLean, *Prawo ochrony klimatu*, 168.

[62] Ciechanowicz-McLean, *Prawo ochrony klimatu*, 167.

[63] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Rep. 2018, p. 15.

[64] 1928 P.C.I.J Series A No 17 p. 47.

[65] Pulp Mills on the River Uruguay ICJ Rep. 2010 (I) p. 103 i 104 par. 273.

limitations, which may be justified by the specific nature and extent of the climatic damage, but also by the characteristics of the state towards which the obligation to compensate has been established[66].

Moving within the boundary conditions cited above, the Court, in deciding on the issue of compensation in Costa Rica vs. Nicaragua, considered as compensable the limitations or loss of the ability of an ecosystem to provide ecosystem services[67]. In the doctrine, ecosystem services are referred to as the circulation of energy and substances in the environment observed by researchers engaged in the analysis of the functioning of ecosystems, and the very existence of the ecosystem provides certain benefits to humans, which are called ecosystem services[68]. The doctrine contains many different definitions of ecosystem services. One of the first was formulated in 1997 by Constanza et al., stating that environmental goods and services consist of flows of matter, energy, and information from natural resources that, together with man-made goods and services, contribute to human well-being[69]. In the case under review, the estimation of environmental damage by this method was advocated by Costa Rica[70].

The Court, in valuing the ecosystem goods and services lost as a result of Nicaragua's unlawful actions, rejected Costa Rica's valuation, which was based on estimating the monetary value of particular categories of environmental goods and services over the time scale necessary to restore them. These calculations made even under the method adopted by Costa Rica seemed overestimated. Instead, it focused on the value of the services provided by the ecosystem as a whole and the difference in their value resulting from the environmental damage caused by Nic-

[66] Mayer, "Climate Change Reparations and the Law," 203.

[67] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Rep. 2018, Par. 42.

[68] Robert Costanza, Ralph d'Arge, Rudolf de Groot, Stephen Farber, Monica Grasso, Bruce Hannon, Karin Limburg, Shahid Naeem, Robert V. O'Neill, Jose Paruelo, Robert G. Raskin, Paul Sutton, and Marjan van den Belt, "The Value of the World's Ecosystem Services and Natural Capital," *Nature* 387 (1997): 255.

[69] Costanza, d'Arge, de Groot, and et. al., "The Value of the World's Ecosystem," 256.

[70] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Rep. 2018, Par. 46, par. 47.

aragua's actions[71]. The Court first identified which ecosystem services were likely to be impaired as a result of the unlawful activity and then assessed the damage separately for each of them. Moreover, the Court took into account when estimating the harm to the availability of ecosystem services not only that these services are likely to be restored after a certain period of time, but also that the restoration of the availability of these services will be gradual and so the damage will diminish over time. The Court also pointed out that the damage will have a different temporal dimension for each of the ecosystem service categories under consideration[72]. The issue of long-term but diminishing over time effects on ecosystem services was also raised in the context of CO_2 sequestration services. Here, the Court disagreed with Nicaragua's suggestion that the damage was one-off and also took into account the multi-year time perspective of the assessed damage.

In valuing the damage to the availability of particular ecosystem services, the Court also took into account the fact that part of the area negatively impacted by Nicaragua was the so-called Ramsar Site, i.e. a protected area included in the list of protected areas of the Ramsar Convention of Wetlands. In the Court's view, this was relevant in valuing the damage to services that sustain biodiversity[73]. In summarizing the estimated damages, the Court referred to the Trail Smelter ruling already mentioned in this article, and the Ahmadu Sadio Dallo case[74], stating that the impossibility of an accurate estimate of the damage should not be an obstacle to its compensation, and that in such a situation, the decision may be based on the Court's equitable estimates[75].

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[71] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, par. 78.

[72] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, par. 82.

[73] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, par. 80.

[74] Ahmadou Sadio Diallo, Guinea v Democratic Republic of the Congo, Judgment, Preliminary Objections, ICJ GL No 103, ICGJ 52 (ICJ 2007).

[75] Ahmadou Sadio Diallo, Guinea v Democratic Republic of the Congo, Judgment, Preliminary Objections par. 86.

9. CONCLUSIONS

The considerations presented above allow the formulation of several conclusions. International climate law, despite its dynamic development and certain aspirations in this respect, has not yet developed a specific system within which States' liability for damages could be exercised. The Warsaw International Mechanism for Loss and Damage is an instrument for the implementation of broadly understood environmental justice, mainly in the intra-generational dimension, but it does not introduce mechanisms for the implementation of compensation liability of states. In the absence of specific mechanisms for the exercise of responsibility for climate damage, claims in this area will be implemented on the basis of mechanisms specific to general international law. The implementation of compensatory liability in relation to climate damage is achievable both under tort responsibility and under the regime of non-prohibited acts liability. In practice, however, this distinction introduced mainly by the ILA Working Group loses its relevance. The exercise of states' liability for damages in the area of climate protection faces a whole range of difficulties. They are inherent in the whole problem of liability for environmental damage. The mechanisms of indemnity liability of states for environmental damage occur both within specific subsystems (nuclear damage, space damage, etc.) and outside them. Difficulties related to the specificity of the implementation of compensatory liability for climate damage appear to be surmountable in light of recent decisions of the International Court of Justice in environmental cases. They indicate the possible directions of argumentation in the event of a dispute concerning the state's liability for climate damage. Concepts based on the acquis of the Convention on Biological Diversity, especially the concept of ecosystem services, are likely to play a leading role in such claims.

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count, edited by Jutta Brunnée and Stephen Toope, 126–219. Cambridge: Cambridge University Press, 2010.

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REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLV
YEAR 2021, ISSUE 2, pp. 153–182
DOI: https://doi.org/10.31743/recl.12223

SPACE TOURISM CHALLENGES

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ABSTRACT

Space is a new destination for tourism. Today tourists can travel the world using many different modes of transportation, including road, maritime, and air. People always want to discover new destinations. Human beings strive to break borders and go beyond - even to the stars. There are new technical and commercial challenges and innovations in reaching outer space. The new transportation business of today has already experienced many ups and downs, but definitely big projects, such as traveling to the Moon or Mars remain the purview of the perennial space powers. The Author considers what kind of challenges space tourism brings (in the commercialization era) and what kind of space governance and policy is needed to make this tourism efficient. Some comparisons referring to airspace and outer space aspects, such as managerial, organizational, and legal have been made. The basic analysis made in this article indicates that the commercial space industry seeks to be new space operators, provided that they operate in a safe and secure manner according to international rules and policies. Good strategic planning and management of space is the key.

Keywords: space tourism, space governance, space policy, aerospace challenges, ICAO, space business

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This publication is financed under the project implemented in the Research Grant Program of the Ministry of National Defense, Republic of Poland.

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1. INTRODUCTION

Space transportation and space tourism issues are not new. Those subjects have been discussed at many international fora in the past. Some observers noticed that the private sector was already active in outer space in the Sixties. Space journeys seem to be a great adventure and a new era of space tourism is coming. The positive trend and the progress made in this domain suggest that space tourism could actually become a factor of space popularization[1]. However, some observers are still very skeptical and see a lot of challenges such as the safety and security of passengers. Among others, space tourism is another niche segment of the aviation industry that seeks to give tourists the ability to become astronauts and experience space travel for recreational, leisure, or business purposes. Since space tourism is extremely expensive, it is a case of a very small segment of consumers that are able and willing to purchase a space experience[2].

Space tourism must be taken seriously. Space transportation of civilian passengers going to Space for pleasure and not as space technical mission members are already a reality. International companies offer already offer sub-orbital, orbital, and lunar trips and there is a long "waiting" list of volunteers waiting to fly to Space. As of today, over 100,000 people have signed up for space travel with private spacecraft companies[3]. While space tourism is currently an expensive mode of travel, experts predict this situation may change soon. Space flight safety may be much more assured within the next ten or fifteen years as space travel becomes more "routine" for the public. The ticket prices will decrease. This article examines some of the challenges associated with such a space transportation system including organizational, legal, safety, and security areas. Space transportation today serves not only as freight services to International Space Sta-

[1] Antonella Forganni, "The potential of space tourism for space popularisation: An opportunity for the EU Space Policy?," *Space Policy* 41 (2017): 48–52.

[2] Isaac Levi Henderson and Wai Hong Kan Tsui, "The role of Niche Aviation Operations as Tourist Attractions, Air Transport: a tourism perspective," 2019, https//www .sciencedirect.com/topiic/socjal-science/space –tourism.

[3] Taiko Kawakami and Taichi Yamazaki, "What women need for space travel," IAC-20-B3.2.9 (x56313), 71st International Astronautical Congress (IAC) – The CyberSpace Edition, 12–14 October 2020, 1–7.

tions or scientific missions but also more and more as touristic purposes. That is the reason why those challenges should be soon governed properly. The suborbital flight that allows people to discover "terra nulla" and to observe the Earth from a different perspective than aviation allows, seems to be better managed than a few years ago[4].

This article is divided into a few sections. Section 1 includes the following topics: the beginnings of the space tourism issue, Section 2 commercialization of space, section 3- space tourism notion, section, 4- governance and policy of Air and Space (with subsections including Air and Space Traffic Management issue, or international air and space organizations). Sections 5 provide some legal challenges for space tourism. The last part of the article includes a discussion and conclusion. The subject of the article is innovative in that it has not been extensively covered in the current literature. The Author's experience in her diplomacy work for the International Civil Aviation Organization as a Polish Council Representative (before her work for national carriers as a subject matter expert for the national carrier and the national regulator as an expert) and member of the ICAO subgroup of Suborbital flights helped in writing this article. Her presence and organization of the conferences and seminars referring to this topic allow this article to address current issues. This article incorporates the latest news and information referring to this subject from organizations such as the Institute of Air and Space, the United Nations treaties, and other regulatory bodies.

2. THE BEGINNINGS OF SPACE TOURISM

Space tourism has experienced some challenges in the past. The current approach to space tourism and the development of vehicles to access space are virtually all based on extensions of the current rocket launch

[4] Małgorzata Polkowska, "Sub- orbital traffic: A new regulatory or non- regulatory discipline," in *Harmonizing Regulatory and Antitrust Regimes for International Air Transport*, ed. Jan Walulik (New York: Routledge, 2018), 189–201.

vehicle and rocket plane development[5]. Seven people have paid to go to space to date, with American multimillionaire Dennis Tito becoming the first space tourist in 2001, flying to the International Space Station. ISS is a modular space station in low Earth orbit. It is a multinational collaborative project between five participating space agencies: NASA, United States, Roscosmos, Russia, JAXA, Japan, ESA, Europe, and CSA, Canada. The ISS serves as a microgravity and space environment research laboratory in which scientific experiments are conducted in astrobiology, astronomy, meteorology, physics, and other fields. It maintains an orbit with an average altitude of 400 kilometers. The ISS circles the Earth in roughly 93 minutes, completing 15.5 orbits per day. For a fee of $20 million USD, Tito traveled to the ISS aboard a Soyuz capsule. During the period from 2001 to 2009, 7 space tourists made 8 space flights only. Orbital tourist flights were set to resume in 2015 but the one planned space tourism flight was postponed indefinitely and none have occurred since 2009[6].

However, in 2019, several private companies in the U.S. began to take humans to space, most for the first time. This is being done by aerospace companies like Blue Origin and Virgin Galactic. Fast technological development of transportation space systems was noted. It seems that the regular transport of passengers and cargo from point A to point A at the Earth through airspace and outer space will be developing very fast. It should be remembered that there is also some criticism, which does not look at the use of space for short suborbital flights in a positive way[7].

It seems that in the near future we will have a significant growth in the number of private entities ready to start operations as suborbital from the land. It will cause traffic in airspace. At present, there is a wide variety of launch infrastructure ex. in Russia, Switzerland, Great Britain or the U.S., which provide different safety rules for handling personnel or third parties on the ground. The space object returning to the ground may

[5] Joseph Pelton, "The international challenges of regulation of commercial space flight," in *Space Safety Regulations and Standards*, eds. Joseph Pelton and Ram S. Jakhu (London: Elsevier, 2010), https://doi.org/10.1016/B978–1–85617–752–8.10023–6.

[6] Marco Aliberti and Ksenia Lisityna, *Russia's Posture in Space, prospects for Europe* (New York: Springer, 2019), 63–64.

[7] Vernon Nase, "Delimitation and the suborbital Passenger: time to prevarication," *Journal of Air Law and Commerce* 77, Issue 4 (2012): 747.

require priority landing. In addition, SpaceX (an aerospace manufacturer) announced in 2018 that they are planning on sending space tourists, on a free-return trajectory around the Moon on a Starship[8].

As Space Watch Global from 4th of February 2021 stated, Elon Musk wants to launch tourists to space. SpaceX is targeting no earlier than the fourth quarter of this year for Falcon 9's launch of Inspiration4 – the world's first all-commercial astronaut mission to orbit – from historic Launch Complex 39A at NASA's Kennedy Space Center in Florida[9].

3. THE SUBORBITAL FLIGHTS

Suborbital flight activity was born many years ago. On June 21, 2004, SpaceShipOne rose to an altitude of over 100 km, which is the imaginary border of Space. This is so-called "Karman lineage". Thus, SpaceShipOne made history as the first private spacecraft. A successful launch from White Knight in October 2004 and his second 7- day journey beyond 100 km started the new era of technology for short suborbital flights with passengers on board. The SpaceShipOne spacecraft took off from the White Knight carrier plane to an altitude of 15 km, after which both vehicles disconnected. The SpaceShipOne pilot turned on a rocket engine that allowed it to fly to a height of over 100 km in a suborbital flight (its speed is too low to enter orbit). After this maneuver was completed, the ship glided back to the airport. Since 2008, thousands of new passengers booked such flights. It's predicted that by 2030, such space tourism may encompass 5 million passengers. This may in turn lead to the creation of adequate infrastructure for tourists with hotels, and orbital sports clubs, or

[8] Turystyka kosmiczna – jak wygląda przyszłość lotów w kosmos?, https://www.speedtest.pl/wiadomosci/esej/turystyka-kosmiczna-jak-wyglada-przyszlosc-lotow-w-kosmos/.

[9] SpaceX will fly four tourists on Dragon into space, https://spacewatch.global/2021/02/spacex-will-fly-four-tourists-on-dragon-into-space/?utm_source=rss&utm_medium=rss&utm_campaign=spacex-will-fly-four-tourists-on-dragon-into-space&mc_cid=a166dadaf10&mc_eid=UNIQID.

space mobility centers[10]. Some voices concern about the inevitable responsibility and liability issues, ownership, or the tourist's status. Sir Branson from Virgin Galactic predicted that a suborbital flight from Singapore to London will last 30 minutes. But of course, this may be cost-prohibitive. The next crucial issue is travel insurance both for the space object and for liability – the space object insurance and liability insurance (insurance "on third parties" and product liability). Such insurance is negotiated in every single case. Some requirements for space insurance are contained in the U.S. Commercial Space Launch Amendments Act from 2004[11].

4. COMMERCIALIZATION OF SPACE

In today's New Space era of commercialization, commercial use of space is more achievable today than ever before. Space community goals to achieve such norms (as in Aviation) to facilitate safe and responsible transportation empower space companies to invest in the new space tourism industry. Space policy is crucial here. Space powers such as the U.S. have space regulations that allow and stimulate private partners to use space and make profitable business based upon passenger transportation[12].

In the U.S. Commercial Space Launch Activities Act (USC Ch. 509) in Title 51—National and Commercial Space Programs in Subtitle V—Programs Targeting Commercial Opportunities as the opportunity of the Act is mentioned inter alia.. "—Congress finds that—private applications of space technology have achieved a significant level of commercial

[10] Taichi Yamazaki, Okabe Yo, and Koike Sota, "Space scooter": space mobility systems used in space hotels and space stations, IAC-20-B3.7.17, 71st International Astronautical Congress (IAC) – The CyberSpace Edition, 12–14 October 2020, 1–7.

[11] Ram S. Jakhu, "Some legal aspects of commercial development of space," the presentations at IASL McGill Macau Conference, 16–21 IV 2007, https://uscode.house.gov/view.xhtml?path=/prelim@title51/subtitle5/chapter509&edition=prelim U.S. Commercial Space Launch Activities Act (USC Ch. 509).

[12] Ram S. Jakhu and Yaw Otu M. Nyampong, "International regulation of emerging modes of space transportation," in *Space Safety Regulations and Standards*, eds. Joseph Pelton and Ram S. Jakhu (London: Elsevier, 2010), 215–238, https://doi.org/10.1016/B978–1–85617–752–8.10017–0.

and economic activity and offer the potential for growth in the future, particularly in the United States. An example of such commercial collaboration is Project Artemis, which seeks to land the first woman and next man on the Moon by 2024, using innovative technologies to explore more of the lunar surface than before. NASA is collaborating with its commercial and international partners to establish sustainable exploration by the end of the decade. Those projects motivated new partners of NASA to cooperate and finally use space for transportation of passengers[13].

The Ansari X Prize marked the beginning of a number of New Space activities that have, over the course of fewer than two decades, changed the basic feature of space activities from originally completely governmental to now increasingly private[14].

In December 2018 Virgin Galactic conducted their first trip to Near-Space. Two pilots reached an altitude of over 82 kilometers. They planned to make additional test flights with the possibility of taking its first passengers – founder Richard Branson being first of all – to Space. Virgin Galactic already sold tickets at a cost between 200- 250 thousand USD[15]. Each of their flights is designed to carry six passengers, who will experience several minutes of weightlessness and be afforded incredible views of Earth as the space plane hops into space, before returning to a runway landing[16].

Virgin isn't the only company hoping to reach Space. Blue Origin, with Amazon CEO Jeff Bezos at the helm, has been making waves with its reusable New Shepard rocket, which has flown to Space 10 times. Now the company is gearing up to launch humans for the first time.

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[13] Christopher Johnson, The Space Law Context of the Artemis Accords (Part 1), SpaceWatchGL Feature (27 May 2020), https://spacewatch.global/2020/05/spacewatchgl-feature-the-space-law-context-of-the-artemis-accords-part-1/.

[14] Stephan Hobe, "A New Format for Space Law?," 2020 International Astronautical Congress (Cyberspace edition) Nandasiri Jasentulyana Highlight Lecture, 14–16 October 2020, 8–16.

[15] Irene Klotz, Virgin Galactic Aims to Fly Space Tourists in 2018, CEO Says, Space.com - 28 April 2017, https://www.sierracountynewmexico.info/press-coverage/virgin-galactic-aims-to-fly-space-tourists-in-2018-ceo-says/.

[16] Jeff Foust, "Origin plans to start selling tickets in 2019 for suborbital spaceflights," July 10, 2018, https://spacenews.com/blue-origin-plans-to-start-selling-tickets-in-2019-for-suborbital-spaceflights/.

Blue Origin plans to start selling tickets for its reusable rocket this year, with rumors suggesting they will charge a similar price to Virgin. Each launch, like Virgin, will also take six passengers to the edge of Space. They will be free to float around the rocket's capsule for several minutes, before returning to Earth via parachute. Another two private U.S. companies – SpaceX and Bo – are launching astronauts to orbit. SpaceX has now launched (November 2020) astronauts to orbit successfully, marking the company's first full-fledged operational mission with humans on board and beginning regularly scheduled commercial flights to the International Space Station. Moreover, SpaceX said that Starship would be able to fly from New York to Shanghai in 39 minutes, rather than the 15 hours it takes currently by airplane[17].

Both firms are contracted by NASA to take astronauts to the ISS, but the companies also plan to fly their own astronauts, a key step towards making Space more accessible and opening up new doors for tourist flights. SpaceX has already begun talking about paid trips to the Moon as early as 2023. Space tourism has been taken much more seriously over the past several years. "Once we see humans flying on commercial rockets from the U.S., I think that space tourism will gain credibility, and that will be great for the industry overall"[18]. Space commercialization (use for commercial purposes such as space tourism) will definitely challenge regulators. Outer space is seen as "a high potential" for the private sector. Transport services of passengers and payloads with the innovative technology in use are a very promising business for many entities. One thing is certain: it will be crucial to construct and introduce such a new legal regime, which can support the private sector. Some observers noticed that new regulation for space tourism should be based on the Chicago Convention 1944 regulating air navigation[19].

[17] Michael Sheetz, "How SpaceX, Virgin Galactic, Blue Origin and others compete in the growing space tourism market," published 26 September 2020, https://www.cnbc.com/2020/09/26/space-tourism-how-spacex-virgin-galactic-blue-origin-axiom-compete.html, accessed October 22, 2020.

[18] Ram S. Jakhu and Rajeev Bhattacharya, "Legal aspects of space tourism, The International Space Station and the Law," *International Institute of Space Law*, no. 45 (2002): 112–131.

[19] Convention on International Civil Aviation, done at Chicago on the 7th December 1944, ICAO Doc. 7300.

5. NOTION OF SPACE TOURISM

Space tourism (under still development), can be defined as human space travel for recreational purposes. There are several different types of space tourism, including orbital, suborbital, and lunar space tourism. Work also continues towards developing suborbital space tourism vehicles[20].

Space tourism challenges regulatory issues related to the restrictions in the use of Air and Space, the definition of space objects and their legal status, the need to exchange traffic rights, and navigation rules in airspace[21]. There is an element of environmental risk that space tourism can incur, thus management of air and space navigation is a primary concern for the main challenge for those states who are engaged in the use of outer space (space-faring states). Besides, there is some concern regarding security issues, because outer space is widely used for military purposes. Some militarization and weaponization problems influence the commercial use of Space[22].

6. SPACE AND AVIATION GOVERNANCE

Air transport, which is a developed industry today, paved the way for Space in the safety, security, and legal domains. This suggests that the space community should consider adopting rules developed by the Aviation international organizations and institutions responsible for such transport[23] or creating a new organization responsible for space. Others think that since space tourism is still an embryonic activity and has been gradually developing through private companies, existing international fora dedicated

[20] Marielle E. Dirkx, "High hopes and low estimates: new space's rocky contractual road," *Journal of Space Law* 36, no. 1 (Spring/Summer 2010): 55.

[21] Małgorzata Polkowska, "Sub- orbital traffic: A new regulatory or non- regulatory discipline," in *Harmonizing Regulatory and Antitrust Regimes for International Air Transport*, ed. Jan Walulik (New York: Routledge, 2018), 189–201.

[22] Małgorzata Polkowska, *Prawo bezpieczeństwa kosmicznego* (Warsaw: Europrawo, 2018), 68.

[23] Armando A. Cocca, "Five centuries of contributions to a legal concept of peace," in *International Space – Miscallanea, liber amicorum honouring Andrzej Górbiel in his 65 Anniversary*, ed. Edward J. Pałyga (Koszalin: Bałtycka Wyższa Szkoła Humanistyczna, 1995), 41.

to the space theme, such as the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS) are sufficient. Discussions within UNCOPUOS will inevitably address issues relating to the rights and obligations of space tourists, responsible companies, and states[24].

Space tourism needs good governance: policy and planning. If states want to develop a space tourist business and a new destination, safety and security rules must be provided. However, some observers noticed that the private space sector is more active when the governmental activities go down. Space and Aviation differ in strategy and planning. For example, in Aviation, there is a long list of regulations provided by the International Civil Aviation Organization (so-called "UN sister organization responsible for airspace"). Those rules are applied by IATA (International Aviation Transport Association) in cooperation with airlines worldwide (e.g., the establishment of international airports). All rules made by ICAO must be adhered to by all aviation organizations. Those also apply to the Air Transport Management (ATM) as a comprehensive and unified set of regulations for air traffic. Air Traffic Controllers governs air traffic and let airlines in reaching new destinations[25].

a) Space Traffic Management

Today, such regulations do not yet exist. Space Traffic Management (STM) rules are missing[26]. It is unclear how or under what authority any entity could manage/control space traffic. It is more likely that an entity could help to facilitate the coordination between operators. The concept of STM is of intense interest today, primarily due to the increase in Space population and the ever-increasing quantity and complexity of Space actors (both states and companies). There are continual and substantive

[24] Jonathan C. P. Andrade, "Space tourism and Space Law: approach based on the law applicable to astronauts," IAC-20,E7,1,16,x57317, 71st International Astronautical Congress (IAC) – The CyberSpace Edition, 12–14 October 2020, 1–4.

[25] "The rules of the Air"-Annex 2 to the Chicago Convention 1944 (ICAO Doc 7300).

[26] Ntorina Antoni, Christina Giannopapa, and Kai-Uwe Schrogl, "Legal and policy perspectives on Civil- Military Cooperation for the Establishment of Space Traffic Management," *Space Policy Journal* 53 (2020): 1–9.

collision risks in both LEO (Low Earth Orbit) and GEO (Geostationary Orbit) orbit regimes. Moreover, "mitigation of this risk requires satellite operators, space object tracking entities and flight dynamicity to be ever vigilant and expend considerable resources and attention to ensure safe and efficient use of space for current and future generations"[27].

There are different phases of space flight which all need STM in order to ensure safety and orderly flow of traffic, both for spacecraft and aircraft. These phases include the launch, in orbit, and reentry phases. The question arising refers to the necessity of STM regulations? The interference of launching objects with air traffic is unavoidable. Spacecraft cannot reach outer space and return to Earth except through the same airspace that aircraft are using. Thus this physical interference of air flights and space flights needs to be handled by an effective traffic management system so that the safety of both aircraft and space objects is not jeopardized. There are high risks of a collision between operating and non-operating objects in orbit that would result in the creation of more space debris[28]. There is a need to guarantee the safety and sustainability of Space while the space objects are in outer space. The most complete research conducted in regard to STM is reflected in a report called the Cosmic Study on Space Traffic Management of 2006, which was prepared by the International Academy of Astronautics (IAA) study group. This report defines STM as a set of technical and regulatory provisions for promoting safe access into outer space, operations in outer space, and return from outer space to Earth free from physical or radio-frequency interference. This study was updated and reissued in 2018 "Space Traffic Management - Towards a Roadmap for Implementation". (ESPI report 2020[29]).

[27] Daniel L. Oltrogge, "The "We" Approach to Space Traffic Management," 2018 SpaceOps Conference, https://arc.aiaa.org/doi/10.2514/6.2018–2668.

[28] Christopher Newman, "Space law and the Space law Games: legal liability and mapping the future in orbit," workshop on AMOS (Advanced Maui Optical and Space Surveillance Technologies) 15–18 September 2020.

[29] ESPI report 2020 "Towards a European Approach to Space Traffic Management! Reference source not found. Towards a European Approach to Space Traffic Management," (ESPI 2020), 1.

b) Air Traffic Management

The ATM (Air Traffic Management) and STM challenges also include suborbital flights. Commercial aerospace operations are a reality (as UAS-Unmanned Aircraft Systems); delays in providing a global framework for them resulted in an extremely fragmented system. Due to the advanced technology, the concept of different types of space launch vehicles other than the traditional rocket launch system is being exploited which are likely to lead to significantly reduced launch costs. These concepts include launches from "mother" aircraft (Swiss Space System S3), high altitude launch station (Dark Sky), and "traditional operations" from airports (Rocketplane U.S.). If the suborbital aerospace industry is to grow, segregated operations cannot be the long-term solution. However, to integrate into the existing ATM system will require the development of a new regulatory, operational, and technical framework. This must ensure not only the safety of the suborbital passengers but also of the other users of the ATM system. No legal requirements exist for the management of space traffic.

There are no global regulations relating to traffic management between aircraft and space flights. In some national space legislation there exist some procedures ensuring (as far as practical) safe operations of space activities and separation assurance. However, they were not integrated into the Air Traffic Management System. There is no definition of suborbital operations. That is the reason why legal constraints do still exist. During a suborbital operation, the atmospheric flight phase accounts for much of the flight. For this reason, suborbital flight space objects are commonly considered to be "aircraft", which is why the legal framework of ICAO applies to these vehicles. Besides, suborbital safety standards will be expected to have no negative impact on the safety of other aircraft. Passengers onboard the suborbital vehicle will increasingly demand higher standards of safety than is presently proved. Some private companies are already involved in space cabin personnel training (Space Flight Attendants -SFA) in the case to ensure the highest standard of passenger care, comfort, and welfare, in the name of safety and security during a flight[30] (Kirihara, Taka-

[30] Yuko Kirihara, Chieko Takahashi, and Taichi Yamazaki, "Creating a new business of Space Flight Attendant Service and SFA Academy," AC-20-B3.2.10, 71st Inter-

hashi, Yamazaki, 2020). Target levels of safety will need to be established for suborbital operations. This raises the question of whether a separate suborbital flight traffic management system is needed.

Fast technological development of space transportation systems has been observed since the 2005 time frame. It seems that the regular transport of passengers and cargo from point A to point A at the Earth through airspace and outer space will be developing very fast. It should be remembered that there is also some criticism, which does not look at the use of Space for short suborbital flights in a positive way. In the near future, we may see significant growth in the number of private entities ready to start operations as suborbital from the land. It will cause traffic in the airspace. There is a risk that normal aircraft landing patterns may need to be suspended since a suborbital flight "go around". New objects operate at higher altitudes than aircraft and are less maneuverable, so safety is a big risk. Probably there is a need to change the Annex 7 ICAO (Aircraft Nationality and Registration Marks)[31], and the new definition of aircraft should be added. The changing nature of space objects, which seems to be similar to aircraft, may require some revision of the definition. For example, operations of White Knight Two are in accordance with the existing definition of aircraft, but SpaceShipTwo is not.

c) ICAO and UNOOSA initiatives

Many conferences and seminars refer to this subject. In May 2013 the Institute of Air and Space Law (IASL) at McGill and IAASS (The International Association for the Advancement of Space Safety) organized the conference about the perspectives of aerospace transport. The conference not only analyzed the current situation but assessed the legislative and operational challenges and suggested policy and mechanisms facilitating suborbital transport. During the conference, much was said about the need to standardize safety in space transport. It was stated also that the law should

national Astronautical Congress (IAC) – The Cyberspace Edition, 12–14 October 2020, 1–10.

[31] Aircraft Nationality and Registration Marks- Annex 7 to the Chicago Convention 1944 (ICAO Doc. 1944).

enhance technology and business to be developed. One conclusion was undisputable- safety is still the priority for space passengers. Few issues were raised referring to the liability of space carrier- the question if there is a need to regulate it today or later is still open. Many space experts feel that this subject is not a priority. At the conference, the issue of transit of suborbital flights was also undertaken. As long as the space object is used for space transport and operates in the airspace of one state over the High Seas or in outer space, the transit rights are not necessary.

Transit rights are necessary when flying over one or a few countries in the process of exchanging traffic rights. Aerospace objects will transit above 60–100 km and they may be subject to a bilateral rights regime (and connected charges) needed for operations of commercial objects. As a result the necessary legislative actions should be undertaken by UNCOPUOS. One of the solutions could be bilateral for launching or return operations. It seems that ICAO (and ICAO Legal Committee) is also very interested in the Safety of Air Navigation (including suborbital flights) which is the priority of the Chicago Convention 1944, so close cooperation with UNOOSA is likely necessary. Under the ICAO auspices, the working space group was established, engaging in close cooperation with governments, UNOOSA and ICAO representatives, academia, space industry, and business.

ICAO and UNOOSA Aerospace Symposium in Vienna (29–31 August 2017) observed the need to speed up space legislation in the interest of the space community. The Space Learning Group established Terms of Reference which provided a common approach roadmap. The idea of creating the sub-legal group was also discussed. In the last non-published report after the symposium it was said inter alia, that series of ICAO/UNOOSA Aerospace Symposia brought aviation and space communities closer in mutual understanding and recognition of common areas of interest and concern for current and future aerospace activities.

Aviation safety and space sustainability were among the core areas of consideration in the series of aerospace symposia. Some challenges and hazards such as space weather, and space debris are key areas for further discussion. Other emerging areas included data gathering, analysis and protection, spectrum protection, and harmful interference between radio-communication services, critical ground infrastructures, and the pro-

tection of space systems and aviation systems. Cybersecurity poses a serious challenge that requires further collaboration and dialogue among the aviation, space, and telecommunication sectors to be further explored[32]. There is an increasingly high demand for the launching of payloads. The emerging commercial space transportation sector is evolving rapidly and given different international legal regimes for aviation and space flight and space activities, demand better coordination at the intergovernmental level. ICAO, UNCOPUOS, ITU (International Telecommunication Union), and IMO (International Maritime Organization) will play a significant role here. EASA- (European Aviation Safety Agency) responsible for air safety in Europe became recently also interested in emerging space issues[33].

At the ICAO/UNOOSA conference in Vienna in 2017, some delegates raised the issue of complex activities and legal regimes in Near-Space which needs to be a further study in the case to eliminate the uncertainties, which may restrict the industry. Harmonization of certain requirements as licensing, authorization, supervision of orbital and suborbital activities may help the governments in establishing their internal regulations (during the symposium few representatives of space agencies presented their legislation as an example: France- CNES, Germany- DLR, UK- latest law from 2017 entering into force in March 2018, the U.S.- FAA). It is the reason, why international policies and guidelines are welcome. The report also stated that national authorities are working closely with the industry, the private sector, and non-governmental organizations or academia to define the best requirements for stability, consistency, and predictability in developing and applying a national regulatory framework for commercial space transportation. The representatives of space business underline the need for legislation stability, which makes the business more stable and predictable.

[32] Nayef Al Rodhan, Cyber security and space security. What are the challenges at the junction of cybersecurity and space security?, May 2020, https://www.thespacereview.com/article/3950/1.

[33] Jean Marciacq, Felippe Tomasello, Erdelyi Zsuzsanna, and Gerhard Michael, "Establishing a regulatory framework for the development and operations of sub-orbital and orbital aircraft (SoA) in the European Union," in *Regulation of emerging modes of aerospace transportation*, eds. Ram. S. Jakhu and David Kuan-Wei Chen (Montreal: McGill, 2014), 261–306.

The space sector is growing with new actors and technological advancement in the space field accelerating. The representatives of the Civil Air Navigation Services Organization- CANSO (which brings the world's air navigation service providers, leading industry innovators, and air traffic management specialists together), pointed out that there is a need to further explore the possible future establishment of an international space traffic management system that is interoperable with the global air traffic management system and supporting infrastructure, into which aerospace activities must be safely integrated. EUROCONTROL (European Organization for the Safety of Air Navigation) representatives agreed on that as well.

The report also indicated that the development of international provisions for commercial space transportation was seen as one element requiring further discussion. There is a need to take into account emerging aerospace activities, including human space transportation, the different nature of orbital and suborbital environments, and the inherently different requirements under International Air Law and establish mandates of the intergovernmental bodies involved. There is also a need to clarify the scope of aerospace activities that should be studied, including the elaboration of problem statements, conducting gap analysis, and the determination of the work program. Performance-based standards that consider associated risks need to be considered to allow for the flexibility of future technological development, increase predictability and transparency, and enhanced implementation.

Suborbital vehicles share airspace with aircraft and spacecraft, and it is, therefore, important to consider the notion of "integrity" while regulating the traffic management aspects of different types of flying vehicles to prevent collisions and ensure the optimum use of airspace. The best scenario could be the development of an integrated traffic management system that would render services for all types of aircraft, spacecraft, and suborbital vehicles at all altitudes. However, bearing in mind all the legal hurdles in the existing international legal framework of air and space, as well as the technical complications, this might be too optimistic, at least in the short term.

ICAO established its Learning group of Suborbital flights with international experts. There is hope that they can achieve the most in legisla-

tion (step by step) having much experience with ATM (ICAO technical annexes). The group cooperates with UNOOSA (United Nations Office for Outer Space Affairs) discussed the proposal of creating a new technical annex or amending existing ones[34]. The group's task shall be to examine questions relating to civil space transport in order to better understand the future needs of industry and, in particular, to start to plan safe, effective, and routine activities in an unoccupied space. The aim of the learning group is to check the relevant regulations and recommendations prepared by the Member States and develop a work program for consideration by the ICAO's Air Navigation Commission, including the space theme within GANP and GASP (Global Air Navigation and Global Aviation Safety Plans). The group is to inform ICAO of important matters relating to suborbital flights, collecting, and sharing best practices on these activities in the coming years, and determine whether the space component should be included in future plans for navigation and safety. ICAO encourages the participation of the Commission, in close cooperation with the industry and international organizations, shall carry out questionnaires on transport issues, initiates discussions on the use of airports/spaceports, in order to facilitate suborbital flight operations, space delimitation and aircrafts space and air delimitation, integration of the navigation systems, responsibility for space activities or the necessity of the creation of a new annex on space[35].

[34] Thomas Cheney and Lauren Napier, "Policy Memorandum: Air Versus Space, Policy Analysis: Air versus Space, Where do Suborbital Flights Fit into International Regulation?," *Journal of Science Policy & Governance JSPG* 7, Issue 1 (August 2015): 1–13.

[35] Paul S. Dempsey and Maria Manoli, "Suborbital flights and the delimitation of air space vis a vis outer space: functionalism, spatialism and state sovereignty," Submission to the United Nations Office of Outer Space Affairs By The Space Safety Law & Regulation Committee of the International Association for the Advancement of Space Safety, Reference: OOSA/2017/19 12 September 2017 CU 2017/351(D)/OOSA/CPLA submitted to Office for Outer Space Affairs, United Nations Office at Vienna, P.O. Box 500, 1400 Vienna, Austria. (submissions@unoosa.org) December 9, 2017.

d) ICAO legislation about Space

ICAO has extensive legislation (technical annexes to the Chicago Convention) and the implementation system. These annexes could be amended by adding specific provisions on space issues (e.g. spacecraft, licensing regulation), the Chicago Convention could be updated by establishing ICAO's jurisdiction in space. Due to possible risk potential in the event of a collision between a spacecraft and an aircraft, the amendment of the rules shall consider prevention, i.e. as soon as possible. This applies in particular to suborbital vehicles, which will soon be operating commercial flights. When establishing new SARP's (standards and recommended practices) and complementing existing SARP's, ICAO shall take into account the problems and areas that exist today (e.g. security or environmental protection) rather than in times of need the creation of the Chicago Convention in 1944, hence space should not be a topic foreign to ICAO[36].

One of the working documents for the 175th Session of the ICAO Council of 30 March 2005 presented by the ICAO Secretary-General concerned space matters and was under consideration by the 36 Council members. The Council, due to the increasing importance of commercial transport of passengers has been exchanging views, whether such flights fall within the scope of the 1944 Chicago Convention and are subject to the ICAO regulatory regime. The Council noted that UNCOPUOS had considered possible legal scenarios, with regard to suborbital vehicles, in order not to duplicate tasks. The Council decided to follow the work of the subcommittee and to be kept informed of the outcome of its work. ICAO has participated in several meetings of the subcommittee to see the scope of activities that ICAO could potentially become involved with[37].

ICAO Resolution A29–11 provides that ICAO will continue to be responsible for determining the position of civil aircraft in all matters

[36] Ram S. Jakhu, Tomasso Scobba, and Paul S. Dempsey, *The need for an Integrated Regulatory Regime for Aviation and Space, ICAO for Space*? (Vienna: Springer, 2011), 127–130.

[37] Nancy Graham, "Message from the ICAO," in *Regulation of emerging modes of aerospace transportation*, eds. Ram S. Jakhu and David Kuan-Wei Chen (Montreal: McGill, 2014), 3.

relating to space[38]. ICAO itself refers at a long distance to the immediate necessity of the regulation of space. This refers to the legislative experience of UNCOPUOS and declares that it will cooperate with them. ICAO notes the rapid development of space technologies and new trends (commercialization of space activities, more and more convergence points with civil aviation, e.g. in the area of aircraft and space object contracts). ICAO is not enthusiastic about the creation of a new annex and believes that it is necessary first to get to know and understand the existing problems, and only then create with the help of a study group guidance material. In June 2014 ICAO has sent a State Letter to Member States (AN 1/64–14/41) requesting information on the activities of the space sector in their territories and forthcoming plans on this subject. According to ICAO, it is too early to develop SARP's; at present, there is not enough understanding of the subject to integrate it into the work cycle of the organization. Raising awareness among countries is essential and further research is therefore required.

Aeronautical and space issues have much in common from a safety perspective. Underline here the international dimension of space accidents, involving: passengers, astronauts, or private crew and passengers. ICAO's activities would be based on four pillars, i.e. policy and regulation, safety oversight, monitoring (inspection, search and rescue) and independent accident investigation (to prevent and determine the causes). The current ICAO structure could be expanded to include a new compartment (Space Navigation Bureau) subordinate to the ICAO Secretary-General and Deputy Directors. It would be responsible for issues relating to launch (site related certificates), accident prevention, traffic management (Space Traffic Management), maritime safety oversight, and certification and space medicine (including crew and passenger medical examinations). Besides, the new section would be under the direct authority of the ICAO Secretary and would be independent of the accident office and the Space Safety Oversight Audit.

The idea to change the scope of ICAO's activities was based on the fact that UNCOPUOS was not been able to amend existing space conven-

[38] Use of space technology in the field of air navigation, ICAO Assembly resolutions, Doc 9600, A 29-RES:70.

tions for many years. It was therefore considered that ICAO's competence should now be extended, while clarifying the questions that are still open, such as those concerning the differences between space or the classification of space objects. ICAO could also develop a certification procedure security for commercial space service providers. Operators call on the ICAO to adopt the task of harmonizing air and space law in the following years[39].

It is important here to harmonize the rules within SARP's (as provided for in Articles 37 and 38 of the Chicago Convention). Since, under the ICAO Convention, it is responsible for emissions from air navigation should have an impact on air traffic and the associated space movement. Therefore, it is proposed that the Council of ICAO broadens the organization's scope of activities and amend the annexes (so that ICAO's oversight also covers e.g. suborbital and air traffic-related suborbital flights). Another solution would be to adopt a new treaty. Such a treaty, realized through a small number of ratifications, could address the issues of greatest concern.

The existing ICAO Air Navigation Bureau would therefore extend the scope of its own activities. A separate office would solve the problems at the interface between air and space navigation. The sooner these matters are settled, the sooner any collision between them could be avoided. At present there are no common standards for aerospace operations, there is no vision for the future or hope for new regulations. It is certain that space objects cross the air border at the entry into space. It is often an international space because many of the launches take place from areas located close to the oceans (for safety purposes). ICAO currently has regulations in place - ATM's for aircraft over the High Seas. Object classification should be based on functional approaches.

Another way to address space security issues is to create a new organization, following the example of EASA in Europe. Such an organization would be involved in, inter alia, certification.

[39] Paul S. Dempsey and Michael Mineiro, "The ICAO's legal authority to regulate aerospace vehicles," in *Introduction to space safety regulations and standards*, eds. Joseph N. Pelton and Ram S. Jakhu (Nidjihof: Routledge, 2010), 250–252.

7. LEGAL CHALLENGES

Space tourism also raises questions related to liability (civil or criminal). The 1968 UN Astronauts Rescue Agreement[40] addresses only astronauts and personnel, not passengers. Some observers recommend a broader definition in this regard. The legal regime of astronauts is extremely simple and incompatible with the risks they are exposed to perform activities of interest to humanity. Space tourists, who cannot be considered "personnel", cannot apply the current rules of Space Law. Finally, it is essential to create specific international standards, which will be regulated by internal standards. The legal regime applicable to astronauts is insufficient. There are predictions that they are "sent from humanity", however, this expression does not have, by far, the legal load that it suggests it has. States recognize the importance of astronauts, due to the risks they are exposed to develop activities of interest to them and to humanity, but the list of rights is negligible[41].

In the U.S. 2004 Act, there is also the definition of "crew" and "participants of the space flight". Very similar provisions are included in the ISS (International Space Station) agreement. The status of "tourists" in space is different from "astronauts" in international treaties. According to Art V of OST, astronauts are envoys of mankind in outer space. States shall render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the High Seas. When astronauts make such a landing, they shall be safely and promptly returned to the State of registry of their space vehicle.

In carrying on activities in outer space and on celestial bodies, the astronauts of one State Party shall render all possible assistance to the astronauts of other States Parties. States Parties to the Treaty shall immediately inform the other States Parties to the Treaty or the Secretary-General of the United Nations of any phenomena they discover in outer space,

[40] Resolution adopted by the General Assembly 2345 (XXII). Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (1968).

[41] Jonathan C.P. Andrade. "Space tourism and Space Law: approach based on the law applicable to astronauts," IAC-20,E7,1,16,x57317, 71st International Astronautical Congress (IAC) – The CyberSpace Edition, 12–14 October 2020, 1–4.

including the Moon and other celestial bodies, which could constitute a danger to the life or health of astronauts. Besides, the space journey demands from the traveling public to be well prepared for such a flight. Medical examination and the right psychophysical conditions are necessary to make space travel. So the question of proper preparation and planning such destinations is crucial. Having in mind the tourist branch in space there is also a couple of questions about the ownership rights at the planets or asteroids. There is some media news about Moon tourists based on researches made by astronauts about living there by human beings (one of the arguments is the availability of water). There are some questions about the state's right to hotels. Thus, there is a necessity to update existing and binding Space Treaties to facilitate such new touristic destinations. Among many observers, the international treaties should not regulate too much, but the regulations should be feasible to implement by different local regimes. National law should supplement the international rules. That is the reason why good management of space national policy plays an important role[42].

There are some obstacles to the practical use of existing Space treaties that need new international governance. The status of space travel should be determined as well. The space journey may demand transits through the borders of several states, which are sovereign according to the Chicago Convention 1944[43]. As stated before, there is no border between Air and Space. The national regime may impose restrictions on flights through the airspace. There is no clear and accepted definition of innocent passage of potential suborbital flight as well, which describes the conditions of space flight of the single ship through the air space of different states. Thus the space journey will demand a license from all states whose airspace will be crossed. Since space tourism will be mostly a commercial activity, some states may not agree to issue such a license or may wish to introduce legal or financial barriers in obtaining such. For this reason, states should make

[42] Michel Bourély, "Quelques réflexions au sujet des législations spatiales nationales," *Annals of Air and Space Law* XVI (AASL 1991): 266.

[43] Michel Chatzipanagiotis, "The impact of liability rules on the development of private commercial human spaceflight," in *Proceedings of the International Institute of Space Law: 54th Colloquium on the Law of Outer Space* (Leiden: International Institute of Space Law, 2011), 52–56.

bilateral or multilateral agreements regulating these sensitivities. The situation is further complicated by issues regarding patents, contracts with manufacturers, and others. For future space tourism, the law must be clear and transparent. There is also the need to support this kind of space activity by governments to facilitate those activities by the private sectors.

Due to commercialization, there is a special need to address such legal issues as "spaceports", "launches", "radiation", "space debris" and "radio spectrum frequencies". As it was already stated, the use of air and space law in the case of suborbital flights is still unclear. Suborbital operations issues are quite complex and require cooperation with governments, space agencies, and space entities at the market level[44]. It is not clear, which safety and security provisions must be followed. Pragmatic solutions may be used. As an example, U.S. law permits passengers to be transported on a suborbital flight at their own risk. The carrier should inform the passengers about travel risks and insurance. In space, passenger rights should also be protected. Some authors very openly call for creating the international provisions of civil liability in the name of development of commercial activities in space. The rest think that national law is sufficient in this matter[45].

Suborbital passengers and their safety and security have not yet been regulated. "Suborbital flights" have only recently come to be defined in the framework of national legislation, but in the U.S. they are covered by the law from 2004 about commercial launches. Some authors tried to form such a definition[46].

Suborbital flights and space tourism demand necessary steps to be taken. One of them is a consensus definition of the demarcation between airspace and outer space. Even though the UNCOPUOS included "the

[44] George C. Nield, "A new way to look at things," in *Regulation of emerging modes of aero-space transportation*, eds. Ram S. Jakhu and David Kuan-Wei Chen (Montreal: McGill, 2014), 21.

[45] Hamid Kazemi, Hadi Mahmoundi, and Ali Akbar Golroo, "Towards a new international space Liability regime alongside the Liability Convention 1971," in *Proceedings of the International Institute of Space Law*: *54th Colloquium on the Law of Outer Space* (Leiden: International Institute of Space Law, 2011), 272–273.

[46] Stephan Hobe, Gérardine Meishan Goh, and Julia Neumann, "Space Tourism activities – emerging challenges to air and space law?," *Journal of Space Law* 33, no. 2 (2007): 359–373.

definition and delimitation of outer space" on its first agenda six decades ago and has been deliberating on the issue ever since, these questions have now become all the more important with the proliferation of commercial space activities and accelerated development of suborbital flying machines. The ensuing academic debate between two approaches— Functionalism and Spatialism— have found their way into divergent opinions of States as expressed in international fora, national legislation, and aviation treaties.

After examining the merits and demerits of these approaches, the Institute of Air and Space Law with its partners (IAASS- International Association for the Advancement of Space Safety) made a legal proposal of establishing an intermediate region (18–160 km) between airspace and outer space with a mixed legal regime, instead of an abrupt demarcation line (based on Functionalist or Spatialist approaches) to separate the two regions[47]. Near-Space is an innovative and possible solution for the issue of delimitation of air space and outer space and the proposed draft Convention can be an important start of a discussion[48]. Thus, a specific legal regime for Near-Space is needed. This legal regime should center around limited sovereignty but with full jurisdiction of the underlying State. The new legal regime would hope to illuminate how the conscious economic exploitation of Near-Space can lead to greater sharing of economic and environmental benefits with the public at large. The new idea presented by the Institute used the precedent of the exclusive economic zone (EEZ) and suggests a new categorization of the Near-Space as the exclusive utilization space (EUS) and a set of rules to manage its utilization. Uniformity of law may improve the market's interest in investment in space transportation, and the insurance industry's ability to assess and price risk. Delineation of

[47] Dempsey Paul S. and Maria Manoli, "Suborbital flights and the delimitation of air space vis a vis outer space: functionalism, spatialism and state sovereignty," Submission to the United Nations Office of Outer Space Affairs By The Space Safety Law & Regulation Committee of the International Association for the Advancement of Space Safety Reference: OOSA/2017/19 12 September 2017 CU 2017/351(D)/OOSA/CPLA submitted to Office for Outer Space Affairs, United Nations Office at Vienna, P.O. Box 500, 1400 Vienna, Austria. (submissions@unoosa.org) December 9, 2017.

[48] Tomasso Scobba and Mini Gupta, "Near Space Activities - The Search for a New Legal Regime," 71st International Astronautical Congress (IAC) – The CyberSpace Edition, 12–14 October 2020, IAC-20,E7,VP,13,x59461, 1–8.

which legal regime applies – in air space, near space, and outer space - will clarify rights and obligations, and enhance the margin of safety for aircraft, spacecraft, and aerospace vehicles operating in all three zones[49].

During reentry, the object will transit both through outer space and airspace and may be covered by two different international legal regimes. The same object may be defined as a space object while journeying through outer space. The term "space object" is not defined in international conventions, but from a practical point of view, a space object must be equipped with all components that facilitate its launch. There are some questions referring to the registration of space objects and notification to the UNOOSA (United Nations Office for Outer Space Affairs) - if those provisions can apply to suborbital flight operations as well? There are also a couple of questions referring to state responsibility and liability for space operations. This subject is crucial in the context of environmental protection of outer space (space debris). Aviation and space law are covered by two different legal regimes (Chicago Convention 1944 and Outer Space Treaty 1967[50]), stating about the sovereignty of the states in their airspace and the non-appropriation principle. There is still no certainty about the border between airspace and outer space. The Karman Line (100 km above the Earth) can be such a limit, but it has never been used as a provision of a binding Treaty. Some space-faring nations don't treat this lack of regulation as a problem. The limits can be more political issues than practical. There is still no formal decision on this issue at UNCOPUOS (The Committee on the Peaceful Uses of Outer Space) level.[51]

The use of air and space law in the case of suborbital flights still is unclear. There is no certainty in which safety and security provisions must be followed. Pragmatic solutions may be used (e.g., U.S. law permits the transportation of space tourists at their own risk, as long as the space tourism carrier informs them about the risks and relevant insurance issues).

[49] Liu Hao and Fabio Tronchetti, "RegulatingNear-Space Activities: Using the Precedent of the Exclusive Economic Zone as a Model," *Ocean Development & International Law* 50 (2–3) (2019): 1–27, https://doi.org/10.1080/00908320.2018.1548452.

[50] UN Outer Space Treaty 1967, UN ST/SPACE/11.

[51] Neto Bittencourt and Olavo de Oliveira, *Defining the Limits of Outer Space for Regulatory Purposes* (Cham-Heidelberg-New York-Dordrecht-London: Springer, 2015), 31.

8. CONCLUSION

Space is a new destination that is open to all mankind. According to space treaties, outer space should be used in the interest of all nations on equal and fair conditions. Even though the cost of the space tourism experience today is very high, it is expected to be lower soon due to growing technology and innovations. Fast commercialization and opening new space markets to different international entities should be accomplished in concert with the implementation of professional management of space activities. Space tourism must be managed properly by international space governance, under the auspices of such entities as UNCOPUOS.

States themselves should make their space policies in a manner that fosters the commercial use of outer space. The international space community should support those initiatives to the benefit of all users. In the end, this will help the operators make good strategic plans and find interesting new challenging destinations for more and more demanding clients. Such rules must be implemented and followed by states for common safety and security. Operational risks must be lowered as much as possible. Insurance protection should be involved. All those rules are necessary to make this new kind of tourism profitable and efficient.

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REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLV
YEAR 2021, ISSUE 2, pp. 183–206
DOI: https://doi.org/10.31743/recl.12282

THE ROLE OF THE CENTRAL BANK IN FOREIGN EXCHANGE INSPECTION IN SELECTED COUNTRIES OF THE EUROPEAN UNION – AS SEEN IN THE EXAMPLE OF POLAND, THE CZECH REPUBLIC AND GERMANY

*Ewa Kowalewska**

ABSTRACT

The activity of central banks in EU states is based on similar assumptions. Their aim is usually to maintain a stable level of prices and to support the state's economic policy. Central banks are responsible for issuing money and for monetary policy. They have been equipped with adequate instruments to this end. The aim of this research is to demonstrate that legislation in Poland, the Czech Republic and Germany vested another important function in the central banks, namely foreign exchange inspection. However, this function is exercised differently in each of them. The central banks of countries referred to above are not only responsible for currency in circulation within the country but also for the balance of payments. Also, by pursuing their own foreign exchange policy they ensure an adequate position of the national currency in relation to foreign ones. The foreign exchange inspection in each of these countries is based on a different tradition and at the same time outlines the special role of the central bank. The analysis herein makes it possible to establish the scope of this inspection, taking into account the dynamics of changes that occur on the legal ground. What is also important here is whether a given country is only a member of the European Union or a member of the EU and of the euro area. The adopted research methodology is based on analysis of legislation in force with a reference to views expressed by legal commentators.

Keywords: central bank, foreign exchange inspection, supervision

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1. INTRODUCTION

The history of central banking in Europe dates back to the turn of the seventieth and eighteenth century and the Bank of England can be treated as its prototype. In the ninetieth century issuing banks were established in a number of other countries and in the twentieth century they became universally functioning institutions[1].

In the majority of contemporary countries, the central bank functions as an independent institution. Taking into account the comparative aspect one needs to point to two categories of central banks in European Union (EU) states. These are central banks of countries which belong to the Euro zone and central banks of countries outside the euro area. Given the above, the role and position of the central banks of Poland, Germany and the Czech Republic as examples of central banking functioning on different economic, political and social terms will be presented in further parts of this discussion. The central banks of these countries will be presented principally in terms of their responsibility for foreign exchange inspection.

Each central bank is tasked with a broadly understood monetary policy. On the basis of regulations legally binding in EU countries one may notice that in each of them the central bank has a special place, both in the economic and social system. This specific nature of the central bank results primarily from its monopoly in creating money[2]. Nevertheless, it is not its only capacity. Next to the issuing function, the central bank also has the function of the central bank of the State and of the banks' bank. At the same time, it needs to be stressed that central banks in some EU countries also play another, special function of the so-called

[1] Hans Aufricht, *Comparative Survey of Central Bank Law* (New York, Washington: Frederick A. Praeger, 1965), 7; Hanna Gronkiewicz – Waltz, *Bank centralny od gospodarki planowej do rynkowej* (Warsaw: Wydawnictwo Prawnicze, 1992), 18; Paweł Baltyn, "Modelowe ujęcie polityki monetarnej w warunkach kryzysu," in *Współczesny system bankowy. Ujęcie interdyscyplinarne*, ed. Joanna Świderska (Warsaw: Difin, 2013), 264, 264.

[2] Stanisław Owsiak, "Bank centralny," in *Bankowość*, ed. Małgorzata Zaleska (Warsaw: C.H. Beck, 2013), 13.

central banking foreign exchange institution tasked with foreign exchange inspection.

2. SCOPE OF RESEARCH AND METHODOLOGY

The subject of the described research involves legal instruments relevant to the functioning of central banks in selected EU states, mainly in terms of responsibilities under foreign exchange inspection. Regulations in force in Poland, Germany and the Czech Republic relating to the central bank and foreign exchange inspection feature a different degree of detail. The aim of the analysis is to show the differences and/or similarities in setting standards in the discussed scope. A hypothesis may be put forward against this background that there is no uniform regulation in the area of foreign exchange inspection at the EU level.

The research method adopted by the author was based on the analysis of legislative acts key to the issue in question with reference to selected views expressed in the literature. Given the above, it must be concluded that the main research method involved legal comparison and an analysis of binding law.

The discussed subject-matter concerns the sphere of the functioning of the central bank where even though the principles of operation of central banking are standardized, certain differences may be noticed in the area of foreign exchange inspection. Europeanization in the sphere of central banking should aim to single out universal principles and standards, including central banks' responsibilities relating to the discussed scope. It is especially important due to the principle of freedom of foreign exchange, which shapes inter alia the economic development of EU states, and also due to the central bank's responsibility for security and stability on the financial market.

3. CENTRAL BANKING AND FOREIGN EXCHANGE INSPECTION IN POLAND

Poland's *Narodowy Bank Polski* (NBP), as the central bank, takes a special position in the national banking system in Poland. This position

involves three elements: objectives, scope of functions and responsibilities, and legal status[3]. NBP's main objective is to maintain a stable level of prices. Secondly, it is tasked with supporting the government's economic policy. NBP as a legal person acts through its organs. Pursuant to the Constitution of the Republic of Poland[4] these organs are: the President of the NBP, the Council for Monetary Policy and the Board of the NBP.

In terms of foreign exchange inspection, which is the subject of this research, the President of the NBP holds special powers which are primarily regulated by the Act on the National Bank of Poland[5] and the Foreign Exchange Law[6].

NBP as the central bank performs a number of actions that fit within its functions: the banks' bank, the central bank of the State and the issuing bank. Along with the responsibilities enumerated above, the NBP also holds the function of the central banking foreign exchange institution[7]. It is an organ with a special legal status in terms of foreign exchange which entails the capability of stipulating foreign exchange restrictions[8]. The Act on the NBP includes a catalogue of tasks carried out by the NBP as the central banking foreign exchange institution. These include inter alia foreign exchange reserve management, undertaking banking activities aimed at ensuring the security of foreign exchange and the state's payment liquidity. The NBP may act as the government's financial agent in terms of conclusion and implementation of credit agreements and han-

[3] Rafał Mroczkowski, "Status prawny, cele, funkcje i zadania Narodowego Banku Polskiego," in *Podstawy finansów i prawa finansowego*, ed. Andrzej Drwiłło (Warsaw: Wolters Kluwer, 2018), 351.

[4] The Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended, section 227.

[5] Act on the National Bank of Poland of August 29, 1997, consolidated text, Journal of Laws 2019 item 1810.

[6] Foreign Exchange Law of July 27, 2002, consolidated text, Journal of Laws 2019 item 160.

[7] Krzysztof Oplustil and Marek Porzycki, "Unia walutowa w Europie," in *Instytucje gospodarki rynkowej*, eds. Tadeusz Włudyka and Marcin Smaga (Warsaw: Wolters Kluwer, 2018), 286, 293.

[8] Ewa Kowalewska, "Narodowy Bank Polski jako centralna bankowa instytucja dewizowa," *Finanse, Rynki Finansowe, Ubezpieczenia*, no. 79 (2016): 682.

dling external debt. Moreover, the NBP's responsibilities in this scope also include performing inspections within limits established by the provisions of the Foreign Exchange Law.

The Foreign Exchange Law regulates foreign exchange in the manner required by the EU principle of the free movement of capital and external payments[9]. In Poland the model of foreign exchange law has run through a long path of changes that have led to liberalization. The changes that have occurred in legislation in force resulted primarily from adjusting Polish foreign exchange law to community's norms and principles guaranteed under EU law[10]. Foreign exchange legislation has been transformed from being restrictive to a law which supports economic processes[11].

Foreign exchange inspection, as the responsibility of the President of the NBP, concerns the following three areas:

a) individual foreign exchange licenses granted,
b) activity of currency exchange offices,
c) statistical reporting in terms of providing information for the state's balance of payments and international investment position.

The relevant powers of the President of the NBP include other responsibilities regulated under the Foreign Exchange Law. These are mainly: maintaining the register of operators of currency exchange offices and issuing individual foreign exchange licenses. The President of the NBP makes an entry in the register of currency exchange offices on the basis of a written application submitted by the operator. Currency exchange operation can be carried out in compliance with the Entrepreneurs Act[12]. Entry in

[9] Eugenia Fojcik-Mastalska, "Miejsce i rola prawa walutowo – dewizowego w systemie prawa," in *Prawo finansowe w warunkach członkostwa Polski w Unii Europejskiej. Księga Jubileuszowa dedykowana Profesor Wandzie Wójtowicz*, eds. Alicja Pomorska, Paweł Smoleń and Jarzy Stelmasiak (Lublin: Wydawnictwo Uniwersytetu Mari Curie-Skłodowskiej, 2011), 99, 107.

[10] Ewa Kowalewska, "Ustawodawstwo dewizowe w systemie prawa – analiza z perspektywy członkostwa Polski w Unii Europejskiej," in *Obywatel – Państwo – Społeczność Międzynarodowa*, eds. Ewelina Cała – Wacinkiewicz, Kinga Flaga – Gieruszyńska and Daniel Wacinkiewicz (Warsaw: C.H. Beck, 2014), 570, 584.

[11] Kowalewska, "Narodowy Bank Polski," 680.

[12] Entrepreneurs Act of March 6, 2018, consolidated text Journal of Laws 2019 item 1292 as amended.

the above register is made in the form of an administrative decision, where removal from the register is also an entry, which causes specific consequences in the event of filing an appeal against such a decision. An entrepreneur carrying out currency exchange operations has been given a number of responsibilities, which were mainly specified in the Regulation of the Minister of Finance[13] on equipping premises dedicated to carrying out currency exchange operations and the manner of record keeping and issuing evidence of purchase and sale of foreign exchange. It needs to be noted that foreign exchange inspection of currency exchange activity includes also the operator's observance of obligations imposed on him by the Act on Preventing Money Laundering and Financing of Terrorism[14]. It needs to be highlighted that it is a broadly developed direction of inspection due to the changing relevant regulations. Moreover, it is worth stressing that prevention of money-laundering has recently gained a transnational dimension and each of the analyzed countries pays particular attention to this issue, which results mainly from the analyzed legislation.

Currency exchange operations are the major inspection area with legality as its basic criterion. This means verification whether the entrepreneur carries out currency exchange activity in compliance with the requirements specified in the Foreign Exchange Law and specific provisions. The scope of this verification is broad and includes also inspection by counting the content of the cash register. It also needs to be highlighted that currency exchange operators are obliged to submit statistical reports to the state's balance of payments and international investment position, which is why inspection of currency exchange operations may be also extended to include statistical reporting and then one can talk of comprehensive inspection.

The second area of NBP's inspection-related activity includes inspection of individual foreign exchange licenses issued by the President

[13] Ordinance of the Minister of Finance on equipping a premise allocated for operating a currency exchange office and the manner of keeping records and issuing proofs of purchase and sale of foreign exchange assets of September 24, 2004, Journal of Laws no. 219 item 2219 as amended.

[14] Ustawa o przeciwdziałaniu praniu pieniędzy i finansowaniu terroryzmu [Act on preventing money laundering and financing of terrorism] of March 1, 2018, consolidated text Dz. U. of 2020 item 971 as amended.

of the NBP. At present this inspection has marginal importance due to a decrease in the number of decisions issued in the discussed scope. This, in turn, is a consequence of liberalization of the foreign exchange law that happened gradually after Poland's accession to the EU[15]. The role of individual foreign exchange licenses decreased because many foreign exchange activities were allowed under the statute or by general authorization[16]. Inspection of individual foreign exchange licenses should involve investigating whether the use of the issued foreign exchange license proceeds in compliance with its terms. This takes the form of a strongly individualized inspection and has an *ex post* nature[17]. In the event of finding violations of the terms of the license, the President of the NBP may revoke a previously-issued license, though before issuing a revoking decision he is obliged to investigate the evidence. It also needs to be highlighted that in the case of inspection of individual foreign exchange licenses it may take the form of an initial inspection which occurs as part of a procedure preceding the issuance of a decision on granting an individual license. It is because the President of the NBP is obliged to determine each time whether the applicant meets the criteria and premises laid down in the Foreign Exchange Law[18]. It needs to be remembered that individual foreign exchange licenses play a special role as they mitigate the consequences of foreign exchange restrictions. In the Polish legislation, the Fiscal Criminal Code[19] classifies in section 97 "extortion of a license" as a fiscal crime against foreign exchange, punishable by a fine or imprisonment, or by both of these punishments jointly. Activities performed on the basis of an extorted license must be considered as performed without a license[20].

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[15] Kowalewska, "Narodowy Bank Polski," 684.

[16] Wanda Wójtowicz, "Kontrowersje wokół pojęcia obrotu dewizowego," in *Ex iniuria non oritur ius. Księga ku czci Prof. Wojciecha Łączkowskiego*, eds. Andrzej Gomułowicz and Jerzy Małecki (Poznań: Wydawnictwo Uniwersytetu im. Adama Mickiewicza, 2003), 42, 48.

[17] Ewa Kowalewska, *Kontrola dewizowa wykonywana przez Narodowy Bank Polski* (Warsaw: CeDeWu, 2017), 156.

[18] Zbigniew Ofiarski, *Prawo dewizowe. Komentarz* (Warsaw: Zakamycze, 2003), 5.

[19] Fiscal Criminal Code Act of September 10, 1999, consolidated text Journal of Laws of 2020 item 19, section 97

[20] Adam Bartosiewicz and Ryszard Kubacki, *Kodeks karny skarbowy. Przestępstwa i wykroczenia podatkowe oraz dewizowe* (Warsaw: C.H. Beck, 2010), 265–266.

The third area of inspection involves the statistical reporting obligation. Providing information necessary for drawing up the state's balance of payments and international investment position is associated with responsibilities resulting from participation in the European System of Central Banks (ESCB) and the European Central Bank (ECB). These issues result from Protocol no. 4 on the status of the ESCB and the ECB which is an annex to the Treaty on the Functioning of the EU[21] and ECB guidelines of 9 December 2011 on the statistical reporting requirements of the ECB in the field of external statistics[22]. On the national ground, the statistical reporting obligation results from section 23a of the Act on the National Bank of Poland which specifies the manner of providing information necessary to draw up a balance of payments and international investment position. This information is transmitted electronically using appropriate certificates issued by the NBP or other authentication forms applied by the bank. In turn, detailed data associated with providing the NBP with the information in question is regulated by the Regulation from the Minister of Development and Finance[23] (2017) on providing the NBP with information necessary to draw up a balance of payments and international investment position. It specifies the procedure, scope and time limits for fulfilling the obligation to provide the information to the NBP as well as the amounts which when exceeded cause the emergence of this obligation. It needs to be highlighted that firstly this obligation concerns entities which actively participate in foreign exchange, and secondly, the acts of foreign exchange performed by them exceed the specified amounts as the threshold amounts. The legislator uses the term "reporting entity". It encompasses residents who perform acts under foreign exchange and currency exchange operators. The entities are specified by the acts they per-

[21] Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, 47–390.

[22] Guideline of the ECB of 9 December 2011 on the statistical reporting requirements of the ECB in the field of external statistics (recast) (ECB/2011/23), OJ L 65, 3.3.2012, 1.

[23] Ordinance of the Minister of Development and Finance on providing the National Bank of Poland with information necessary for drawing up the balance of payments and international investment position of August 9, 2017, Journal of Laws of 2017 item 1548.

form. The information is provided to the NBP on dedicated forms called statistical reports[24].

4. CENTRAL BANKING AND FOREIGN EXCHANGE INSPECTION IN THE CZECH REPUBLIC

In the Czech Republic the *Česká Národní Banka* (CNB) is a state institution created after the division of Czechoslovakia on the basis of the Act on the Czech National Bank[25]. The CNB has regular functions of a central bank but it also supervises banks. It needs to be emphasized that as a result of numerous amendments, this act was adjusted to the requirements of EU law.

The supreme governing body of the CNB is the Bank Board consisting of seven members - the Governor, two Deputy Governors and four other members of the Bank Board. Pursuant to the Constitution of the Czech Republic[26] the CNB is the central bank of the state. Its primary purpose is to maintain price stability[27]. At the same time, is has been shown that the central bank should support the government's economic policy (focused on long-term growth) as long as it does not jeopardize the primary purpose[28]. As demonstrated above, the aim of the CNB's activity overlaps with the NBP's purpose.

The CNB's main tasks include conducting internal and external foreign currency policy, issuing banknotes and coins, inspection of the amount of money on the market, management of foreign exchange reserve in gold and foreign currency, granting credit and maintaining bank accounts[29]. The CNB's monetary policy strategy, similar to the NBP, focuses on the in-

[24] Kowalewska, "Kontrola dewizowa," 166.

[25] Act on the Czech National Bank of December 17, 1992, 6/1993 Sb. (Collection of Law) as amended.

[26] Constitution of the Czech Republic of December 16, 1992, 1/1993 Sb. (Collection of Law), section 98.

[27] Remigiusz W. Kaszubski and Marcin Krysa, "Prawne gwarancje niezależności banków centralnych w Polsce, Czechach i na Węgrzech," *Glosa*, no. 5 (2002): 10, 15.

[28] Violetta Kałuzińska, *Przejrzystość polityki pieniężnej* (Warsaw: CeDeWu, 2013), 110.

[29] Kałuzińska, *Przejrzystość*, 110.

flation objective. The exchange-rate policy is based on the principle of the floating exchange rate of the Czech koruna in relation to other currencies. The Czech Republic, like Poland, remains outside the Euro zone. This is why there is still special emphasis in legislation placed on the principle of operation of the internal foreign exchange market.

In compliance with the Act on the Czech National Bank, the central bank is an authority performing financial market supervision. It establishes rules of protection of stability of the banking sector, the capital market, the insurance industry and pension funds. It systematically supervises observance of regulations and if necessary imposes penalties for non-compliance.

Moreover, it needs to be pointed out that the CNB is responsible for carrying out inspections of entities engaged in trading in national currency in the form of coins and banknotes. This inspection involves:

a) issuing decisions in terms of licenses, permits and registration applications,
b) verifying compliance of regulations and direct application of regulations of the EU law,
c) application of remedies and penalties under the law,
d) conducting proceedings for administrative offences (specified in the Foreign Exchange Act).

The Foreign exchange law in the Czech Republic, like in Poland, has specific features and methods of regulation. The state monopoly in terms of foreign exchange, even in Czechoslovakia, was a result of a statutory regulation introduced in 1953 as Foreign Exchange Law. Introduction of a limitation on accepting payment in foreign currencies by natural persons and on taking national currency abroad is considered to mark the beginning of foreign exchange restrictions[30]. The Czech literature points to the fact that the Polish act of October 1950 on holding foreign currency, gold coins, gold and platinum and making punishments for foreign exchange offences more severe greatly impacted all foreign exchange regulations in the countries of Eastern Europe, mainly by introducing sanctions. These countries' membership in the Council for Mutual Economic

[30] Petr Mrkyvka, *Determinace a diverzifikace financniho prava* (Brno: Masarykova univerzita, 2012), 192.

Assistance had significant impact on the convergence of foreign exchange regulations of these countries[31].

In line with the provisions of the 1995 Czech Foreign Exchange Act, the entities competent in foreign exchange matters are the Ministry of Finance and the CNB. Under the statute, the Ministry of Finance within its activity exercises inspection over organizational units, local government units, state funds and towards all persons in terms of loans granted or taken by the Czech Republic. The CNB exercises inspection in terms of its activity towards residents and non-residents. In the scope of foreign currency trading the CNB's responsibilities also include foreign exchange reserve management, which is regulated in the Act on the Czech National Bank[32].

Foreign currency bodies as part of their responsibilities inspect the observance of the provisions of the Foreign Exchange Act and to this end may require the inspected entities to cooperate, inter alia by submitting all explanations and necessary documents[33]. These entities are obliged under the statute to provide all necessary information during the inspection. A foreign exchange inspection of a currency exchange office is mainly based on documents and explanations from persons who are responsible for running it. The inspection comes as a follow-up.

In the event of violation of the provisions of the Foreign Exchange Act the organ competent for the inspection may:

a) recommend that all shortcomings be remedied and deficiencies repaired; it sets a suitable deadline for it (the inspected entity is obliged to inform about the way the irregularities are to be removed),
b) suspend the activity which is contrary to the provisions of the Foreign Exchange Act (the competent organ for foreign exchange matters specifies the time and scope of suspension),
c) prohibit activity contrary to the statute,
d) remove an entity from the register or revoke a special permit,
e) impose a financial penalty.

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[31] Mrkyvka, *Determinace*, 192.

[32] Věra Hartlová, Marcela Soldánová, Jitka Svobodová and Michaela Zlebková, *Bankovnictví. Pro střední školy a veřejnost* (Prague: Fortuna, 2004), 137.

[33] Milan Bakeš, Marie Karfiková, Peter Kotáb and Hana Marková, *Finanční právo* (Prague: C.H. Beck, 2012), 384–385.

An entity in which violations of the law were found and which was recommended to remove the indicated shortcomings is obliged to inform the foreign exchange inspection body about how the shortcomings shall be remedied within the time limit specified by the foreign exchange inspection body. If a decision to suspend the activity is made, the foreign exchange inspection body specifies the time and scope of the suspension.

The Czech Foreign Exchange Act, unlike the Polish one, specifies the essence of administrative offences of a foreign currency nature. They are strictly associated with responsibilities the legislator imposed on residents and non-residents. It may be assumed that an offence occurs when a resident or non-resident has violated their statutory obligations or performs them in an inadequate manner. The legislator provides that a legal or natural person who operates a foreign exchange activity without registration or contrary to it commits an offence. Moreover, failure to fulfil statistical reporting duties by a resident or non-resident who carries out activity in the country is also an offense. When a resident or non-resident does not produce an appropriate foreign exchange permit or if he does not specify the purpose of payments coming from abroad it is also classified as an offence. Pursuant to the provisions of the Czech foreign exchange law residents and non-residents are obliged, when summoned, to specify the purpose of a payment coming from abroad where this purpose has not been previously listed.

An original measure in the Czech Foreign Exchange Act involves specifying the amount of fines for individual foreign exchange offences. The legislator specified the limits of these fines in three different places in the statute. Each time the amount of the fine depends on the type of violation. Fines' limits range from CZK 20,000,000 to CZK 100,000.

Moreover, the Foreign Exchange Act's characteristic feature involves defining when an administrative offence occurs. In this scope the following constitute an administrative offence:

a) operating currency exchange activity in a place different to the one specified in the register of the Czech National Bank,
b) the currency exchange operator's failure to inform about a change or liquidation of a place of carrying out the activity,

c) the currency exchange operator's failure to provide specific information to the inspection bodies and handling information obtained as part of performing certain obligations,
d) failure to meet formal requirements specified for currency exchange activity.

Additionally, the legislator reserves that a legal person is not liable for an administrative offence if they have made every effort to ensure that the obligations are not breached. When determining the amount of a fine for a legal person the gravity of the offence and the manner it has been committed must be taken into account, as well as the consequences and circumstances of committing thereof. Legal persons' liability for an offence occurs when an administrative authority initiated proceedings within one year from the date it learnt about it but no later than 5 years from the date of occurrence of the offence. The CNB is the first instance for cases of administrative offences specified in the Foreign Exchange Act.

Czech foreign exchange legislation additionally specifies the so-called deposit duty. It should be imposed only in the case of unfavorable phenomena affecting the state's balance of payments, and also where excessive inflow of capital was observed, which brings the risk of widening of the capital imbalance which might lead to serious economic and financial dangers, including weakening the national currency, and which cannot be warded off effectively by means of traditional instruments of monetary policy.

Specification of the so-called state of emergency in the foreign exchange economy is a characteristic feature of instruments adopted on the ground of the foreign exchange law. It may occur in two situations. A state of emergency in the foreign exchange economy is declared by the government by announcing information in the media. A state of emergency primarily means a state when the ability to make payments to other countries is jeopardized, both directly and seriously. Moreover, this state occurs when the internal monetary balance of the Czech Republic is directly and seriously compromised.

In the time of a state of emergency, in a situation where the ability to make payments to other countries is jeopardized, the legislator forbids acquisition of foreign exchange assets in exchange for Czech currency and making any payments from the Czech Republic to other countries, in-

cluding transfers of money between banks and their branch offices, and depositing funds on accounts abroad, unless a foreign exchange authority has granted a special permit. At a time of a state of emergency, when the internal monetary balance is jeopardized, it is forbidden to sell domestic securities, to accept financial credits from non-residents, to establish in the Czech Republic accounts for non-residents, to deposit money on accounts of non-residents, and to transfer money from another country to the Czech Republic between banks and their branch offices, unless a foreign exchange authority has granted a special permit.

The state of emergency in the foreign exchange economy is introduced on the date the government announces it and terminates on the date set by the government, but not later than three months from the date it was announced in the mass media.

5. CENTRAL BANKING, FOREIGN EXCHANGE INSPECTION AND FINANCIAL SUPERVISION IN GERMANY

The Federal Republic of Germany (Germany) is a "democratic and social federal state" (Basic Law for the Federal Republic of Germany)[34], composed of 16 federated states. Germany is a state which actively participates in the processes of European integration and forms the monetary union along with other EU countries. In recent years, the German banking system has undergone a fundamental transformation[35].

The German banking sector formed in the second half of the ninetieth century along with the emergence of first banks in the form of joint-stock companies. They are the oldest elements of German banking[36]. The twenty-first century is a time of essential transformations in German banking which resulted in changes in the international market (inter alia accelerated globalization process and technological progress)[37].

[34] Grundgesetz fur die Bundesrepublik Deutschland of May 23,1949, BGBl. S. 1.

[35] Stanisław Flejterski and Jan K. Solarz, *Systemy bankowe krajów G-20* (Szczecin: Zapol, 2012), 298.

[36] Bernd Sprenger, "Das deutsche Bankwesen im Zeittalter der industralisierung," *Bank*, no. 10 (1987): 576–579.

[37] Flejterski and Solarz, *System*, 302.

The currently operating *Deutsche Bundesbank* (hereinafter Bundesbank) in Germany with its office in Frankfurt am Main was established by the Act on the German Federal Bank[38]. This started a new stage in the development of central banking in Germany and in the German banking system. The beginnings of the one-tier central banking system, independent of the federal government, are associated with this act. At present, the Bundesbank is a federal institution of public law that holds competence rights of a German federal state body. This amendment introduced changes in the structure of managing the bank. Elements of a two-tier structure of German banking were removed and the Executive Board is the only body managing the German Federal Bank[39].

The Bundesbank, being a member of the ESCB, participates in shaping and implementing the monetary policy of countries belonging to the Euro zone. It is a participant of a decision-making process and contributes to decisions made by the ECB. Moreover, the Bundesbank enforces the ECB's decisions which concern issuing Euro banknotes in Germany and carries out the ECB's credit operations with German commercial banks[40].

The Bundesbank at the same time fulfils all regular functions of a central bank, that is an issuing bank, a banks' bank and a central bank of the State. What is more, as in Poland and the Czech Republic, it safeguards the foreign exchange reserve. It organizes the issuance of German government securities, carries out state's payments and manages Germany's foreign reserve funds, where major foreign currency operations require the ECB's approval[41]. The Bundesbank's internal structure and organization are tailored to its responsibilities and functions.

The state's significant role in the development and shaping of activity in the entire banking sector in Germany is reflected in the tradition

[38] Gesetz über die Deutsche Bundesbank of July 26, 1957, BGBI. I S. 745.

[39] Władysław Baka, *Bankowość centralna. Funkcje-metody-organizacja* (Warsaw: Wydawnictwo Zarządzenie i Finanse, 2001), 158.

[40] Eugeniusz Gostomski, *Bankowość międzynarodowa* (Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego, 2011), 156.

[41] Tomasz Ciszak, Anna Górska, Bartosz Otachel, Małgorzata Siemaszko, Renata Żak and Marcin Żogała, "Europejski System Banków Centralnych," 2004, http://www.nbp.pl/publikacje/esbc/esbc.pdf, p. 25.

of the banking regulation and supervision system[42]. The literature points mainly to the evolution of the banking supervision process. On the basis of the act in force in Germany, in terms of supervision the Bundesbank is co-responsible for exercising it together with the supervisory authority. Bilateral agreement is the basis for this cooperation.

The Bundesbank's main responsibilities include cooperation in terms of issuing Euro banknotes and coins, issues concerning the financial and monetary system, supervision over banks, organization of cash and non-cash transactions, as well as settling transactions in securities. On request of the federal government, the central bank draws up the statistics of Germany's balance of payments and international investment position. Moreover, it prepares analyses and conducts research activity on the financial system, mainly its stability.

Referring to the issue of foreign exchange inspection (in particular inspection of currency exchange offices) one needs to note that relevant significant changes occurred in the German legal system in 1998. Before this date the Act on Preventing Money Laundering was in force (its 2008 version is in force at the moment). Authorities competent for inspection, with regard to the economic activity, do not have appropriate authorization in terms of obtaining information and verifying reports. Inspection was mainly carried out in terms of observance of regulations specifying procedures preventing money laundering. However, tools of efficient foreign exchange inspection of currency exchange operators proved insufficient.

It needs to be emphasized that significant changes in terms of the functioning of the German inspection system, for which Germany's central bank is responsible, were introduced by the Act Establishing the Federal Financial Supervisory Authority[43]. The newly-established office, BaFin in short, took over all functions performed previously by the Federal Banking Supervisory Office, the Federal Insurance Supervisory Office and the Federal Securities Supervisory Office.

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[42] Lesław Góral, *Nadzór bankowy* (Warsaw: Polskie Towarzystwo Ekonomiczne, 1998), 102.

[43] Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht (Finanzdienstleistungsaufsichtsgesetz - FinDAG) of April 22, 2002, BGBl. I S. 1310.

The Federal Financial Supervisory Authority - BaFin, similar to the supervisory office functioning in Poland (Financial Supervisory Authority [*Komisja Nadzoru Finansowego*, *KNF*]) is an authority of integrated supervision over the entire financial market. Integration of supervision over institutions functioning on the financial market is in line with contemporary European trends. Nevertheless, it seems that BaFin's competences cover a more broadly defined financial market. This results from the fact that the activity of financial institutions (including currency exchange offices) was regulated in a different way in German legislation.

The German supervision authority - BaFin safeguards the stability and solvency of banks, investment funds of insurance companies and protects interests of customers and investors[44]. The legislation in force obliges BaFin to work closely with the Bundesbank, primarily in terms of conducting current supervision over all institutions performing banking and foreign exchange operations, mainly through inspecting the observance of laws, guidelines and regulations. It is done by verifying reports and "on-site" inspections.

An important element of collaboration between the Bundesbank and BaFin involves respecting a certain principle stating that provisions of the law issued by BaFin and other banking regulations affecting behavior of banks and other operators are required to be agreed with the Bundesbank. On the other hand, the Bundesbank is obliged to inform BaFin on an ongoing basis about its decisions and more important facts that take place in the operation of, inter alia, banks[45].

The Foreign Trade and Payments Act[46] regulates issues concerning inspection carried out by the German Federal Bank. Pursuant to its provisions the Bundesbank has exclusive competence in terms of movements of capital and payments and the movement of foreign assets and gold. Regulations of the following acts are significant for foreign exchange inspection: the Bundesbank Act[47] and the Banking Act[48]. Given the adopt-

[44] Thomas Hartmann-Wendels, Andreas Pfingsten and Martin Weber, *Bankbetriebslehre* (Berlin: Springer, 2007), 46.

[45] Baka, *Bankowość*, 162.

[46] Ausenwirtschaftsgesetz of June 6, 2013, BGBI. I S. 1482.

[47] Gesetz über die Deutsche Bundesbank In der Fassung der Bekanntmachung of October 22, 1992, BGBI. I S. 1782; amended BGBI. I S. 1981.

[48] Gesetz über das Kreditwesen - KWG of September 9, 1998, BGBl. I S. 2776.

ed measures, it is noticeable that foreign currency trading in German credit institutions is a financial service and requires a permit pursuant to the Banking Act[49].

Moreover, the Banking Act introduced the requirement of obtaining a permit. It is required for dealing in foreign notes and coins and selling and buying travelers' cheques. In accordance with laws in force foreign exchange offices are institutions providing financial services, permits for the operation of which are issued by BaFin (the sixth amendment to the Banking Act, which entered into force on 1 January 1998 specified the so-called financial services carried out under a license). In line with the Banking Act, whoever intends to carry out (provide) financial services gainfully, as well as in the scope for which it is necessary to have a registered office, needs BaFin's permission for the opening and carrying out an activity of a financial nature.

The above shows that the rules for obtaining a currency exchange operator's license are regulated in Germany in a different way than in Poland and the Czech Republic. In Germany the crucial assumption is that currency exchange offices are institutions providing financial services with all related consequences. Therefore, the supervisory authority issues the relevant permission. Poland and the Czech Republic granted currency exchange offices a special status according to which the power to issue permits for operating such an activity is held by the organ of the central bank.

According to the provisions of the Banking Act, financial services include inter alia foreign currency dealing ("*das Sortengestchaft*"). The term "*Sortenhandel*"[50] means exchange of banknotes or coins which are legal tender and selling and buying travelers' cheques. The term "*sorten*" which occurs in German legislation covers the exchange of national legal tender for foreign legal tender and buying and selling travelers' cheques. It is strictly necessary for financial institutions involving "*sorten*" to have a permit. Undertakings for whom dealing in banknotes and coins does not constitute their principal activity are treated differently from the point of view of supervision. Hotels and travel offices are given as an example[51].

[49] Section 1(1a) sentence 2, point 7 of the Banking Act.
[50] Section 1(1a) sentence 2, point 7 of the Banking Act.
[51] Section 2(6) sentence 1, point 12 of the Banking Act.

Ongoing inspection carried out by the Bundesbank also consists in monitoring quarterly reports. Detailed rules in this regard are stipulated by the Regulation on Financial Information Reporting[52]. Undertakings providing financial services involving foreign currency dealing are required to provide information that should include the following content elements: name of the undertaking, its head office, the reporting period, quantities and amounts of transactions broken down by currency and size (up to EUR 2,500; between EUR 2,500 and EUR 15,000, over EUR 15,000). The data contained in the said information include banknotes and coins which are foreign legal tender as well as travelers' cheques made out in a foreign currency.

In terms of such financial services BaFin and the Bundesbank work closely together, within the limits specified by the law[53]. The cooperation in question involves inter alia the Bundesbank's ongoing supervision over such financial institutions. However, taking into consideration the content of the Banking Act[54], the Bundesbank must observe BaFin's guidelines. This means that the central bank in Germany has the right to inspect currency exchange if this inspection should proceed as part of guidelines issued by BaFin.

The cooperation of BaFin and the Bundesbank, whose framework is expressly specified by German legislation, means strict division of competences in terms of the discussed foreign exchange inspection of currency exchange offices. In most general terms: BaFin issues permits, while the Bundesbank carries out ongoing foreign exchange inspection.

The legislator clearly showed which elements of content a permit application must include. When issuing permits, BaFin may include terms and conditions in them. The supervisory authority publishes decisions in cases for granting a permit in the Federal Gazette. Moreover, it is obliged to maintain a register of financial institutions to which permits have been issued pursuant to the statute, along with the date of issuance thereof and the scope of application (or possibly the date of expiry of a permit or its

[52] Verordnung zur Einreichung von Finanzinformationenverordnung – Fina V of December 6, 2013.

[53] Section 7(1) Banking Act.

[54] Section 7(2) Banking Act.

suspension). It seems that the register referred to in German legislation, maintained by BaFin, from the point of view of formal requirements is similar to the register of currency exchange offices which in the Polish legal system must be kept by the President of the NBP.

The above reflections point out that in Germany organizational matters are vested in an institution other than the central bank. Moreover, the Federal Minister of Finance may issue detailed rules concerning the content of the register by resolution which does not require consent from the Upper House of the Parliament. If a financial activity requires having a location, the provisions of the German Code of Administrative Procedure[55] will additionally apply.

However, it needs to be emphasized that the Bundesbank carries out ongoing supervision which includes in particular:

– analysis of the documentation submitted by financial institutions, audit reports and financial statements as well as documents concerning the balance sheets,
– an analysis of banking reports in order to assess institutions' capital adequacy and risk management procedures of these institutions.

6. CONCLUSIONS

The above discussion presents an analysis of legal instruments of an important issue within the competence of the central bank, namely foreign exchange inspection. An important assumption which outlined the direction of this analysis involved the fact that the three represented legal systems have a different origin and despite standardizing principles on the ground of the EU the visible differences between them result from different political and economic experiences. The limits of research are specified by regulations addressing the central bank, foreign exchange inspection and the functioning of supervision, in each of the three analyzed domestic legislations. Without a doubt, Poland and the Czech Republic have corresponding instruments in the investigated scope, which include

[55] Verwaltungsgerichtsordnung (VwGO) of March 19, 1991, BGBl. I S. 686.

the activity of the central bank, while Germany has developed a system based on cooperation of a few institutions.

The legislation in force in Poland and the Czech Republic in an extensive and detailed manner establishes norms regulating the basis of carrying out foreign exchange inspection, its scope, time limits and related obligations. One may feel that the Czech Foreign Exchange Act goes even a step further since it penalizes foreign exchange offences and introduces detailed regulations not prescribed for by the Polish legislator. Therefore, it might be concluded that the Czech Foreign Exchange Act is comprehensive but at the same time creates a rather rigid and restrictive system. The content of the regulations adopted in these countries does not raise doubt in such matters as the personal and material scope of foreign exchange inspection. It needs to be noted that exclusive powers in this scope were attributed to the central bank's authorities. A special feedback was forged in this way. The central bank introduces foreign exchange inspection within the limits in which it itself granted permission or maintains the register of currency exchange offices. A certain linking of powers has occurred. In Poland and in the Czech Republic currency exchange operations are the major areas of foreign exchange inspection. It needs to be noted that contrary to German arrangements, such activity is not an element of a broadly understood financial market within the limits specified by binding legislation. One cannot conclude that a currency exchange office is a financial institution or another similar institution. Supervisory regulations covering the financial market will not be applicable in this case. In terms of foreign exchange inspection in Germany the central bank became tied with the supervision authority. Thus cooperation of two important institutions occurs. At the same time this entails certain consequences primarily in the fact that currency exchange offices in Germany are institutions under the supervision of the supervision authority (BaFin).

Only the area of inspection that involves reporting was focused at the central bank in each of the adopted legal constructs.

This results primarily from the fact that on the European level, due to membership in the ESCB, domestic central banks were given the responsibility to gather data that is significant, for example the state's balance of payments and international investment position.

The differences resulting from the investigation concern the fact that Poland and the Czech Republic are not in the Euro zone, while Germany is a country that has been part of the monetary union from the beginning. The second reason for the discrepancies, indicated above, involves a different past in the functioning of the central bank or the financial market, as well as different historical and economic contexts.

Referring to the hypothesis set forth in the methodology it needs to be highlighted that regulations on foreign exchange inspection should be verified at the EU level and despite significant Europeanization of the adopted legal instruments their standardization should be considered. It is also important due to the transnational activity in the business sphere and freedom of trading in foreign exchange.

The analysis carried out in this study shows that the matters of trading in foreign exchange and foreign exchange inspection fall under the competence of domestic legislation and it is difficult to talk about uniform (EU) rules at this moment. It also needs to be noted, that the ĆNB has the broadest competences among the above-presented domestic legislation, where the ĆNB, apart from performing regular functions of a central bank discussed above, is also a supervisory authority over the financial market and is an authority for compulsory restructuring and resolution. In Poland the KNF is the supervisory authority and the Bank Guarantee Fund is the compulsory restructuring authority. In turn in Germany, it is the Bundesbank and BaFin, respectively (principally in terms of cooperation).

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REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLV
YEAR 2021, ISSUE 2, pp. 207–220
DOI: https://doi.org/10.31743/recl.11565

GLOSS TO THE JUDGEMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN CASE C-524/15, CRIMINAL PROCEEDINGS AGAINST LUCA MENCI

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ABSTRACT

This gloss discusses the position of the Court of Justice of the European Union taken in the judgment passed on 20 March 2018 in the case of Luca Menci (C-524/15) in reference to the restrictions of *ne bis in idem* principle. The main thesis of the Court concerned the admissibility of restrictions of *ne bis in idem* based on the principle of proportionality as a limitation clause and its accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms. The analysis of the right not to be tried or punished twice in Article 4 Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms allows us to formulate opposite conclusions. The application of the balancing test as a limitation clause for *ne bis in idem*, finds no support in the case-law of the ECtHR too. According to the Author, the position taken in Menci infringes Article 52(3) of the Charter of Fundamental Rights, according to which the meaning and scope of the rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms shall be at least be the same.

Keywords: Ne bis in idem, balancing test, limitations of fundamental rights, fundamental rights

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THESIS:

1. Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay value added tax due within the time limits stipulated by law, although that person has already been made subject, in relation to the same acts, to a final administrative penalty of a criminal nature for the purposes of Article 50 of the Charter, on condition that that legislation
   – pursues an objective of general interest which is such as to justify such a duplication of proceedings and penalties, namely combating value added tax offences, it being necessary for those proceedings and penalties to pursue additional objectives,
   – contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and
   – provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.
2. (…)

1. INTRODUCTION

The *Ne bis in idem* principle is a right that protects a person from being tried or punished twice in criminal proceedings for the same act[1].

[1] It is worth to underline that according to the European Court of Human Rights (ECtHR) jurisprudence, Article 4 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol 7) comprises three distinct but interrelated guarantees: no one shall be liable to be tried, be tried or be punished for the same offence. See: ECtHR Judgements: of 29 May 2001, Case Franz Fischer v. Austria, application no. 37950/97, hudoc.int, para 29; of 10 February 2009, Case Zolotukhin v. Russia, application no. 14939/03, hudoc.int, para 110.

The main interest that lays behind the right is legal certainty[2]. The guarantee protects not only individual rights but also the integrity of the first final decision[3]. Furthermore, according to the Article 50 of the Charter of Fundamental Rights (Charter), no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.[4] The *ne bis in idem* principle embracing the area of all Member States facilitates European integration[5]. Therefore, it is not only human rights, but it constitutes also the general principle of European Union law too.[6]

Within the European Union there are many different levels of possible cumulation of penal responsibility for the same act and, in consequence, many levels of the application of *ne bis in idem*. They may be called as domestic (relating to different kinds of penal responsibility in the same Member State), transnational or horizontal (relating to the same kind of responsibility in different Member States), European or vertical levels (relating to responsibility before European Commission and national court or authority).[7] However, these are not all possible levels of cumulation,

[2] Michiel Luchtman, "The ECJ's Recent Case Law on Ne Bis in Idem: Implications for Law Enforcement in a Shared Legal Order," *Common Market Law Review* 55, Issue 6 (2018): 1721.

[3] See more about rationale of *ne bis in idem*: Bas van Bockel, *The Ne Bis in Idem Principle in EU Law* (Alphen aan den Rijn: Kluwer Law International, 2010), 25–30.

[4] The difference between Article 50 of the Charter and art. 4(1) of Protocol 7 relates to the scope of the reference of the rights, which is only national in the Protocol. The transnational scope of the application has also *ne bis in idem* provided for in Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (CISA) and the difference will be important for the further considerations.

[5] Luchtman, "The ECJ's Recent Case Law," 1741; John A.E. Vervaele, "*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU?," *Utrecht Law Review* 9 (2013): 211–229.

[6] Valsamis Mitsilegas and Fabio Giuffrida, "Ne bis in idem," in *General principles for a common criminal law framework in the EU. A guide for legal practitioners*, ed. Rosario Sicurella, Valsamis Mitsilegas, Raphaele Parizot, and Annalisa Lucifora (Milan: Giuffrè Editore, 2017), 209.

[7] Vervaele, "*Ne Bis In Idem*," 220.

because they can have a mixed character too. The reason of *ne bis in idem* development and its growing importance was not only the process of European Union integration, but also the autonomous way of understanding criminal responsibility, developed in jurisprudence of the ECtHR starting from the Engel case[8] and then accepted by the Court of Justice of the European Union (Court or CJEU).[9] Moreover, the essential step for the development of *ne bis in idem* was made by the ECtHR in the judgment of Zolotukhin v. Russia[10], according to which the principle should be understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from 'identical facts or facts which are substantially the same'. '*Idem*' was defined as *idem factum*, not *idem crimen*. As regards the jurisprudence of the Court, two approaches to the understanding of '*idem*' could be distinguished. The first one required three conditions to be fulfilled: identity of the facts, unity of the offender and unity of the legal interest protected.[11] According to the second one, the only criterion should be the identity of the underlying material acts. The second position was mainly adopted in cases related to the interpretation of art. 54 CISA,[12] but the provision regards only the transboundary accumulation of responsibil-

[8] ECtHR, Engel and others v. the Netherlands, Appl. No. 5100/71, judgment of 8 June 1976, para 80–82. See more about the development of formally administrative sanctions which have criminal character: Adrienne De Moor-van Vugt, "Administrative Sanctions in EU Law," *Review of European Administrative Law* 5 (2012): 13; Antoine Bailleux, "The fiftyth shade of grey Competition law, „criministrative law" and „fairly fair trials"," in *Do Labels Still Matter: Blurring Boundaries Between Administrative and Criminal Law, The Influence of the EU*, ed. Francesca Galli, and Anne Weyembergh (Bruxelles: Institute d'etudes Europeennes, 2014), 137–152.

[9] CJUE Judgment of 5 June 2012, criminal proceedings against Łukasz Bonda, Case C-489/10, ECLI:EU:C:2012:319, para 37.

[10] ECtHR Judgements of 10 February 2009, Case Zolotukhin v. Russia, application no. 14939/03, hudoc.int, para 80–82.

[11] See e.g.: CJUE Judgment of 7 January 2004, Aalborg Portland and Others v. Commission, Joined Cases C-204/00 P, C- 205/00 P, C-211/00 P, C-213/00 P, C-217/00 P et C-219/00 P, ECLI:EU:C:2004:6, para 38; CJUE Judgment of 7 June 2011, Arkema France and others v. Commission, T-217/06, ECLI:EU:T:2011:251, para 292; CJUE Judgment of 14 February 2012, *Toshiba Coporation and others v Úřad pro ochranu hospodářské soutěže*, Case C-17/10, ECLI:EU:C:2012:72, para 97.

[12] See e.g.: CJUE Judgment of 9 March 2006, *Hof van Cassatie v L.H. Van Esbroeck*, Case C-436/04, ECLI:EU:C:2006:165, para 35–36; CJUE Judgment

ity. Therefore, a more important example of such an approach is the CJUE Judgment of 26 February 2006, Åklagaren v. H. Åkerberg Fransson, Case C-617/10,[13] because in this judgment the Court interpreted *ne bis in idem* formulated in Article 50 of the Charter.

The considerations may lead to the conclusion that standards of *ne bis in idem* in the case-law of the ECtHR and the Court were the same. However, in the judgment of 16 November 2016 passed in the case of A. and B. v. Norway[14] the ECtHR redefined what constitutes the second prosecution. According to the ECtHR, the duplication of criminal and administrative proceedings does not breach Article 4 of Protocol 7, provided that the proceedings are sufficiently closely connected in time and in substance. There are substantive links, if the purposes of the proceedings are complementary and they relate to different aspects of the same act. The imprecise character of the criteria presented in A. and B. v. Norway limited the impact of the judgment passed in the case of Zolotukhin. As it was described by Judge Pinto de Albuquerque in his dissenting opinion to A. and B. v. Norway: *„The past, generous stance on idem factum is significantly curtailed by the new proposed bis straitjacket."*[15]

At this stage, the Court faced on 20 March 2018 three cases that dealt with preliminary questions related to *ne bis in idem*. They were: criminal proceedings against Luca Menci, Case C-524/15[16]; Enzo Di Puma v. Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) v. Antonio Zecca, Joined cases C-596/16 et 597/16[17]; Garlsson Real Estate SA, in liquidation, Stefano Ricucci, Magiste International SA v. Commissione Nazionale per le Società e la Borsa (Consob), Case C-537/16.[18] They concerned the cumulation of responsibility for the same act as a crime and an administrative offence.

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of 28 September 2006, *J.L. Van Straaten v Staat der Nederlanden.*, Case C-150/05, ECLI:EU:C:2006:614, para 53.

[13] ECLI:EU:C:2013:105.

[14] ECtHR Judgement of 15 November 2016, Case A. and B. v. Norway, application no. 24130/11 and 29758/11, hudoc.int.

[15] Para 79 of the dissenting opinion of Judge Pinto de Albuquerque.

[16] EU:C:2018:197.

[17] EU:C:2018:192.

[18] EU:C:2018:193.

Although they regarded the level of cumulations which was defined above as domestic, they are important for all the other levels of cumulation mentioned above. Having in mind the development of quasi-criminal enforcements, helps to realize how important is the problem and how broad is the scope of the reference of the judgments.

Taking into account the actual jurisprudence of the ECtHR, the judgments may be described as the Court's response to the judgment of the ECtHR in case A. and B. v. Norway.[19] The question on the influence of A. and B. v. Norway on the Court's case-law can be formulated. Did the Court follow in the footsteps of the ECtHR, or maintain the position taken in Åklagaren v. H. Åkerberg Fransson? Did the Court provide for higher or lower standards of *ne bis in idem* than the ECtHR?

I have decided to refer in the gloss only to one of the three Court's judgments passed on 20 March 2018. Among the judgments I have chosen Menci, because it was the first judgment passed on that day. In comparison to the two other judgments, Menci is more detailed than judgments posed in the cases of Garlsson and Di Puma.

2. FACTUAL AND LEGAL BACKGROUND

The Italian Amministrazione Finanziaria took a decision ordering Mr Menci, as a proprietor of a sole trading business, to pay the VAT due and imposed administrative financial penalty representing 30% of the Tax debt (84 748.74 EUR). The decision was the result of administrative proceedings concerning allegation of the failure to pay within the time limit the VAT resulting from the annual tax return for the tax year 2011. The decision became final and Mr Menci started paying the penalty in installments, what was accepted by the authority.

Then criminal proceedings against Mr Menci were initiated. The ground for the proceedings was the same act (behaviour) of failure to pay VAT. Failure to pay VAT constituted the offence provided for in Article

[19] Luchtman, "The ECJ's Recent Case Law," 1718; Gianni Lo Schiavo, "The principle of ne bis in idem and the application of criminal sanctions: of scope and restrictions," *European Constitutional Law Review* 14, Issue 3 (2018): 645.

10a(1) and Article 10b(1) of Legislative Decree No 74/2000. According to the same legal act, the criminal and administrative proceedings are to be conducted independently and neither administrative proceedings nor criminal could be suspended pending the result of the other proceedings. An administrative authority and a court are entitled to impose penalties independently. Only at the stage of the penalties execution the consequences of the multiplicity proceedings are deducted. According to Article 21(2) of Legislative Decree 74/2000 administrative penalties are not enforceable unless the criminal proceedings have been finally concluded by dismissal of the case, acquittal or termination of the proceedings. However, the rule does not prevent conducting independently administrative and criminal proceedings for the same act.

Therefore the Tribunale di Bergamo, that conducted the criminal proceedings in Mr. Menci case, decided to refer to the Court the question for a preliminary ruling whether Article 50 of the Charter interpreted in the light of Article 4 of Protocol 7 and the related case-law of the ECtHR, preclude the possibility of conducting criminal proceedings concerning the same act concerning the failure to pay VAT for which a final administrative penalty has been imposed on the same person.

Advocate General Campos Sánchez-Bordona delivered his opinion on 12 September 2017. According to his conclusions, Article 50 of the Charter requires for its application the existence of the same 'material facts' which, regardless of their legal classification, must be the basis for the imposition of tax penalties and criminal penalties. This rule is infringed, „*if criminal proceedings are commenced or a penalty of a criminal nature is imposed on a person who, in respect of the same act has previously had a tax penalty imposed on him by a judgment which has become final, where, despite its name, that penalty is in fact criminal in nature.*"

3. JUDGEMENT OF THE COURT

The Court examined the nature of proceedings and penalties imposed on Mr Menci and assessed that they had a criminal character according to the criteria accepted by the Court in the Bonda case. The proceedings regarded the same offence understood as the existence of the same facts

(*idem factum*). Therefore, the cumulation of proceedings and sanctions could be evaluated from the perspective of the right guaranteed in Article 50 of the Charter.

Assessing the cumulation the Court began from the statement that in the judgment of 27 May 2014, criminal proceedings against Zoran Spasic, Case C-129/14,[20] it was ruled that a limitation to *ne bis in idem* may be justified on the basis of Article 52 (1) of the Charter (par. 41). The provision constitutes the general rule of limitation of the rights and freedoms recognized by the Charter. According to Article 52(1) of the Charter, the limitation must be provided for by law and respect the essence of those rights and freedoms. The Article requires also the consistency of the limitation with the principle of proportionality. It means that they should be necessary and should meet objectives of general interest recognized by the EU or the need to protect the rights and freedoms of others. When there is a choice between appropriate measures, the least onerous should be applied and the disadvantages caused by the measure must not be disproportionate to the aims pursued.

There were no doubts that the duplication of proceedings and penalties was in this case provided for by law. As regards the essential content of the right not to be tried or punished twice, The Court took position that the right is respected because the duplication is allowed only under conditions exhaustively defined in law. The limitation also meets the objective of general interest because it supports the collection of all the VAT due. The Court noticed that proceedings and penalties relate to different aspects of the same unlawful conduct at issue.

The Court recalled also Article 52(3) of the Charter according to which, so far as the Charter contains the rights which correspond to rights guaranteed by the ECHR, their meaning and scope are the same. In the judgment of 15 November 2016, A. and B. v. Norway the ECtHR has held that the duplication of tax and criminal proceedings and penalties punishing the same violation of tax law does not infringe *ne bis in idem*, if the proceedings have sufficiently close connection in substance and time. It constituted for the Court the base for the argument, that the duplication

[20] ECLI:EU:C:2014:586.

of proceedings and penalties is possible even in the light of Article 4 of Protocol 7.

To sum up, the Court did not accept the position of the Advocate General. Assuming that Article 50 of the Charter does not preclude duplication of criminal and administrative proceedings of criminal nature and such penalties, the Court enumerated conditions for the state. The first one is pursuing an objective of general interest. According to the Court, the duplication of proceedings and penalties is justified, when they pursue additional objectives. Moreover, the rules ensuring coordination of proceedings which limit their additional disadvantages for the persons concerned should be provided for, as well as the rules that ensure that the severity of all the penalties imposed for the same person is limited to what is strictly necessary in relation to seriousness of the offence concerned.

4. COMMENT

The meaning of the judgment results from the following thesis. First of all, the Court stated that the limitations of the right enshrined in Article 50 of the Charter may be justified on the basis of Article 52 (1) of the Charter. Moreover, the cumulation of the proceedings and penalties respects the essence of the right and it is not excluded in the light of Article 4 of Protocol 7.

The reference to the accordance of the restriction of the right not to be tried or punished twice based on the principle of proportionality with the standard of the correspondent right provided for in the ECHR - requires the interpretation of the Article 52(1) of the Charter especially in conjunction with Article 52(3) of the Charter.[21] According to the provision, in so far as this Charter contains rights which correspond to the rights guaranteed by the ECHR, the meaning and the scope of those rights shall be the same as those laid down by the ECHR. Furthermore, the Court can

[21] The interpretative directive results from the third subparagraph of Article 6(1) TEU, according to which the rights, freedoms and principles set out in the Charter are to be interpreted in accordance with the general provisions in Title VII of the Charter and with due regard to the explanations referred to in the Charter.

develop an autonomous approach to the rights enshrined in the Charter, but only if the Court guarantees more extensive protection than provided for in the ECHR. Therefore, the shape of the right on the ground of the ECHR has to be taken into consideration during the interpretation of Article 50 of the Charter. According to the Explanations relating to the Charter, they are determined not only by the text of the legal acts, but also by the case-law of the ECtHR.

It has to be also clarified that when the Charter recalls the ECHR it comprises not only the European Convention on Human Rights and Fundamental Freedoms, but also Protocols to the Convention.[22] One may raise an argument that not all the Member States of the EU are parties to Protocol 7. However, the importance of the ECHR and the Protocols does not result from the obligations taken by every Member State which is a party to the ECHR and the Protocols, but from the binding character of the Charter, which refers in Article 52(3) of the Charter to the ECHR. There is no difference between the Protocols to the ECHR that were ratified by all Member States and those which were not in the Charter and in the Explanations to the Charter.[23] One cannot find any notion on that, although the drafters of the Charter were aware of the reservations made by Member States to the ECHR and the Protocols.[24]

Although the ECHR does not provide for the limitation of the right not to be tried or punished twice based on the proportionality principle, the Court declared in Menci that the acceptance of such limitations of the right is in accordance with the way the ECtHR understands the right. The argument raised by the Court was based on the judgment of 15 November 2016, A. and B. v. Norway, in which the ECtHR has

[22] Steve Peers and Sacha Prechal, "Article 52 - Scope and interpretation of Rights and Principles," in *The EU Charter of Fundamental Rights. A Commentary*, ed. Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward (Oxford: Hart Publishing, 2014), 1498.

[23] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), O.J. 2007, C 303/17–35.

[24] John A.E. Vervaele, "Schengen and Charter-related ne bis in idem protection in the Area of Freedom, Security and Justice: M and Zoran Spasic," *Common Market Law Review* 52, Issue 5 (2015): 1349.

held that the duplication of tax and criminal proceedings and penalties punishing the same violation of tax law does not infringe *ne bis in idem*.[25]

However, there is a fundamental difference between the position taken by the ECtHR in the case of A. and B. v. Norway and the position taken in the case of Menci, as well as in two other cases adjudicated on 20 March 2018. In the case of A. and B. v. Norway the ECtHR did not declare that the duplication of criminal proceedings for the same behaviour constitutes a permissible limitation to *ne bis in idem*, because it was assessed as permissible from the perspective of the balancing test. The ECtHR stated that under some circumstances two proceedings can be treated as one and therefore such a situation is outside the scope of the application of *ne bis in idem*. Two proceedings have to be sufficiently close in substance and in time. According to the ECtHR, in such a situation there is not an element that in the Latin formula of *ne bis in idem* constitutes 'bis'. The ECtHR used the balancing test to assess whether, even if the two proceedings were treated as one, therefore the situation is outside the scope of application of *ne bis in idem*, such an integrated response to the failure to declare income and pay taxes did not result in any disproportionate prejudice or injustice.[26] Therefore, the Court did not accept other limitations of *ne bis in idem* than provided for in Article 4(2) of Protocol 7, especially not limitations based on the balancing test. The balancing test was applied by the ECtHR at a different level. A. and B. v. Norway is a subject of fair criticism, mainly because of the lack of precision concerning the criteria of closeness of two proceedings.[27] However, the judgment did not approve an introduction of such extensive opportunities of the right's restriction as it would be possible when the limitation clause based on the principle of proportionality is applied. If two or more proceedings do not fulfill the re-

[25] Para 60–62.

[26] Para 144–153.

[27] See: The Dissenting Opinion of Judge Pinto de Albuquerque, par. 50–56; Luchtman, "The ECJ's Recent Case Law," 1727–1728; Katalin Ligeti and Stanisław Tosza, "Challenges and Trends in Enforcing Economic and Financial Crime: Criminal Law and Alternatives in Europe and the US," in *White Collar Crime: A Comparative Perspective*, ed. Katalin Ligeti and Stanislaw Tosza (Oxford: Hart Publishing, 2019), 32; Gulia Lasagni and Sofia Mirandola, "The European ne bis in idem at the Crossroads of Administrative and Criminal Law," *Eucrim* 2 (2019): 128–129.

quirements of being so close in substance and in time, that they can be treated as one proceeding, the second one constitutes an infringement of the right not to be tried or punished twice. Then, the assessment of the cumulation from the perspective of the principle of proportionality does not matter, because the limitation clause based on principle of proportionality is not a limitation clause admissible to the restriction of the right. Summarizing, the application of the balancing test in reference to restrictions of the right not to be tried and punished twice does not have a basis in the jurisprudence of the ECtHR.

Taking into account the analysis, the question whether the meaning and the scope of *ne bis in idem* is at least not lower than provided for in the ECHR has to be formulated. One can find different answers to the question in the literature. Judgments passed on 20 March 2018 are assessed as providing for the more extensive protection of *ne bis in idem* than the protection guaranteed by the ECtHR.[28] According to other authors, they constitute a modified version of the criteria adopted by the ECtHR in A. and B. v. Norway[29]. However, in my opinion the judgments are incoherent with the case-law of the ECtHR and they do not provide for higher or even equal protection of *ne bis in idem*.

As it was emphasized before, the ECtHR stipulated in the case A. and B. v. Norway the specific conditions that have to be fulfilled to treat two or more proceedings as one. Although the criteria are not precise, in many situations the cumulation of proceedings will lead to them being excluded. The requirements constitute a test which not every cumulation of penal proceedings for the same act may pass. What is interesting, taking into account the criteria presented in A. and B. v. Norway, the Advocate General Campos Sánchez-Bordona assessed the proceedings that took place in the case of Menci. According to his Opinion, there are not sufficiently close connected to treat them as one proceeding. Therefore, even if the standard regarding 'bis' has been relaxed by the ECtHR, not all kinds of cumulation of penal responsibilities are able to fulfill the requirements presented in A. and B. v. Norway.

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[28] Schiavo, "The principle," 657, 663; Luchtman, "The ECJ's Recent Case Law," 1748.

[29] Zoran Burić, "Ne Bis in Idem in European Criminal Law - Moving in Circles?," *EU and Comparative Law Issues and Challenges Series*, Issue 3 (2018): 517–518.

In Menci the Court did not recall the criteria of the closeness of two or more proceedings. However, contrary to way the judgments passed on 20 March 2018 are read by some commentators, it does not mean that the Court provided for higher standards for *ne bis in idem* protection. Instead of the criteria the Court accepted an admissibility of the restrictions of *ne bis in idem* if they fulfill the criteria provided for in Article 52(1) of the Charter. Therefore, the Court applied the less precise criteria which constitutes elements of the principle of proportionality.

One may say, that "at the end of the day" A. and B. v. Norway and Menci lead to the same loose protection of *ne bis in idem*, and presumably therefore the position taken in the judgments is treated as a modified version of the criteria adopted by the ECtHR in A. and B. v. Norway. However, the difference between A. and B. v. Norway and Menci, as well as two other judgments passed on 20 March 2018, is in the way and the scope the protection has been loosened. The right not to be tried or punished twice, which is according to the ECHR a non-derogable right, limited only by the limitation clause described in a detailed way, became in Menci a relative right, which protection depends on the strength of interests which are in conflict. Such a way of understanding ne bis in idem does not respect the need of protection of the legal certainty.

5. CONCLUSIONS

In conclusion, the application of the balancing test as a limitation clause for *ne bis in idem*, finds no support in the case-law of the ECtHR. It reduces the level of *ne bis in idem* protection in comparison to the case-law of the ECtHR and, therefore, such a position infringes Article 52(3) of the Charter.

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REVIEW OF EUROPEAN AND COMPARATIVE LAW
VOLUME XLV
YEAR 2021, ISSUE 2, pp. 221–225
DOI: https://doi.org/10.31743/recl.9379

REVIEW OF MACIEJ JOŃCA, *ROMAN LAW. MIRABILIA,* C.H. BECK, WARSZAWA 2020, PP. 506, ISBN 978-83-8158-443-2

*Michał Lewandowski**

The year 2020 marked the publication of the book entitled *Roman Law. Mirabilia*, written by Prof. Maciej Jońca, by the renowned publishing house C.H. Beck. Prof. Maciej Jońca is Head of the Department of Roman law at the John Paul II Catholic University of Lublin and an art historian. Apart from that, he is an honorary member of the Academic Corporation *Astrea Lublinensis* (which I also happen to belong to).

Maciej Jońca is a recognizable scholar in the circle of Polish law historians. He is an author of five monographic studies and of over one hundred articles. Recently, his professional interests have been focused on the underscoring of the role of Roman law in the shaping of the cultural identity of the contemporary world. In his latest works he has proposed a provocative thesis that in the present times Roman law is often perceived as an "aunt" far advanced in years. Even though she may still exhibit considerable wisdom, she is already well past her prime. The "aunt" has something interesting to say occasionally, but there are few who would listen to her. However, as the author of *Mirabilia* argues, Roman law is now something more than a rigid academic discipline, as it comprises an integral part of our culture. It is our present DNA code. Roman law resembles a box of bricks, which can always be used to build something new. Trying to build a new legal system or a new codex, we almost always

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use the same material and it is not all. There is also literature, art, popular culture etc. This is where Roman law is also to be found!

Mirabilia might be considered as a continuation of a previously published book entitled *Roman Law. Marginalia*. The accuracy of the ideas comprised in that study is best emphasized by the fact that in a short time it was reissued. It was already then that Maciej Jońca declared that he intended to make his texts lighter with a view to attracting a wider audience to the topic of Roman law, who otherwise would not be interested in strictly academic studies. "It was at that time that I over and over again realized that there existed such a plethora of issues and aspects that could be used as a prism for showing the intertwining of Roman law with the existing reality" he wrote then.

Prawo rzymskie. Mirabilia counts 505 pages including bibliography. It consists of 45 chapters, of which each is a separate essay. Undoubtedly, one of Jońca's skills as a writer is his ability to resort to a subtly provocative statement. He seems to have accidentally identified "the problem of Polish Roman studies", as he refers to it himself. The author claims that Polish authors have difficulties with reaching to a wider audience in Poland due to communication problems. In his opinion, Polish addressees should be offered texts written in a straightforward and uncomplicated way (due to the fact that the majority of people lack both profound knowledge and a willingness to put an effort into the reading process). The "Preface" also contains an important question: "What can Roman law offer to a Polish student of law?". The answer is simple: "An understanding that *ius Romanum* contains much more than just textbook *mancipatio*, interdicts or the scary Latin names of complaints may turn out to be a valuable experience". A considerable amount of time has passed since I took my exam in Roman law, but it seems to me that the above doubts deserve a moment of reflection.

One of the author's favourite sayings is this: "We are not only what we eat, but also what we look at". This principle has been effectively applied in the book, as each chapter is preceded by an illustration, which in itself is meant to speak to the reader. Despite the author's meticulous attention to the "aesthetics of the product", at times the reading of Jońca's book might be an arduous experience. While engaging in the reading of *Mirabilia,* we can participate in the author's bitter perception of reality.

On several occasions we might be invited to share an entirely new perspective on life.

Indeed, the problem that has been present in the Polish academic world for some time is the difficulty of conveying the message, even though it is hardly an issue of contemporary times that a person from outside a specific field should be addressed in simple, understandable and interesting terms. It also has not really changed that popularization of knowledge is not particularly appreciated in Poland. As far as Roman law is concerned, it lies beyond doubt that an ever-going synthesis of all that has already been said by scholars previously sounds quite boring. Therefore, the approach proposed by Maciej Jońca in his *Mirabilia* (and before that in *Marginalia*) deserves appreciation.

Maciej Jońca points out that he was inspired by Antonio Guarino (1914–2015) who once said: "I merely think that by designating not-so-trivial a trend for developing Roman studies in contemporary times, I also made it reflect my sense of taste, by the fact that it was described half-jokingly". The above reference to both the scholar and his opinion is cunning and very accurate at the same time. Guarino is an icon of Italian Roman studies. This scholar was very quick in convincing the public that the secrets of the institutes of Roman law could be easily explained in the pages of the daily press and that esteemed journal *Labeo* could easily publish popular columns next to serious studies. Apparently Maciej Jońca wants to follow in Guarino's footsteps.

Each of the essays collected in *Mirabilia* is different and each is a closed entity, seemingly not connected with the other texts. Personally, I especially enjoyed a few of them. The first one is a study entitled "Where you are Gaius, I am Gaia – on Roman Marriage from a Different Perspective". At the beginning the author describes how Roman society perceived marriage. To our surprise, we learn that in the antique times, it was perceived by some as a necessary evil. Then we read: "At present, the essence of marriage is usually viewed through the prism of the teaching of the Church on the one hand and romantic comedies on the other. For the Church, marriage is a sacrament – a sacred and indissoluble one. Further, in romantic comedies action is constructed on the basis of the same well-rehearsed pattern" (p. 20). In this simple and elegant way, the author seems to be trying to say: "look, today we think in this way,

but for the ancient people this or some other aspect of life was not so obvious or it looked entirely different".

The other essays which impressed me considerably include: "The die has been cast" (p. 10 et seq.), "On Roman bar with a grain of salt" (p. 65 et seq.), "Honour and written laws: some remarks on Polish academic corporations" (p. 339 et seq.), and "The capital of the non-practicing" (p. 463 et seq.). Let us briefly consider for the chapter "Honour and Written Laws: A Word on Polish Academic Corporations". In this essay the author (as mentioned above: an honorary member of the Polish Academic Corporation *Astrea Lublinensis*) describes in greater detail the way the academic corporations functioned, the way the *Mensur* or academic fencing looked like and also focuses on the concept of honour, being a good that was highly protected by the corporation customary law. He also pays attention to the way the state and also the Church tried to eliminate fencing duels from social life or limit them in such a way so as to minimize the risk of death of the contestants. The considerations are kept in a serious tone and then there is a dramatic turn. At the end, the reader is surprised with an amusing conclusion. "After some time had passed, the curator and fillister in one person received a shopping list for approval deemed necessary for carrying on with the activities of the corporation. It comprised *schlägers* and protective sleeves. For the non-initiated, the *schläger* is a duelling sword and protective sleeves were used to encase the forearm against cuts. No comment" (p. 351).

Another short essay that is also worth mentioning is the one entitled "The capital of the non-practicing" (p. 461 et seq.). It includes considerations on the fact that legal studies are most often chosen by those who are not-decided. The candidates declare that they want to become lawyers but they do not really know much about the specifics of this profession, nor do they know what their future professional life (possibly) will look like. Even though the persons mentioned in the book did not follow the legal profession as their career path after studies, in the conclusion we can read: "Law is worth studying. Not for the fact of studying itself, but for forming this unique-in-itself outlook on the world … Legal education, even though a person may not choose to follow a career strictly related to legal professions, is usually more of a help than a hindrance in life".

The above and all the other reflections offered by Maciej Jońca in his *Mirabilia* carry with themselves an important message. I do not claim that he is always right in his opinions, but he always presents his point of view in an original and intriguing way. *Roman Law. Mirabilia* is a book that has been written with a view to popularizing science and it fully accomplishes its purpose. Works such as *Mirabilia* are much needed as they make it easier to reach with scientific considerations and research results to wider audiences. A clueless reader requires some assistance as to the form in which the message is to be offered to him. Maciej Jońca managed to deal with this challenge.