e-ISSN 2545-384X

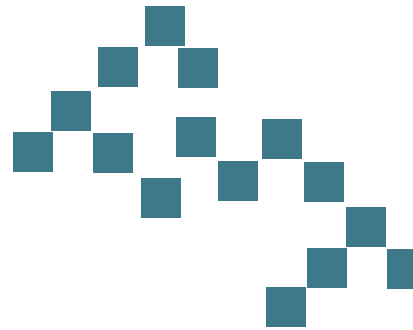
REVIEW
OF EUROPEAN AND COMPARATIVE LAW

Volume 52 2023/1

REVIEW
OF EUROPEAN AND COMPARATIVE LAW

REVIEW
OF EUROPEAN AND COMPARATIVE LAW

Volume 52 2023/1



Wydawnictwo KUL
Lublin 2023

Cover design
Agnieszka Gawryszuk

Typesetting
Jarosław Łukasik

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

e-ISSN 2545-384X

The original version is the electronic version.

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

TABLE OF CONTENTS

PUBLIC COMMERCIAL LAW

OTHERS

GLOSS

Review of European and Comparative Law | 2023
Vol. 52, No. 1, 7–29
https://doi.org/10.31743/recl.15478
Received: 1 January 2023 | Accepted: 1 February 2023 | Published: 30 March 2023

The Obligations of Entrepreneurs Providing Services by Electronic Means

Małgorzata Ganczar
Dr. habil., Assistant Professor, Faculty of Public Economic Law, Department of Law, Canon Law and Administration, The John Paul II Catholic University of Lublin, correspondence address: ul. Spokojna 1, 20-074 Lublin, Poland, email: mganczar@kul.pl
https://orcid.org/0000-0003-0880-4647

Keywords:
services provided by electronic means, a consumer, an entrepreneur, information obligations

Abstract: The development of new information and communication technologies affects economic development. E-services, along with the accompanying social changes, are being implemented in almost every area of human life, and the development of information and communication technologies makes it possible to employ a number of new instruments in its various spheres (e-banking, e-commerce, e-education, etc.). Currently, the information space in the context of the provision and use of e-services includes consumers and entrepreneurs although it assigns them different rights and obligations in this area. It seems necessary to assess the impact of the implementation by entrepreneurs of obligations related to the provision of e-services and their impact on the economy and on consumer safety in online trade. Legal changes concerning the obligations imposed on entrepreneurs in that field appear periodically in response to new threats related to dynamic technological development. The publication is devoted to an analysis of the provision of on-line services and an assessment of the law, in particular with regard to fulfilling information obligations with respect to consumers in cyberspace.

1. Introduction

It is very important for economic development that business processes are streamlined, which enables effective socio-economic development, occurring when innovations are implemented to introduce new, meaningful

ISSN 2545-384X (Online)

solutions, working methods and new services, including those provided electronically. What we can observe today is the development of a data-driven economy. This is the fourth stage of digitisation (after the development of ICT infrastructure, its networking and its application-based use by businesses and consumers). It is built on the huge volumes of generated data that currently remain only marginally structured and utilised. The world does not yet know how to make full use of them, but the race to shape the future state of the data driven economy is gathering pace and involves large technology companies, international organisations, economic blocs as well as individual countries[1]. Precisely from 1 January 2023, the rules for the sale of goods and digital content, e.g. games, software, photos in cyberspace, have changed, with the obligation to adapt the rules of procedure to the new rules implementing the EU directives: on the provision of digital content[2], the so-called the Sales of Goods Directive[3] and the Omnibus Directive[4].

Poland is also accepting the indicated challenge through active monitoring of new developments in digitalisation, the international environment, as well as exploring its own potential[5]. Unfortunately, the legislative process related to the implementation of the 5G network[6] in Poland is still

1 New services are emerging such as chatbots, ChatGPT, voice applications based on artificial intelligence solutions, which automate iterative learning and discovery with data. More widely: Luigi Lai and Marek Świerczyński, *Prawo sztucznej inteligencji* (Warszawa: Wydawnictwo C.H. Beck, 2020).

2 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services

3 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC

4 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

5 *Strategia 5G dla Polski,* Ministerstwo Cyfryzacji, styczeń 2018, 7.

6 The 5G network, which consists of fibre-optic lines or other fibre-equivalent telecommunications networks and connected short-range wireless access points with associated hardware and power supply equipment. Next-generation networks will be used for smart cities, the provision of M2M (Machine-To-Machine) services, the provision of services for automated (connected) and autonomous vehicles, and the provision of broadband internet access and interpersonal communication services.

going on. The 5G technology is crucial for the development of modern society and economy, the evolution of a society in which people use interactive public e-services in real time, e-commerce, e-medicine, or have the opportunity to participate in cultural events via digital media without loss of quality. The task of 5G will be to integrate massive amounts of data together with widespread and efficient access to network infrastructure, in order to make a range of new digital services and processes available to consumers. The 5G network is perceived as an agent of revolutionary changes enabling a transformation in the economy through wireless broadband services at gigabit speeds, as well as support for new types of applications where devices and objects will be connected via networks (the Internet of Things[7]) and versatility through software virtualisation – enabling innovative business models in many sectors (e.g. transport, healthcare, manufacturing, logistics, energy, media and entertainment). The key importance of the 5G network in the implementation of the digital single market strategy is highlighted in the European Union, through which Europe will be able to compete in the global marketplace[8].

The functioning of entrepreneurs and consumers in cyberspace involves risks. Alongside the development of new technologies, cybercrime is increasing, which is defined in the European Union as criminal acts committed by using electronic communications networks and information systems or directed against such networks and systems[9]. One should be aware of the fact that the nowadays digital world cannot be considered an oasis of stability and security. Threats in cyberspace affect all players in the market. It is worth noting that cyber security has different meanings for different recipients. For individuals, it is a sense of security, protection of

[7] More broadly: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *5G for Europe: An Action Plan*, Bruksela, 14.9.2016 r. COM(2016) 588 final, 2. Grażyna Szpor, ed., *Internet rzeczy. Bezpieczeństwo w Smart city* (Warszawa: Wydawnictwo C.H. Beck, 2015).

[8] See more: Marta Grabowska, "Europejskie społeczeństwo gigabitowe," *Studia Europejskie,* no. 1 (2020): 151–172; Agnieszka Besiekierska, "Legal Aspects of the Supply Chain Cybersecurity in the Context of 5G Technology," *Review of European and Comparative Law*, 51(4), (2022): 129–147, https://doi.org/10.31743/recl.14623.

[9] Communication from the Commission to the European Parliament, the Council and the Committee of the Regions of 22 May 2007, COM (2007) 267 final.

personal data and privacy. For entrepreneurs, on the other hand, it is ensuring the availability of mission-critical business functions and protecting confidential information through information security management. For the state, the concept will denote the protection of citizens, businesses, critical infrastructure and state ICT systems against attack or breach of integrity. Digital attacks can be accompanied by the use of manipulation and influence technology on people. Unfortunately, many reports and studies strongly indicate that it is the human factor that is the Achilles' heel of security systems[10].

The global economy is becoming a digital economy at an astonishing rate. It is a space in which the free movement of goods, people, services and capital is ensured and citizens and businesses can access or provide services online without obstacles and on a fair competitive basis. In such an area, a high level of protection of consumers and personal data is also guaranteed, regardless of nationality or place of residence. The introduction of a single digital market[11] will help European businesses to expand globally, ensuring that Europe remains a global leader in the digital economy. The main idea behind the Single Digital Market is essentially to remove national restrictions on transactions over the internet. On 6 May 2015 the Commission adopted the Single Digital Market Strategy[12], which is based on three pillars:

---

10 Tomasz Zdzikot, "Państwo i administracja publiczna na straży cyberbezpieczeństwa," in *Stulecie polskiej administracji. Doświadczenia i perspektywy* (Warszawa: Krajowa Szkoła Administracji Publicznej, 2018), 246–247.

11 The European Commission published the European Digital Agenda 2020 in 2010, which aims to make better use of the potential of information and communication technologies to support innovation, economic growth and progress. It identified the importance of the digital market for the development of the modern economy and stressed the need to increase consumer confidence in cross-border e-commerce and to strengthen the supervision over the digital market. COM (2010) 245 final version, accessed December 12, 2022, https://ec.europa.eu/digital-single-market/en/europe-2020-strategy, In October 2012 the Commission presented the second set of conclusions – *the Single Market Act II. Together for New Growth (*COM (2012) 0573*)* – containing 12 key actions focused on four key drivers for growth, jobs and confidence: integrated networks, cross-border mobility of citizens and businesses, the digital economy and actions to strengthen cohesion and enhance consumer benefits. Within the framework of the digital single market, the aim was to reduce the costs and increase the efficiency of the deployment of infrastructure for high-speed communication networks.

12 COM (2015) 192.

1. Ensuring that consumers and businesses have easier access to digital goods and services across Europe;
2. Creating an appropriate and equal operational environment enabling digital networks and innovative services to flourish;
3. Maximising the growth potential of the digital economy.

The Single Digital Market Strategy provides, among other things, for better online access with regard to consumers and businesses. Some aspects of consumer and contract law have already been fully harmonised when it comes to online sales, e.g. the information which needs to be provided to consumers before a contract is concluded, or the rules governing the consumer's right to withdraw from a contract if he or she opts out. The main target of the Single Digital Market is to create a climate that encourages investment in digital networks, in research and innovative businesses in the indicated sector. In response to the challenges of the digital single market, the Council of Ministers has established a Government Plenipotentiary for the Single Digital Market[13], whose tasks concern the analysis of existing barriers to the implementation of the principles of the digital single market, including barriers to the development of online services, and the presentation of proposals for their removal; the preparation of guidelines for the development of an electronic economy, consistent with the principles of the digital single market; the elaboration and monitoring of legal or organisational solutions aimed at the implementation of the principles of the digital single market; the initiation of and cooperation with European Union Member States in order to develop projects in the field of the common market for online services.

The entrepreneur providing electronic services is constantly exposed to the need to adapt to new technological reality and, consequently, has to meet a number of obligations imposed by the legislator in a number of legal acts, seeking to protect participants involved in electronic trading in the service market.

[13] The Regulation of the Council of Ministers on the establishment of the Government Plenipotentiary for the Digital Single Market of 14 March 2017 (Journal of Laws 2017, item 563).

2. The notion of electronically supplied services under the EU and Polish law

First, it is worth pointing out the legal definition of the concept of services, provided for in Article 57 of the Treaty on the Functioning of the European Union[14]. These are the services usually rendered for remuneration to the extent that they are not covered by the provisions on free movement of goods, capital and persons. The services concerned comprise in particular activities of an industrial nature, handicrafts and the liberal professions.

By contrast, the e-service is defined in the literature as a new form of service provision, including the satisfaction of needs using the Internet, starting with the contact between the entrepreneur and the customer, through the presentation of an offer, then its ordering and finally executing thereof[15]. It is not possible to clearly define the boundary of an e-service, due to the dynamic nature of the environment in which it is created and developed. Consequently, it becomes difficult to unambiguously determine whether a given activity via the Internet is an e-service or not[16]. An e-service reduces human activity to a minimum and is individually customer oriented.

What distinguishes an e-service from a service delivered in a traditional form is mainly the lack of human involvement on the other side while delivering services over long distances. Due to the highly dynamic nature of ICT, it is difficult to clearly define the boundaries of an e-service. It leads to complications in determining whether an Internet activity is already or not yet an e-service. For a better understanding of what e-services actually are, the characteristics of electronic services are worth mentioning. The most important ones include the simplicity of using this form of service for consumers, the accessibility and openness as well as the individualisation of the services provided. Other characteristics of e-services would include mobility, which involves dedicating them also to mobile devices such as tablets. Moreover, e-services are also distinctive in

14 Consolidated versions of the Treaty on European Union and the Treaty establishing the European Community of 26 October 2012, Official Journal of the EU, C 326/1.

15 Anna Dąbrowska, Mirosława Janoś-Kresło and Arkadiusz Wódkowski, *E-usługi a społeczeństwo informacyjne* (Warszawa: Wydawnictwo Difin, 2011), 41.

16 Kornelia Batko, Grażyna Billewicz, "E-usługi w biznesie i administracji publicznej," *Studia Ekonomiczne* no. 136 (2013): 47–49.

terms of the possibility to build an e-community around a specific service, as well as originality meaning pioneering, providing services in the form of *cloud computing*[17]. E-service can be provided via the Internet, mobile devices, satellite and digital TV[18]. The dynamic development of e-services can be observed in areas such as communication, commerce, banking, health care, finance, science, tourism and culture. E-services include in particular: the web page creation and maintenance, the remote management of programmes and equipment, the supply of software and software updates, the provision of images, text and information as well as database access, the provision of music, films and games, including games of chance and gambling games, as well as political, cultural, artistic, sporting, scientific and entertainment broadcasts and news, distance-learning services.

Given the above, it should be pointed out that e-services should be characterised by simplicity, meaning easy and intuitive use of the service by the user; originality, meaning that the e-service should be something new that has not been on the market before or a new solution based on existing trends in the economy. It should be featured by individualisation and personalisation, i.e. the service should be tailored to the user and his or her preferences, giving the user the impression that the service is addressed directly to him or her; and mobility, the extension of traditional e-services offered as websites to new distribution channels, i.e. solutions for mobile devices (e.g. smartphones, tablets) dedicated to satellite or digital television.

The E-Commerce Directive regulates the provision of electronic services in the EU. The main objective of the Directive is to enable the proper functioning of the single market by ensuring the free movement of such services. The e-commerce Directive uses the concept of *information society*

[17] From English: Cloud computing. A data processing model based on the use of services provided by a service provider. Cloud computing services can be divided into: IaaS (infrastructure as a service), PaaS (platform as a service) and SaaS (software as a service). Cloud computing is a newly developed trend in the use of available information technology. It helps to use and manage IT resources in a simple way using new technologies. Cloud computing is a model that enables comprehensive, convenient access to widely available, configurable computing resources (e.g. networks, servers, databases, storage, applications and services) in an unlimited, convenient, on-demand access via the Internet. These resources can be quickly provisioned and transferred with minimal management or service provider interaction and with minimal involvement of technical services.

[18] Batko, Billewicz, "E-usługi w biznesie i administracji publicznej," 47–49.

service, referring to the definition in the Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and requirements and of rules on Information Society services[19], supplemented by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 on the legal protection of services based on or consisting of conditional access[20]. The definitions included in the above mentioned directives define information society services as all services normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including *digital compression*) and storage of data, at the individual request of a recipient of services. Thus, the Directive applies to services provided through online activities such as, for example, information, advertising, shopping and the conclusion of contracts online. The scope of the concept of information society services has been clarified in Annex 5 to the Directive 98/48/EC, which identifies examples of services that are not of this nature and are therefore not provided at a distance, i.e. provided in the physical presence of the provider and the recipient, even if they use electronic devices (e.g. providing electronic games in a living room in the physical presence of the user). The second group concerns services that are not performed by electronic means. The last group covers services which are not performed at an individual request of the recipient of the service, but are provided in the form of data transmission without individual request and are intended for simultaneous reception by an unlimited number of recipients, e.g. television broadcasting.

The provision of services by electronic means is regulated by the Act of 18 July 2002 on Providing Services by Electronic Means (PSEM)[21], with which the EU provisions related to e-commerce were implemented[22]. he Act contains a definition of service provided by electronic means, which, according to Article 2(4), is the performance of a service provided without the simultaneous presence of the parties (at a distance),

19 The Official Journal of the EU L 204/37.

20 The Official Journal of the EU L 217/18.

21 Journal of Laws. 2020, item 344.

22 More broadly on the implementation of the directive: Jacek Gołaczyński, *Ustawa o świadczeniu usług drogą elektroniczną. Komentarz* (Warszawa: Wolters Kluwer, 2009), 27.

through the transmission of data at the individual request of the recipient of the service, sent and received by means of equipment for electronic processing, including digital compression, and storage of data, which is entirely transmitted, received or transmitted via a telecommunications network within the meaning of the Act of 16 July 2004. – Telecommunications Law. The qualification of a given transaction as a service provided by electronic means requires that the following premises occur together: 1) the service must be performed without the simultaneous presence of the parties at a distance (e.g. via the internet), 2) by transmitting data at an individual request of the recipient of the service (e.g. data reception on a smartphone), 3) the sending, receiving or storing of data as part of the service must be carried out by means of electronic processing devices (e.g. computers, laptops, tablets, smartphones), 4) the service should be transmitted, received or broadcast via a telecommunications network. The last element is not present in the EU law on information society services, nor is it specified in the Polish regulation, which is why it is assumed in the literature that it refers to telecommunication networks of all types (e.g. Internet, intranet). The legislator has included exemptions in Article 3 of the Act on Providing Services by Electronic Means (PSEM) to which it does not apply.

The Act contains a number of legal definitions regarding the concepts used in the text of the Act. The act in question first of all regulates the concept of a service provider, which, according to Article 2(6), is: a natural person, a legal person or an organisational unit without the legal personality, providing services electronically, even if only incidentally, in the course of paid or professional activity. The Polish legislator interprets the service provider in two ways: firstly, it is an entity providing its own or third parties' services/content, and secondly, it is an entity involved in mediating access to such services[23]. However, within the meaning of the described Act, the recipient of the service will be: a natural person, a legal person or an organisational unit without legal personality, which uses the service provided electronically. It seems to be interesting that the verb to use the service is employed. It permits to conclude that a recipient of the service will be not only the one who concludes a contract for the provision of services

[23] Gołaczyński, *Ustawa o świadczeniu,* 47.

by electronic means, but also the one who uses such a service[24]. Similarly to the E-Commerce Directive, the recipient of services is not the same as the consumer in the PSEM Act The concept of the recipient of the service is broader. It is sometimes indicated in the literature that the concepts of service provider and service recipient may overlap. Indeed, there are situations in which one entity can be both a service provider and a service recipient. It happens when an entity simultaneously provides a service via a website and is the recipient of a hosting service provided by another entity[25]. Information society services can therefore be grouped into three categories, namely: 1) transmission services (electronic communication services; telecommunication services); 2) services related to the performance of a distance contract (electronic contracts concluded at a distance; 3) services for the supply of content by electronic means[26].

From 1 January 2023, the provisions of the amended Act of 30 May 2014 on consumer rights[27], where a definition of digital service was introduced indicating it to be a service allowing the consumer to: a) produce, process, store or access digital data, b) share digital data transmitted or produced by the consumer or other users of the service, c) interact in other ways using digital data.

3. Obligations of an entrepreneur providing services by electronic means

Following the EU law, detailed solutions with regard to the information obligation imposed on the e-service provider have been introduced in the Polish legislation. The first group of information obligations includes, among other things, a set of pieces of information contained in Article 5

[24] Paweł Litwiński, "Świadczenie usług drogą elektroniczną" in *Prawo Internetu,* ed. Paweł Podrecki (Warszawa: LexisNexis, 2007), 169.

[25] Gołaczyński, *Ustawa o świadczeniu,* 49–51.

[26] Dariusz Wociór, *Ochrona danych osobowych i informacji niejawnych z uwzględnieniem ogólnego rozporządzenia unijnego* (Warszawa: C.H. Beck, 2016), 372.

[27] Journal of Laws of 2020, item 287 and of 2021, item 2105. Consumer Rights Act amended by the Act of 4 November 2022 amending the Consumer Rights Act, the Civil Code Act and the Private International Law Act, Journal of Laws. 2022, item 2337.

of the PSEM Act[28]. Its basic task is to counteract threats that arise as a result of the application of anonymity to services provided online. The imposition of a number of information obligations on e-service providers stems from the will to ensure the transparency of trading, already assumed in the e-Commerce Directive and consistently adopted and implemented by the Polish legislator[29]. In addition to setting out a detailed set of information, the legislator has also elaborated on the form of the provision thereof. As per the classification of the information obligations incumbent on the entrepreneur, a distinction can be made between: information obligations that arise when any activity is carried out on the internet; obligations that arise when messages with a specific content (commercial information, electronic offer) are disseminated; and specific obligations concerning the targeting of messages with a specific content (contract proposal) to a specific group of recipients, i.e. consumers.

Pursuant to Article 5(1) of the Act on Providing Services by Electronic Means, basic information[30], which enables the recipient of the service to contact the service provider directly, shall be given by the service provider in a clear, unambiguous and directly accessible manner via the information and communication system used by the recipient of the service. It is important in terms of exercising the right of withdrawal from agreement. The expressions used in the abovementioned

28 Katarzyna Chałubińska-Jentkiewicz and Joanna Taczkowska-Olszewska, *Świadczenie usług drogą elektroniczną. Komentarz* (Warszawa: C.H. Beck, 2019), 166.

29 Dominik Lubasz, *Handel elektroniczny. Bariery prawne* (Warszawa: LexisNexis, 2013), 175.

30 Basic information as defined in Article 5(2) to (5) of the Act on Providing Services by Electronic Means. These are: electronic addresses, name, surname, place of residence and address or name or company and seat and address. If the service provider is an entrepreneur, he or she shall also provide information on the relevant authorisation and the authorising authority, if the provision of the service requires, under separate legislation, such authorisation. If the service provider is a natural person whose right to practice the profession is subject to the fulfilment of requirements specified in separate acts, he shall also provide: 1) in the case of appointment of a proxy, his/her name, surname, place of residence and address, or his/her name or company name and registered office and address; 2) the professional self-government to which he/she belongs; 3) the professional title he/she uses and the state in which it was granted; 4) the number in the public register in which he/she is entered, together with an indication of the name of the register and the authority keeping the register; 5) information on the existence of rules of professional ethics appropriate to the profession and the manner of access to those rules.

Article should be interpreted in the light of the notion of the prudent and average consumer, in other words someone with sufficient experience of life enabling him to know and guess easily the content of the information given to him or her.

The said provision implements Article 5 of the E-Commerce Directive. The information about the service provider should be displayed in a place that is visible, so that the recipient of the service can easily find it and determine who the service provider is and where the seat thereof is located. Therefore, it is also very significant to present the information in a clear and comprehensible way, so that it does not mislead the recipient of the service. Such information is most often to be found on the website in sections such as contact us, privacy policy, terms and conditions or at the very bottom of the page in the footer. In the event that that the provider fails to include the information referred to in Article 5, or the data he provides is untrue or incomplete, he shall be liable to a fine (Article 23 of the PSEM Act). The information should be presented in a way that is easy to read, not only in terms of its clear wording, but also in terms of its technical ease of access. Therefore, it seems that the service provider's indication of an internet address, for example, where the indicated data can be found, or any other similar form of indirect communication of data about oneself to the recipient of the service, would not be allowed.

It is also necessary to consider a further information obligation stipulated by Article 6 of the PSEM Act, which regulates the scope of security related to the use of the services by electronic means. The service provider is obliged to ensure that the service recipient has access to up-to-date information on specific risks related to the use of a service provided electronically, as well as on the function and purpose of software or data not being a component of the content of the service, introduced by the service provider into the ICT system used by the service recipient. The fulfilment of such an obligation entails that the service provider makes the information available to the recipient of the service upon request[31]. It should be noted that the necessity of immediacy has been omitted and therefore in order to comply with the requirements it is sufficient for the service provider to create a link to that information.

[31] Gołaczyński, *Ustawa o świadczeniu*, 82.

The *ratio legis* of solutions stemming from Article 6 of the PSEM Act is the necessity to protect consumer privacy and issues related to shifting the costs of violation of such privacy only to the entrepreneur, or the supplier acting in agreement therewith. In addition, the provision of Article 7 of the PSEM Act stipulates that the service provider shall ensure the operation of the information and communication system used, permitting, free of charge, the recipient of the service when required by the nature of the service: (a) to use the service provided electronically in a way that prevents access of unauthorised persons to the content of the message constituting the service, in particular using cryptographic techniques appropriate to the characteristics of the service provided, b) to unambiguously identify the parties to the service provided electronically and to confirm the fact of making declarations of intent and their content, necessary for the conclusion of the agreement for the provision of the said service electronically, in particular using a qualified electronic signature. Furthermore, the service provider shall ensure the termination, at any time, of the use of the electronically supplied service. to unambiguously identify the parties to the service provided electronically and to confirm the fact of making declarations of intent and their content, necessary for the conclusion of the agreement for the provision of the said service electronically, in particular using a qualified electronic signature. Furthermore, the service provider shall ensure the termination, at any time, of the use of the electronically supplied service. The quoted provision imposes obligations on the service provider to ensure the security and confidentiality of transactions transmitted over the network. It involves the protection of transmissions from interference by third parties, as well as the guarantee of the certainty that a statement made by a person actually originates from that person. Pursuant to the quoted provision, the service provider is obliged to ensure appropriate conditions for the use of the ICT system and services by the customer in such a way that access to these transmission contents is impossible for unauthorised persons and to enable unambiguous identification of the parties to the e-service provided and to confirm the fact of making declarations of intent and their content, in particular with the use of a qualified electronic signature.

The protection of IT systems and the content processed within them is mainly focused on technical security measures incorporated

into the operating system, based on access control. In addition to this, additional solutions – primarily in the area of software – are also employed to secure IT resources. In particular, it concerns *firewalls,* which operate on the basis of appropriate software filtering and controlling network activity; this type of software makes it possible, among other things, to provide protection against standard external attacks, allowing, for example, early identification of intrusion attempts; anti-virus software, the purpose of which is to secure a computer system against dangerous software; anti-spyware and anti-advertising software used to detect and remove *spyware* or *adware*; anti-spam software used to reduce the number of unwanted commercial messages received by the user[32]. Most crimes can be committed using ICT systems. Particularly popular and frequent forms of crime in electronic communication networks are various types of fraud and attempted fraud. Methods such as identity theft,, *phishing* (password hunting) and ransomware are used to commit fraud on a massive scale. Mass-scale attacks against IT systems, organisations and individuals (often via so-called botnets[33]) are becoming more and more common. Other types of crimes committed using new technologies include illegal *online* transactions, offering non-existent goods and services, or extorting various types of benefits using stolen, lost or even manipulated payment cards. These can also include electronic fund transfer crimes, which involve intercepting the login details of an online bank account in order to take out all the money one has on that account, as well as investment fraud, the creation of fictitious websites offering the possibility of profit from a fictitious investment[34].

It is also important to discuss the issue of unsolicited commercial information. Commercial information shall be clearly distinguished and marked in a manner that does not raise any doubts as to its being commercial information. Pursuant to Article 9 of the PSEM Act commercial information sent out by service providers must contain: the designation

32 Cf. Brunon Hołyst and Jacek Pomykała, *Cyberprzestępczość i ochrona informacji* (Warszawa: Wydawnictwo Wyższej Szkoły Menedżerskiej, 2012), 14–16.

33 *Botnet* denotes a group of computers infected with malware under common remote control.

34 Jonathan Clough, *Principles of Cybercrime* (Cambridge University Press, 2015), 183–199.

of the entity on whose instructions it is disseminated and its electronic addresses; a clear description of the forms of promotional activity, in particular price reductions, gratuitous benefits in cash or in kind and other advantages related to the promoted good, service or image, as well as a clear indication of the conditions necessary to benefit from the said advantages if they are a component of the offer; any information that may affect the determination of the parties' responsibilities, in particular warnings and disclaimers. As in the aforementioned cases, the consequence of breaching this obligation is to consider the service provider's action as a misleading practice or as an act of unfair competition.

Commercial information should be distinguished from SPAM, denoting unsolicited electronic correspondence sent to an unspecified number of addressees, regardless of their identity. Commercial information sent by entrepreneurs to their existing and potential customers may resemble SPAM for the average user of an e-mail account, but the difference is that the sending of information and advertising material under the conditions set by law, including in particular the consent of the addressee, is not in conflict with the law. Art. 9 and 10 of the PSEM Act contain norms regulating the issue of unsolicited commercial information. Under Article 10 of the PSEM Act it is forbidden to send unsolicited commercial information addressed to a designated recipient who is a natural person by electronic means of communication, in particular by e-mail. Commercial information is presumed to be solicited if the recipient has given consent to receive such information and in particularly if he or she has provided an electronic address, identifying him or her for that purpose. On the other hand, according to Article 172(1) of the Telecommunications Act, the use of telecommunications terminal equipment for the purposes of direct marketing is allowed only if the subscriber or end-user has given his or her prior consent[35]. Telecommunications terminal equipment

[35] Work is currently underway on a draft law – the Law on Electronic Communications (parliamentary print 2816), which implements EU provisions into national law, in particular Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Official Journal of the EU L 321 of 17.12.2018, p. 36, as amended). On the basis of Article 393 of the draft, it is prohibited to use: 1) automated calling systems, 2) telecommunication terminal equipment, in particular in the use of interpersonal communication

is any device intended to be connected directly or indirectly to network termination points. It is any product enabling the transmission of information, or a significant component thereof, which can be directly or indirectly connected by any means to an interface of public telecommunications networks. An interface is a network termination point with specific technical characteristics, i.e. the physical part of the network by means of which a user accesses the network. The terminal equipment serves primarily to transmit and receive information. In addition to transmitting and receiving, terminal equipment can also process information. There is no restriction on the type of information that can be transmitted, received and processed by means of terminal equipment (signs, signals, writing, images, sounds). The telecommunications terminal equipment should be directly or indirectly connected to the network. Direct connection is when no other telecommunications equipment is present between the network termination and the terminal equipment. However, there may be a wire (cable) and telecommunications fixtures to connect the device. In the case of indirect connection, there is another terminal device between the terminal equipment and the network termination, which mediates the transmission of signals (e.g. switchboard, modem). Technological advancement reveals that a single device can perform more and more functions in transmitting and receiving information by adding more modules. Typical terminal devices mediating the transmission process are modems, terminal routers and decoders.

What the above-mentioned provisions have in common is, first of all, the need to have the consent of the person to whom commercial or marketing information is addressed (an individual, an end user). It is worth indicating the practice that got stronger recently, namely requesting consent to send such information. This is the aftermath of the judgment of the Warsaw-Praga Regional Court in Warsaw of 4 January 2019. In this

services – for the purpose of sending unsolicited commercial information within the meaning of the Act of 18 July 2002 on the provision of services by electronic means, including direct marketing, to the subscriber or end user, unless he or she has previously given his or her consent. The consent referred to in subsection 1 may be given by the subscriber or end-user providing an electronic address identifying them within the meaning of the Act of 18 July 2002 on the provision of services by electronic means for the purpose of sending unsolicited commercial information.

judgment, dismissing the plaintiff's appeal, the court confirmed the decision of the court of first instance according to which: *'It is not contrary to Article 172 of the Telecommunications Act for the defendant's employees to make calls to randomly selected numbers of subscribers without their consent in order to determine whether they agree to be contacted by telephone for direct marketing purposes. It is only after consent has been given that the party carries out direct marketing activities in relation to subscribers*[36]. The divergent positions of the central authorities in this regard are also worth pointing out. The Office of Electronic Communications (Pol.: UKE) seems to have a more liberal view in this respect. In the letter[37] addressed to the Association of Information Security Administrators (Pol.: SABI) of 21.10.2015, the President of the Office of Electronic Communications indicated that it is permissible to obtain consent during a telephone conversation and then continue it in order to present an offer. A different opinion is presented by the Office of Competition and Consumer Protection (Pol.: UOKiK). In one of its decisions, the President of OCCP stated that *'the notion of direct marketing includes not only activities of a sales nature but also those that serve to provide information if their final effect is to make the addressee interested in the entrepreneur's offer. Therefore, not only the situations in which an entrepreneur contacts a consumer in order to present an offer proposal, but also the contact aimed at obtaining consent for direct marketing, including the presentation of an offer, will be qualified as falling within the hypothesis of Article 172'*. According to the Office of Competition and Consumer Protection, the very request for consent to present an offer will therefore be treated as a direct marketing activity, which requires prior consent[38]. The draft provisions of the new electronic communications law do not resolve the indicated issue.

When it comes to sending unsolicited commercial information by entrepreneurs, the Act on Combating Unfair Competition also applies, as the Act

---

36 IV Ca 1873/16 – The Judgment of the District Court Warsaw-Praga in Warsaw, LEX no. 2745113.

37 Prezes Urzędu Komunikacji Elektronicznej, 21.10.2015, DP.034.32.2015.2, accessed January 12, 2023, https://www.sabi.org.pl/attachments/File/do_pobrania/UKE-2015/odpowiedz-UKE-21-10-2015.pdf.

38 The decision of the President of the Office of Competition and Consumer Protection, no. DOZIK 3/2019 of 30 May 2019, DOZIK-8.610.20.2017.KA/MO.

on Providing Services by Electronic Means recognises sending unsolicited commercial information as an act of unfair competition[39]. The Article 24 of the Act on Providing Services by Electronic Means sets out a fine for infringement of the provisions on the ban on sending unsolicited commercial information. As this is an offence prosecuted at the request of the aggrieved party, one has to wonder about the effectiveness of such a solution, taking into account the behaviour of the average e-mail user, who either deletes SPAM and advertisements or creates a new account, hoping that it will not be cluttered with advertisements.

Due to the fulfilment of the information obligation imposed on the service provider, it is also necessary to draw up the rules and regulations for the provision of services by electronic means, which results from Article 8(1)(1) of the Act on Providing Services by Electronic Means. The service provider is obliged to formulate such rules and regulations as the basis on which the legal relationship with the consumer may be established. The service provider shall make the rules and regulations available to the recipient of the service free of charge prior to the conclusion of the agreement for the provision of such services and also – upon the recipient's request – in such a manner that enables the content of the rules and regulations to be obtained, reproduced and recorded by means of the ICT system used by the recipient of the service. The risk of ineffectiveness covers the necessity to make the rules of procedure available before the conclusion of the contract, which means that the recipient is not bound by the provisions of the rules of procedure not made available to him/her before the conclusion of the contract.

The minimum requirements for the content of the rules and regulations include: the types and scope of services provided by electronic means and the conditions for the provision of e-services. In this regard, it is necessary for the service provider to specify the technical requirements that are indispensable in order to cooperate with the ICT system used by the service provider, the prohibition of illegal content, the conditions for the conclusion and termination of agreements for the provision of services by electronic

[39] Article 10 of the Act on Providing Services by Electronic Means, an act of unfair competition within the meaning of the provisions of the Act on Combating Unfair Competition of 16 April 1993 (Journal of Laws 2018, item 419 as amended).

means, as well as the complaint procedure. The above-mentioned scope of components of the terms and conditions is not a closed catalogue, and this is evidenced by the expression 'in particular'[40] contained therein. The rules of procedure should contain, for example, clear criteria on which the seller may take action against the buyer if, as a result of the buyer's non-performance of the contract, the seller applies for a refund of the commission charged. The rules on warnings and account suspensions are part of the terms and conditions for the services provided by electronic means and should be included in the terms and conditions for the provision of the said services. Action consisting in informing about the rules for warnings and account suspensions elsewhere than in the terms and conditions should be considered insufficient to assume that the entrepreneur correctly complies with the statutory regulation. In addition, the service provider is liable for damages under the general principles of the Civil Code. Failure to provide certain information may be considered a misleading practice.

The aforementioned terms and conditions shall be identified with the model contract (general terms and conditions)[41]. Code shall be applicable, which stipulates that a model contract agreed by one of the parties, in particular, general terms and conditions, a model contract or rules of procedure, is binding on the other party, if it has been delivered to that party prior to the conclusion of the contract. The aforesaid obligation to establish terms and conditions is to enable consumers to familiarize themselves with the principles governing the provision of services, including, for example, the complaint procedure. It is therefore a document containing provisions significant from the consumer's point of view. Given such content of the provisions, the question should be posed: what are the consequences of an entrepreneur's failure to comply with this statutory obligation and providing services electronically without establishing terms and conditions? At first glance, it seems that the legislator has not introduced any legal consequences for not creating the regulations. However,

40 Konarski, *Komentarz do ustawy*, 103–105.

41 Krzysztof Korus, "Umowy i inne czynności prawne w obrocie elektronicznym," in *Prawo handlu elektronicznego,* ed. Mariusz Chudzik, Aneta Frań, Agnieszka Grzywacz, Krzysztof Korus, Maciej Spyra, Bydgoszcz (Kraków: Wydawnictwo Branta, 2005), 103–104; Dominik Lubasz, Monika Namysłowska, ed., *Świadczenie usług drogą elektroniczną oraz dostęp warunkowy. Komentarz do ustaw* (Warszawa: LexisNexis, 2011), 138–140.

this applies only to the provisions of the Act on Providing Services by Electronic Means, not to all laws. Entrepreneurs are frequently unaware of the fact that the lack of regulations is also punished by the sanction provided for in the provisions of the Act on Competition and Consumer Protection of 16 February 2007 (hereinafter: A.C.C.P.)[42]. Well, the failure to have the terms and conditions required by the Act on the provision of services by electronic means is incompatible with Article 24. para. 2 pt. 2 of the A.C.C.P. and constitutes a violation of the collective interests of consumers. The sanctions imposed for the lack of terms and conditions are regulated by the Act. The disposition of Article 24(2)(2) of the A.C.C.P. stipulates that *a practice infringing the collective interests of consumers is understood as an unlawful action of an entrepreneur against them, in particular infringement of the obligation to provide consumers with reliable, true and complete information*. Thus, the President of the Office of Competition and Consumer Protection – on the basis of Article 106 of the A.C.C.P. – may impose on an entrepreneur, by way of a decision, *a fine of up to 10% of the revenue generated in the accounting year preceding the year in which the fine is imposed, if the entrepreneur, even if unintentionally (...), committed practices infringing the collective interests of consumers within the meaning of Article 24 of the Act on Competition and Consumer Protection* (i.e. he/she did not have terms and conditions for the provision of electronic services).

The Act of 1 December 2022 amending the Consumer Rights Act and certain other acts[43] imposed new information obligations on entrepreneurs. The newly added Article 12a of the Consumer Rights Act specifies an obligation imposed on the provider of an online trading platform to inform the consumer, in a clear and comprehensible manner, at the latest at the moment when the consumer expresses his or her will to be bound by a distance contract, about the general information made available in a special part of the web interface, which is directly and easily accessible from the page on which the offers are presented, concerning the main

42 Journal of Laws. 2018, item 798.

43 The Act of 1 December 2022 amending the Consumer Rights Act and certain other acts Journal of Laws. 2022, item 2581.

parameters determining the placement[44] in the search result, and the relative importance of the said parameters in comparison with other parameters. In addition, one must be informed whether a third party offering goods, services or digital content on an online trading platform is an entrepreneur – on the basis of a statement made by that person to the provider of the online trading platform. On the other hand, a catalogue of relevant information that an entrepreneur using a market practice is obliged to provide to consumers under separate regulations has been expanded under the Act on Counteracting Unfair Market Practices. It applies, inter alia, to information about whether and how an entrepreneur ensures that the published opinions come from the consumers who have used or purchased the product – in the case of an entrepreneur providing access to consumer product reviews. The entrepreneur will be obliged to indicate whether the reviews are verified at all and whether they come from people who have actually purchased the product. If he does indeed verify them, he will have to mandatorily communicate how he does so. It does not mean, however, that the entrepreneur will have to verify the veracity of the opinion or the assessment that is expressed in it, which would be very difficult in practice. The only thing to be checked is whether the opinion has been added by a person who has actually bought or used the product. This does not give consumers confidence that an opinion is genuine.

4. Conclusions

In summary, the scale of electronically provided services is growing significantly not only in Poland or the European Union, but also worldwide. The provision of services by electronic means plays an important role at the level of contacts with individual customers through online auctions, electronic shops, retail sales of services (e.g. booking tickets, hotels, cars). Business in the B2C segment is strongly consumer-oriented. Retaining a regular customer is sometimes more important than acquiring a new one. This is linked to the high transparency of online offers and the short

[44] Placement is the attribution of a certain product visibility or weight given to search results by entrepreneurs who provide the Internet search function as it is presented, organised or transmitted regardless of the technological means used (Article 2(11) of the Act on Counteracting Unfair Market Practices).

time needed to review competitive offers. Companies in the B2C segment want to develop a bond with their customers by creating various types of loyalty programmes, consumer clubs or even projects that enable consumers to design new products. Moreover, the consumer is equipped with the tools to analyse the market before deciding to buy or use the services of a particular entrepreneur. It increases confidence and trust in the market on both sides of the transaction. The emerging phenomena of website positioning or influencing consumers with fake reviews have determined the EU legislator and, following it, the national legislator to protect consumers against such phenomena. We have yet to assess the effectiveness of the adopted regulations, but this is probably a step in the right direction.

When examining the changes that may be brought about by the advancement of new technologies, it should not be forgotten that virtual reality may only represent a new dimension of the reality in which we will be functioning with newer and newer products and services. Consequently, it can be concluded that the regulations currently in force are directly applicable to electronic trading, but it is necessary to constantly analyse the effectiveness of the legal acts already in force and to react to emerging threats. There is a fear that legal regulations are lagging behind technological development and the level of consumer protection is still insufficient. It should be noted that legislative measures are being taken both in the EU and in the Polish law. The increase in the transactional level of e-commerce and the growing interest in it as well as in its specifics make it necessary to regulate the phenomena occurring in it in separate legal provisions. Legal regulations are subject to constant review and the EU lawmakers, along with the national ones, are trying to keep up with technological progress with varying degrees of success.

References

Batko, Kornelia, Grażyna Billewicz. "E-usługi w biznesie i administracji publicznej." *Studia Ekonomiczne* no. 136/13 (2013): 47–49.

Besiekierska, Agnieszka. "Legal Aspects of the Supply Chain Cybersecurity in the Context of 5G Technology." *Review of European and Comparative Law*, 51(4), (2022): 129–147, https://doi.org/10.31743/recl.14623.

Chałubińska-Jentkiewicz, Katarzyna, Joanna Taczkowska-Olszewska. *Świadczenie usług drogą elektroniczną. Komentarz*. Warsaw: C.H. Beck, 2019.
Clough, Jonathan. *Principles of Cybercrime*. Cambridge University Press, 2015.
Dąbrowska, Agnieszka, Mirosława Janoś-Kresło, Arkadiusz Wódkowski. *E-usługi a społeczeństwo informacyjne*. Warsaw: Difin, 2011.
Gołaczyński, Jacek. *Ustawa o świadczeniu usług drogą elektroniczną. Komentarz*. Warsaw: Wolters Kluwer, 2009.
Grabowska, Marta. "Europejskie społeczeństwo gigabitowe." *Studia Europejskie,* no. 1 (2020): 151–172.
Hołyst, Brunon, Jacek Pomykała. *Cyberprzestępczość i ochrona informacji*. Warsaw: Wydawnictwo Wyższej Szkoły Menedżerskiej, 2012.
Konarski, Xawery. *Komentarz do ustawy o świadczeniu usług drogą elektroniczną*. Warsaw: Difin, 2004.
Korus, Krzysztof. "Umowy i inne czynności prawne w obrocie elektronicznym." In *Prawo handlu elektronicznego,* edited by Mariusz Chudzik, Aneta Frań, Agnieszka Grzywacz, Krzysztof Korus, Maciej Spyra, Bydgoszcz, 67–122. Kraków: Wydawnictwo Branta, 2005.
Lai, Luigi, Marek Świerczyński. *Prawo sztucznej inteligencji.* Warsaw: C.H. Beck, 2020.
Litwiński, Paweł. *Świadczenie usług drogą elektroniczną*. Warsaw: LexisNexis, 2007.
Lubasz, Dominik. *Handel elektroniczny. Bariery prawne*. Warsaw: LexisNexis, 2013.
Lubasz, Dominik, Monika Namysłowska, eds. *Świadczenie usług drogą elektroniczną oraz dostęp warunkowy. Komentarz do ustaw.* Warsaw: LexisNexis, 2011.
Szpor, Grażyna, ed. *Internet rzeczy. Bezpieczeństwo w Smart city.* Warsaw: C. H. Beck, 2015.Wociór, Dariusz. *Ochrona danych osobowych i informacji niejawnych z uwzględnieniem ogólnego rozporządzenia unijnego.* Warsaw: C.H. Beck, 2016.
Zdzikot, Tomasz. "Państwo i administracja publiczna na straży cyberbezpieczeństwa." In *Stulecie polskiej administracji. Doświadczenia i perspektywy*, 239–260, Warsaw: Krajowa Szkoła Administracji Publicznej, 2018.

Review of European and Comparative Law | **2023**
Vol. 52, No. 1, 31–48
https://doi.org/10.31743/recl.14939
Received: 23 December 2022 | Accepted: 24 January 2023 | Published: 30 March 2023

The Principle of the Social Market Economy from the Perspective of Public Economic Law

Andrzej Powałowski
Professor, Dr. habil., Faculty of Law and Administration, University of Gdańsk, correspondence address: University of Gdańsk, Jana Bażyńskiego 6, 80-952 Gdańsk, Poland; e-mail: andrzej.powalowski@prawo.ug.edu.pl
https://orcid.org/0000-0001-5299-704X

Keywords:
principle, social market economy, public economic law, authorities, state, entrepreneurs

Abstract: The social market economy is a conceptual category transposed to the provisions of the Constitution of the Republic of Poland, within which it is defined as a principle. It constitutes an appropriate foundation for the construction and functioning of the system of public economic law. It is a starting point for actions of the state and its bodies and defines the range of influence on the economy, as well as directs state activity in the economy. The premises for the participation and influence of the state on the economy which, according to the assumptions, should be both market-oriented and responsive to social needs, result from the principle of a social market economy. The objective so outlined should be pursued through the rules of public economic law and the legal constructions and institutions introduced in this normative area. They must remain, in terms of their content and nature, in close connection with the essence of the principle in question and its constituent elements.

1. Introduction

The social market economy (hereinafter: SMA) is a conceptual category reflected in the legal system. It has been transposed to the provisions of the Constitution of the Republic of Poland, within which it is defined as a principle. It is usually interpreted in the context of the provisions of the Constitution, although it seems to constitute an adequate basis for the construction and operation of the system of public economic

ISSN 2545-384X (Online)

law. From the perspective of that law, it is the starting point for actions undertaken by the state and its bodies, and it defines the area of influence on the economy, as well as directs the state's activity in the economy.

Periodically and at the same time regularly held, scientific conferences devoted to the subject of public economic law and the discussions conducted within the framework of them bear witness to the fact that it is still relevant to discuss the fundamental problems of the indicated discipline, and in particular the premises of impact on the economy, the objectives of the state's involvement in the area of economic activity of entrepreneurs and the creation of appropriate conditions for these entities to carry out business activities. It seems that such considerations, due to their importance, are worth continuing also in the present article. It is advisable, as it must be admitted, to combine them with the essence and features of the social market economy, as will be shown below.

2. Public economic law and its objectives

Public economic law is a component of the legal system comprising norms whose object is the impact of the state on the economy, including regulation as to the manner in which the state behaves towards the subjects of economic activity, i.e. entrepreneurs. Public economic law is a form of normatively regulated permissibility of interference of the state within the sphere of economic relations. It is an expression of the state's authority in the economy, reflects the duties of the state, and at the same time shapes the rules of functioning and the scope of rights and obligations of entrepreneurs determined in connection with the functions of the state[1].

Public economic law regulates in particular: the economic system and the principles of its functioning and protection, property relations which are the basis of management and the object of state protection, principles of management which are typical of a given system of property relations and which are subject to state protection, the legal forms of organising

[1] To read more the notion and essence of public economic law see: Jan Grabowski, "Prawo publiczne gospodarcze," in *System Prawa Administracyjnego, Volume 8A, Publiczne prawo gospodarcze*, ed. Jan Grabowski, Leon Kieres, Anna Walaszek-Pyzioł, (Warsaw: C. H. Beck, 2013), 4 et seq. See aso: Kazimierz Strzyczkowski, *Prawo gospodarcze publiczne* (Warszawa, 2011) and the literature cited therein.

and carrying out economic activity, the scope and forms of state legal protection of economic mechanisms and economic rights, as well as the organisation and legal forms of state interference into economic relations on a macro- and micro-economic scale[2].

As the doctrine highlights, the basis for the separation of the issues of public economic law is the thesis according to which the subject of economic law is constituted by the functions and tasks of the state in the sphere of economy and all legal consequences of their performance[3]. The said law encompasses the legal relations shaped in the relationship between state authorities and the subjects of economic activity. These entities are both the addressees of state actions, as well as their initiators, expecting relevant actions to be taken by state authorities. The area of the aforementioned legal relations includes the competences of the state bodies, the mechanism (procedures) of their decision-making and expressing a certain point of view (e.g. through the establishment of norms), as well as the rights and obligations of the subjects of economic activity, together with the conditions and forms of their realisation and guarantees of protection. The indicated legal relations are usually shaped with the use of methods and instruments of an administrative-legal nature, although solutions specific to civil law are also increasingly used.

The aim of public economic law is to protect the fundamental values of the market economy and to set permissible limits to the realisation and respect of the public interest. Thereby, it is recognised that the influence of the state on the economy is the domain of public administrative activity. According to this line of thinking, public economic law includes the provisions of administrative law that govern the conditions for undertaking and carrying out economic activity and define the relevant functions and competences of public administration bodies[4]. Thus, it constitutes the juridical layer of state interventionism, an encroachment upon the sphere

---

2 The subject matters of public economic law are specified and discussed in the study: Andrzej Powałowski, ed., *Prawo gospodarcze publiczne* (Warsaw: C.H. Beck, 2020).

3 See, for example: Kazimierz Strzyczkowski, *Prawo gospodarcze publiczne* (Warsaw: Lexis Nexis, 2009), 27 et seq. and in: Hanna Gronkiewicz-Waltz, Marek Wierzbowski, ed., *Prawo gospodarcze. Aspekty publicznoprawne* (Warsaw: Wolters Kluwer, 2020), 19 et seq.

4 See: Leon Kieres, ed., *Administracyjne prawo gospodarcze*, Wrocław, 2009 and the literature cited therein and Leon Kieres, "Działalność gospodarcza," in *System Prawa*

of economic activity of society, and its object is to define the areas of such interference, its content and legal forms. The said areas include police and economic rationing, as well as organising certain macroeconomic undertakings or actively supporting certain areas of the economy. It is, therefore, the scope of state influence on the economy to the extent to which – legitimised by the rule of law – the public interest justifies state interference in the sphere of constitutionally protected freedoms and rights of the citizen exercised on the market. Moreover, it is also accepted that public economic law applies to state action in the sphere of free economic activity, not only to restrict and protect it, but also to shape a certain desired and intended order in the economy, including in the sphere of competition, property relations and various areas of economic activity.

Both the aim and the means (instruments) of state influence on the economy and their main carrier (expression of the message), which is the system of law, clearly indicate that the social market economy is the premise of this influence, and the constitutional principle of the social market economy is the foundation on the basis of which public economic law is constructed.

3. The essence of a social market economy

Social market economy is a normative concept in the Polish law, introduced into the Constitution of the Republic of Poland. It seems that since its introduction into the law, both the legislator, the doctrine and the jurisprudence have made only a small contribution to clarifying the content of this concept and the possibility of its transposition to the grounds of legal acts relating to the economy. The hierarchical legal order and the interrelation of legal contents and constructions provide the basis for assuming that there is an obligation to respect this order in the form prescribed by the provisions of the Constitution of the Republic of Poland. It also seems that there is a duty to develop the general legislative concepts in a reflective, creative manner, which the legislator has just given expression to in the Basic Law, and to suggest that the legislator should transpose those concepts into ordinary laws.

Administracyjnego, Volume 8A, Publiczne prawo gospodarcze, ed. Jan Grabowski, Leon Kieres, Anna Walaszek-Pyzioł, (Warsaw: C. H. Beck, 2013), 165 et seq.

Of course, all sorts of concepts, ideas and doctrines of a social and economic nature may derive from the Constitution, from its particular provisions and their fragments, including individual expressions. They often constitute the premises for the provisions introduced into the Constitution, and they undoubtedly form the genesis of its content. However, it seems, in the first instance, to be the duty of legal scholars to take steps to interpret the law by applying the rules of grammar. It was, after all, these rules that made it possible to introduce certain provisions into the Constitution and into other legal acts and to give them a specific linguistic meaning. It was undoubtedly the intention of the legislator and this preceded the transposition of concepts, ideas or doctrines into the law. It means that there is primarily a need to read the content of the provisions in the meaning given to them by the legislator, and only then the underlying normative formulation (idea, concept, doctrinal views).

The doctrinal basis of social market economy (SME) is, as is indicated, the concept, which originated in Germany, of regulating the economic system through a peculiar combination of the principle of economic liberalism and the market economy with the attainment of social goals[5]. It gained acceptance and political support in most European countries, including those in Eastern Europe, after their political, social and economic transformations in the 1990s, with the proviso, however, that its 'transposition' into the legal systems of individual countries took place in a very diverse manner and with emphasis on various elements of the concept indicated[6] Thus, there is no 'one' social market economy, or its ideal model.

The SME is, first of all, a principle expressed in the Constitution of the Republic of Poland, which provides the basis of Poland's economic system supported by the freedom of economic activity, private property and solidarity, dialogue and cooperation of social partners. The principle unequivocally implies that Poland's economic system should, as part of its legal construction, be based on the aforementioned three pillars:

---

5 See: Tadeusz Włudyka, *Model społecznej gospodarki rynkowej a transformacja ustrojowa polskiej gospodarki. Analiza prawnogospodarcza* (Kraków: wydawnictwo Uniwersytetu Jagillońskiego, 2002), 124 and 191 et seq.

6 See in this regard Jan Ciapała, *Konstytucyjna wolność działalności gospodarczej w Rzeczypospolitej Polskiej* (Szczecin: WPiA USz, 2009), 61 et seq.

freedom, ownership and dialogue, in a uniform and equivalent manner, while at the same time neither of the pillars should be marginalised and treated less fundamentally than the others[7] At the same time, it is difficult to assume, as this is by no means apparent from the content of Article 20 of the Polish Constitution, that the SME is supported by yet other values (pillars)[8]. Thus, the SME principle is an indication for the state to shape the economy through its bodies by legislating and applying laws that make it possible to achieve a state of harmony between a free and predominantly private, and consequently market economy and the needs of society, while at the same time ensuring that the conditions for dialogue and cooperation between the social partners exist[9].

The above statements by no means imply that the SME as a principle of law has been expressed in a fully correct manner with no doubts concerning its interpretation[10]. First of all, it should be noted that as early as Article 22 of the Constitution of the Republic of Poland, the possibility of limiting the freedom of economic activity by way of a statute was introduced, however without linking this possibility to the principle of the SME, but only with reference made by the limiting entity (the state) to an important public interest as the premise for the indicated limitation. At the same time, it is not known whether the public interest is identical with the social interest and whether, as a consequence, restrictions on the freedom of economic activity made in the public interest will be in line with the social interest in the area of functioning of the economy[11]. It is, moreover, not at all possible to give an answer to the question posed in this way, as the social

7 Differently Przemysław Czarnek, *Wolność gospodarcza. Pierwszy filar społecznej gospodarki rynkowej* (Lublin: Wydawnictwo KUL 2014), 93 et seq.

8 Differently Cezary Kosikowski, "Gospodarka i finanse publiczne w nowej Konstytucji," *PiP*, no. 11–12(1997): 149.

9 See for example: Wiesław Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz, ed. VII* (Warszawa: Lex, 2013), art. 20.

10 See for example: Krystian Complak, Komentarz do art. 22 Konstytucji RP, in *Konstytucja RP. Komentarz*, ed. Monika. Haczkowska (Warszawa: LexisNexis, 2014).

11 See in this regard Artu Żurawik, "Interes publiczny", „interes społeczny" i „interes społecznie uzasadniony". Próba dookreślenia pojęć," *Ruch Prawniczy, Ekonomiczny i Społeczny*, no. 2(2013): 57–69. Extensive comments on the issue are presented by Marek Szydło, *Wolność działalności gospodarczej jako prawo podstawowe,* (Bydgoszcz-Wrocław: Oficyna Wydawnicza Branta, 2011), 165 et seq.

interest may only be a default category, possibly alleged one on the part of the state, while it may be clear and defined in a specific situation, at a specific time by the society or its group, but also on the grounds of specific provisions of the law. None of the categories of the indicated interests is defined and they are not distinguished on the grounds of the Constitution of the Republic of Poland.

It would also be difficult to assume that – in determining the content of the normative construction of the social market economy – it is necessary to refer to other concepts, values, constructions or institutions contained in the Constitution of the Republic of Poland. This was not done by the legislator in the content of Article 20 of the Constitution of the Republic of Poland, allowing, however, for a systemic interpretation of the concept of the SME, including, as it seems, the one related to the system of public economic law.

4. The state participation in a social market economy

It can be assumed that the premises of participation and influence of the state on the economy, which, according to the assumptions, should be both market-based and taking into account social needs, stem from the principle of the SME. The pursuit of such a goal should be carried out through the provisions of public economic law and the legal constructions and institutions introduced on the basis of this normative area. In terms of their content and nature, they must remain closely related to the essence of the principle in question and its constituent elements, including: freedom of economic activity, private property and solidarity, dialogue and the cooperation of social partners.

Determining the meaning of the concept of freedom of economic activity remains a debatable issue[12]. The interpretation in this matter is not

[12] Cf. in this regard e.g. Cezary Kosikowski, "Wolność działalności gospodarczej i jej ograniczenia w praktyce stosowania Konstytucji RP," in *Zasady ustroju społecznego i gospodarczego w procesie stosowania Konstytucji,* ed. Cezary Kosikowski (Warszawa: Wydawnictwo Sejmowe, 2005), 37 et seq.; Ciapała, *Konstytucyjna wolność działalności gospodarczej w Rzeczypospolitej Polskiej* 115 et seq.; Klaudia Klecha, *Wolność działalności gospodarczej w Konstytucji RP* (Warszawa: C.H. Beck, 2009). 21 et seq.; Szydło, *Wolność działalności gospodarczej,* 53 et seq.; Kazimierz Strzyczkowski, *Prawo gospodarcze publiczne* (Warszawa: Wolters Kluwer, 2011), 98 et seq.; Marian Zdyb, "Wolność działalności gospodarczej

made by the legislator, and the Constitution of the Republic of Poland indicates only that this freedom is a pillar of the social market economy. The grammatical interpretation of the indicated concept undoubtedly dictates that freedom of economic activity should be distinguished from economic freedom. The latter concept, non-normative but applied in doctrine[13], has a broader scope than the freedom of economic activity, because its scope includes both the problem of performing economic activity perceived in the context of the freedom (freeness) on the part of the participants (subjects) of the economy understood objectively, as well as the sphere of initiating (undertaking) economic activity in a free manner, creating appropriate economic entities and structures, and, moreover, the provision of adequate (freeness) rules by the state and its authorities for the functioning of entrepreneurs and the use of instruments of influence on the economy by the state which do not cause excessive infringement (or nullification) of the freedom of economic activity.

The doctrine highlights various meanings of the term: freedom of economic activity. Freedom is first perceived as a fundamental constitutional principle of the Republic of Poland[14]. It is also seen as a public subjective right of a negative nature, which is matched with a general obligation of the state not to infringe this right in the sphere of (free) economic activity[15]. Moreover, it may be assumed, referring the notion category to the subjects of economic activity that the freedom of economic activity means all the freedoms ascribed to these subjects by law[16].

---

w Konstytucji RP," *Rejent*, no. 5 (1997): 145–166, and also: Andrzej Ogonowski, "Konstytucyjna wolność działalności gospodarczej w orzecznictwie Trybunału Konstytucyjnego," *Przegląd Prawa Konstytucyjnego*, no. 1(2012): 213–235.

13 See e.g.. Stanisław Biernat, Andrzej Wasilewski, *Wolność gospodarcza w Europie* (Kraków: Kantor Wydawniczy Zakamycze, 2000); Zdzisław Brodecki, ed., *Wolność gospodarcza* (Warszawa, 2003); Jerzy Jacyszyn, "Wolność gospodarcza – stan obecny," *Przegląd Ustawodawstwa Gospodarczego,* no. 7 (2015): 2–6, Cezary Kosikowski, *Wolność gospodarcza w prawie polskim* (Warszawa: Państwowe Wydawnictwo Ekonomiczne, 1995).

14 See: Biernat, Wasilewski, *Wolność gospodarcza w Europie,* 141, Strzyczkowski, *Prawo gospodarcze publiczne*, 101–103

15 See: Anna Walaszek-Pyzioł, *Swoboda działalności gospodarczej* (Kraków: Księgarnia Akademicka, 1994), 12 et seq.

16 See: Andrzej Powałowski, "Wolność gospodarcza a konkurencja," in *Granice wolności gospodarczej w systemie społecznej gospodarki rynkowej, Księga jubileuszowa z okazji*

It seems that the freedom of economic activity is the element (pillar) of the SME which is most strongly linked to the market economy. In order for the economy to have a market character, its subjects should be able to be guided by the rules of the free (unrestricted) market in the course of economic activity, and thus be guaranteed, in particular, freedom of contract, decision-making regarding the strategy and tactics of performing various activities in the sphere of the economy, price formation, as well as free competition with other entities. Consequently, as it were, market economy actors can (and should) be guided by economic calculation and, above all, by profit in their actions. After all, economic activity has, according to the law, a profit-making purpose. It could be added here that the freedom of economic activity is a determinant of the market economy. Total freedom, as well as limited freedom, enables the economy to function as a market mechanism; the absence of freedom, or its restriction to an excessive, disproportionate extent, negates the nature of the economy as a market mechanism[17].

However, the freedom of economic activity cannot be absolute, ruthless. Such freedom would be a negation of the social market economy, as it would favour the market element, while neglecting the social aspect within the economy. The legislator recognises this and introduces (Article 22 of the Constitution of the Republic of Poland) the possibility of limiting the freedom of economic activity in the public interest.

An issue that does not find a proper optimal solution is the scope of restrictions on the freedom of economic activity. The stipulation that these restrictions should result from the provisions of laws and that they are to be justified by an important public interest does not make it possible to define the limits of state interference in the sphere of freedom, and thus in the sphere of the market economy. In principle, the state may consider the implementation of various activities and the pursuit of – also various – objectives to be in the public interest, even if such activities and aims are

40-lecia pracy naukowej prof. dr hab. Jana Grabowskiego (Katowice: Górnośląska Wyższa Szkoła Handlowa im. Wojciecha Korfantego, 2004), 202.

17 Cf. in this regard Krystyna Pawłowicz, "Wolność gospodarcza w kręgu mitów," in *Konstytucyjna zasada wolności gospodarczej. Materiały konferencyjne*, ed. Wojciech Szwajdler i Henryk Nowicki (Toruń: Dom Organizatora, 2009).

objectively not of a public nature and are not "important" at all, although, of course, this "validity" may also be adequately justified and may even be linked to an alleged, artificially created public interest[18].

Accepting that a restriction on the freedom to operate should be, for example, proportionate presupposes that there is an awareness on the part of the state authorities of the need not to overstep the boundary demarcating the sphere of freedom and the sphere of its absence, and thus to recognise that certain restrictions on the freedom to operate an economic activity, or the sum thereof, will lead to a state of exclusion of freedom in the economy and the impossibility of functioning of the market economy. The assessment of the achieved state of freedom and the economy goes beyond the legal issues, as the yardsticks of that state are rather economic or even political in nature. Therefore, it should be assumed that – in line with the content of Article 22 of the Constitution – it is necessary to characterise not so much the state of freedom (freedom and economy) achieved as a result of the application of limitations but rather the form (law) of the limitations applied, as well as their premise (important public interest). In this respect, there are no doubts as to the possibility of using only the form of an act for the introduction of restrictions, while an undoubtedly controversial issue, as noted earlier, is the premise in the form of an important public interest. It seems indisputable that it should be valid and linked to the fulfilment of public needs, although both 'validity' and the catalogue of public needs are not subject to normative characterisation and assessment.

It is difficult to assume that the legislator will undertake the task of specifying the category of validity, as this by its very nature is of a particularly subjective character, and it should probably be assumed that a privilege, reserved to the state bodies, derives from the Constitution, and which reduces to the possibility of arbitrary recognition of a public interest as important, and thus of making a kind of segregation of public interests

[18] On the 'validity' of the public interest, see: Szydło, *Wolność działalności gospodarczej,* 186–189; See the judgment of the Constitutional Tribunal of 8 July 2008, ref. no: K. 46/07, OTK ZU 2008, no. 6A, item.104

into important and non-important ones[19]. At most, it may be assumed that the public interest acquires the feature of validity when the legislator refers to it in the area of an act of statutory rank and indicates such interest as a premise for specific (statutory) legal regulations. Examples in this respect are provided by many legal acts relating to the economy and various aspects of its functioning[20].

On the other hand, one might expect the category of public interest to be specified in ordinary legislation, since the Constitution of the Republic of Poland does not do so. It could take place, as it seems, on the occasion of referring to this category on the grounds of particular acts, if only by indicating the aims which should be pursued with respect to the public interest, or by way of justifying the reason for which the actions of state authorities consisting in restricting the freedom of economic activity are undertaken. It is relevant because there is no single, generally understood public interest, and such interests take on different content. For example, it is only possible to point to the issue of state security, consumer interests, protection of the domestic market, environmental needs, price stability, balance of payments sustainability, protection of certain entities of the economy, state aid, needs related to the protection of citizens' health, etc. Thus, what matters is to move away from the general public interest formula, which in the current state of the law is used to conceal the intentions and purposes of those entities that can legitimately undertake actions leading to the restriction of freedom of economic activity.

If it is reasonable to assume that the public interest formula may be a premise for limiting the freedom of economic activity, and consequently for narrowing or changing the character of the market

---

19 Different, however, was the opinion of the TK in the judgment of 14 December 2004 in case K. 25/03, OTK ZU 2004, no. 11, item 116. In the opinion of the TK, each case of the necessity to protect the goods specified in Article 31(3) of the Constitution of the Republic of Poland, such as: state security, public order, protection of the environment, health and public morality certainly falls within the notion of 'important public interest'"

20 See, for example, the Act of 16 February 2007 on competition and consumer protection, i.e Journal of Laws. Of 2021 item 275, Act of 10 April 1997 Prawo energetyczne, i.e. Journal of Laws of 2022 item. 1385, as amended, the Act of 11 September 2019 Prawo zamówień publicznych, i.e. Journal of Laws of 2022 item 1710, as amended., the Act of 6 March 2018 Prawo przedsiębiorców, i.e. Journal of Laws of 2021 item 162, s amended.

economy, one cannot, at the same time, accept arbitrary actions taken in the name of the public interest, unidentified as to their purpose and content. The Constitution of the Republic of Poland, in creating the legal construction of a social market economy and indicating its pillars (Article 20), as well as in treating the possibility of limiting the freedom of economic activity as one of these pillars, does not give any consent to the exclusion or significant restriction of freedom and negation of the market economy, even in the name of an important public interest. In order to prevent the use of the general public interest for actions contrary to the SME principle, it is necessary to recognise, firstly, the primacy of the freedom of economic activity over the public interest and, secondly, the need to identify the public interest, in order to ascertain, by means of legal and social control, the correctness of the actions of state bodies and their adherence to the said SME principle.

The question of the second pillar, mentioned in Article 20 of the Polish Constitution, and the constituent element of the SME, is different. Private property within a market economy is, as one may assume, the dominant form of property. Even if there are non-private entities in the structure of the economy, the state is tasked with the aim of marketising their mode of operation, i.e. making them similar to private entities from the sphere of private property so that they can become elements of the market economy with the dominant participation of private entities. The legislator reflected on this fact in the law on commercialisation[21] and in the concept of subjecting organisational units belonging to the public sectors to analogous rules of operation as private entities. Thus, noting that private ownership is a pillar of the SME is meant to recognise the primacy of such ownership in the economy and, at the same time, to acknowledge that within the framework of a market economy the rules for conducting economic activity proper to private entities for which the point of reference is the freedom of economic activity should apply. These rules should also extend in their entirety to those economic entities in which the State Treasury or another public entity is the sole or majority shareholder, and for which such a public entity is the founding body. However, it does not

[21] See the Act of 30 August1996 on commercialisation and certain rights of employees, i.e. Journal of Laws of 2022 item318, as amended.

mean that a public entity, just like any other (private) entity of property, may not exercise its property rights with respect to a given organisational unit which is an entrepreneur within the meaning of the provisions of relevant acts[22]. In no way does it contradict the participation of such organisational units in the market economy and the inclusion of such units in the freedom of economic activity.

The third pillar of the social market economy, i.e. solidarity, dialogue and cooperation of the social partners, is, in its content, a guiding principle that should be applied to the state and its bodies and to all social and economic organisations. Such a broad *spectrum* of players should be taken into account given the need to achieve the indicated solidarity, dialogue and cooperation. Reaching a state amounting to the existence of a social market economy requires the application of a broad formula for participation in the process of determining the objectives, forms and methods of functioning of the economy. Undoubtedly, organisations representing various types of social groups should have the possibility to express their members' needs and expectations with regard to the functioning of the economy. Within the framework of a democratic state under the rule of law, such a possibility is something very obvious, which, at the same time, does not mean, however, that these needs and expectations will be met by merely articulating them. In many cases their implementation is unrealistic or impossible for legal, economic or organisational reasons or, which is equally predictable, they remain in opposition to the market economy system. In many cases, a "social" perception of the problems of the functioning of the market economy should also be appropriate for the bodies of the state, which, after all, is by its very nature a form of organisation of society and which is obliged to represent and express the social interest as well. In doing so, the involvement in the determination of strategies and tactics for the functioning of the economy is also extremely important for all those entities that represent the interests of entrepreneurs as direct participants in economic processes performing economic activity. The said bodies are most capable of determining what the interests of the market economy

[22] This refers to the definition contained in Article 4 of the Act of 6 March 2018. Entrepreneurs' Law and in Article 431 of the Act of 23 April 1964 Civil Code, i.e. Journal of Laws of 2022, item 1360, as amended

are, what its priorities and development prospects are under the given conditions and environment.

The selected groups of entities are – as it seems – the social partners, who have a duty to fill in the content of the notions of solidarity, dialogue and cooperation, concepts referring to the activity of these entities in the area in which the market economy is given proper character. It may be assumed at this point that it is the social partners and their solidarity, dialogue and cooperation that should contribute to the fact that the market economy, governed in principle by the freedom of economic activity and dominated by private property, may at the same time have a social character.

The indicated terms referring to the activities of the social partners are difficult to determine and are of no normative significance. At the same time, it seems that they should be ranked in a slightly different order than in Article 20 of the Polish Constitution. First of all, the social partners negotiate, i.e. conduct a dialogue, expressing their own positions within the framework of this dialogue. In the event of differences of opinion as to the issues covered by the subject of dialogue, they should declare their willingness to cooperate, including the possibility of compromise, in the name of solidarity, i.e. the community of interests. What is meant here is an ideal, exemplary situation that is very difficult to achieve. If it is possible to initiate a dialogue between the social partners, it is not realistic to develop a common position resulting from the desire to cooperate in many cases. However, it is absolutely impossible to work out a community of interests because the social partners, and above all the social organisations (excluding the state), represent interests that are diametrically opposed to those of the business community. The social interest includes, to a significant extent, the protection of the rights and privileges of the entire community, as well as its individual groups, including the right to a decent remuneration for work, social security, consumer protection, while the interest of the entities of the market economy is dominated by the interest of achieving maximum profit. Due to the fact that these are antagonistic interests, an ideal community of interests will probably never exist, and presumably the legislator, when using the word solidarity, had in mind only the pursuit of a common position with regard to the functioning of the market economy, as well as the emphasis on the role of the actors representing social interests and

their capacities, and in particular the need for them to influence the shape of the market economy.

The provision of the Constitution of the Republic of Poland concerning the third pillar of the GSC finds its extension in the provisions of the Act on social dialogue[23]. It stipulates (Article 1) the functioning of the Social Dialogue Council as a forum for tripartite cooperation of employees, employers and the government. The Council is established to 'conduct dialogue in order to ensure the conditions for social and economic development and to increase the competitiveness of the Polish economy and social cohesion, and acts for the implementation of the principle of participation and social solidarity in employment relations. Moreover, the Council acts to improve the quality of formulation and implementation of socio-economic policies and strategies, as well as to build social consensus around them by conducting a transparent, substantive and regular dialogue between organisations of employees and employers and the government party'.

However, irrespective of the problem of the correctness of the semantic and substantive construction of the notions: solidarity, dialogue and cooperation, it should be pointed out that they should relate to the first constituent element of the principle of social market economy, i.e. to the term indicating the nature of market economy. The market economy, pursuant to the provision of Article 20 of the Constitution of the Republic of Poland, is supposed to be social, and therefore, as it seems, responsive to social interests and needs. At the same time, the economy is to be a market economy, i.e. related to the freedom of economic activity, as far as the boundaries and the area of social interest reach.

One should note, however, that the above interpretation of the meaning of the word 'social' is not exclusive. 'Social', in relation to the economy, may also mean the manner and scale of the influence of society and its organisations on decision-making concerning the management of the economy by collective, social bodies such as e.g. employee self-governments or the influence of social groups (e.g. shareholders) on the management of enterprises. 'Social' can furthermore be the economy realised (performed) by non-public entities, not related to organisational units of the public sector.

[23] See Act of 24 July 2015 on the Social Dialogue Council and other institutions of social dialogue, i.e. Journal of Laws of 2018, item 2232, as amended.

5. Conclusions

By indicating the purpose, object scope, methods and means of the state's influence (impact) on the economy, one can see the close connection between public economic law, which is the expression and basis of this influence, and the social market economy, legitimately perceived primarily as a constitutional principle defining Poland's economic system. The link is primarily based on the recognition of the need for a correct, rational and legal interpretation of the principle of the SME also (or perhaps primarily) in the area of the creation and application of the provisions of public economic law.

The interpretation of the SME principle should aim at the introduction of everything that follows from the constitutional principle of the SME into public economic law. In particular, it is a matter of appropriate modelling of the relationship between the state and its bodies and entrepreneurs as well as including in this relationship the freedom of economic activity, private property and solidarity, dialogue and cooperation of social partners as pillars of the SME and at the same time features of such an economy.

The constituent elements of the SME are not only directional guidelines shaping the normative content of public economic law, but, which needs to be emphasised, specific values 'entering' the sphere of the axiology of this law. As values, they should justify the formal and material constructions introduced into public economic law and, moreover, serve the interpretation and application of the law.

In the context of its objectives, comprehensively defining the sphere of the state's influence on the economy, including shaping the conditions for the functioning of entities of economic activity, public economic law bases its normative existence on the principle of the social market economy and is at the same time its emanation, an entity shaped on its grounds. The above characteristics seem to support such a statement.

References

Biernat, Stanisław, Andrzej Wasilewski. *Wolność gospodarcza w Europie*. Kraków: Kantor Wydawniczy Zakamycze, 2000.

Brodecki, Zdzisław, ed. *Wolność gospodarcza.* Warszawa: LexisNexis, 2003.

Ciapała, Jan. *Konstytucyjna wolność działalności gospodarczej w Rzeczypospolitej Polskiej.* Szczecin: WPiA USz, 2009.

Complak, Krystian. Komentarz do art. 22 Konstytucji RP. In *Konstytucja RP. Komentarz*, edited by Monika Haczkowska. Warszawa: LexisNexis, 2014.

Czarnek, Przemysław. *Wolność gospodarcza. Pierwszy filar społecznej gospodarki rynkowej.* Lublin: Wydawnictwo KUL, 2014.

Grabowski, Jan. "Prawo publiczne gospodarcze." In *System Prawa Administracyjnego, Volume 8A, Publiczne prawo gospodarcze*, edited by Jan Grabowski, Leon Kieres, Anna Walaszek-Pyzioł, 4 et seq. Warsaw: C. H. Beck, 2013.

Gronkiewicz-Waltz, Hanna, Marek Wierzbowski ed. *Prawo gospodarcze. Aspekty publicznoprawne.* Warsaw: Wolters Kluwer, 2020.

Jacyszyn, Jerzy. "Wolność gospodarcza – stan obecny." *Przegląd Ustawodawstwa Gospodarczego,* no. 7 (2015): 2–6.

Kieres, Leon. "Publiczne prawo gospodarcze." In *System Prawa Administracyjnego, Volume 8A*, edited by Jan Grabowski, Leon Kieresa, Anna Walaszek-Pyzioł, 4 et seq. Warsaw: C. H. Beck, 2013.

Kieres, Leon, ed. *Administracyjne prawo gospodarcze*, Wrocław 2009.

Klecha, Klaudia. *Wolność działalności gospodarczej w Konstytucji RP.* Warszawa: C.H. Beck, 2009.

Kosikowski, Cezary. "Gospodarka i finanse publiczne w nowej Konstytucji." *PiP*, no. 11–12(1997): 149.

Kosikowski, Cezary. "Wolność działalności gospodarczej i jej ograniczenia w praktyce stosowania Konstytucji RP." In *Zasady ustroju społecznego i gospodarczego w procesie stosowania Konstytucji,* edited by Cezary Kosikowski, 37 et seq. Warszawa: Wydawnictwo Sejmowe, 2005.

Kosikowski, Cezary. *Wolność gospodarcza w prawie polskim.* Warszawa: Państwowe Wydawnictwo Ekonomiczne, 1995.

Ogonowski, Andrzej. "Konstytucyjna wolność działalności gospodarczej w orzecznictwie Trybunału Konstytucyjnego." *Przegląd Prawa Konstytucyjnego*, no. 1 (2012): 213–235.

Pawłowicz, Krystyna. "Wolność gospodarcza w kręgu mitów." In *Konstytucyjna zasada wolności gospodarczej. Materiały konferencyjne*, edited by Wojciech Szwajdler i Henryk Nowicki. Toruń: Dom Organizatora, 2009.

Powałowski, Andrzej. "Wolność gospodarcza a konkurencja." In *Granice wolności gospodarczej w systemie społecznej gospodarki rynkowej, Księga jubileuszowa z okazji 40-lecia pracy naukowej prof. dr hab. Jana Grabowskiego,* 202. Katowice: Górnośląska Wyższa Szkoła Handlowa im. Wojciecha Korfantego, 2004.

Powałowski, Andrzej, ed. *Prawo gospodarcze publiczne.* Warsaw: C.H. Beck 2020.

Skrzydło, Wiesław. *Konstytucja Rzeczypospolitej Polskiej. Komentarz, ed. VII*. Warszawa: Lex, 2013.
Strzyczkowski, Kazimierz. *Prawo gospodarcze publiczne.* Warszawa: Wolters Kluwer 2011.
Strzyczkowski, Kazimierz. *Prawo gospodarcze publiczne*. Warsaw: LexisNexis, 2009.
Szydło, Marek. *Wolność działalności gospodarczej jako prawo podstawowe.* Bydgoszcz-Wrocław: Oficyna Wydawnicza Branta, 2011.
Walaszek-Pyzioł, Anna. *Swoboda działalności gospodarczej.* Kraków: Księgarnia Akademicka, 1994.
Władyka, Tadeusz. *Model społecznej gospodarki rynkowej a transformacja ustrojowa polskiej gospodarki. Analiza prawnogospodarcza.* Kraków: Wydawnictwo Uniwersytetu Jagillońskiego, 2002.
Zdyb, Marian. "Wolność działalności gospodarczej w Konstytucji RP." *Rejent*, no. 5 (1997): 145–166.
Żurawik, Artur. "Interes publiczny," „interes społeczny" i „interes społecznie uzasadniony". Próba dookreślenia pojęć." *Ruch Prawniczy, Ekonomiczny i Społeczny*, no. 2(2013): 57–69.

Review of European and Comparative Law | 2023
Vol. 52, No. 1, 49–62
https://doi.org/10.31743/recl.14201
Received: 1 August 2022 | Accepted: 23 January 2022 | Published: 30 March 2023

Settlement of Conflicts of Values in the Area of Public Commercial Law. Comments in Relation to European Union Law

Tomasz Długosz
Dr. habil., Assistant Professor, Faculty of Public Economic Law and Economic Politics, Jagiellonian University in Kraków, correspondence address: Bracka 12, 31-005 Kraków, Poland; e-mail: t.dlugosz@uj.edu.pl
https://orcid.org/0000-0003-3174-1568

Keywords:
conflict of values, public commercial law, Europeanisation of the law, weighting of values, state intervention in the economy

Abstract: The author identifies two ways in which value conflicts can be solved in the area of public commercial law and proves that the method of weighing values and finding a compromise solution is predominant because of the strong politicization of public commercial law and the need to respond to dynamic changes in the economy. He also makes other suggestions on the values present in public commercial law and raises issues, among others, of Europeanisation of law and the impact of European Union law on the resolution of value conflicts, as well as the problems of economization of law and judicial review of decisions that are carried out in conditions of strong politicization.

1. Introduction

It is evident that public commercial law is an area of conflict of values. In fact, the laws, policies and other spheres of social life are implementing the formulas of justice adopted in a society, which are designed to determine how goods and burdens are to be distributed in society. As Zygmunt Ziembiński, an outstanding Polish law theorist, once said, very complex justice formulas are used in practice. Defining these formulas of justice is complex, but depends primarily on how society is organized. It is different in communities where important decisions related to actions of a group or

ISSN 2545-384X (Online)

community are taken by one-man or by a small group of individuals – in these communities, there is so-called monocentric governance – and in communities where there is polycentric governance and decisions are being shaped in multiple centres, although there must also be an agreement between these independent decision-making centres to some extent[12]. From this point of view, it is interesting that when the market method is the basic method of determining what is right in the economy so, in other words, it is a reference point for the assessment of economic processes, then there is a certain highly polycentric order in the area of the economy in which management processes are the result of an unimaginable number of economic decisions, relatively insignificant decisions. Thus, a certain social order is created where the needs of people are met in some way. At the time, Fryderyk Hayek was very fascinated by this spontaneously realized market order that he named catallaxy[3]. In his assessment, the great advantage of such a market-based order and society is that there is no existing prioritization of objectives, no specific common objectives, but everyone can act for their own purpose[4]. The situation is changing as the State enters into the functioning of the market mechanism, when the State undertakes to achieve specific common objectives and assumes responsibility for managing economic processes. Then we are moving toward a monocentric order and, at the same time, economic goals are becoming secondary. Kazimierz Styczkowski, another outstanding Polish lawyer, has rightly pointed out that the value system (axiology) adopted in the current legal order instrumentalizes the economy, which is no longer oriented solely by economic objectives. In this context, this author argued that the model of social market economy in the meaning of the Polish Constitution[5] is not

1 Zygmunt Ziembiński, *O pojmowaniu sprawiedliwości* (Lublin: "Daimonion", 1992), 33.

2 Ziembinski, *O pojmowaniu sprawiedliwości*,157–158.

3 The term catallaxy was used by Friedrich Hayek to describe the order brought about by the mutual adjustment of many individual economies in a market – Friedrich August von Hayek, *Prawo, legislacja i wolność: Nowe sformułowanie liberalnych zasad sprawiedliwości i ekonomii politycznej*. Translated by Grzegorz Łuczkiewicz (Warsaw: Wydawnictwo Aletheia, 2020), 351–353.

4 von Hayek, *Prawo, legislacja i wolność*, 353–354.

5 See Article 20 of The Constitution of the Republic of Poland, Journal of Laws 1997, no. 78, item 483, as amended.

only an economic order but also a social order[6]. The problem is, however, that there are plenty of values and objectives pursued in the economic policies of the State and consequently in the commercial law and the question arises of how to resolve all these value conflicts. Kazimierz Strzyczkowski concludes that the functioning of public commercial law depends on the existence of a clear hierarchy of values[7]. However, we may ask, in what sense can one speak about the hierarchy of values in public commercial law? Does this involve some permanent way or one method of resolving value conflicts? Wojciech Jankowski once asled a straight question: Is it possible at all to obtain a universal and effective way (model) of resolving conflicts of value? He posed that question in the context of the par excellence commercial case when the Polish Constitutional Tribunal ruled on the unconstitutionality of the provision prohibiting the slaughter of animals for ritual reasons[8].

It seems that the way to deal with conflicts of values in law is an extremely complex issue and that it is difficult to talk about some abstract hierarchy of values. However, we can point out that, firstly, conflicts of values are settled within a certain institutional system, i.e. by the authorities or bodies designated by the State, which operate following certain procedural rules. It can be seen that this institutional system is becoming more and more complex, which is certainly because more and more difficult issues as regards values are being dealt with[9]. Secondly, it is rather not possible to talk about a single way or method of resolving conflicts of values in law. At most, we can distinguish two methods of resolving conflicts of values in law. One method is that we are giving priority to one value over another value in some abstract way. The second method is that we weigh values and try to find the best solution under the specific circumstances of the case. It seems that the scope of the latter method is much wider under public commercial law[10], which is probably a general

6 Kazimierz Strzyczkowski, *Prawo gospodarcze publiczne* (Warszawa: LexisNexis, 2008), 35.

7 Strzyczkowski, *Prawo gospodarcze publiczne*, 34.

8 Wojciech Jankowski, "Krowy i kury prawa nie mają," Essay, in *Fascynujące ścieżki filozofii prawa 2*, ed. Jerzy Zajadło and Kamil Zeidler (Warszawa: Wolters Kluwer, 2021), 112.

9 For example, related to genetic engineering or artificial intelligence

10 A similar conclusion is reached by Rafał Blicharz – See Rafał Blicharz, "Ważenie wartości w publicznym prawie gospodarczym," Essay, in *Aksjologia publicznego prawa gospodarczego*, ed. Andrzej Powałowski (Warszawa, Poland: Wydawnictwo C.H. Beck, 2022), 32.

trend in contemporary law, but also stems from the specific features of public commercial law. In particular, it is recognized in legal science that there is a move away from the syllogistic model of application of legal rules toward the so-called argumentation model of the application of the law[11]. As regards the specific feature of public commercial law, this law is, firstly, driven by the dynamics of change in economic life, i.e. it is assumed that public commercial law should respond adequately to the needs of the economy and should be flexible. Secondly, public commercial law is the law of state interventionism in the economy[12] and the prevailing doctrine of state interventionism in the economy is characterized by the fact that there are many objectives, tasks and values to be achieved, and they are pursued in a parallel way. Therefore, public commercial law appears to be an area where there are many conflicts of values and the weighting of these values and finding compromise solutions plays a particularly important role. We observe, therefore, that the science of public commercial law has a constant interest in the question of conflicts of values.

It can also be said that in the area of public commercial law evaluations are to a large extent carried out at the level of the law enforcement bodies, i.e. the entities of public authority which are responsible for applying the law are very much looking for the values to which the legislator refers and they weigh these values. They are therefore equipped with the appropriate competencies. Consequently, there is also a problem of judicial control in this regard, if the bodies applying the law set values and balance values. In particular, there is a problem with the scope of judicial review of the decisions of these bodies. The point is that judicial control relating to the concepts of 'fairness' or 'purpose' always makes problems. Finally, it is interesting to note the context of the European Union law and, in this respect, it is

11 Lech Morawski, *Główne problemy współczesnej filozofii prawa: Prawo w toku przemian* (Warszawa: LexisNexis, 2006), 199–208.

12 Likewise, Jan Grabowski considers that the subject of public commercial law is the behaviour of public authorities, which are based on the State's intervention powers, with which the clean market mechanism is adjusted and limited. The market mechanism itself is based solely on the criterion of individual economic efficiency – Jan Grabowski, "Przedmiot i Zakres Publicznego Prawa Gospodarczego," Essay, in *System prawa administracyjnego. Publiczne prawo gospodarcze*, Tom 8a, ed. Roman Hauser, Zygmunt Niewiadomski and Andrzej Wróbel (Warszawa, Poland: Wydawnictwo C.H. Beck, 2018), 23.

noteworthy that in the conflicts of values that occur in public commercial law, the basic principle of preference is to maintain and deepen integration within the European Union. This rule can be reconstructed on the basis of the principles of European Union law: sincere cooperation, the effectiveness of European Union law, solidarity between the European Union and the Member States.

2. Balancing values in public commercial law

If we look at how conflicts of values in law are handled, then we can see that there are essentially two methods. One method is that one value takes precedence over another value. For example, economic freedom understood as an individual's right is such a value that must give way to an important public interest, i.e. this value is limited by an important public interest under Article 22 of the Constitution of the Republic of Poland and in the area of limitation the person concerned may not invoke a personal right. The second method is to come to an agreement on values and find the best solution in the specific circumstances of the case. The values which clash with one another are weighed and we try to realize these values together in the circumstances of the case. In other words, none of the norms that contain conflicting values is prioritized, but a compromise resolution is sought in the specific circumstances of the case. We are looking for the possibility to maintain the validity of each value. The circumstances of a particular case become important to find the best solution and we can also say that a weighting of value takes an important role. There are therefore two methods for resolving value conflicts, the tertium non datur. By the way, this observation has become the basis for Ronald Dworkin to distinguish rules and principles. Let us recall that this distinction implies that there are such legal norms (principles) when conflicts need to be resolved to take into account the relative importance of each norm and in such situations, there is no precise method of measurement for decision-making and decisions that one norm is more important than others are controversial. The situation is different in the case of legal norms, which contain rules. These norms have such specificity that if such norms clash, one of them cannot be enforced[13].

[13] Ronald Dworkin, *Biorąc prawa poważnie.* Translated by Tomasz Kowalski (Warszawa: Wydawnictwo Aletheia, 2021), 68–69.

There is no need to assess which method of resolving conflicts of values in law is better, but generally, the latter method seems to be more widely used in the current legal situation. This is the opinion of many legal theory representatives. For example, Lech Morawski, when analyzing the fundamental problems of applying the modern law, noted that the procedures for applying the law are now evolving from the syllogistic model of application of legal norms toward the so-called argumentation model of the application of the law. He added that for the latter model, the idea of "reconciliation over judging" was an inspiration[14]. Also Marek Zirk – Sadowski noted that after Poland joined the European Union, the ideology of the law is changing and therefore he talks about a new type of law, which he calls a responsive law (in polish: prawo responsywne). The characteristic feature of this law is that the law aims to have a diverse and adaptive impact on social reality, that the law is "open" for social needs and aspirations, that the legal rules and subject to legal principles and "open", and the rationale for legal decisions is teleological[15]. Furthermore, it also appears that the specific nature of public commercial law itself causes value conflicts to occur in this area with increased severity and it is relatively more important than in other fields to balance the values. Public commercial law is, after all, the law of state interventionism in the economy, the law of an active state in the economy, which takes responsibility for economic processes and related social relations, and the scale of the state's intervention in the current economy is nowadays very broad. Cezary Kosikowski analysed the objectives of modern government (state) economic interventionism in the economy and the associated legal instruments and he concluded that, at present, economic interventionism is pursuing more far-reaching social and civilizational objectives than it was before[16]. We are therefore dealing with regulations that set the objectives of sustainable development, development policy, closed-loop economy, environmental or climate protection,

14 Lech Morawski, *Główne problemy współczesnej filozofii prawa: Prawo w toku przemian*, 11.

15 Marek Zirk-Sadowski, "Ideologie wykładni prawa administracyjnego," in *System prawa administracyjnego. Wykładnia w prawie administracyjnym. Tom 4*, ed. Roman Hauser, Zygmunt Niewiadomski and Andrzej Wróbel (Warszawa: Wydawnictwo C.H. Beck, 2015), 175.

16 In this connection, Cezary Kosikowski talks about the theory of the "active civilizational interventionism" – Cezary Kosikowski, *Współczesny interwencjonizm* (Warszawa: Wolters Kluwer, 2018), 502.

competition protection, etc. These values are included in the legislation in different ways and the specific forms of action, plans and economic programs are also linked to them[17].

3. Categories of values present in public commercial law

Looking for the categories of values that are present in public commercial law, we can refer to an administrative law doctrine, where issues concerning axiology have been given much space. And so, Jan Zimmermann has distinguished three groups of values based on administrative law rules. The first group comprises the universal values present in all areas of law. These are values somehow beyond the law, which legitimize, for example, the well-being of man, justice. The second group is non-externally derived values, but values created by the law itself to ensure that the bodies applying the law respect certain standards, in particular the standards concerning relations between public administrations and the citizen. These are some firm axiological assumptions, such as the principle of proportionality and legal clarity, but also the principle of rationality and the economic efficiency of legal actions[18]. Interestingly, administrative law scholars also see the danger of the economization of law, which leads to replacing the law with a market mechanism. The term "economization of law" is understood differently, but the concern is mostly that economic instruments are being used improperly or are being abused in the organization of some areas of life, for example in the organization of public services[19]. Such phenomena are observed in public commercial law, for example in antitrust law, but rather they do not raise concerns such as in the administrative law; in antitrust

[17] Cezary Kosikowski notes that modern interventionism uses new forms of action: development strategies, economic programming, multi-annual financial planning, financial support for the economy and entrepreneurs. Such activities occur in addition to traditional forms of control and surveillance, etc.– Cezary Kosikowski, *Współczesny interwencjonizm*, 502. For more information see also Hanna Wolska, "Źródła i podstawy normatywne wartości w prawie gospodarczym publicznym, " in *Aksjologia publicznego prawa gospodarczego,* ed. Andrzej Powałowski (Warszawa: Wydawnictwo C.H. Beck, 2022), 45 and next.

[18] Jan Zimmermann, *Aksjomaty prawa administracyjnego* (Warszawa: Lex a Wolters Kluwer business, 2013), 75.

[19] Jan Zimmermann following Eberhard Schmidt-Assmann says that the risk of economization is to replace the role of the law with market mechanisms – Zimmermann, *Aksjomaty prawa administracyjnego*, 92.

law the „more economic approach" is perceived rather positively[20]. However, the problem is that in this way, legal rules and power of authorities can be used for particular interests[21]. Finally, the third type of values that are present in administrative law are values for which administrative law rules are established for protection or enforcement. This way are achieved targets such as, for example, proper land use, environmental security[22]. This division may raise doubts, but it gives an idea of the different origins and significance of values present in the law.

In the context of the above, we may draw the following conclusions about the values contained in public commercial law:

1) The fundamental value created and protected by this law is the public interest, not an individual interest or a set of individual interests[23].
2) The desirability (value) of efficiency of legal rules plays a relatively high role in public commercial law (it is about ensuring that there are reasonable regulations due to economic processes). This comes from the subject matter of regulation, which is very dynamic economic relationships, and there is a particular risk that regulation will be "impossible" or even economically harmful. It may be added that the demand for the economic viability of the legislation requires desire in particular that:
    a) the law does not call for economically impossible things,
    b) the law is created and applied using economic methods,
    c) the law maximizes social wealth and the proper allocation of resources,

---

20 See Anna Piszcz, "Ekonomizacja prawa antymonopolowego," *Zeszyty Naukowe Uniwersytetu Szczecińskiego. Ekonomiczne Problemy Usług 45* (2009): 502–509.

21 On this background, Ilona Przybojewska makes interesting reflections on the "morality" of the emissions trading system – Ilona Przybojewska, *Instrumenty rynkowe w prawie ochrony środowiska Unii Europejskiej* (Warszawa: Wydawnictwo C. H. Beck, 2021), 9–15. She juxtaposes emission permits with the acquisition of emission allowances. In both cases, the problem with such instruments is that a large (richer) company can do more.

22 Zimmermann, *Aksjomaty prawa administracyjnego*, 75.

23 The public interest is based on values, needs or objectives that are objectives of existing government policy. The public interest is defined differently in that policy – See Artur Żurawik, *Interes publiczny w prawie gospodarczym* (Warszawa: C. H.Beck, 2013), 200–203.

d) the law promotes the minimization of costs associated with the exchange of goods[24].

3) Among the leading values of public commercial law, there are social market economy, social justice, economic freedom, development policy, sustainable development and economic and social cohesion. Understanding these values is difficult because they often come from complex economic and social doctrines.
4) Among the values that come from outside the law, but are recognised by the law, we can distinguish the value of integration within the European Union, which is expressed by legal principles such as sincere cooperation within the European Union, the effectiveness of EU law, the principle of solidarity between the European Union and the Member States. Maintaining and developing the integration of states within the European Union has become the basic value preference that we apply when we choose between values or when we weigh values in specific circumstances.

4. Conflicts of values with European Union law and judicial review

The last conclusion made in the preceding chapter, which concerns EU integration, may be surprising, so it is worthwhile explaining it. We can note that when there is a conflict between the policy of a Member State and the policy of the European Union, the latter always takes precedence and is not, in fact, subject to an examination of what this policy is going to do and what this policy provides. It is settled case law that, under the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State[25]. This is precisely because of the principle of sincere cooperation and its derivative: the principles of the effectiveness of EU law, solidarity and so on. The principle of sincere cooperation as expressed in Article 4(3) of the Treaty on European Union[26]

[24] Zimmermann, *Aksjomaty prawa administracyjnego*, 92.

[25] See CJEU Judgment of 26 February 2013, Stefano Melloni v Ministerio Fiscal, Case C-399/11, ECLI:EU:C:2013:107, point 59.

[26] Consolidated versions of the Treaty on European Union in Official Journal of 26 October 2012, C 326, 1–390.

is based on a general obligation of the parties of the Treaty and the institutions established under it to provide fair and equitable support to each other in achieving the EU's objectives. David Miąsik explains that the principle of sincere cooperation: 1) provides the desired pattern of behaviour of Member States and EU institutions in achieving the Union's objectives, 2) is the basis for the creation of EU law enforcement instruments in national legal systems, 3) is the basis for filling gaps in Member States' obligations[27]. This principle obliges Member States and EU institutions to apply EU policies consistently. Moreover, as indicated by the Court of Justice of the European Union in its judgment in Case C-235/87, Matteucci, each Member State must facilitate the enforcement of a provision of Community law and for that purpose, support any other Member State which has obligations under the Community law[28]. This leads to the conclusion that there is an overall principle of preference for EU values and that even achieving the EU's objectives has become a goal in itself[29].

Finally, let us consider judicial control of decisions which are the result of the valuation made by law enforcement authorities. For instance, if we look at the powers of the president of the Office of Competition and Consumer Protection, we will note that this body makes numerous choices between values and thus creates a State policy in a certain domain, for example, this authority must balance the value of market competition with the collective interests of consumers. This raises the question of how a court should review its decision, because, as we know, political decisions spiral out of judicial review, which means it is hard to make a "complete" judicial review with the principle of responsibility for the political decisions of the government, administration or executive authority. It is fair to say that this problem has been present in various areas of law for a long

27 Dawid Miąsik, *Zasady i prawa podstawowe. System prawa Unii Europejskiej. Tom 2* (Warszawa: Wydawnictwo C. H. Beck, 2022), 139.

28 Judgment of the Curt of 27 September 1988, Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium, Case 235/87, ECLI:EU:C:1988:460, point 19.

29 This is not completely acceptable in all Member States – See, for example, Polish Constitutional Tribunal, Judgment of 7 October 2021, Ref. no. K 3/21, accessed Februrary 10, 2023, https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej.

time. For example, the Constitutional Court cannot rule on the substantive relevance of the legislative measures adopted by the legislator, since it is up to the legislator to adopt legal arrangements which, in his view, will best serve the political and economic objectives he has chosen[30]. In the area of administrative law, this problem can be found in the form of a question about the scope of judicial control of so-called administrative discretion. Zbigniew Kmieciak and Joanna Wegner-Kowalska show what problems administrative courts face in controlling administrative discretion, and this leads them to the conclusion that little has changed since administrative discretion was completely excluded from judicial control[31]. This is also a matter of public commercial law since the implementation of a broad economic policy by the State authorities leads to wide discretion. Furthermore, public commercial law is largely governed by EU law and in the European Union the question of judicial review of political decisions is also on the agenda. The case law of the EU courts takes the view that the judicial review of the economic assessments made by the EU Commission should be limited to the fact that the court must respect the discretion of those assessments and cannot substitute the authority competent to carry out these assessments[32]. Also in the area of regulation of so-called infrastructure sectors, it is also pointed out that the specificities of such sectors require that the regulatory authorities have a margin of discretion in taking regulatory measures to attain their objectives[33]. In public commercial law, therefore, we are facing the issue of judicial review of executive decision-making. Executive decisions are based on different policy assumptions and complex economic evaluations. Scholars of administrative law in Poland are even raising such far-reaching demands that it is necessary to introduce

30 See, for example, Polish Constitutional Tribunal, Judgment of 7 January 204, Ref. no. K 14/03, reported in: OTK-A Journal 2004, Edition 1, Pos. 1.

31 Zbigniew Kmieciak and Joanna Wegner-Kowalska. "O ułomności formuły sądowej kontroli uznania administracyjnego," *Przegląd Prawa Publicznego* 5 (2016): 30.

32 See, for example, Judgment of the Court of First Instance (First Chamber) of 25 October 2002, Tetra Laval BV v Commission of the European Communities, Joined Cases T-5/02 DEP, T-80/02 DEP, ECLI:EU:T:2002:264, point 119.

33 CJEU Judgment of 15 September 2016, Koninklijke KPN NV and Others v Autoriteit Consument en Markt (ACM), Case C-28/15, ECLI:EU:C:2016:692, point 36.

or develop forms of control over the exercise of discretion[34]. In the case of the president of the Office of Competition and Consumer Protection whose decisions may be challenged before the Court of Competition and Consumer Protection and should be reviewed by the court on a substantive basis – the matter is only prima facie clear, because, as Marek Szydło pointed out, it can be questioned whether there is indeed a qualitative difference between the control exercised by the Court of Competition and Consumer Protection and, in principle, a limited control exercised by administrative courts over the decision of the administrative authorities in Poland[35].

5. Conclusion

Public commercial law is an area of conflict of different values and there is no single way to resolve these conflicts. At most, two methods can be distinguished for resolving these conflicts, and it seems that the dominant method is to weigh values in the legislative and enforcement process so as to find a compromise solution. The method of weighting values in specific circumstances is becoming increasingly important due to the exceptional politicising of public commercial law and the dynamics of economic relations. The basic value of public commercial law is a somehow defined public interest, not an individual interest or a set of individual interests. Among the many values present in the area of public commercial law, the value of preserving and developing integration within the European Union is exceptionally important. This value of EU integration sets a general preference rule when there is a need to select or weigh values. In the context of the many values present in public commercial law and the need to continuously resolve the conflicts of values, key are questions about the extent of discretion left to the authorities applying the law and the scope of the judicial review thus exercised.

---

34 Kmieciak and Wegner-Kowalska. "O ułomności formuły sądowej kontroli uznania administracyjnego," 30.

35 Marek Szydło, "Sądowa kontrola decyzji prezesa UOKiK w świetle prawa unijnego i prawa polskiego." *Europejski Przegląd Sądowy 7* (2015): 16. In The polish administrative court shall decide only on legality of the administrative acts. The jurisdiction of the Court of Competition and Consumer Protection in theory goes further and is directed towards a complete reconsideration of the matter.

This Article is an extended version of the speech given in Polish during the scientific and research entities conference held in Lublin on 12–14 June 2022.

References

Blicharz, Rafał. "Ważenie wartości w publicznym prawie gospodarczym." Essay. In *Aksjologia publicznego prawa gospodarczego*, edited by Andrzej Powałowski, 21–44. Warszawa: Wydawnictwo C.H. Beck, 2022.

Dworkin, Ronald. *Biorąc prawa poważnie*. Translated by Tomasz Kowalski. Warszawa: Wydawnictwo Aletheia, 2021.

Grabowski, Jan. "Przedmiot i zakres publicznego prawa gospodarczego." Essay. In *System prawa administracyjnego. Publiczne prawo gospodarcze. Tom 8a*, edited by Roman Hauser, Zygmunt Niewiadomski, and Andrzej Wróbel, 22–27. Warszawa: Wydawnictwo C.H. Beck, 2018.

Jankowski, Wojciech. "Krowy i kury prawa nie mają." Essay. In *Fascynujące ścieżki filozofii prawa 2*, edited by Jerzy Zajadło and Kamil Zeidler, 102–113. Warszawa: Wolters Kluwer, 2021.

Kmieciak, Zbigniew, and Joanna Wegner-Kowalska. "O ułomności formuły sądowej kontroli uznania administracyjnego." *Przegląd Prawa Publicznego* 5 (2016): 17–32.

Kosikowski, Cezary. *Współczesny interwencjonizm*. Warszawa: Wolters Kluwer, 2018.

Miąsik, Dawid. *Zasady i prawa podstawowe. System prawa unii europejskiej. Tom 2*. Warszawa: Wydawnictwo C. H. Beck, 2022.

Morawski, Lech. *Główne problemy współczesnej filozofii prawa: Prawo w toku przemian*. Warszawa: LexisNexis, 2006.

Piszcz, Anna. "Ekonomizacja prawa antymonopolowego." *Zeszyty Naukowe Uniwersytetu Szczecińskiego. Ekonomiczne problemy usług* 45 (2009): 501–509. Accessed February 10, 2023. https://bazhum.muzhp.pl/media/files/Ekonomiczne_Problemy_Uslug/Ekonomiczne_Problemy_Uslug-r2009-t-n45/Ekonomiczne_Problemy_Uslug-r2009-t-n45-s501-509/Ekonomiczne_Problemy_Uslug-r2009-t-n45-s501-509.pdf.

Powałowski, Andrzej, Michał Biliński, Rafał Blicharz, Filip Grzegorczyk, Leon Kieres, Konrad Kohutek, Katarzyna Kokocińska, et al. "Ważenie wartości w publicznym prawie gospodarczym." Essay. In *Aksjologia publicznego prawa gospodarczego*, 21–44. Warszawa: Wydawnictwo C.H. Beck, 2022.

Przybojewska, Ilona. *Instrumenty rynkowe w prawie ochrony środowiska Unii Europejskiej*. Warszawa: Wydawnictwo C. H. Beck, 2021.

Strzyczkowski, Kazimierz. *Prawo gospodarcze publiczne*. Warszawa: LexisNexis, 2008.

Szydło, Marek. "Sądowa kontrola decyzji prezesa UOKIK w świetle prawa unijnego i prawa polskiego." *Europejski Przegląd Sądowy* 7 (2015): 13–19.

von, Hayek Friedrich August. *Prawo, legislacja i wolność: Nowe sformułowanie liberalnych zasad sprawiedliwości i ekonomii politycznej*. Translated by Grzegorz Łuczkiewicz. Warszawa: Wydawnictwo Aletheia, 2020.

Wolska, Hanna. "Źródła i podstawy normatywne wartości w prawie gospodarczym publicznym." Essay. In *Aksjologia publicznego prawa gospodarczego*, edited by Andrzej Powałowski, 45–54. Warszawa: Wydawnictwo C.H. Beck, 2022.

Ziembiński, Zygmunt. *O pojmowaniu sprawiedliwości*. Lublin: "Daimonion", 1992.

Zimmermann, Jan. *Aksjomaty prawa administracyjnego*. Warszawa: Lex a Wolters Kluwer business, 2013.

Zirk-Sadowski, Marek. "Ideologie wykładni prawa administracyjnego." Essay. In *System prawa administracyjnego. Wykładnia w prawie administracyjnym. Tom 4*, edited by Roman Hauser, Zygmunt Niewiadomski, and Wróbel Andrzej, 171–77. Warszawa: Wydawnictwo C.H. Beck, 2015.

Żurawik Artur. *Interes publiczny w prawie gospodarczym*. Warszawa: Beck, 2013.

Review of European and Comparative Law | 2023
Vol. 52, No. 1, 63–82
https://doi.org/10.31743/recl.14568
Received: 3 October 2022 | Accepted: 22 January 2023 | Published: 30 March 2023

The Role of Values in Decision-Making for National Development Planning (a study in light of legal orders in Poland and Norway)

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

Keywords:
socio-economic development planning,
values,
public participation

Abstract: The issues discussed in this paper relate to the axiological justification of planning decisions as part of development policy pursued by public authority bodies, using the example of Polish and Norwegian planning systems. This study derived from the premise that the contemporary model of planning for socio-economic development is crucially significant in terms of organizing the activities of public administration that aim to meet socio-economic needs. In addition to values, the article also identifies legal institutions through which the values in question may be integrated in planning decisions for the development pursued with public participation.

1. Introduction

Values should underpin the objectives to be accomplished so as to further development, including prospective benefits the community may enjoy as a result. Hence, the question is whether and how values influence planning decisions for national development. On the one hand, the challenge is to take social values into account, while on the other one must factor

The article is a result of a research stay at the University of Bergen (July 2022), as part of the author's studies into development planning.

ISSN 2545-384X (Online)

in the economic objectives that the development policy aims to achieve[1], financial realities, as well as seek to incorporate universal values into the legal mechanisms of that policy. Therefore, next to values, it is important to identify those legal institutions which enable their integration in the decision-making while planning for development.

For the purposes of research, it has been presumed in advance that the pursuit of development policy is a vital component in socio-economic development planning which, in conjunction with spatial planning and multi-annual financial planning, constitutes an instrument with which socio-economic processes can be sensibly structured.[2] Hence, in the findings on the axiological rationale of development planning decisions in Poland, the Act on the Principles of Development Policy (APDP) of 6 December 2006[3] plays a paramount role as, in conjunction with the systemic statutes, it establishes the competence mandate for the executive bodies to act in this sphere. At the same time, it should be emphasized that the Polish system of socio-economic development planning is strongly linked to the EU acquis with respect to cohesion policy (strategic programming).[4] In fact,

---

1 Policy of a public authority policy understood as "the determination of the most effective, legally permitted modes of action which administration may employ to accomplish public goals, modes which are admissible under existing legal circumstances"; thus e.g. Jan Jeżewski, "Polityka administracyjna. Zagadnienia podstawowe," in: *Administracja publiczna*, ed. Jan Boć (Wrocław: Kolonia Limited, 2003), 309. Thus, the idea is to arrive at "an optimal formulation of the legal facet of state policy", After: Michał Kulesza, "Z problematyki badań nad metodami działania administracji," in: *Zbiór studiów z zakresu nauk administracyjnych*, ed. Zygmunt Rybicki, Maria Gromadzka-Grzegorzewska and Mirosław Wyrzykowski (Wrocław-Warszawa-Kraków-Gdańsk: Ossolineum, 1978), 337. In Poland, actions and activities geared towards development have been defined in pertinent legislation as "conduct of development policy"; its terminological EU equivalent is "cohesion policy".

2 Katarzyna Kokocińska, "Integrated programming in national development," *Ruch Prawniczy Ekonomiczny i Socjologiczny*, vol. 4 (2019): 139–149; Katarzyna Kokocińska, "Legal instruments in the development of electromobility in the European Union, with particular focus on planning acts," *Review of European and Comparative Law, no. 44(1) (2020): 81–102.*

3 Act on the Principles of Development Policy of 6 September 2007, (consolidated text Journal of Laws of 2021, item 1057), hereinafter as APDP or Act of 2006.

4 "Strategic programming" is distinguished here within the framework of socio-economic development planning (development planning), whereby it encompasses procedures

both are functionally coupled. Therefore, it is likely that the catalogue of EU objectives and values coincides with the legal mechanism behind domestic decision-making for development planning. For this reason, it would be advisable to examine the legal system of a non-EU member state to identify common values (and objectives) and ascertain how they are taken into account in the planning process. The planning system selected for this analysis (albeit not cited in extensive detail due to the scope of the study) originates from Norway, where the Planning and Building Act of 2008 is central to development planning.[5]

2. The Axiology of Decision-Making

According to Z. Ziembiński, "(...)the norms of a given legal system draw their axiological rationale (justification) in an appropriately ordered system of values that the implementation of legal norms is supposed to serve"[6]; in such instances, one may assert that the system is axiologically cohesive. The law is to further certain values, thus promoting the achievement of states of affairs that the community finds advantageous or desirable.

From the standpoint of jurisprudence, values constitute the substrate for the law in force and its applications alike. Legal norms are founded on values[7], which means that when law is applied or planning decisions made, they must be taken into account by seeking axiological justification for such applications or decisions. In their analyses, legal researchers usually adopt a systemic perspective for the assessment of normative solutions.[8] Such an approach facilitates identification of the values which deter-

for the preparation of programming acts based on the provisions of EU law concerning implementation of the cohesion funds.

5 Act of 27 June 2008 no. 71 relating to Planning and the Processing of Building Applications (the Planning and Building Act).

6 Zygmunt Ziembiński, *Wartości konstytucyjne. Zarys problematyki* (Warsaw: Wydawnictwo Sejmowe, 1993), 7; Maciej Zieliński, Zygmunt Ziembiński, *Uzasadnianie twierdzeń, ocen i norm w prawoznawstwie* (Warsaw: Państwowe Wydawnictwo Naukowe, 1988), 305; Jan Zimmermann, ed., *Wartości w prawie administracyjnym* (Warsaw: Wolters Kluwer business, 2015), 465.

7 Jan Zimmermann, *Aksjomaty prawa administracyjnego* (Warsaw: Wolters Kluwer business, 2013), 74.

8 For a critique of the systemic approach see Marek Piechowiak, "W sprawie funkcjonalności i dysfunkcjonalności konstytucji. Zagadnienia filozoficzno-prawne," *Ruch Prawniczy*

mine the identity of a given system of law and result in socially desirable outcomes. It is assumed that a system of values originates with the rational legislator and spans values that become binding under law (legal values) and values which the legislator invokes through general clauses or non-specific wording; public morality is another component, comprising all those values/moral norms that are shared by the majority.[9]

For the decision-maker (planning decision) it does not suffice that a system of values has been established, because the relationships between them are relevant as well. The pursuit of a certain value does not take place in an axiological vacuum, since it is contiguous to other values. Therefore, the planning decision-maker is left with no choice but to make a careful axiological diagnosis. Where a conflict of values occurs, the determining authority is under obligation to weigh them appropriately and make the decision drawing on the adopted hierarchy of values arising from the axiology of the sources of law and, in consequence, from their constitutionally defined order.[10]

Sources of law derive their axiological legitimacy from three groups of values within the system of law. According to M. Kordela, this includes values which are commonly recognized as binding, as well as legal values–constitutional ones in particular–encompassing the foremost principles of a political system, such as democracy which governs sovereign authority, the division of power as a value which informs the system of government, or the notions of social justice and social market economy as the mainstays of the social and economic system. Even superior to the latter, there are values such as sovereignty, dignity, solidarity, and subsidiarity. The second group is constituted by the normative competences of public authority: a defined and constitutionally guaranteed system of sources of law along with a hierarchy of resulting values. Custom and

Ekonomiczny i Socjologiczny, vol. 3 (1995): 131.

9 This category of values includes humanity's universal values such as goodness, beauty, truth, justice, which are often referred to in constitutional preambles. See Marzena Kordela, "Aksjologia źródeł prawa," *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, vol. 2 (2016), 15–26.

10 Leszek Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu, wyd. 15* (Warsaw: Wolters Kluwer, 2011), 52–57; Krzysztof Płeszka, *Hierarchia w systemie prawa* (Krakow: Wyd. UJ, 1988), 119–132.

precedent as well as the tenets of legal text exegesis makes up yet another group.[11] The hierarchy of sources of law and the values thence derived are intended to supply adequate axiological justification for a decision. This does not mean that axiological conflicts do not occur in the course of making a decision. As A. Węgrzecki argues, any situation in which a person participates may–from an axiological viewpoint– bring forth distinct values and lead to conflict[12] which most often manifests in the competitiveness of values. A genuine problem arises when competition ensues between values at the same level of hierarchy.

While being aware of a certain simplification for the purposes of further inquiry, it has been assumed in the light of the above that the system of values which informs the activities of executive authorities in undertakings geared towards development consists of universal values, constitutional values (including the values stated in the economic constitution of the EU[13]), as well as values/principles resulting from detailed legislation pertaining directly to development-oriented action.

3. Development Planning: Making Decisions about Future Decisions

The conduct of development policy and, consequently, socio-economic planning in Poland is comprehensively regulated in APDP, which specifies the entities involved and the modes of cooperation between them, as well as the principles of pursuing that policy[14] with respect to social and economic development in the spatial dimension. Essentially, the legal mechanism of implementing that policy is determined by the catalogue of entities (the Council of Ministers and local government bodies) and their relations based on interrelated activities. Pursuant to Article 2 APDP, the conduct of

11 Kordela, "Aksjologia," 20; Marzena Kordela, *Zasady prawa. Studium teoretycznoprawne* (Poznań: Wydawnictwo Naukowe UAM, 2012), 102.

12 Adam Węgrzecki, "O konflikcie wartości," *Zeszyty Naukowe Akademii Ekonomicznej w Krakowie,* vol. 22 (2006): 5–12.

13 Kazimierz Strzyczkowski, "Uwagi o zadaniach nauki o prawnych formach działania administracji gospodarczej," in *Instrumenty i formy prawne działania administracji gospodarczej*, ed. Bożena Popowska, Katarzyna Kokocińska (Poznań, Wydawnictwo Naukowe UAM, 2009), 53.

14 More broadly in Katarzyna Kokocińska, *Prawny mechanizm prowadzenia polityki rozwoju w zdecentralizowanych strukturach władzy publicznej* (Poznań: Wydawnictwo Naukowe UAM, 2014), 309.

development policy includes delivering public tasks on a national scale and, simultaneously, in the regional and local dimensions, so as to pursue the objectives defined in relevant statutes.[15]

Socio-economic development planning is a key element of development policy.[16] The legislator, in addition to stating the goals (values – objectives for the conduct of development policy), defines the circumstances which justify the issue of planning acts, simultaneously indicating their substantive scope. The national socio-economic planning system comprises development strategies executed by means of programmes as well as public policies. Development strategies are declarative in nature and refer to trends, challenges, concepts and scenarios of socio-economic development in a specific perspective, indicating the objectives, directions and priorities of development in a particular sphere, whereby their territorial or substantive scope may differ. Development strategies are adopted by the Council of Ministers (national, sectoral, domain-specific) and by local government bodies (regional and local development strategies), but their essential feature is that they remain consistent within the adopted system of planning documents, also where the pursued socio-economic development goals are concerned. Programmes, on the other hand, qualify as executive instruments in relation to the development strategy and state

15 Article 2 APDP.

16 For the purposes of this analysis, planning is assumed to mean the activity of actors aimed at designing the future, by defining objectives and instruments (including legal measures) to achieve them. See: Janusz Łętowski, "Miejsce i funkcje planowania w działalności administracji," *SP* 1983, vol. 1 (75): 3–34; Kazimierz Strzyczkowski, *Administracyjnoprawne instytucje planowania* (Warsaw: Wydawnictwo Uniwersytetu Warszawskiego, 1985), 164; Peter Badura, *Das Planungsermessen Und die rechtsstaatliche Funktion des Allgemeinen Verwaltungsrechts, in Festschrift zum 25 Jährigen Bestechen des Bayerisches Verfassungsgerichstshof*, ed. Hans Domcke (München: Booberg, 1972), 157–182; Eberhard Schmidt-Assmann, "Planung unter dem Grundgesetz," *Die öffentliche Verwaltung*, no. 16 (1974): 541–547; Eberhard Wille, ed., *Konzeptionelle Probleme öffentlicher Planung, Allokation im marktwirtschaftlichen System, no. 7* (Frankfurt nad Menem, Bern, New Yourk, Nancy: Peter Lang International Academic Publishers, Berlin, 1985), 278; Werner Hoppe, Hans Scharmann, Reimar Buchner, *Rechtsschutz bei der Planung von Straßen und anderen Verkehrsanlagen* (München: Beck, C. H. (Verlag), 2001), 373; Edwin Buitelaar, Maaike Galle, Niels Soler, "Plan-led planning systems in development-led practices: an empirical analysis into the (lack of) institutionalisation of planning law," *Environment and Planning A*) *Economy and Space*, vol. 43(2011), 928–941, https://doi.org/10.1068/a43400.

goal-oriented details. Importantly, there exists a functional link between planning decisions (which assume the form of planning acts) and legal acts, which for their part contain incentives for the accomplishment of objectives stipulated in such instruments. Thus, they perform a motivating function to make certain states of affairs a reality[17] (i.e. achieve the values-objectives specified therein).

The domestic structure of the socio-economic development planning system is profoundly influenced by EU solutions. The implementation of the EU cohesion policy[18] by the Member States follows the principle of programming involving planning documents: partnership agreements and programmes, whose preparation and implementation adhere to the EU principles and values relating to cohesion and development activities.[19] Also, a strong connection with the general objectives of the functioning of the EU is particularly conspicuous in this area of commitment of its institutions.[20]

The development planning system in the Kingdom of Norway has been structured differently. The legislation focuses primarily on spatial planning. Although a separate general law governing the activities of public authorities in the field of development has not been enacted, it does not mean that relevant references are lacking or that state activity in this respect remains thoroughly unregulated. The planning framework adopted in Norway is based on the integrated approach to development, which means that social and economic development are important elements of

17 Marek Szydło, "Planowanie indykatywne jako funkcja państwa wobec gospodarki," in *Funkcje współczesnej administracji gospodarczej. Księga dedykowana Profesor Teresie Rabskiej*, ed. Bożena Popowska (Poznań: Wydawnictwo Poznańskie, 2006), 143–162.

18 Article 174 TFEU.

19 Title II, Strategic Approach, Chapter I, Partnership Agreement, Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, Official Journal of the European Union L 231/159 of 30.06.2021, hereinafter as Regulation 2021/1060.

20 Articles 3 and 4 TEU.

spatial planning[21], although the latter is often subject to detailed provisions in sectoral legislation.

According to the Planning and Building Act, planning in the Kingdom of Norway takes place at three levels: central, regional and local. Such a paradigm of planning results in different scopes of planning acts adopted at each level of governance and their reciprocal effects. Regional and local planning is part of the national policy and one approaches it as an instrument of coordination between different tiers of administration, as well as a tool for coordinating sectoral policies. At the central level (within the Ministry of Local Government and Regional Development), a document is drafted which sets out the governmental guidelines on regional and urban planning, on whose grounds local governance bodies work out regional and municipal planning strategies. The central planning guidelines define the objectives and values that should be taken into account in the planning process, which includes responding to distinct interests. Regional planning takes advantage of corresponding strategies (drawing on the national development goals and the UN Sustainable Development Goals[22]) and plans as its key instruments, while planning processes at this level rely on cooperation in terms of inter-municipal planning and as part of the regional planning forum. Here, areas of interest include transport infrastructure, housing and commercial development, social and cultural development, education, public health as well as the protection of soil, forests, coastal zones, etc. In addition, local authorities may request municipalities to engage in collaborative inter-municipal planning if they consider it necessary in order to address current challenges. An inter-municipal plan is an element of the planning effort next to plans for land use or spatial development in a particular municipality.

It follows from this brief overview of planning systems for development (also in spatial terms) that state development policies are devised at

[21] The Polish system of socio-economic development planning is not extensively aligned with spatial planning, which is governed by the Planning and Spatial Development Act of 27 March 2003, even though attempts have been made to integrate the socio-economic and the spatial dimension in development planning documents elaborated at national, regional and local levels.

[22] *The Sustainable Development Goals* were adopted by UN member states by a General Assembly Resolution on 25 September 2015 in New York.

multiple levels in which public bodies exercise their authority. It may be noted that domestic circumstances are not the only important point of reference for planning decisions, as those arising from EU policies and global challenges need to be taken into consideration as well.

4. Socio-Economic Development Planning in the Light of Values

Universal values, including constitutional values, are particularly significant for the efforts undertaken with a view to pursuing development. Moreover, public law rests on established axiological premises which inform its standard[23], supplemented by the values introduced into the system by specific statutes (values relevant to its individual areas).[24] Bearing in mind the difficulty of arguing their hierarchy, a reconstruction of a catalogue of values in the planning activities of the state may be attempted.

The concept of "policy", understood as the delineation of directions of state activities in various fields in order to achieve a specific goal, as well as the notion of "development", approached as a process of change, are characterized by value-dependent relativity.[25] For this reason, the pursuit of development policy and the consequent planning must be situated in the current socio-economic context. The latter is determined by the purposes of the social and economic dimension of the EU common market, which prioritizes sustainable growth, highly competitive social market economy geared towards full employment and social progress, as well as conservation and improvement of the quality of the natural environment.[26] In Poland,

---

23 Andrzej Powałowski, ed., *Aksjologia Publicznego Prawa Gospodarczego* (Warsaw: C.H. Beck, 2022), 255.

24 Katarzyna Kokocińska, ed., "Publicznoprawne aspekty udziału sektora MŚP w procesie realizacji strategicznych celów polityki rozwoju ("Aspectos de derecho público de la participación del sector de PYMES en el proceso de implementación de los objetivos estratégicos de la política de desarrollo)," (Poznań, Wydawnictwo Naukowe UAM:2021), 19–43.

25 J. Hausner argues that invoking specific values, legal and extra-legal norms, or rules of conduct is indispensable, because "(...) failure to comply with political rights and democratic rules hinders development in the long run--also because it means depriving individuals and groups of the necessary autonomy and civil society of its subjectivity." Jerzy Hausner, *Zarządzanie publiczne* (Warsaw: Wydawnictwo Naukowe Scholar, 2008), 370.

26 Article 3(3) of the Treaty on the European Union, consolidated version, Official Journal of the European Union of 26.20.2012, C 326/13, hereinafter as Treaty on the European Union or TEU.

that context derives from the constitutional principles of social market economy, inclusive of economic freedom and private property, solidarity, dialogue and cooperation of social partners. Consequently, the substance of a "development policy" will not be constant and tend to have various meanings assigned, but they will not transcend the boundaries delimited by the values – objectives that this obligation of the executive bodies should serve to achieve.

In Poland, "development policy" became a normative concept by virtue of APDP, having been defined through reference to specific values – objectives which are subject to normativization, understood as "the state of subsuming values within the normative scope of substantive law".[27] The normative scaffolding for the definition of "development policy" relies on two value-oriented elements. On the one hand, it is to be pursued by way of "a complex of interrelated actions", which should be approached as a value inherent in the paradigm of public management informed by decentralization of public authority and partnership. The other component of the definition lies in the espoused values – objectives that these activities are intended to serve: continual and sustainable development[28] of the country, socio-economic, regional and spatial cohesion, greater competitiveness of the economy and creation of new jobs, all of which have been assigned a specific legal meaning by both normative and policy acts.

It should therefore be assumed that, each time a planning decision is taken, the bodies designated to pursue development policy will be obliged to weigh the values, including those which reflect social needs in line with EU policies. In fact, when implementing measures for cohesion and development that receive co-financing from the EU budget, the Member States

[27] Jan Boć, Piotr Lisowski, "Normatywizacja wartości w prawie administracyjnym," in *Wartości w prawie administracyjnym*, ed. Jan Zimmermann (Warsaw: Wolters Kluwer business, 2015), 24.

[28] Anchoring in law also applies to "development" construed as an objective (value) towards which actions normatively defined as the conduct of a policy are geared. Z. Cieślak distinguishes a group of values pertaining to "the development of the state understood as a community of communities, including creation of spatial conditions for development, protection and use of environmental resources, creation of social conditions for development, creation of economic conditions for development and creation of scientific and cultural conditions for development." Zbigniew Cieślak, "Istota i zakres prawa administracyjnego," in *Prawo administracyjne*, ed. Zygmunt Niewiadomski (Warsaw: LexisNexis, 2011), 53–55.

are under obligation to align their strategic programming with the specific objectives and values towards which that support is allocated. At present, in addition to the objectives of a more competitive, smarter, greener Europe whose enhanced social dimension makes it closer to citizens by promoting sustainable and integrated development, one highlights the significance of climate objectives and the mechanisms of adaptation to climate change.[29]

One cannot fail to mention the contribution of EU institutions to the implementation of public governance standards, which have a substantial impact on planning-related decision-making. The much underscored need to prepare and implement programmes at the appropriate territorial level[30], the obligation to establish partnerships in accordance with the principle of multi-level governance and the local approach involving regional and local authorities, economic and social partners, or actors who represent civil society, inform the essence of development-oriented efforts. Moreover, with regard to the implementation of funds, the 2021–2027 perspective attaches particular importance to horizontal principles, such as respect for fundamental rights and adherence to the EU Charter of Fundamental Rights. The objectives of the EU Funds are to be pursued with the objective of promoting sustainable development in mind – as set out in Article 11 TFEU – as well as in conjunction with the UN Sustainable Development Goals, the Paris Agreement and the principle of "do no significant harm", while thoroughly respecting the environmental acquis of the Union.[31]

The principles/values applicable to public governance are vital in the development planning process. Therefore, the analyses of the Polish legal order must not disregard the systemic context of APDP, which to a substantial extent draws on the structure of the executive[32] and the relations between its bodies which presuppose decentralization of public power. This constitutional principle, interpreted in tandem with other constitutional principles, notably the tenet of subsidiarity, gives rise to the obligation to establish specific frameworks of tasks and competences, as well as delegate

29 Article 6, Regulation 2021/1060.

30 Article 7, Regulation 2021/1060.

31 Article 9, Regulation 2021/1060.

32 Article 14, Constitution of the Republic of Poland, Journal of Laws of 1997, No 78, item 483; 2001, no. 28, item 319; 2006, no. 200, item 1471; 2009, no. 114, item 946.

their execution to lower tiers. This principle stresses the organizational arrangement involved in development policy (and its planning) and, as a result, the requirement to respect territorial self-governance communities, directly invoking the key values that attest to democratization of social life. This is augmented by the values to which the EU institutions and bodies give precedence: multi-level governance and partnership. Essentially, they seek to be closer to the citizen, who has an influence either indirectly (through representative entities) or directly on the directions of policies and planning decisions.

Given the above, when one examines the values espoused in the Norwegian system for development and planning, constitutional solutions prove to be the key elements, just as in the Polish system.[33] That approach stems primarily from Article 112 of the Constitution of the Kingdom of Norway, which asserts everyone's right to an environment conducive to health and to a natural environment in which productivity and diversity are preserved. According to the Norwegian Constitution, natural resources should be managed comprehensively and in the long term, so as to ensure that future generations will have the benefit of that right. The principle of sustainable development, reinforced by the principle/value of intergenerational justice[34] are further complemented by a standard of action undertaken by public authorities. Namely, in order to safeguard those rights, citizens are entitled to information on the state of the environment and on the effects of planned or ongoing intervention into natural habitats.

---

[33] The Constitution of the Kingdom of Norway The Constitution, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll, subsequently amended, most recently by Resolutions of 14 May 2020, https://lovdata.no/dokument/NLE/lov/1814-05-17

[34] Andrzej Klimczuk, "Intergenerationality, Intergenerational Justice, Intergenerational Policies," in *The Encyclopedia of Diversity and Social Justice*, ed. Thmopson Sherwood (Rowman & Littlefield, Lanham, MD 2015), 419–423; Janna Thompson, *Intergenerational justice: Rights and Responsibilities in an intergenerational Polity*. (MIASTO New York: Routledge, 2013), 198; Nina Tissera, "Intergenerational Justice," in *Encyclopedia of Corporate Social Responsibility*, ed. Samuel O. Idowu, Nicholas Capaldi, Matthias S. Fifka, Liangrong Zu, René Schmidpeter. (Berlin: Springer Heidelberg), 500, https://doi.org/10.1007/978-3-642-28036-8; Wilfred Beckerman, "The impossibility of a theory of intergenerational justice," in *Handbook of intergenerational justice*, ed. Joerg Chet Tremmel (Cheltenham: Edward Elgar Publishing, 2006), 53–71; Dale Jamieson, "Ethics, public policy, and global warming," *Science, Technology, & Human Values, vol.* 17(2), (1992), 139–153.

State bodies take action to implement these principles relying, among other things, on the provisions of the Planning and Building Act, a law whose premises draw on the UN principles of sustainable development. The Planning and Building Act promotes sustainable development in the interest of individuals, society and future generations[35], while planning carried out under the provisions of this Act is intended to facilitate the coordination of governmental, regional and municipal functions, supplying grounds for administrative decisions on resource use and conservation. The adopted plans, which integrate development activities with spatial development, define the objectives of spatial, environmental, economic, social and cultural development of municipalities and regions, identify social needs and functions and determine how these functions can be discharged. The catalogue of core values includes protection of land resources, scenic qualities and the preservation of valuable landscapes and cultural environments; industrial and commercial development are stated as valuable goals as well, alongside promoting public health and addressing social inequalities in health. The Norwegian planning process is based on the standards of a state with highly advanced democracy. It is emphasized that planning and decision-making procedures, including administrative decisions, should ensure transparency, predictability, participation of all authorities and the public, as well as compliance with international obligations. The principle of universal accessibility in planning is intended to guarantee cohesion of actions undertaken by local authorities, whether self-governmental, regional and central, which translates into realization of the previously adopted values, at each level of public governance.[36]

---

35 LANDTIME – The Planning and Building Act between market demand, land policy, sustainability, temporality, and intergenerational justice, project manager: Associate Professor Knut Boge, Department of Property and Law, Norwegian University of Life Sciences, Funding: The Research Council of Norway,

36 Mønnesland Jan, Naustdalslid Jon, "Planning and Regional Development in Norway," *Built Environment (1978-)* 26, no. 1 (2000): 61–71, http://www.jstor.org/stable/23288975; Thor Falkanger, "Planning law in Norway," in *Planning Law In Western Europe*, ed. John Francis, Garner, NigelP. Gravells (Amsterdam: Elsevier Science Publishers B.V. North-Holland, 1986): 245–268.

5. Legal Institutions of Public Participation in Planning Decision-Making

When adopting a certain system of values (and their hierarchy) which are relevant to development, the legal institutions that guarantee their inclusion in planning decision-making are crucial if the process is to be successful. The above analysis of EU regulations and domestic legislation (Polish and Norwegian), shows that the legal institutions which emphasize partnership in the planning process have a considerable impact. Openness, participation, accountability, efficacy and cohesion of actions within the framework of multi-level governance not only constitute the essential values, but also describe which directions to follow to structure the modes of managing development. This approach affords the actors participating in the development planning process a broader scope of authority, while their actions are mutually complementary, which enables one to surmise that policies will be devised and applied at the most appropriate level of government, where the actions in question will prove the most effective.

Another greatly significant element is the idea of territorial self-government, which is referred to both in APDP and the Planning and Building Act, demonstrating that the legislator respects the value of democratization of public life. The place and role of territorial arrangements in the conduct of development policy endorsed in Polish and Norwegian legislation should be associated with consolidating actual participation of the civil society in the exercise of power. This amounts to an obligation of close cooperation between public authorities and partners, with a view to achieving harmonious development of the country while taking a specific system of values into consideration. Thus, a fundamental issue from the standpoint of this inquiry is the extent of normative assurance for public participation in the exercise of public authority and instruments of putting that standard into practice.

Unquestionably, the statutory guarantee of regional and local contribution to development policy is crucial; as has been demonstrated, this has been provided for by the legislator in either legal order. Pertinent legislation lists local and regional structures among the actors involved in development policy, equipping them with the legal means to carry out their tasks, including active participation in the development planning process. Another strongly emphasized means of collaboration is ensuring immediate

participation of social and economic partners and enabling citizens (outside formal structures) to partake in formulating a development policy. Here, consultations and receiving opinions on planning acts constitute some of the key solutions in both Polish and Norwegian statutes. In Polish law, Article 6 APDP expressly states the obligation to consult as an integral part of the planning process. Consultation is mandatory with a specific category of planning acts[37], whereby this right may be exercised by a statutorily defined category of entities, which includes local government bodies and their associations, social and economic partners as well as the Joint Commission of the Government and Local Government. In the Norwegian system, next to systemic and competence statutes, public participation in planning is guaranteed primarily by the provisions of the Planning and Building Act. Under the latter[38], anyone who puts forward a planning proposal is obliged to facilitate public participation in the planning process. The implementation of this requirement rests primarily with municipalities, also in the planning processes carried out by other public bodies or private entities. Where the Act stipulates that a proposal for a planning act is to be submitted for opinion, the draft should be sent to all central administrative bodies, regional and municipal authorities as well as other public bodies, organizations and private institutions that the proposal concerns. In addition, one underscores special responsibility of the municipalities to ensure active participation of vulnerable groups, including children and young people, which not only shows how important this principle is but also promotes the idea of social participation (also referred to in the Norwegian law as the social element). This, in turn, translates into increased likelihood that needs (and the values represented by specific social groups) are genuinely heeded. In both legal orders examined here, the procedural provisions of mandatory consultation are formulated in very general terms. The legislator establishes a catalogue of requirements that an entity which holds consultations is obliged to meet, including the obligation to

37 Currently, this obligation applies to three types of planning acts: draft concepts for national development, development strategies and public policy drafts. Under Article 6 APDP, consultations are to take place with respect to operational and implementative documents. This category includes programmes which serve to deliver a partnership agreement as well as programmes which require to be drafted in accordance with the provisions of EU law.

38 Chapter 5, Public participation in planning, Planning and Building Act.

send the draft to relevant actors, post an announcement that consultations will be taking place on their website, and state the deadline and manner of submitting comments on the draft, as well as the date and venue of consultation meetings.

This analysis confirms that the Polish and Norwegian legislators provide for legal institutions which allow the public have their say in the decisions made by public authorities with respect to planning acts for development. The key difference consists of the appointment of subsidiary bodies, which act as expert collaboration forums. The Norwegian system posits the requirement for consultative and advisory structures, which subsequently contribute considerably to the decision-making process. County authorities establish regional planning forums whose task is to aid coordination and cooperation in the municipal and regional planning processes. Serving to exchange views and represent various interests, they foster the principle of collaboration, offering a space for the exchange of experiences and thus constitute a legal, structured form of cooperation. This particular cooperative formula was abandoned by the Polish legislator in 2019.[39]

The provisions in question also make it requisite to ensure the participation of the representatives of diverse interest groups when planning documents are drafted, approaching it an indispensable element in the mechanism of development policy. The significance of the adopted solutions should be underlined in view of the legal distinction between the domestic development policy pursued by the government and the development policy implemented at the regional and local levels, as well as given the necessity to harmonize development-oriented activities. Moreover, the Polish and Norwegian legislators recognize the need for the regional and local communities which are directly concerned by planning decisions to be involved in their making.[40]

---

[39] Previously (until 2019), it was the National Territorial Forum which served as a subsidiary body. In addition to representatives of the central authorities, the forum comprised representation of self-government at voivodeship level, associations of territorial governance units and socio-economic partners.

[40] E. Buitelaar, M. Galle, N. Sorel, Plan-Led Planning Systems in Development-Led Practices: An Empirical Analysis into the (Lack of) Institutionalisation of Planning Law, in

6. Conclusions

This study relied on two main assumptions: the contemporary model of planning for socio-economic development is crucial considering the organization of the activities of public administration as well as other participants in socio-economic life; consequently, since it serves to meet socio-economic needs (by accomplishing normatively defined objectives), it should be informed by a specific system of values (axiological justification for planning decisions made by public authorities in the conduct of development policy).

An inquiry thus oriented demonstrates that next to universal values–including constitutional ones–which guide public administration as it plans for development, crucial importance should be attributed to values that influence both the decision-making process and the achievement of statutory objectives. Values have an impact on development policy decisions in that they shape the standards and principles to which public administration adheres (governance values or good governance values). Decentralization, subsidiarity and public participation–the values embraced to foster transparent, effective, accountable policy decision-making–do not serve to achieve development goals directly, but they do ensure that the public partakes in planning decision-making to see the essential values – objectives taken into account in the process. Thus, they have a decisive influence on the extent to which the statutorily defined development goals will be accomplished (values – objectives). It should be stressed that the public authorities involved in pursuing development policy–from the initial concept to the adoption of a planning decision implemented by means of legal acts–lend legitimacy to certain values being guided by the public interest. Therefore, one cannot underestimate the contribution of stakeholder groups and partners who represent various social expectations since they influence the ultimate planning decisions. Hence, the study highlights the legal institutions which guarantee public participation in development planning decisions.

Environment and Planning A: Economy and Space, Sage Journal, 2011, 928–941, https://doi.org/10.1068/a43400.

References

Badura, Petera. "Das Planungsermessen Und die rechtsstaatliche Funktion des Allgemeinen Verwaltungsrechts." In *Festschrift zum 25 Jährigen Bestechen des Bayerisches Verfassungsgerichstshof*, edited by Hans Domcke. 157–182. München: Booberg, 1972.

Boć, Jan, Piotr Lisowski. "Normatywizacja wartości w prawie administracyjnym." In *Wartości w prawie administracyjnym*, edited by Jan Zimmermann, 24. Warsaw: Wolters Kluwer business, 2015.

Buitelaar, Edwin, Maaike Galle, and Niels Sorel. "Plan-led planning systems in development-led practices: an empirical analysis into the (lack of) institutionalisation of planning law." *Environment and Planning*, vol. 43 (2011): 928–941. https://doi.org/10.1068/a43400.

Buitelaar, Edwin, Maaike Galle, and Nielse Sorel. "Plan-Led Planning Systems in Development-Led Practices: An Empirical Analysis into the (Lack of) Institutionalisation of Planning Law." *Environment and Planning A: Economy and Space*, Sage Journal, vol. 43(2011) 928–941, https://doi.org/10.1068/a43400.

Cieślak, Zbigniew. "Istota i zakres prawa administracyjnego." In *Prawo administracyjne*, edited by Zygmunt Niewiadomski, 52–69. Warsaw: LexisNexis, 2011.

Falkanger, Thor. "Planning law in Norway." In *Planning Law In Western Europe*, edited John Francis, Garner, Nigel P. Gravells, 245–268. Amsterdam: Elsevier Science Publishers B.V. North-Holland, 1986.

Garlicki, Leszek. *Polskie prawo konstytucyjne. Zarys wykładu*. Warsaw: Wolters Kluwer, 2011.

Hausner, Jerzy. *Zarządzanie publiczne.* Warsaw: Wydawnictwo Naukowe Scholar, 2008.

Hoppe, Werner, Hans Scharmann and Reimar Buchner. *Rechtsschutz bei der Planung von Straßen und anderen Verkehrsanlagen*. Verlag: C.H. Beck, 2001.

Jeżewski, Jan. "Polityka administracyjna. Zagadnienia podstawowe." In *Administracja publiczna*, edited by Jan Boć, 309. Wrocław: Kolonia Limited, 2003.

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

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

Kokocińska, Katarzyna ed. *Publicznoprawne aspekty udziału sektora MŚP w procesie realizacji strategicznych celów polityki rozwoju ("Aspectos de derecho público de la participación del sector de PYMES en el proceso de implementación de los objetivos estratégicos de la política de desarrollo")*. Poznań: Wydawnictwo Naukowe UAM, 2021.

Kordela, Marzena. "Aksjologia źródeł prawa." *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, vol. 2 (2016): 15–26.

Kulesza, Michał. "Z problematyki badań nad metodami działania administracji." In *Zbiór studiów z zakresu nauk administracyjnych*, edited by Zygmunt Rybicki, Maria Gromadzka-Grzegorzewska, Mirosław Wyrzykowski, 335–339. Wrocław-Warszawa-Kraków-Gdańsk: Ossolineum, 1978.

Łętowski, Janusz. "Miejsce i funkcje planowania w działalności administracji." *SP* 1983, vol. 1 (75): 3–34.

Mønnesland, Jan, and Jon Naustdalslid. "Planning and Regional Development in Norway." *Built Environment (1978)* 26, no. 1 (2000): 61–71. http://www.jstor.org/stable/23288975.

Piechowiak, Marek. "W sprawie funkcjonalności i dysfunkcjonalności konstytucji. Zagadnienia filozoficzno-prawne." *Ruch Prawniczy Ekonomiczny i Socjologiczny*, vol. 3 (1995): 131.

Płeszka, Krzysztof. *Hierarchia w systemie prawa.* Kraków: Wyd. UJ, 1988.

Powałowski, Andrzej ed. *Aksjologia Publicznego Prawa Gospodarczego*. Warsaw: C.H. Beck, 2022.

Prawne i ekonomiczne aspekty rozwoju elektromobilności, edited by Katarzyna Kokocińska, *a*nd Jarosław Kola, Warsaw: C.H. Beck, 2019.

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

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

Strzyczkowski, Kazimierz. "Uwagi o zadaniach nauki o prawnych formach działania administracji gospodarczej." In *Instrumenty i formy prawne działania administracji gospodarczej*, edited by Bożena, Popowska, Katarzyna Kokocińska. 35–64. Poznań: Wydawnictwo Naukowe UAM, 2009.

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

Thompson, Janna. *Intergenerational justice: Rights and responsibilities in an intergenerational Polity*. Abingdon: Routledge. Duckworth, C, 2013.

Węgrzecki, Adam. "O konflikcie wartości." *Zeszyty Naukowe Akademii Ekonomicznej w Krakowie,* vol. 22 (2006): 108.

Wille, Eberhard, ed. *Konzeptionelle Probleme öffentlicher Planung, Allokation im marktwirtschaftlichen System, No 7.* Frankfurt nad Menem, Bern, New Yourk, Nancy: Peter Lang International Academic Publishers, Berlin, 1985.

Zieliński, Maciej, and Ziembiński Zygmunt. *Uzasadnianie twierdzeń, ocen i norm w prawoznawstwie*. Warsaw: Państwowe Wydawnictwo Naukowe, 1988.
Ziembiński, Zygmunt. *Wartości konstytucyjne. Zarys problematyki.* Warsaw: Wydawnictwo Sejmowe, 1993.
Zimmermann, Jan. *Aksjomaty prawa administracyjnego.* Warsaw: Wolters Kluwer business, 2013.
Zimmermann, Jan ed. *Wartości w prawie administracyjnym*. Warsaw: Wolters Kluwer business, 2015.

Review of European and Comparative Law | 2023
Vol. 52, No. 1, 83–126
https://doi.org/10.31743/recl.14636
Received: 19 October 2022 | Accepted: 20 January 2023 | Published: 30 March 2023

Economic Freedom and Imperative Requirements in the General Interest-Conflict of Coexistence of Values in European and Polish Economic Law? Remarks Against the Background of Cross-Border Business Activities of Companies in the European Union

Katarzyna Pokryszka
Dr. habil., Asscociate Professor, Faculty of Law and Administration, University of Silesia in Katowice; correspondence address: Bankowa 11B street, 40-007 Katowice, Poland; email: katarzyna.pokryszka@us.edu.pl
https://orcid.org/ 0000-0003-4975-7496

Keywords:
economic freedom, freedom of establishment, restrictions on economic freedom, cross-border company conversion, imperative requirements in the general interest, principle of proportionality

Abstract: Economic freedom is one of the basic principles of Poland's economic system and, at the same time, a fundamental rule on which the functioning of the European Union's internal market is based. In the judgment in Case C-106/16 Polbud, which was issued on the basis of Polish law, the Court of Justice confirmed the possibility for companies to carry out activities in the territories of EU Member States in the form of a cross-border conversion into a company governed by the law of another Member State, and stressed the need for Member States to verify the restrictions imposed on companies in connection with their cross-border activities in terms of their compliance with EU law. The article focuses on analysis of the idea of economic freedom in the context of cross-border business activities of companies and on the presentation of the concept of "imperative requirements in the general interest" as conditions determining the admissibility of restrictions on cross-border activities of companies by the company's home State in the light of European Union and Polish law.

ISSN 2545-384X (Online)

1. Introduction

The operation of companies in the territory of the internal market of the European Union associated with the cross-border transfer of the real or registered office to the territory of another Member State, has long been regarded in legal doctrine and case law as one of the most controversial forms of exercising freedom of establishment under EU law.[1] Interpretation-related doubts arising in this regard, primarily concerning the scope of application of the freedom of establishment and related to differences in the substantive and conflict of laws of the Member States, as well as the permissibility of EU Member States to impose restrictions on the exercise of freedom of establishment by companies in the form of cross-border conversion, were finally resolved by the Court of Justice in the judgment in case C-106/16 Polbud[2], the issue of which was based

[1] On the interpretation-related issues related to the possibility for companies to exercise their freedom of establishment in the form of cross-border transfer of their real head office or registered office to another Member State, see in particular: Ewa Skibińska, "Komentarz do art. 54 Traktatu o Funkcjonowaniu Unii Europejskiej," in *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Volume I (Articles 1–89)*, ed. Andrzej Wróbel, Dawid Miąsik and Nina Półtorak (Warsaw: LEX a Wolters Kluwer business, 2012), 919–927; Adam Opalski, *Europejskie prawo spółek,* (Warsaw: LexisNexis 2010), 92–149; Jacek Napierała, *Europejskie prawo spółek. Prawo spółek Unii Europejskiej z perspektywy prawa polskiego* (Warsaw: Wydawnictwo C. H. Beck, 2013), 112–125, 399–425; Ewa Skibińska, *Swoboda zakładania przedsiębiorstw przez osoby prawne (art. 43–48 TWE)* (Warsaw: Wydawnictwo C.H.Beck, 2008), 175–202; Marek Szydło, *Krajowe prawo spółek a swoboda przedsiębiorczości*, Warsaw: LexisNexis, 2007), 15–120; Ariel Mucha, *Transgraniczna mobilność spółek kapitałowych w świetle prawa unijnego i polskiego* (Warsaw: Difin SA, 2020), 113–149, 161–164; Ariel Mucha, "Transgraniczne przeniesienie siedziby spółki w prawie unijnym," *Glosa* no. 2 (2018): 56–68; Thomas Biermeyer, "Chapter 3: The Impact of European Law on Cross-Border Seat Transfers," in Thomas Biermeyer, *Stakeholder Protection in Cross-Border Seat Transfers in the EU* (Oisterwijk:Wolf Legal Publishers, 2015), 54–79, (https://ssrn.com/abstract=2747103 or http://dx.doi.org/10.2139/ssrn.2747103); Francesco Costamagna, "At the Roots of Regulatory Competition in the EU: Cross-border Movement of Companies as a Way to Exercise a Genuine Economic Activity or just Law Shopping?," *European Papers*, vol. 4, no. 1 (2019): 185–199; Mirosława Myszke-Nowakowska, *Transfer siedziby spółki w Unii Europejskiej,* (Warsaw: Wydawnictwo C. H. Beck, 2015), 60–110, 115–126, 133–136; Katarzyna Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy* (Warsaw: Difin SA, 2017), 102-115 and the literature cited therein.

[2] Marek Szydło, "Cross–border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation

on the provisions of Polish law. The purpose of this article is to analyse the principle of economic freedom from the perspective of Polish law and European Union law, with a particular focus on two important aspects of that principle: its applicability to the cross-border activities of companies and the permissibility and conditions for the application of restrictions in this regard by the company's country of origin. This issue will be presented in light of the Court's judgment in Case C-106/16 Polbud and the provisions of Directive 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions[3], which regulates the conditions and procedure for cross-border company conversion and should be implemented by Member States by 31 January 2023.

2. Economic Freedom as One of the Basic Principles of Undertaking and Conducting Economic Activity in the Law of the European Union and Polish Law

The principle of economic freedom is indicated in Article 20 of the Polish Constitution[4] as one of the foundations of the social market economy, which gives it the status of a fundamental principle of Poland's economic system.[5] Having the rank of a constitutional principle and, at the same time, a constitutional norm, it obliges state bodies to guarantee

("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804, "*Common Market Law Review*" vol. 55, issue 5 (2018): 1555–1568; Ariel Mucha and Krzysztof Oplustil, "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud," *European Company and Finanncial Law Review,* vol 15, no. 2 (2018): 280–294; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI:EU:C:2017:804, hereandafter reffered to as Case C-106/16 Polbud.

3 Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, O.J. of the EU No L 321, 12 December 2019, hereandafter reffered to as Directive 2019/2121.

4 The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997, no. 78, item 483, as amended, hereandafter reffered to as the "Polish Constitution" or "the Constitution of the Republic of Poland".

5 Marek Szydło, *Swoboda działalności gospodarczej* (Warsaw: Wydawnictwo C.H. Beck, 2005), 5–6. See also: Katarzyna Pokryszka, "Podejmowanie i prowadzenie działalności

entrepreneurs the freedom to undertake and conduct business activities to the fullest extent possible.[6] While analysing the essence of the principle of economic freedom from the point of view of the rights that entrepreneurs gain from it, it can be seen as a set of economic freedoms that involve undertaking, organising and conducting business activities.[7] In the doctrine of Polish law, these freedoms include, first and foremost, the freedom to undertake and carry out business activity, the freedom to choose the organisational and legal form in which business activity will be conducted, the freedom to compete with other entrepreneurs, the freedom to conclude contracts, and the freedom to decide how to conduct business activity, change its profile and term.[8] The constitutional principle of economic freedom is developed and clarified by the provisions of Article 2 of the Law on Entrepreneurs Act[9], according to which the undertaking, performance and termination of business activities are available for everyone on equal terms. However, in Polish law the principle of economic freedom is not absolute. Indeed, the provisions of Article 22 of the Constitution of the Republic of Poland provide for its limitations. Under Article 22 of the Constitution, however, these restrictions can only be imposed by law and only if they are justified by an important public interest. The introduction of restrictions on the principle of economic freedom solely on the basis of statutory provisions is an absolute

gospodarczej," in *Publiczne prawo gospodarcze. Zarys wykładu*, ed. Rafał Blicharz (Warsaw: Wolters Kluwer, 2017), 23 and the literature cited therein.

6 Kazimierz Strzyczkowski, *Prawo gospodarcze publiczne* (Warsaw: Lexis Nexis 2007), 75. See also: Pokryszka, "Podejmowanie i prowadzenie działalności gospodarczej," 23 and the literature cited therein.

7 Beata Sagan, "Zasady prowadzenia działalności gospodarczej," in *Publiczne prawo gospodarcze*, ed. Jan Olszewski (Warsaw: Wydawnictwo C.H. Beck, 2005), 11 and the literature cited therein; Anna Walaszek – Pyzioł, *Swoboda działalności gospodarczej. Studium prawne* (Cracow: Księgarnia Akademicka, 1994), 36–38; Artur Żurawik, *Interes publiczny w prawie gospodarczym* (Warsaw: Wydawnictwo C. H. Beck: 2013), 67 and the literature referred to by the Author. See also: Pokryszka, "Podejmowanie i prowadzenie działalności gospodarczej," 24 and the literature cited therein.

8 Szydło, *Swoboda działalności gospodarczej*, 10; Sagan, "Zasady prowadzenia działalności gospodarczej," 11; Walaszek – Pyzioł, *Swoboda działalności gospodarczej. Studium prawne*, 37–39; Żurawik, *Interes publiczny w prawie gospodarczym*, 67–68 and the literature referred to by the Author. See also: Pokryszka, "Podejmowanie i prowadzenie działalności gospodarczej," 24 and the literature cited therein.

9 Law on Entrepreneurs Act of 6 March 2018, Journal of Laws of 2021, item 162, as amended.

requirement that derives from the principle of a democratic state under the rule of law.[10] However, there is some controversy in the doctrine over the concept of "important public interest", which has not been defined for the purposes of interpreting Article 22 of the Constitution and, as a general clause, can be understood individually in the light of specific laws introducing restrictions on the undertaking and conduct of business activities.[11] Doubts arose especially regarding the possibility of interpreting the concept of "important public interest" from the point of view of the provision of Article 31(3) of the Polish Constitution, which indicates a closed catalogue of premises justifying the introduction of restrictions on constitutional rights and freedoms.[12] When making a systemic interpretation of Article 22 and Article 31(3) of the Constitution in the context of the possibility and prerequisites for introducing restrictions on economic freedom, the Constitutional Tribunal stressed that "freedom of economic activity, as a principle of the system of the Republic of Poland, has a different, "broader" perspective and a different degree of abstraction than the constitutional freedoms and rights indicated in Chapter II of the Constitution. It is also reasonable to assume, on the one hand that every case of the need to protect the goods indicated in Article 31(3) of the Constitution falls within the "important public interest" clause within the meaning of Article 22 of the Constitution. On the other hand, it should be stated that the scope of "important public interest" also includes values not listed in Article 31(3) of the Constitution. Consequently, the scope of permissible restrictions on freedom of economic activity is, at least when viewed in terms of the substantive grounds (prerequisites) for restrictions, broader than the scope of permissible restrictions on

10 Strzyczkowski, *Prawo gospodarcze publiczne*, 75; Żurawik, *Interes publiczny w prawie gospodarczym*, 69–70 and the literature referred to by the author See also: Pokryszka, "Podejmowanie i prowadzenie działalności gospodarczej," 23 and the literature cited therein.

11 Henryk Nowicki and Paweł Nowicki, "Reglamentacja działalności gospodarczej a zasada proporcjonalności," in *Przedsiębiorcy i ich działalność*, ed. Andrzej Powałowski and Hanna Wolska (Warsaw: Wydawnictwo C.H. Beck, 2019), 125–126.

12 Nowicki and Nowicki, "Reglamentacja działalności gospodarczej a zasada proporcjonalności," 125–126. On this topic, see also: Żurawik, *Interes publiczny w prawie gospodarczym*, 71–72 and the literature cited by the Author as well as Daria Świerblewska and Michał Nowacki, "Klauzula interesu publicznego w kontekście swobody działalności gospodarczej," in *Państwo a gospodarka. Interes publiczny w prawie gospodarczym*, ed. Henryk Nowicki, Paweł Nowicki, and Krzysztof Kucharski (Toruń: Wydawnictwo Adam Marszałek, 2018), 159.

those freedoms and rights to which Article 31(3) of the Constitution refers."[13] At the same time, the Constitutional Tribunal stressed that premises that fall within the concept of "important public interest" but go beyond the catalogue of premises enumerated in the provisions of Article 31(3) of the Constitution of the Republic of Poland must remain in harmony with the other values indicated in the Constitution, the classification of which is a consequence of adoption of the principle of a democratic state of law.[14]

It should also be noted that the Constitutional Tribunal, in its judgment of 25.05.2009, ref. SK 54/08 clearly emphasized the importance of the principle of proportionality and the need to respect it as a prerequisite for introducing restrictions on economic freedom.[15] In its ruling of 6 December 2006, ref. SK 25/05, the Constitutional Tribunal underlined that restrictions on freedom of economic activity must be justified by an important public interest. The Court explained that the premise of "importance" of public interest should be identified with the principle of proportionality, which should be understood to mean that the purpose of the statutory regulation should be justified by the values adopted in the Constitution of the Republic of Poland, and the means used should be applied in appropriate proportions to the intended purpose.[16]

---

13 Polish Constitutional Tribunal, Judgment of 29 April 2003, Ref. no. SK 24/02, OTK-A 2003, No 4, item. 33), see in: Katarzyna Grabarczyk, "Pojęcie "nadrzędnego interesu publicznego" w prawie unijnym oraz w polskich przepisach dotyczących prowadzenia działalności gospodarczej," in *Państwo a gospodarka. Interes publiczny w prawie gospodarczym*, ed. Henryk Nowicki, Paweł Nowicki and Krzysztof Kucharski (Toruń: Wydawnictwo Adam Marszałek, 2018), 61. See also: Żurawik, *Interes publiczny w prawie gospodarczym*, 72 and the judgement of the Polish Constitutional Tribunal cited by the Author, i.e. Judgment of 25 May 2009, Ref. No 54/08, OTK-A 2009, no. 5, item. 69.

14 Grabarczyk, "Pojęcie "nadrzędnego interesu publicznego" w prawie unijnym oraz w polskich przepisach dotyczących prowadzenia działalności gospodarczej," 61–62 and the judgement of the Polish Constitutional Tribunal cited by the Author: Polish Constitutional Tribunal, Judgment of 17 December 2003, Ref. no. SK 15/02, OTK-A 2003, no 9, item. 103.

15 Żurawik, *Interes publiczny w prawie gospodarczym*, 72 and the judgement of the Polish Constitutional Tribunal cited by the Author: Judgment of 25 May 2009, Ref. no 54/08, OTK-A 2009, no. 5, item. 69).

16 Żurawik, *Interes publiczny w prawie gospodarczym*, 70 and the judgement of the Polish Constitutional Tribunal cited by the Author: Polish Constitutional Tribunal, Judgment of 6 December 2006 r., ref. no. SK 25/05, OTK-A 2006, no.11, item. 169.

The principle of economic freedom under European Union law is recognized in its cross-border perspective related to the right to undertake and carry out economic activity in the territory of the internal market of the European Union based on the fundamental freedoms of that market – the freedom of establishment regulated in the provisions of Articles 49–55 of the Treaty on the Functioning of the European Union[17] and the freedom to provide services regulated in the provisions of Articles 56–62 of the TFEU.[18] Both freedoms provide the basis for undertaking and carrying out activities in the territory of another Member State[19]. The important difference between the two, however, is that freedom of establishment allows one to carry out an economic activity in another Member State on a permanent basis, which involves setting up an establishment there, while freedom to provide services allows one to carry out an activity in the territory of another state on a temporary basis, without having to set up an establishment or settle permanently in that state.[20]

---

17 Treaty on the Functioning of the European Union (consolidated version) OJ of the EU 2012 No C 326/01 of 26 October 2012, hereandafter reffered to as TFEU or Treaty.

18 Aleksander Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I* (Warsaw: Wydawnictwo C.H. Beck, 2009), 307–308.

19 Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I,* 308; Marek Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej* (Toruń: Towarzystwo Nukowe Organizacji i Kierownictwa "Dom Organizatora", 2005), 39; Pokryszka, *"Podejmowanie i prowadzenie działalności gospodarczej,"* 25; Katarzyna Pokryszka, "Prowadzenie działalności gospodarczej przez osoby zagraniczne i świadczenie usług przez usługodawców z Unii Europejskiej na terytorium Polski w świetle „konstytucji biznesu," in *Prawo przedsiębiorcy*, ed. Rafał Blicharz and Andrzej Powałowski (Warsaw: Wydawnictwo C.H. Beck, 2019), 242.

20 Monika Szwarc-Kuczer, "Komentarz do art. 49 Traktatu o Funkcjonowaniu Unii Europejskiej," in *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Volume I (Articles 1–89)*, ed. Andrzej Wróbel, Dawid Miąsik, and Nina Półtorak (Warsaw: LEX a Wolters Kluwer business, 2012), 858-859 and the judgement cited by the Author, i.e. CJEU Judgment of 30 November 1995, Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C 55/94, ECLI:EU:C:1995:411, paras, 25–27; Michael Ahlt and Maciej Szpunar, *Prawo europejskie* (Warsaw: Wydawnictwo C.H. Beck, 2011), 246; Pokryszka, "Prowadzenie działalności gospodarczej przez osoby zagraniczne i świadczenie usług przez usługodawców z Unii Europejskiej na terytorium Polski w świetle „konstytucji biznesu," 249–251.

The basic principle underpinning freedom of establishment is the prohibition of discrimination on the basis of nationality, which imposes an obligation on Member States to treat all entrepreneurs from any Member State equally. What is important here is that, in light of Article 49 TFEU, the obligation to treat entrepreneurs equally includes not only the establishment of an economic activity, but also its conduct in the territory of the destination country in a broad sense.[21]

However, it should be emphasized that, according to the current line of CJEU judicial decisions, the Treaty provisions governing freedom of establishment oblige Member States not only to remove restrictions of a discriminatory nature, but also those that are not based on discriminatory criteria, but nevertheless constitute a restriction on freedom of establishment.[22] This principle was indicated by the Court in its judgment of 31 March 1993 in Case C-19/92 Kraus and definitively reaffirmed it in its judgment of 30 November 1995 in Case C-55/94 Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano.[23] The ruling in Case C-55/94 Gebhard had very important consequences for evaluation of Member States' regulations on business activities. Since its issue, laws governing the undertaking and pursuit of economic activities have been subject to scrutiny for their compatibility with freedom of establishment, and it is no longer sufficient for Member States to provide national

---

21 Ahlt and Szpunar, *Prawo europejskie*, 230; Szwarc – Kuczer, "Komentarz do art. 49 Traktatu o Funkcjonowaniu Unii Europejskiej," 865. More on the principle of equal treatment of the prohibition of discrimination on the basis of nationality as a basis for the functioning of freedom of establishment, including in the field of tax law and access to social privileges, see in: Catherine Barnard, *The Substantive Law of the EU. The four Freedoms* (Oxford, New York: Oxford University Press, 2010), 299–305.

22 Szwarc-Kuczer, "Komentarz do art. 49 Traktatu o Funkcjonowaniu Unii Europejskiej," 866.

23 Ahlt and Szpunar, *Prawo europejskie*, 231–232; Szwarc-Kuczer, "Komentarz do art. 49 Traktatu o Funkcjonowaniu Unii Europejskiej," 866; Anna Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej a interes publiczny* (Warsaw: Wydawnictwo Prawo i Praktyka Gospodarcza, 2005), 210–216, 243; Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 192–193. See also: Barnard, *The Substantive Law of the EU. The four Freedoms*, 300; CJEU Judgment of 31 March 1993, Dieter Kraus v Land Baden-Württemberg, Case C-19/92 ECLI:EU:C:1993:125; CJEU Judgment of 30 November 1995, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94, ECLI:EU:C:1995:411.

treatment to entrepreneurs from other European Union countries to ensure such compatibility. Indeed, in light of the ruling in Case C-55/94 Gebhard, Member States were obliged to guarantee the most far-reaching liberalisation of the rules on access to professions and the exercise of an economic activity, which goes beyond the application of the prohibition of discrimination on the basis of nationality. However, this liberalisation does not need to be absolute. Indeed, Member States may exceptionally maintain restrictions on the undertaking and pursuit of economic activities that are justified by so-called imperative requirements in the general interest.[24] The so-called Gebhard test is used to review the compatibility of national law with European Union law and allows challenges to regulations in force in a Member State that apply equally to domestic entrepreneurs and those from another Member State, if these regulations impede the exercise of freedom of establishment or make the exercise of freedom of establishment less attractive, and therefore constitute barriers to access to the exercise of economic activity in the territory of that state. Under the conditions of the Gebhard test, Member States should demonstrate that such restrictions are not only applied to entrepreneurs without discrimination on the basis of nationality, but are also necessary and justified by the imperative requirements of protecting the general interest. While planning to apply these requirements to entrepreneurs from the European Union, Member States should additionally demonstrate that these requirements are adequate to ensure the achievement of the intended objective and do not go beyond what is necessary to achieve it.[25]

3. Imperative Requirements in the General Interest and the Principle of Proportionality as Conditions for Application of Restrictions on Freedom of Establishment by European Union Member States

With its ruling in Case C-55/94 Gebhard, the Court sanctioned the full applicability of the doctrine of imperative requirements in the field of freedom

[24] Szwarc-Kuczer, "Komentarz do art. 49 Traktatu o Funkcjonowaniu Unii Europejskiej," 866–867.

[25] Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 423. See also: CJEU Judgment of 30 November 1995, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94, ECLI:EU:C:1995:411, paras. 35–37.

of movement.[26] According to the so-called Gebhard test, the concept of "imperative requirements in the general interest" and the values they represent as a rationale justifying the application of restrictions on economic freedom under European Union law, is crucial to control the restrictions applied by Member States on the undertaking and pursuit of economic activities. What is also of utmost importance is the principle of proportionality, which in turn refers to the legitimacy of application of such restrictions by Member States, and also defines their permissible scope.[27]

When analysing the concept of "imperative requirements in the general interest" in the context of restrictions on the freedoms of the internal market, it is worth noting that under European Union law, this is not a normative concept, as the EU legislator does not generally apply it. It appears only in some secondary legislation, and most often in CJEU judicial decisions.[28] In the context of restrictions on the freedom of movement of goods, the Court usually invokes the concept of "imperative requirements", while in assessing the legality of restrictions on the freedom of movement of services and the freedom of establishment, it introduces the concepts of "imperative reasons of public interest"[29] and "imperative requirements in the general interest"[30]. The catalogue of values and

---

26 Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej a interes publiczny*, 243. See also: Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 192.

27 Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 423–424; Justyna Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej* (Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2020), 203–315.

28 Andrzej Borkowski, "Swoboda przedsiębiorczości w kontekście realizacji interesu ogólnego Unii Europejskiej," in *Administracja publiczna pod rządami prawa. Księga pamiątkowa z okazji 70-lecia urodzin prof. zw. dra hab. Adama Błasia*, ed. Jerzy Korczak (Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Faculty of Law, Administration and Economics, University of Wroclaw, 2016), 42.

29 Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 243, see also: "imperative reasons of public interest" – while analysing the permissibility of restrictions on the freedom to provide services in Case C-384/93 – CJEU Judgment of 10 May 1995 – Alpine Investments BV v Minister van Financiën ECLI:EU:C:1995:126, para. 44.

30 Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 243, see also: "imperative

interests covered by these concepts may differ somewhat because it takes into account the differences between freedom of establishment and freedom to provide services.[31]

The list of imperative requirements identified in the Court's judicial decisions since the CJEU's judgment in Case C-55/94 Gebhard, is open. Member States may invoke still other reasons that, in their view, justify the application of restrictive national laws limiting access to a certain type of economic activity.[32] The imperative requirements in the general interest most frequently cited by Member States that have gained acceptance by the Court as grounds justifying restrictions on the freedom of establishment and the freedom to provide services, are: protection of consumers and all persons using the services of a given entrepreneur, protection of the legitimate interests of employees, effectiveness of tax control and cohesion of the tax system, protection of pluralism and diversity in the sphere of mass media, protection of financial balance in the social security system, protection of certain intangible national values and protection of fundamental rights.[33] In the case of the freedom of establishment, the Court also considered the following important reasons in the general interest as requiring protection, and therefore justifying the introduction of restrictions by Member States: protecting lenders from the risk of losing borrowed capital[34], ensuring that the doctor can communicate with the patient,

requirements in the general interest" – in the context of restrictions on the freedom of establishment in Case C-55/94 Gebhard, para. 35, and "overriding general interest" – in connection with restrictions on the freedom of establishment in Case C-264/96 Colmer, Judgment of the Court of July 16, 1998, Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes, Case C-264/96, ECLI:EU:C:1998:370, para. 28..

31 Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 243–244.

32 Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej a interes publiczny*, 243; Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 202.

33 Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 200 and the CJEU judgments referred to by the Author.

34 Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej a interes publiczny*, 239–240 and the judgement of the CJEU cited by the Author: Judgment of the CJEU of 9 March 1999, Centros Ltd v Erhvervs-og Selskabsstyrelsen., Case C-212/97, ECLI:EU:C:1999:126.

administrative authorities and the medical self-government[35], and protecting public health.[36]

It is worth noting that the concept of "overriding reasons relating to the public interest" is defined in the provisions of the Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market.[37] According to the provisions of Article 4(8) of the Services Directive: "overriding reasons relating to the public interest" means considerations identified as such in the judicial decisions of the Court of Justice, and includes: public order, public safety, public security, public health, maintaining the financial equilibrium of the social security system, protection of consumers, recipients of services and employees, fairness in commercial transactions, combating fraud, protection of the natural and urban environment, animal health, intellectual property, protection of the national historical and artistic heritage, social and cultural policy objectives. The list of prerequisites indicated in that provision is not exhaustive, and the EU legislator expressly allows it to be supplemented by pointing out in paragraph 40 of the preamble to the Services Directive that the concept of "overriding reasons relating to the public interest" has been shaped by the Court's judicial decisions relating to freedom of establishment and freedom to provide services, and may continue to evolve.[38] The EU legislator, giving interpretative guidance on the concept of "overriding reasons relating to the public interest," develops this concept

---

35 Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej a interes publiczny*, 240–241 and the judgement of the CJEU cited by the Author: Judgment of the CJEU of 4 July 2000, Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein, Case C-424/97, ECLI:EU:C:2000:357.

36 Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej a interes publiczny*, 241–243 and the judgement of the CJEU cited by the Author: Judgment of the CJEU of 1 February 2001, Criminal proceedings against Dennis Mac Quen, Derek Pouton, Carla Godts, Youssef Antoun and Grandvision Belgium SA, being civilly liable, intervener: Union professionnelle belge des médecins spécialistes en ophtalmologie et chirurgie oculaire, Case C-108/96, ECLI:EU:C:2001:67.

37 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, O.J. of the EU, no. L 376, 27.12.2006, P. 0036–0068, hereandafter reffered as Services Directive.

38 Catherine Barnard, "Unravelling the services Directive," *Common Market Law Review*, vol. 45, no. 2 (2008): 353–354.

by adding new values that are not indicated in the provisions of Article 4(8) of the Services Directive. Some of these have already been pointed out in the Court's judicial decisions (such as, for example, preventing unfair competition or safeguarding the sound administration of justice. Interestingly, however – some of the values identified in the preamble as falling within the concept of "overriding reasons relating to the public interest" have not been invoked in this capacity before in the Court's judicial decisions or in EU legislation. In this regard, it is worth pointing out, in particular, such premises as "the objectives of cultural policy, including safeguarding the free expression of various views, especially the social, cultural, religious and philosophical values of society, the need to provide quality education, the promotion of the national language or veterinary policy."[39]

It should be emphasised that, in light of the provisions of the Services Directive, an "overriding reasons relating to the public interest" comprising, in fact, an open-ended catalogue of grounds, may justify the introduction by Member States of restrictions on the freedom of establishment, in particular justification of making access to the undertaking and pursuit of economic activities subject to authorization within the meaning of the Services Directive in the areas of economic activity covered by its regulation or to the application of so-called " requirements to be evaluated". However, the application of such restrictions must respect the principle of proportionality, which means that the requirements must be suitable to achieving the stated objective and must not go beyond what is necessary to achieve that objective, and there must be no possibility of replacing these requirements with other, less restrictive means by which the same effect can be achieved (Article 15(3)(b) and (c) of the Services Directive).[40]

The literature points out that the Court verifies whether the reasons invoked by Member States for imposing restrictions on undertaking and carrying out economic activities are actually relevant and can fall within those objectives, the implementation of which remains within the scope of the European Union's tasks. This is important, because "imperative

39 Catherine Barnard, "Unravelling the services Directive," 354.

40 Inga Kawka, *Gospodarcza działalność usługowa w prawie polskim w świetle unijnych swobód przedsiębiorczości i świadczenia usług* (Warsaw: LEX a Wolters Kluwer business, 2015), 256–257.

requirements" is a concept of European Union law, not national law, and therefore Member States should clarify its meaning in the context of protecting certain values "in the spirit of EU law".[41]

It should also be noted that the Court does not accept all of the reasons for the restrictions on undertaking and pursuing economic activities cited by Member States. According to the Court, the concept of "imperative requirements in the general interest" that can justify the introduction of restrictions on the freedom of establishment does not include considerations of a "purely economic nature," such as, for example, "preventing a reduction in state revenue from taxes."[42] In turn, when analysing the legitimacy of Member States' restrictions on the freedom to provide services, the Court held that they could not be justified on "purely administrative" grounds.[43]

In the law of the European Union, the principle of proportionality has been emphasised from the beginning in the judicial decisions of the Court of Justice, and then only introduced into the treaty regulations that relate to the exercise of competencies by the Union. Currently, that principle is expressed in the provisions of Article 5 (1) and (4) of the Treaty on European Union, which stipulates that, in accordance with the principle of proportionality, the scope and form of the Union activities must not exceed what is necessary to achieve the objectives of the Treaties.[44] The Court of Justice emphasises that "the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition

41 Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 199-200 and the literature referred to by the Author; Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 85–88.

42 Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej, a interes publiczny*, 201, 243; Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 201 and the judgement cited by the Authors, i.e. CJEU Judgment of 16 July 1998, Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes), Case C-264/96, ECLI:EU:C:1998:370, par. 28.

43 Zawidzka, *Rynek wewnętrzny Wspólnoty Europejskiej, a interes publiczny*, 201, 243; Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 201-202 and the Court's judgments referred to by the Authors.

44 Maliszewska – Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 23; Treaty on European Union (consolidated version), OJ of the EU 2012, No C 326/01.

that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".[45] In the Court's decisions, the principle of proportionality is defined as the injunction that "an individual should not have his freedom of action limited beyond the degree necessary for the public interest."[46] The literature indicates that in light of the Court's decisions, the principle of proportionality is formed by three essential components: suitability, necessity and proportionality stricto sensu.[47] In examining the criterion of suitability as an element of the principle of proportionality, the Court assesses whether the objective indicated by the Member State can be legitimised under European Union law, and then examines whether the measure applied by the state under consideration can achieve this objective.[48] At the stage of assessing the fulfilment of the criterion of suitability (adequacy), the Court analyses whether the values indicated

45 CJEU Judgment of 13 November 1990, The Queen v. Minister of Agriculture, Fisheries and Food i Secretary of State for Health, ex parte: Fedesa and others, Case C-331/88, ECLI: EU:C:1990:391, para. 13, See in: Margot Horspool, Matthew Humphreys, and Michael Wells – Greco with contributions by Noreen O'Meara and Menelaos Makakis, *European Union Law* (Oxford: Oxford University Press, 2018), 147.

46 Anthony Arnull, Alan Dashwood, Michael Dougan, Malcolm Ross, Eleanor Spaventa, Derrick Wyatt Q.C., *Wyattt and Dashwood's European Union Law* (London Sweet & Maxwell, 2006), 240 and the judgement referred to by the Authors: CJEU Judgment of 17 December 1970, Internationale Handelsgeselklschaft, Case 11/70, ECLI:EU:C:1970:114. This principle was expressed in principle by Advocate General Dutheillet de Lamothe – Joined opinion of Mr Advocate General Dutheillet de Lamothe delivered on 2 December 1970 – Case 11–70, Case 25–70, Case 26–70, Case 30–70; ECLI:EU:C:1970:100 – "In fact, the fundamental right invoked here – that the individual should not have his freedom of action limited beyond the degree necessary for the general interest – is already guaranteed both by the general principles of Community law, the compliance with which is ensured by the Court and by an express provision of the Treaty!"

47 Horspool and Humphreys and Wells – Greco with contributions by O'Meara and Makakis, *European Union Law*, 147; Maliszewska – Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 64–84; Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej*, 198–210.

48 Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 65.

by the Member States justify the introduction of restrictions on freedom of establishment, that is, whether these values fall within the concept of "imperative requirements in the general interest."[49] In the context of the Court's review of restrictions on the freedoms of the internal market introduced by Member States, the criterion of necessity means that a Member State should compare measures that are suitable for achieving a given objective (i.e., meet the criterion of suitability) and, if it has an alternative, it should choose one among them that is equally effective in protecting its legitimate interests while restricting the freedoms of the internal market to the smallest possible degree.[50] Proportionality stricto sensu, on the other hand, refers directly to the need to balance the two protected values. In assessing state activity in this regard, the Court must balance conflicting interests, which, when analysing restrictions on the freedoms of the internal market, means that the Court should compare the values protected by Member States with the permissible scope of restrictions on the functioning of the internal market. Consequently, restrictions on the freedoms of the internal market introduced by Member States can only be considered proportional if the state has applied the least restrictive measure available, while at the same time the measures undertaken by the state do not have unduly negative consequences for the functioning of the internal market.[51]

4. Restrictions on the Freedom of Establishment Applied by Member States in Connection with the Activities of Companies in the Internal Market

Due to the regulation of Article 49 TFEU, according to which, on the basis of the freedom of establishment, entrepreneurs have the right to undertake and carry out economic activity in the territory of another Member State under the same conditions under which local entrepreneurs carry out their activity, the concept of restrictions on this freedom is most often analysed

[49] Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 65–66; Szydło, *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej,* 199.

[50] Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 73.

[51] Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 77, 79.

in CJEU judgments in the context of acts taken and measures applied by a Member State that impede access to the market of that country for entrepreneurs from other Member States.[52] However, the Court also noted that the introduction by Member States of restrictions or prohibitions that prevent or impede their own entrepreneurs from undertaking and carrying out business activities abroad, is likely to significantly jeopardise the effective implementation of the freedom of establishment.[53]

This aspect of freedom of establishment – the ability to do business in another Member State and the associated restrictions imposed by the country of origin on its domestic entrepreneurs – is particularly relevant to the activities of companies in the internal market of the European Union. The issues addressed in this paper do not require a more extensive discussion of the Court's judgments on the exercise of freedom of establishment by companies, especially since it has been the subject of detailed analysis in both Polish and foreign literature.[54] From the point of view of the subject matter of this article, however, it is necessary to draw attention to the position taken by the Court on the issue of permissibility of restrictions by Member States on the cross-border activities of companies justified by overriding reasons in the general interest in cases that were precedent-setting for the formation of the Court's decisions and the subsequent adoption of provisions of European Union law on the cross-border transfer of the registered office, i.e. the so-called cross-border conversion

---

52 Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 427.

53 Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 428-429 and the CJEU judgement referred to by the author: CJEU Judgment of 14 July 1994, Criminal proceedings against Matteo Peralta, Case C-379/92, ECLI:EU:C:1994:296.

54 On the capacity of companies exercising freedom of establishment, see in particular: Ariel Mucha, *Transgraniczna mobilność spółek kapitałowych w świetle prawa unijnego i polskiego* (Warsaw: Difin SA, 2020), 98–164; Adam Opalski, *Europejskie prawo spółek* (Warsaw: Lexis Nexis Polska sp. z o.o., 2010), 85–160; Jacek Napierała, *Europejskie prawo spółek. Prawo spółek Unii Europejskiej z perspektywy prawa polskiego* (Warsaw: Wydawnictwo C.H.Beck, 2013), 63–172; Thomas Biermeyer, "Chapter 3: The Impact of European Law on Cross-Border Seat Transfers," in Thomas Biermeyer, *Stakeholder Protection in Cross-Border Seat Transfers in the EU* (Oisterwijk:Wolf Legal Publishers, 2015), 54–79 (https://ssrn.com/abstract=2747103 or http://dx.doi.org/10.2139/ssrn.2747103). See also: Katarzyna Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy* (Warsaw: Difin SA, 2017), 81-121 and the literature cited therein.

of a company. This is primarily the nature of the judgments of the CJEU in the cases: C-210/06 Cartesio[55], C-378/10 Vale[56] and C-106/16 Polbud.[57]

The Court's ruling in Case C-210/06 Cartesio was very important for interpretation of the Treaty's provisions on the possibility of cross-border conversion of a company under freedom of establishment, although the basic problem analysed in that ruling concerned the possibility of transferring the real head office of the company to another Member State while retaining its original personal statute. However, the Court pointed out that the transfer of the real head office company should be distinguished from the transfer of a company that is governed by the law of one state to another Member State, associated with a change in the national law applicable to the company and its conversion into a company governed by the law of the state of its new registered office.[58] The Court emphasised that a Member State cannot prevent a company from converting to a company operating under the national law of another state by requiring its dissolution and liquidation if the law of the state to which the company is moving permits such conversion.[59] In the Court's view, such a provision would constitute a restriction on the freedom of establishment that is impermissible under Article 49 TFEU, which could only be justified by overriding reasons relating to the public interest.[60]

---

55 CJEU Judgment of 16 December 2008, Cartesio Oktató és Szolgáltató Bt, Case C-210/06, ECLI:EU:C:2008:723

56 CJEU Judgment of 12 July 2012, VALE Építési kft., Case C-378/10, ECLI:EU:C:2012:440.

57 CJEU Judgment of 25 October 2017, 16 Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804.

58 CJEU Judgment of 16 December 2008, Cartesio Oktató és Szolgáltató Bt, Case C-210/06, par. 111, 119, ECLI:EU:C:2008:723, see: Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy*, 99-100 and the literature cited therein.

59 CJEU Judgment of 16 December 2008, Cartesio Oktató és Szolgáltató Bt, Case C-210/06, ECLI:EU:C:2008:723, par. 112, see: Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy*, 100 and the literature cited therein.

60 CJEU Judgment of 16 December 2008, Cartesio Oktató és Szolgáltató Bt, Case C-210/06, ECLI:EU:C:2008:723, par. 113, see: Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy*, 100 and the literature cited therein. An analysis of the conflict-of-law issues associated with the cross-border transfer of a company's registered office in the exercise of freedom of establishment is beyond the scope of the subject matter of this article. It is worth noting, however, that in the judgment in Case C-210/06 Cartesio, which was issued in a case related to the cross-border transfer of the real head

In case C-378/10 Vale the Court analysed the issue of transferring the registered office of a company to another Member State and converting it into a company governed by the law of that state in the context of the destination state's ability to impose restrictions in this regard. However, with regard to the exercise of freedom of establishment by companies and the scope and grounds for the ability of Member States to impose restrictions on this freedom, the Court made a very important point. The Court of Justice expressly stated that the freedom of establishment also includes the right of companies to carry out cross-border conversions.[61] It is worth noting that the Court did not exclude the possibility for Member States to impose restrictions in this regard, but stipulated that they must be justified by imperative requirements in the general interest, and that concept in the case of cross-border activities of companies includes such values as the protection of the interests of creditors, minority shareholders and employees and preservation of effective tax control, as well as fairness of commercial transactions. However, the CJEU stressed that such considerations may justify a measure constituting a restriction on the freedom of establishment, but it is necessary that the measure meets the criterion of proportionality, i.e. that it is appropriate to ensure the achievement of the adopted objective and does not go beyond what is necessary to achieve it.[62]

office of a company, the CJEU stressed that Member States are entitled to determine the criteria that determine a company's belonging to that state, by which it can exercise freedom of establishment. This results in the possibility that a Member State may refuse to allow a company to maintain its status as a company under the national law of that state in the event that the company moves its registered office to another state and thus loses its connection to the law of the state under the laws of which it was established (Judgment in Case C-210/06 Cartesio, paras. 109–110). See in: Opalski, *Europejskie prawo spółek,* 127–128*;* Napierała, *Europejskie prawo spółek. Prawo spółek Unii Europejskiej z perspektywy prawa polskiego*, 95–96*;* Mucha, *Transgraniczna mobilność spółek kapitałowych w świetle prawa unijnego i polskiego*, 119–121*, see also:* Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy,* 98–99 and the literature cited therein.

61 Myszke-Nowakowska, *Transfer siedziby spółki w Unii Europejskiej*, 109; Biermeyer, "Chapter 3: The Impact of European Law on Cross-Border Seat Transfers," 60; see also: Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy*, 101 and the literature cited therein.

62 CJEU Judgment of 12 July 2012, VALE Építési kft., Case C378/10, ECLI:EU:C:2012:440, par. 39 and the reference made by the CJEU to CJEU Judgment of 13 December 2005 SEVIC Systems AG, Case C-411/03, ECLI:EU:C:2005:762, paras. 28–29.

However, the breakthrough for the possibility of cross-border conversions by companies and the development of European Union law in this regard was the ruling in the case C-106/16 Polbud, issued several years later.[63]

5. Permissibility of EU Member States to Apply Restrictions on the Exercise of Freedom of Establishment by Companies Justified by Imperative Requirements in the General Interest in Light of the CJEU Judgment in CASE C-106/16 POLBUD

The possibility for companies to exercise the freedom of establishment in the form of a cross-border conversion into a company governed by the law of another Member State, as well as the admissibility of introduction by Member States of restrictions in this regard, were the main issues addressed by the Court in the widely commented judgment of 25 October 2017 in case C-106/16 Polbud – Wykonawstwo sp. z o.o. in liquidation, which was issued on the basis of the provisions of Polish law.

In the case under review, the problem arose in connection with the transfer by the limited liability company – Polbud Wykonawstawo spółka z o.o. – of its registered office from Poland to Luxembourg for the purpose of continuing its existence as a company incorporated under Luxembourg law - 'Consoil Geotechnik' Sàrl. Polbud cited Article 270(2) of the Code of Commercial Companies as the legal basis for transferring its registered office to another state.[64] However, according to that provision, the resolution

[63] Marek Szydło, "Cross – border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804," *Common Market Law Review,*" vol. 55, issue 5 (2018): 1568–1571; Ariel Mucha and Krzysztof Oplustil, "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud," *European Company and Finanncial Law Review,* vol 15, no. 2 (2018): 306; Ariel Mucha and Krzysztof Oplustil, "Transgraniczne przekształcenie i przeniesienie siedziby polskiej spółki kapitałowej po wyroku Trybunału Sprawiedliwości C-106/16," *Przegląd Prawa Handlowego* no. 11 (2018): 1–13; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106, ECLI: EU:C:2017:804;

[64] The Code of Commercial Companies of 15 September 2000 (consolidated text: Journal of Laws of 2022, item 1467, as amended), hereandafter reffered to as the Code of Commercial Companies.

of the shareholders to transfer the company's registered office abroad, as stated in the minutes prepared by a notary public, is a cause for dissolution of the company. As a result, the company's application to the court for removal from the register of entrepreneurs in the National Court Register, which the company justified by moving its registered office to Luxembourg, was dismissed on the grounds that it had not filed the documents required to liquidate the company. Since the position of the court registrar in the case was upheld by the courts of first and second instance, the company filed a cassation appeal with the Supreme Court. The Supreme Court suspended the proceedings and requested a preliminary ruling from the CJEU on the interpretation of Articles 49 and 54 TFEU. On that basis, the Court analysed three important issues presented in the preliminary questions. First of all, the CJEU answered the question of whether, in light of the provisions of the TFEU governing the freedom of establishment (Article 49 TFEU and Article 54 TFEU), it is permissible for Member States to apply provisions that make the deletion of a company from the register conditional on winding up the company after its liquidation if the company has been reincorporated in another Member State and its legal existence continues there. Next, the Court assessed whether the requirement to carry out the liquidation procedure of the company, which includes, inter alia, activities such as the termination of the company's current business, the performance of obligations, the recovery of debts, the sale of company assets, the satisfaction or securing the creditors and which precedes the winding up of the company resulting from the transfer of the company's registered office to another state, constitutes a measure that is adequate, necessary and proportional to protection of the interest of minority shareholders, creditors and employees of the company. The third major issue analysed by the CJEU in that case, however, was the possibility for a company to invoke freedom of establishment in order to move its registered office alone to another Member State, without transferring its main business or real head office there.[65]

[65] CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106, ECLI: EU:C:2017:804, paras. 8–18; Mucha and Oplustil, "Transgraniczne przekształcenie i przeniesienie siedziby polskiej spółki kapitałowej po wyroku Trybunału Sprawiedliwości C-106/16," 10–11; Aleksander Chłopecki, "Transgraniczne przeniesienie

In the C-106/16 Polbud judgment, the CJEU started its considerations from the assertion that cross-border company conversions are subject to the Treaty provisions governing freedom of establishment.[66] In the Polbud ruling, the Court dispelled any doubts that had hitherto arisen regarding the applicability of the Treaty's provisions to cross-border company conversions by categorically stating that the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State for the purpose of converting it into a company governed by the law of that other state, falls within the scope of freedom of establishment. However, the Court noted that European Union law, at its current stage of development, does not specify the criteria for recognition of a company as formed in accordance with the law of a particular state; Member States identify these criteria themselves. For that reason, a cross-border conversion depends on whether the subject company meets the conditions established by the destination country's laws.[67] It should also be noted that the Court has unequivocally stated that under European Union law, a cross-border conversion of a company does not have to be accompanied by the transfer of its real head office or place of business to the territory of the destination state.[68] In doing so, the CJEU

siedziby spółki – glosa do postanowienia Sądu Najwyższego z 25.01.2018., IV CSK 664/14," *Glosa*, no. 1 (2019): 27–28; Ariel Mucha, "Przeniesienie siedziby polskiej spółki za granicę (uwagi na tle pytań prejudycjalnych Sądu Najwyższego do Trybunału Sprawiedliwości)," *Glosa,* no. 3 (2016): 41–42.

66 Jacek Napierała, "Transgraniczne przekształcenie spółki w świetle wyroku Trybunału Sprawedliwości Unii Europejskiej w sprawie C-106/16 (Polbud – Wykonawstwo – sp. z o.o., w likwidacji)," in *Ius est ars boni et aequi: księga pamiątkowa dedykowana profesorowi Józefowi Frąckowiakowi,* ed. Anna Dańko-Roesler, Marek Leśniak, Maciej Skory and Bogusław Sołtys (Warsaw: Stowarzyszenie Notariuszy Rzeczypospolitej Polskiej, 2018), 800; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, paras. 29,33,35,38,41,43,44.

67 Napierała, "Transgraniczne przekształcenie spółki w świetle wyroku Trybunału Sprawedliwości Unii Europejskiej w sprawie C-106/16 (Polbud – Wykonawstwo – sp. z o.o., w likwidacji)," 800–801; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, paras. 43, 44.

68 Szydło, "Cross–border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804,": 1557–1560; Mucha and Oplustil, "Redefining the Freedom of Establishment under EU law

made it clear, referring to its earlier judgment in Case C-212/97 Centros, that the establishment by a company of a registered office in another Member State in order to benefit from more favourable regulations, cannot in itself be seen as an abuse of law.[69]

In its judgment in Case C-106/16 Polbud, the CJEU also addressed the concept of restrictions on the freedom of establishment in the context of cross-border company conversions and pointed out that under European Union law, the CJEU understood such restrictions to mean any rules that prevent the exercise of the freedom of establishment, impede it or make it less attractive. The Court found that the regulations of Polish law under review, including primarily Article 270 (2), Article 272 and Article 288 of the Code of Commercial Companies which requires the filing of a liquidation report with the court and the conduct of liquidation to remove the company from the register, may make it difficult, if not impossible, to carry out a cross-border conversion of a company. Therefore, in the Court's view, these provisions constitute restrictions on the freedom of establishment.[70]

While analysing the issue of permissibility of restrictions on the freedom of establishment, the Court, referring to its previous rulings, stressed that such restrictions may be permissible only if they are justified by imperative requirements in the general interest. In addition, they should be adequate to guarantee the achievement of the given objective and not go

as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud," 285–291; Mucha and Oplustil, "Transgraniczne przekształcenie i przeniesienie siedziby polskiej spółki kapitałowej po wyroku Trybunału Sprawiedliwości C-106/16," 11.CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, paras. 38,44.

69 Mucha and Oplustil, "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud," 298; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, para. 40 and the judgments cited by the Court of 9.03.1999 in Case C-212/97 Centros, ECLI:EU:C:1999:126, para. 27 and of 30.09.2003 in Case C-167/01 Inspire Art., ECLI:EU: C: 2003:512, para. 96.

70 CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804, paras. 48, 51.

beyond what is necessary to achieve it.[71] The CJEU acknowledged that in the context of companies' activities in the internal market area, the imperative requirements in the general interest justifying the introduction of restrictions on the freedom of establishment include the protection of the interests of minority shareholders and the protection of employees.[72] In view of this, the CJEU held that, in principle, the provisions of Articles 49 and 54 TFEU do not preclude the laws of a Member State from guaranteeing the protection of the interests of creditors, minority shareholders or employees of a company in a situation where its registered office is transferred to another Member State and converted into a company governed by the law of that state.[73] However, the Court stressed that these provisions must be applied in accordance with the principle of proportionality, which means that they must be adequate to achieve the goal of protecting the interests of creditors, minority shareholders and employees and not go beyond what is necessary to achieve that goal.[74] In this context, the Court noted that the provisions of Polish law under review provide for a general obligation to liquidate the company regardless of whether the transfer of its

71 CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804, para. 52 and the judgement cited by the Court – CJEU Judgment of 29 November 2011, National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam, Case C-371/10, EU:C:2011:785, para. 42 and the judicial decisions cited therein

72 Szydło, "Cross – border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804," 1566; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804, para. 54, and the CJEU Judgment cited therein of 13 December 2005, SEVIC Systems, Case C-411/03, ECLI: EU:C:2005:762, para. 28 and CJEU Judgment of 21 December 2016, Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis), Case C-201/15, ECLI:EU:C:2016:972, para. 73.

73 CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, para. 55.

74 Szydło, "Cross – border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804,": 1565–1566; Mucha and Oplustil, "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud," 297.

registered office to another country entails a real risk of prejudicing the interests of the company's creditors, minority shareholders and employees, and does not provide the possibility of choosing less restrictive measures to protect those interests. The Court agreed with the opinion of the European Commission indicating that such protection, particularly for creditors, could be provided by the establishment of bank guarantees or other equivalent security. Therefore, in the Court's view, the provisions introducing a general requirement to liquidate a company as a consequence of a resolution to transfer its registered office to another country go beyond what is necessary to protect the interests of the company's creditors, minority shareholders and employees, and are therefore incompatible with the principle of proportionality.[75]

It is interesting to note that in the judgment in case C-106/16 Polbud, the Court also referred to the possibility of imposing restrictions on the freedom of establishment on the grounds of protection against abuse. This argument was raised by the Polish government and the CJEU recognised its validity in that, as it noted, the need to protect against abuse justifies the introduction of restrictions by Member States. However, the Court made it clear that this argument could not be applied in the case at hand, since the mere transfer of a company's registered office from one Member State to another, even if carried out in order to take advantage of more favourable rules, does not constitute an abuse of rights and cannot be the basis for a general presumption of abuse and justify the adoption by Member States of rules that violate the exercise of the freedom of establishment.[76]

---

[75] CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, paras. 56–59, 64; Szydło, "Cross – border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804,": 1566.

[76] CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, paras. 62–65 and the judgement cited by the CJEU, i.e. Judgment of 29 November 2011, National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam, Case C-371/10, ECLI:EU:C:2011:785, para. 84. See: Mucha and Oplustil, "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud," *European Company and Finanncial Law Review,* vol. 15, no. 2 (2018): 297–300; Szydło, "Cross–border

6. Exercising Freedom of Establishment by Companies in the Form of Cross-Border Conversions and Requirements Related to the Protection of the Interest of Company's Shareholders, Creditors and Employees as well as the Protection Against Abuse Under the Provisions of Directive 2019/2121

The CJEU judgment in case C-106/16 Polbud inspired the adoption of new Directive 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive EU 2017/1132 as regards cross-border conversions, mergers and divisions of companies.[77] The provisions of Directive 2019/2121 introduce a definition of cross-border conversion of a company, according to which it is an operation "whereby a company, without being dissolved or wound up or going into liquidation, converts the legal form under which it is registered in a departure Member State into a legal form of the destination Member State, as listed in Annex II, and transfers at least its registered office to the destination Member State, while retaining its legal personality" (Article 86b point 2 of Directive 2017/1132). In light of this definition, the departure Member State may not require that the cross-border conversion of a company involve the transfer of its real head office or the undertaking by the company of business activities in the territory of the destination state. This definition clearly reflects the position adopted by the CJEU in its judgment in case C-106/16 Polbud, according to which freedom of establishment applies to the transfer of the registered office of a company formed in accordance with the laws

conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804," 1565–1568.

77 Directive (EU) 2019/2121of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross – border conversions, mergers and divisions, OJ of the EU 2019, No L 321/1, hereandafter reffered to as Directive 2019/2121; Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ of the EU No L 169/46, hereandafter reffered to as Directive 2017/1132. See: Mucha and Oplustil, "Transgraniczne przekształcenie polskiej spółki kapitałowej po wyroku Trybunału Sprawiedliwości C-106/16," 12, 20; Katarzyna Pokryszka, "Cross – border conversion of a company in the light of the provisions of Directive 2019/2121 as regards cross – border conversions, mergers and divisions – selected issues," *Przegląd Ustawodawstwa Gospodarczego,* no. 3 (March 2021): 20, see also Preamble of the Directive 2019/2121 recitals 2–5.

of one state to the territory of another Member State and its conversion into a company governed by the law of the destination state, which is not accompanied by a simultaneous transfer of the real head office of the company.[78] While regulating the procedural aspects of a cross-border conversion of a company, Directive 2019/2121 also requires Member States to put in place appropriate legal instruments to protect such values as the rights of the company's shareholders, creditors and its emploees, as well as to protect against abuse of the law.[79] The procedure for cross-border conversion of a company regulated by Directive 2019/2121 introduces the obligation for the competent authorities in the Member States to check that the company meets the legal and formal requirements necessary for such an operation, including primarily those related to safeguarding the interests of the company's shareholders, creditors and employees. Only as a result of a positive outcome of such a scrutiny will the competent authorities be able to issue "pre-conversion certificate" confirming the admissibility of cross-border conversion, which is a condition for the effectiveness of such an operation and the basis for registration of the company in the destination country.[80]

Protection of the interests of the shareholders who voted against the company's cross-border conversion should be guaranteed by granting them the right to exit the company and to dispose of their shares for adequate cash compensation. According to the provisions of Directive 2019/2121, the share repurchase offer should be examined by an independent

78 Krzysztof Oplustil and Ariel Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," *Transformacje Prawa Prywatnego* No 3 (2020): 136, 142–143; Mucha and Oplustil, "Transgraniczne przekształcenie i przeniesienie siedziby polskiej spółki kapitałowej po wyroku Trybunału Sprawiedliwości C-106/16," 12; Pokryszka, "Cross–border conversion of a company in the light of the provisions of Directive 2019/2121 as regards cross–border conversions, mergers and divisions – selected issues," 20, 23–24.

79 Pokryszka, "Cross–border conversion of a company in the light of the provisions of Directive 2019/2121 as regards cross–border conversions, mergers and divisions. Selected issues," 20–21, 24; Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 136, 156–169, 173–178.

80 Pokryszka, "Cross–border conversion of a company in the light of the provisions of Directive 2019/2121 as regards cross–border conversions, mergers and divisions – selected issues," 20–21, 25; Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 148, 168–169, 173–174; Art. 86m – 86o of the Directive 2017/1132, Preamble of the Directive 2019/2121 recitals 33–45.

expert, and shareholders should have a claim for additional cash compensation if, in their opinion, the price proposed by the company has not been properly determined. These rights should be governed by the laws of the departure Member State, and any disputes arising from their exercise should be subject to the exclusive jurisdiction of the departure Member State (Article 86 i of Directive 2017/1132).[81]

Directive 2019/2121 obliges Member States to introduce a system of protection for creditors of a company subject to a cross-border conversion whose claims arose before the disclosure of the draft terms of the cross-border conversion and had not become due at that time. Two of these instruments are mandatory, while one, the declaration of solvency, can be introduced optionally by Member States.[82] The mandatory instruments for the protection of creditors of a converted company include the right to apply to the relevant administrative authority or court in the departure Member State for appropriate safeguards. Such a right will be enjoyed by creditors who are dissatisfied with the safeguard granted to them in the draft terms of the cross-border conversion, provided that they can credibly demonstrate that the cross-border conversion may jeopardise the security of their claims and that they have not obtained adequate collateral from the company. In doing so, Member States are required to ensure that safeguards are dependent on the effectiveness of the cross-border conversion (Article 86j(1) of Directive 2017/1132). The second mandatory creditor protection instrument is procedural in nature. Creditors, whose claims arose before disclosure of the draft terms of the cross-border conversion, will also have the right to bring an action against the company in the departure Member State within two years after the cross-border conversion became effective (Article 86j(4) of Directive 2017/1132). The peculiarity of this measure lies primarily in the fact that the continuation of the domestic jurisdiction on which it is based is a consequence of the choice of creditors, who will also be able to bring an action against the company

81 More on this issue: Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 156–162. See also Preamble to the Directive 2019/2121, recitals 14 and 18.

82 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 163. See also art. 86 j (1)(2)(4) of the Directive 2017/1132 and Preamble of the Directive 2019/2121 recitals 23–25.

in the country of its new registered office.[83] In turn, the optional measures to protect the interests of creditors include the ability of Member States to require a company to provide a certificate of its financial condition along with a statement that it will be able to pay its debts after a cross-border conversion (Article 86j(2) of Directive 2017/1132).[84]

Under the provisions of Directive 2019/2121, Member States are also required to guarantee protection for employees of a company undergoing a cross-border conversion. This protection focuses on two issues. First of all, employees of the converted company will be guaranteed the right to be informed and consulted about the company's cross-border restructuring plan (even before the draft terms of the cross-border conversion or the report referred to in Article 86e, is adopted and announced (Article 86 k(2) of Directive 2017/1132). In addition, Directive 2019/2121 aims to ensure that if a company operated under a system of so-called employee participation, or in other words, its employees had a say in determining the composition of the company's management or supervisory bodies[85], its cross-border conversion will not lead to an unjustified violation of the right of employee participation. This should be prevented by the company's obligation to adopt a legal form that allows employees to exercise their right to participate (recital 30 of the preamble to Directive 2019/2121). The basic principle concerning the protection of employee participation rights in a company's corporate bodies is the rule according to which the employee participation rules of the destination country will apply to the company subject to cross-border conversion if, of course, such rules have been adopted (Article 86(1) of Directive 2017/1132). The provisions of Directive 2019/2121 provide for certain exceptions to this rule (Article 86 l (2) of Directive 2017/1132). However, in situations subject to

---

83 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 163–165.

84 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 165–166.

85 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 166. The concept of participation is defined in the provisions of Article 2(k) of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ of the EU No L 294/22, hereandafter reffered to as Directive 2001/86.

exclusion, the EU legislator prescribes the application (mutatis mutandis and subject to paragraphs 4 to 7 of Article 86l of Directive 2017/1132) of the principles and procedures of the protection of employee participation rights provided for in the provisions of Directive 2001/86, which apply to a European company[86]. The company carrying out the cross-border conversion should be obliged to negotiate with employees on the terms of their participation, and if such negotiations fail, to adopt the standard methods of employee participation provided for in the provisions of Directive 2001/86.[87]

In light of the judgments of the CJEU and the provisions of the Services Directive, the values that fall within the concept of "imperative requirements in the general interest" also include protection against abuse of the law, which consists in evading the application of national or EU law, which justifies the introduction by Member States of restrictions on the fundamental freedoms of the internal market.[88] Such possibility is also provided in Directive 2019/2121. The EU legislator notes that "in certain circumstances, the right of companies to carry out a cross-border operation could be used for abusive or fraudulent purposes, such as for the circumvention of the rights of employees, social security payments or tax obligations, or for criminal purposes."[89] The greatest danger of abuse of the law, according to EU legislators, may be the creation of so-called

---

86 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 166–167; Article 86l (3) of the Directive 2017/1132. Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ of the EU No L 294/1, hereinafter reffered to as Council Regulation 2157/2001. See art. 12 of Council Regulation 2157/2001.

87 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 167; see Article 86l (4) points a) b) c) of the Directive 2017/1132, recital 30 of the Preamble to Directive 2019/2121.

88 See: CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804, para. 39 and the judicial decisions in the following cases cited therein: CJEU Judgment of 9 March 1999, Centros Ltd v Erhvervs-og Selskabsstyrelsen. Case C-212/97, ECLI:EU:C:1999:126, paras. 18, 24 and CJEU Judgment of 30 September 2003, Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd. C-167/01, ECLI: EU: C: 2003:512, para. 98. See also Article 4(8) of the Services Directive.

89 Preamble to Directive 2019/2121, recital 35, first sentence.

"shell companies" created to avoid, circumvent or violate national or EU regulations. Therefore, the competent authorities in the Member States should exercise particular care in scrutinizing the legality of cross-border conversions, and where they consider that a cross-border conversion serves to commit fraud or abuse, to circumvent the law or for criminal purposes, they should not issue the pre-conversion certificate confirming the admissibility of the cross-border conversion of the company, which is a necessary condition for allowing the company to be registered in the destination state.[90] It is worth noting that the regulations of Directive 2019/2121 aimed at protection against abuse of rights are among the provisions of this Directive, the interpretation of which is most controversial.[91] Doubts may arise, in particular, in interpretation of the provisions concerning the control of the legality of a cross-border conversion of a company by the competent authorities on the basis of the so-called "indicative factors" listed by example in recital 36 of the Preamble to Directive 2019/2121 and referring to the characteristics of the company in the Member State to which it transfers its registered office. In particular, the interpretive guideline in the preamble, which allows the competent authorities in a Member State to determine the absence of circumstances leading to fraud or abuse when, as a result of a cross-border conversion, the company's place of effective management or place of business will be in the Member State in which the company is to be registered, may raise legitimate objections.[92]

---

90 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 173–174; Pokryszka, "Cross-border conversion of a company in the light of the provisions of Directive 2019/2121 as regards cross–border conversions, mergers and divisions. Selected issues," 21–24, 25 and the literature cited therein.; Preamble to Directive 219/2121 recital 35, second sentence, Article 86m(7)-(11), Article 86o(5) of Directive 2019/2121.

91 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 173–178; Pokryszka, "Cross-border conversion of a company in the light of the provisions of Directive 2019/2121 as regards cross–border conversions, mergers and divisions. Selected issues," 21–25 and the literature cited therein. See also: Francesco Costamagna, "At the Roots of Regulatory Competition in the EU: Cross-border Movement of Companies as a Way to Exercise a Genuine Economic Activity or just Law Shopping?," *European Papers*, 2019 vol. 4, no. 1 (2019): 203–204.

92 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 174–176; Pokryszka, "Cross-border conversion of a company in the light

This rationale may provide a basis for national authorities to interpret the provisions on the control of the legality of cross-border company conversions based on a presumption of abuse of rights, which will have to be rebutted by the company by demonstrating that the cross-border operation is carried out for economic purposes. Such an interpretation will not only be able to significantly impede cross-border company conversions by constituting a restriction on the freedom of establishment, but will be in conflict with the Court's position expressed in the judgments in the case C-212/97 Centros and C-106/16 Polbud, according to which the exercise of the freedom of establishment may involve the establishment of a company's registered office in a Member State with more favourable legislation, which in itself does not constitute an abuse of the law. In its judgment in Case C-106/16 Polbud, the Court further emphasized that a cross-border conversion of a company does not have to involve the simultaneous transfer of its real head office or the undertaking by the company of business activities in the territory of the destination state.[93] The correct interpretation of the provisions of Directive 2019/2121 on the scrutiny of legality of cross-border company conversions will therefore require the competent authorities in the Member States to have an exceptionally good knowledge of EU law and the case law of the CJEU and to take into consideration the concept of cross-border conversion of the company presented by the CJEU in its judgment in case C-106/16 Polbud.[94]

---

of the provisions of Directive 2019/2121 as regards cross – border conversions, mergers and divisions. Selected issues," 21–24, 25 and the literature cited therein.

93 Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 174–175; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804, paras.40,44, 62,63 see also: Pokryszka, "Cross-border conversion of a company in the light of the provisions of Directive 2019/2121 as regards cross–border conversions, mergers and divisions. Selected issues," 23–25 and the literature cited therein.

94 Mucha and Oplustil, "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud," 299; Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 174–175, 178. See also: Pokryszka, "Cross – border conversion of a company in the light of the provisions of Directive 2019/2121 as regards cross – border conversions, mergers and divisions. Selected issues," 23–24, 25 and the literature cited therein.

The Directive should be implemented by 31 January 2023. It is worth noting that the CJEU's judgment in the case C-106/16 Polbud has already provided the inspiration to propose draft amendments to the Code of Commercial Companies concerning the introduction of a simple joint-stock company, and provisions indicating the reasons for dissolution of this company.[95] Indeed, according to Article 300.120 §1(2) of the Code of Commercial Companies, the reason for dissolution of a simple joint-stock company is not a resolution of the general meeting of that company to transfer its registered office abroad, if the transfer of the registered office is to take place to another Member State of the European Union or to another country – a party to the EEA, and the law of that country allows it. This provision can be considered a harbinger of the changes that should be introduced into Polish law as a consequence of the CJEU's judgment in case C-106/16 Polbud and the adoption of Directive 2019/2121.[96] A bill to amend the provisions of the Code of Commercial Companies to implement it has been prepared by the Ministry of Justice and was published on the website of the Government Legislation Center on 8 August 2022. Currently, the draft has been sent for public consultation and as well as submitted to the competent authorities to obtain their opinions.[97]

---

95 Uzasadnienie projektu ustawy o zmianie ustawy – Kodeks spółek handlowych oraz niektórych innych ustaw, druk 3236, 82 (Explanatory Memorandum to the bill amending the Code of Commercial Companies and Certain Other Laws, form 3236, p. 82). The bill was received by the Sejm on 13 February 2019.

96 Katarzyna Pokryszka, "Przeniesienie siedziby statutowej spółki za granicę w świetle wyroku Trybunału Sprawiedliwości w sprawie C-106/16 Polbud Wykonawstwo spółka z o.o. Wybrane zagadnienia dotyczące prounijnej wykładni prawa polskiego," in *Prawo handlowe. Między teorią, praktyką a orzecznictwem. Księga jubileuszowa dedykowana Profesorowi Januszowi A. Strzępce*, ed. Piotr Pinior, Paweł Relidzyński, Wojciech Wyrzykowski, Ewa Zielińska and Mateusz Żaba (Warsaw: Wydawnictwo C.H. Beck, 2019), 243. The provisions of the Act of 19 July 2019 amending the Act – The Code of Commercial Companies and certain other acts (consolidatet text: Journal of Laws of 2019, item 1655 as amended) concerning the simple joint-stock company entered into force on 1 July 2021.

97 Bill amending the Code of Commercial Companies and Certain Other Laws, accessed February 3, 2023, https://legislacja.gov.pl/projekt/12362751/katalog/12901057#12901057.

7. Conclusions

Economic freedom in European Union law is a principle based on the concept of the internal market and related to the functioning of its fundamental freedoms – freedom of establishment and freedom to provide services. The realisation of these freedoms has traditionally been seen in terms of the obligation of Member States to lift restrictions on entrepreneurs from other Member States to undertake and carry out economic activities on their territory.[98] However, CJEU judgments have for some time shown a tendency for adopting a broader interpretation of the provisions governing this freedom, according to which, at the current, already advanced, stage of development of the internal market, freedom of establishment also means prohibiting Member States from applying restrictions to their entrepreneurs that make it difficult for them to undertake economic activities in another Member State, or from extending the territorial scope of their activities beyond the borders of their country of origin.[99] The need for such an interpretation of the scope of the freedom of establishment has been confirmed by the Court in its rulings on the exercise of this freedom by companies in the form of transferring their registered office to another Member State with simultaneous conversion into a company governed by the law of the destination state, i.e. cross-border company conversion. In its judgments in cases C-210/06 Cartesio and C-106/16 Polbud, the Court stressed that the Treaty provisions on freedom of establishment prohibit the Member State in which a company is formed from preventing it from converting into a company governed by the law of another Member State, in particular by applying the requirement to dissolve and liquidate the company if the law of the destination state permits such conversion. Such a restriction, according to the Court, could only be justified by overriding requirements of the general interest.[100] However, the adoption of this concept of

98 Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 303–304, 307–308, 427.

99 Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 428 and the judgement of the CJEU cited by the Author: CJEU Judgment of 16 July 1998, Imperial Chemical Industries plc (ICI) v. Keneth Hall Colmer (Her Majesty's Inspector of Taxes), C-264/96, ECLI:EU:C:1998:370.

100 CJEU Judgment of 16 December 2008, Cartesio Oktató és Szolgáltató Bt, Case C-210/06, ECLI:EU:C:2008:723, paras. 112, 113; CJEU Judgment of 25 October 2017,

interpretation of the freedom of establishment, according to which a Member State should not hinder its entrepreneurs from undertaking activities in other Member States, is most clearly evidenced by the position expressed by the CJEU in its judgment in case C-106/16 Polbud, issued on the basis of Polish law.[101] In that ruling, the Court not only affirmed that cross-border company conversions are subject to the freedom of establishment, but also emphasised that, from the perspective of the company's home state, this means that it cannot prevent or discourage a company from carrying out such a cross-border restructuring by establishing more restrictive requirements for cross-border conversions than those applicable to domestic company conversions carried out in its territory. In light of the judgment in Case C-106/16 Polbud, it can also be assumed that this prohibition also applies to the application of non-discriminatory restrictions by the company's Member State of origin, unless they are justified.[102]

The Court's ruling in Case C-106/16 Polbud has resonated widely in the doctrine of Polish law, confirming correctness of the view presented even before its issue by many Authors, according to which the provisions of Article 270(2) of the Code of Commercial Companies and Article 459(2) of the Code of Commercial Companies which order dissolution and liquidation of a company in the event of adoption of a resolution by shareholders to transfer its registered office abroad, are incompatible with the TFEU regulations on freedom of establishment and should

Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804, paras. 43, 51, 52, 65.

101 Marek Szydło, "Cross–border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804," *Common Market Law Review,* vol. 55, Issue 5 (2018): 1561, 1564–1565.

102 Szydło, "Cross–border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804," 1561–1562; 1564–1565; CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-10, ECLI: EU:C:2017:804, para. 43 and the judgement cited therein, i.e. CJEU Judgment of 12 July 2012 VALE Építési kft., Case C-378/10, ECLI:EU:C:2012:440, para. 32.

therefore be amended.[103] However, it seems that the consequences of that ruling for evaluation of Polish law regulations could be analysed from a perspective broader than the one exclusively related to cross-border company conversion and the need to amend the provisions of the Code of Commercial Companies in this regard. Indeed, the prohibition on a Member State from applying restrictions on a company's transfer of its registered office to another country is, in fact, a result of the prohibition under the freedom of establishment against hindering or preventing entrepreneurs from undertaking activities outside their home country.[104] When analysing the concept of economic freedom in Polish law and its practical significance for entrepreneurs, it is therefore also worth noting its cross-border dimension, resulting from Poland's membership in the European Union and related to the State's obligation to comply with the principles of functioning

[103] On incompatibility of the provisions of Article 270(2) of the Code of Commercial Companies and Article 459(2) of the Code of Commercial Companies with the provisions of the Treaty (TFEU) on freedom of establishment and on the need to amend the Code of Commercial Companies, see in particular: Ariel Mucha, "Transgraniczne przekształcenie polskiej spółki kapitałowej – uwagi na temat niezgodności art. 270 pkt. 2 oraz art. 459 pkt. 2 k.s.h. z prawem europejskim," *Transformacje Prawa Prywatnego*, no. 4 (2015): 45–46, 70, 90–91 and the literature cited by the Author; Olga Sachabińska, "Transgraniczne przeniesienie siedziby spółki kapitałowej – potrzeba działania unijnego i polskiego ustawodawcy," *Transformacje Prawa Prywatnego*, no. 3 (2015): 73–106; Marek Szydło, "Przeniesienie siedziby statutowej spółki kapitałowej za granicę," *Rejent,* no. 7–8 (2008): 146; Opalski, *Europejskie prawo spółek, Europejskie prawo spółek* (Warsaw: LexisNexis 2010), 93, 131–133, Adam Opalski, "Komentarz do art. 270 kodeksu spółek handlowych," in *Kodeks spółek handlowych. Tom IIB. Spółka z ograniczoną odpowiedzialnością. Komentarz. Art. 227–300,* ed. Adam Opalski (Warsaw: Wydawnictwo C.H. Beck, 2018), 952–958; Napierała, *Europejskie prawo spółek. Prawo spółek Unii Europejskiej z perspektywy prawa polskiego*, 422*;* Pokryszka, *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy*, 121 and the literature cited by the Author; Pokryszka, "Przeniesienie siedziby statutowej spółki za granicę w świetle wyroku Trybunału Sprawiedliwości w sprawie C-106/16 Polbud Wykonawstwo spółka z o.o. Wybrane zagadnienia dotyczące prounijnej wykładni prawa polskiego," 243 and the literature cited by the Author.

[104] See: Marek Szydło, "The Right of Companies to Cross – Border Conversion under the TFEU Rules on Freedom of Establishment," *European Company and Financial Law Review,* vol. 3 *(*2010), 422, 425–426, 443; Szydło, "Przeniesienie siedziby statutowej spółki kapitałowej za granicę," 136–139; Sachabińska, "Transgraniczne przeniesienie siedziby spółki kapitałowej – potrzeba działania unijnego i polskiego ustawodawcy," 79–81.

of the internal market and its fundamental freedoms.[105] This means that economic freedom entails a prohibition on the State to impose restrictions on undertaking and carrying out economic activities in Poland, but also to impede entrepreneurs from undertaking activities outside its territory, i.e. on the territory of other Member States, if they are not justified by imperative requirements in the general interest.[106]

The Court's decisions on the cross-border activities of companies, including in particular the judgment handed down in Case C-106/16 Polbud, confirms that respect for the principle of proportionality is of key importance for the ability of Member States to introduce restrictions on economic freedom as a fundamental principle of the functioning of the internal market of the European Union.[107] The literature correctly emphasises that this requires a very careful "balancing act" between values that are sometimes considered to be on a par, such as the objectives of the internal market and the freedom to conduct economic activity within its territory versus, for example, the protection of public order, state security or

---

105 Żurawik, *Interes publiczny w prawie gospodarczym,* 67 and the literature referred to by the Author; Sagan, "Zasady prowadzenia działalności gospodarczej," 11 and the literature cited therein.

106 On the interpretation of the provisions of the TFUE concerning freedom of establishment in the light of which Member Statees are prohibited from imposing the restrictions on national entrepreneurs undertaking business activities outside the territory of their home State – see: Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 428 and the judgement cited by the Author, i.e. CJEU Judgment of 16 July 1998, Imperial Chemical Industries plc (ICI) v. Keneth Hall Colmer (Her Majesty's Inspector of Taxes), C-264/96, ECLI:EU:C:1998:370.

107 Szydło, "Cross – border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud")," 1565–1567; Mucha and Oplustil, "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud,", 283–284, 3030–306. See also: CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, ECLI: EU:C:2017:804, Case C-106/16, paras. 52–65. On the principle of proportionality as the basis for assessing the permissibility of restrictions on internal market freedoms under European Union law, see: Maliszewska – Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 97–320, 316, 323.

consumer interests.[108] For that reason, the choice of means by which Member States impose restrictions on economic freedom in the EU dimension, is extremely important. These measures must not only meet the criteria of suitability and necessity, but also be the least restrictive of the measures possible for the Member State to apply in order to protect certain values.[109] In light of the Court's decisions on admissibility of restrictions on economic freedom, it can be assumed that in many situations the CJEU does not question the necessity of protecting the values invoked by a Member State, only the legitimacy of its application of specific measures which, in the Court's view, are disproportionate and too harsh, and the Member State could ensure the protection of certain values by applying measures that are less severe for entrepreneurs.[110] Such a position was presented by the Court in its judgment in Case C-106/16 Polbud, in which it did not question the need to protect the company's minority shareholders, its creditors or its employees, whose interests could be affected as a consequence of the company's cross-border conversion, but found that the measures used to guarantee their protection, consisting of mandatory dissolution and liquidation of the company, were disproportionate because they were too restrictive, and that the intended objective could be achieved by means that would not deprive the company of the right to exercise its freedom of establishment.[111] Directive 2019/2121 on the cross-border conversion of a company, the adoption of which was inspired by the judgment in Case

---

108 Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I*, 86; Maliszewska – Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 77, 96, 316–317; Agnieszka Frąckowiak – Adamska, *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej* (Warsaw: Oficyna a Wolters Kluwer business: 2009), 332.

109 Maliszewska – Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 79.

110 Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I,* 89–95 and the CJEU decisions cited by the Author; Maliszewska – Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej,* 322–323.

111 CJEU Judgment of 25 October 2017, Polbud – Wykonawstwo sp. z o.o., in liquidation, Case C-106/16, ECLI: EU:C:2017:804, paras. 52–59; Szydło, "Cross–border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud")," 1565–1566.

C-106/16 Polbud, was also maintained in this spirit. It should be emphasized that enabling the companies to exercise freedom of establishment and, at the same time, reconciling this with the need to ensure the protection of the company's employees, creditors and shareholders, as well as the protection of the public interest related primarily to the prevention of attempts to abuse the law, was one of the primary objectives of the European Commission's Proposal for a directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and division.[112] The provisions of Directive 2019/2121 aim to achieve this goal.[113] The EU legislator has guaranteed companies the right to exercise freedom of establishment in the form of a cross-border conversion to a company governed by the laws of another Member State. However, the exercise of that right is subject to the fulfilment of certain conditions including, first and foremost, the company's fulfilment of its obligations to shareholders, creditors

[112] Paul Davies, Susan Emmenegger, Ellis Ferran, Guido Ferrarini, Klaus J. Hopt, Niamh Moloney, Adam Opalski, Alain Pietrancosta, Markus Roth, Rolf Skog, Martin Winner, Jaap Winter, Eddy Wymeersch, "The Commission's 2018 Proposal on Cross-Border Mobility – An Assessment," *European Company and Financial Law Review,* vol. 16 (1–2), (2019), 199; Thomas Biermeyer and Marcus Meyer, "European Commission Proposal on Corporate Mobility and Digitalization: Beetwen Enabling (Cross – Border Corporate) Freedom and Fighting the "Bad Gay"," European Company Law Journal 15, no. 4 (2018): 111; Francesco Costamagna, "At the Roots of Regulatory Competition in the EU: Cross-border Movement of Companies as a Way to Exercise a Genuine Economic Activity or just Law Shopping?," *European Papers*, 2019 vol. 4 (1), 202; Mucha and Oplustil, "Transgraniczne przekształcenie i przeniesienie siedziby polskiej spółki kapitałowej po wyroku Trybunału Sprawiedliwości C-106/16," 12. On the need for introducing amendments in Polish law and the necessity to strike a balance between the interest of the company and its shareholders, emploees and creditors on the one hand and the protection of public interest on the other hand in Polish regulations on cross-border company conversions that should be adopted see in: Zuzanna Hajłasz, "Transgraniczne przeniesienie siedziby spółki kapitałowej w prawie polskim oraz w porządkach prawnych wybranych państw europejskich," *Monitor Prawniczy*, no. 12 (2020): 644–651; Proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (Brussels,25.4.2018, COM(2018) 241 final

[113] Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 136,182,186; Preamble to Directive 2019/2121 recitals: 4, 5, 6. See also: Pokryszka, "Cross – border conversion of a company in the light of the provisions of Directive 2019/2121 as regards cross – border conversions, mergers and divisions – selected issues," 25.

and employees of the company as stipulated in the Directive, which ensures a significant strengthening of the protection of their interests.[114] Striking a balance between the realisation of the freedoms of the internal market and protection of values that are not economic in nature, is the essence of the principle of proportionality in the context of the functioning of the freedoms of the internal market.[115] The solutions adopted in Directive 2019/2121 on cross-border company conversions reflect the specificity of this principle, aiming, on the one hand, to ensure that companies can enjoy the economic freedom on the territory of the internal market of the EU and, on the other hand, to impose restrictions in this regard justified by imperative requirements in the general interest.[116]

References

Ahlt Michael, and Maciej Szpunar. *Prawo europejskie*. Warsaw: Wydawnictwo C.H. Beck, 2011.

Arnull, Anthony, Alan Dashwood, Michael Dougan, Malcolm Ross, Eleanor Spaventa, Derrick Wyatt Q.C., *Wyattt and Dashwood's European Union Law*. London: Sweet & Maxwell, 2006.

Barnard, Catherine. "Unravelling the services Directive." *Common Market Law Review*, vol. 45, no. 2, (2008): 323–394.

Barnard, Catherine. *The Substantive Law of the EU. The four Freedoms*. Oxford, New York: Oxford University Press, 2010.

---

114 Oplustil, Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 136,182; Preamble to Directive 2019/2121 recitals 5, 6.

115 Maliszewska-Nienartowicz, *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*, 77; Frąckowiak-Adamska, *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej*, 330.

116 See: Oplustil and Mucha, "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121," 136, 176, 182, 186; Preamble to Directive 2019/2121 recitals: 4, 5, 6. On the need for the competent national authorities to strike a balance between the need to remove restrictions on freedom of establishment and the necessity to guarantee protection of the interests of company's shareholders, employees and creditors and to counteract the abuse of law when scrutinising the legality of a cross-border conversion see in: Pokryszka, "Cross–border conversion of a company in the light of the provisions of Directive 2019/2121 as regards cross–border conversions, mergers and divisions – selected issues", 25 and the literature cited therein.

Biermeyer, Thomas and Marcus Meyer. "European Commission Proposal on Corporate Mobility and Digitalization: Between Enabling (Cross-Border Corporate) Freedom and Fighting the 'Bad Guy'." *European Company Law Journal*, vol. 15, Issue 4 (August 2018): 110–111.

Biermeyer, Thomas. "Chapter 3: The Impact of European Law on Cross-Border Seat Transfers." In Thomas Biermeyer, *Stakeholder Protection in Cross-Border Seat Transfers in the EU*, 49–92. Oisterwijk:Wolf Legal Publishers, 2015 (https://ssrn.com/abstract=2747103 or http://dx.doi.org/10.2139/ssrn.2747103)

Borkowski, Andrzej. "Swoboda przedsiębiorczości w kontekście realizacji interesu ogólnego Unii Europejskiej." In *Administracja publiczna pod rządami prawa. Księga pamiątkowa z okazji 70-lecia urodzin prof. zw. dra hab. Adama Błasia*, edited by Jerzy Korczak, 35–46. Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2016.

Chłopecki, Aleksander. "Transgraniczne przeniesienie siedziby spółki – glosa do postanowienia Sądu Najwyższego z 25.01.2018., IV CSK 664/14." *Glosa,* no. 1 (2019): 26–32.

Cieśliński, Aleksander. *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego. Tom I.* Warsaw: Wydawnictwo C.H. Beck, 2009.

Costamagna, Francesco. "At the Roots of Regulatory Competition in the EU: Cross-border Movement of Companies as a Way to Exercise a Genuine Economic Activity or just Law Shopping?." *European Papers*, vol. 4, no. 1 (2019): 185–205.

Davies, Paul, Susan Emmenegger, Ellis Ferran, Guido Ferrarini, Klaus J. Hopt, Niamh Moloney, Adam Opalski, Alain Pietrancosta, Markus Roth, Rolf Skog, Martin Winner, Jaap Winter and Eddy Wymeersch. "The Commission's 2018 Proposal on Cross-Border Mobility – An Assessment." *European Company and Financial Law Review,* vol. 16, no. 1–2, (2019): 196–221.

Frąckowiak-Adamska, Agnieszka. *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej.* Warsaw: Oficyna a Wolters Kluwer business: 2009.

Grabarczyk, Katarzyna. "Pojęcie „nadrzędnego interesu publicznego" w prawie unijnym oraz w polskich przepisach dotyczących prowadzenia działalności gospodarczej." In *Państwo a gospodarka. Interes publiczny w prawie gospodarczym*, edited by Henryk Nowicki, Paweł Nowicki, and Krzysztof Kucharski, 49–64. Toruń: Wydawnictwo Adam Marszałek, 2018.

Hajłasz, Zuzanna. "Transgraniczne przeniesienie siedziby spółki kapitałowej w prawie polskim oraz w porządkach prawnych wybranych państw europejskich." *Monitor Prawniczy,* no. 12 (2020): 644–651.

Horspool, Margot, Matthew Humphreys, and Michael Wells-Greco with contributions by Noreen O'Meara and Menelaos Makakis. *European Union Law.* Oxford: Oxford University Press, 2018.

Kawka, Inga. *Gospodarcza działalność usługowa w prawie polskim w świetle unijnych swobód przedsiębiorczości i świadczenia usług*. Warsaw: LEX a Wolters Kluwer business, 2015.

Maliszewska-Nienartowicz, Justyna. *Zasada proporcjonalności jako podstawa oceny legalności ograniczeń swobód rynku wewnętrznego Unii Europejskiej*. Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2020.

Mucha Ariel and Krzysztof Oplustil. "Redefining the Freedom of Establishment under EU law as the Freedom to Choose the Applicable Company Law: A Discussion after the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16 Polbud." *European Company and Finanncial Law Review,* vol 15, no. 2 (2018): 270–307.

Mucha, Ariel and Krzysztof Oplustil. "Transgraniczne przekształcenie polskiej spółki kapitałowej po wyroku Trybunału Sprawiedliwości C-106/16." *Przegląd Prawa Handlowego,* no. 11 (2018): 10–21.

Mucha, Ariel. "Przeniesienie siedziby polskiej spółki za granicę (uwagi na tle pytań prejudycjalnych Sądu Najwyższego do Trybunału Sprawiedliwości)." *Glosa,* no. 3 (2016): 40–49.

Mucha, Ariel. "Transgraniczne przekształcenie polskiej spółki kapitałowej – uwagi na temat niezgodności art. 270 pkt. 2 oraz art. 459 pkt. 2 k.s.h. z prawem europejskim." *Transformacje Prawa Prywatnego,* no. 4 (2015): 43–92.

Mucha, Ariel. "Transgraniczne przeniesienie siedziby spółki w prawie unijnym." *Glosa,* no. 2 (2018): 56–66.

Mucha, Ariel. *Transgraniczna mobilność spółek kapitałowych w świetle prawa unijnego i polskiego.* Warsaw: Difin SA, 2020.

Myszke-Nowakowska, Mirosława. *Transfer siedziby spółki w Unii Europejskiej.* Warsaw: Wydawnictwo C. H. Beck, 2015.

Napierała, Jacek. *Europejskie prawo spółek. Prawo spółek Unii Europejskiej z perspektywy prawa polskiego.* Warsaw: Wydawnictwo C.H.Beck, 2013.

Napierała, Jacek. "Transgraniczne przekształcenie spółki w świetle wyroku Trybunału Sprawedliwości Unii Europejskiej w sprawie C-106/16 (Polbud – Wykonawstwo – sp. z o.o., w likwidacji). " In *Ius est ars boni et aequi: księga pamiątkowa dedykowana profesorowi Józefowi Frąckowiakowi,* edited by Anna Dańko-Roesler, Marek Leśniak, Maciej Skory and Bogusław Sołtys, 795–808. Warsaw: Stowarzyszenie Notariuszy Rzeczypospolitej Polskiej, 2018.

Nowicki, Henryk, and Paweł Nowicki. "Reglamentacja działalności gospodarczej a zasada proporcjonalności." In *Przedsiębiorcy i ich działalność*, edited

by Andrzej Powałowski, and Hanna Wolska, 119–131. Warsaw: Wydawnictwo C.H.Beck, 2019.

Opalski, Adam. "Komentarz do art. 270 kodeksu spółek handlowych." In *Kodeks spółek handlowych. Tom II B. Spółka z ograniczoną odpowiedzialnością. Komentarz. Art. 227–300,* edited Adam Opalski, 936–967. Warsaw: Wydawnictwo C.H. Beck, 2018.

Opalski, Adam. *Europejskie prawo spółek.* Warsaw: Lexis Nexis Polska sp. z o.o, 2010.

Oplustil Krzysztof and Ariel Mucha. "Transgraniczne reorganizacje spółek w świetle unijnej Dyrektywy 2019/2121." *Transformacje Prawa Prywatnego,* no. 3 (2020): 125–186.

Pokryszka, Katarzyna. "Cross–border conversion of a company in the light of the provisions of Directive 2019/2121 as regards cross–border conversions, mergers and divisions – selected issues." *Przegląd Ustawodawstwa Gospodarczego,* no. 3 (March 2021): 17–27.

Pokryszka, Katarzyna. "Podejmowanie i prowadzenie działalności gospodarczej." In *Publiczne prawo gospodarcze*. *Zarys wykładu*, edited by Rafał Blicharz, 19–127. Warsaw: Wolters Kluwer, 2017.

Pokryszka, Katarzyna. "Prowadzenie działalności gospodarczej przez osoby zagraniczne i świadczenie usług przez usługodawców z Unii Europejskiej na terytorium Polski w świetle „konstytucji biznesu." In *Prawo przedsiębiorcy*, edited by Rafał Blicharz, and Andrzej Powałowski, 235–276. Warsaw: Wydawnictwo C.H. Beck, 2019.

Pokryszka, Katarzyna. "Przeniesienie siedziby statutowej spółki za granicę w świetle wyroku Trybunału Sprawiedliwości w sprawie C-106/16 Polbud Wykonawstwo spółka z o.o. Wybrane zagadnienia dotyczące prounijnej wykładni prawa polskiego." In *Prawo handlowe. Między teorią, praktyką a orzecznictwem. Księga jubileuszowa dedykowana Profesorowi Januszowi A. Strzępce*, edited by Piotr Pinior, Paweł Relidzyński, Wojciech Wyrzykowski, Ewa Zielińska and Mateusz Żaba, 231–243. Warsaw: Wydawnictwo C.H. Beck, 2019.

Pokryszka, Katarzyna. *Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy.* Warszawa: Difin SA, 2017.

Sachabińska, Olga. "Transgraniczne przeniesienie siedziby spółki kapitałowej – potrzeba działania unijnego i polskiego ustawodawcy." *Transformacje Prawa Prywatnego*, no. 3 (2015): 73–106.

Sagan, Beata. "Zasady prowadzenia działalności gospodarczej." In *Publiczne prawo gospodarcze*, edited by Jan Olszewski, 9–24. Warsaw: Wydawnictwo C.H. Beck, 2005.

Skibińska, Ewa. "Komentarz do art. 54 Traktatu o Funkcjonowaniu Unii Europejskiej." In *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz.*

Tom I (art. 1–89), edited by Andrzej Wróbel, Dawid Miąsik, and Nina Półtorak, 902–927. Warsaw: LEX a Wolters Kluwer business, 2012.

Skibińska, Ewa. *Swoboda zakładania przedsiębiorstw przez osoby prawne (art. 43–48 TWE).* Warsaw: Wydawnictwo C.H.Beck, 2008.

Strzyczkowski, Kazimierz. *Prawo gospodarcze publiczne.* Warsaw: Lexis Nexis, 2007.

Szwarc-Kuczer, Monika. "Komentarz do art. 49 Traktatu o Funkcjonowaniu Unii Europejskiej." In *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom I (art. 1–89)*, edited by Andrzej Wróbel, Dawid Miąsik, and Nina Półtorak, 853–867. Warsaw: LEX a Wolters Kluwer business, 2012.

Szydło, Marek. "Przeniesienie siedziby statutowej spółki kapitałowej za granicę." *Rejent*, no. 7–8 (2008): 120–147.

Szydło, Marek. "Cross-border conversion of companies under the freedom of establishment: Polbud and beyond. Case C-106/16, Polbud Wykonawstwo sp. z o.o. in liquidation ("Polbud"), judgment of the Court of Justice (Grand Chamber) of 25 October 2017, EU:C:2017:804." *Common Market Law Review*, vol. 55, issue 5 (2018): 1549–1571.

Szydło, Marek. *Krajowe prawo spółek a swoboda przedsiębiorczości*. Warsaw: LexisNexis, 2007.

Szydło, Marek. *Swoboda działalności gospodarczej*. Warsaw: Wydawnictwo C.H. Beck, 2005.

Szydło, Marek. *Swoboda prowadzenia działalności gospodarczej i swoboda świadczenia usług w prawie Unii Europejskiej.* Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa "Dom Organizatora", 2005.

Szydło, Marek. "The Right of Companies to Cross-Border Conversion under the TFEU Rules on Freedom of Establishment." *European Company and Financial Law Review,* vol. 3 (2010): 414-–443.

Świerblewska, Daria and Michał Nowacki. "Klauzula interesu publicznego w kontekście swobody działalności gospodarczej." In *Państwo a gospodarka. Interes publiczny w prawie gospodarczym*, edited by Henryk Nowicki, Paweł Nowicki, and Krzysztof Kucharski, 157–166. Toruń: Wydawnictwo Adam Marszałek, 2018.

Walaszek-Pyzioł, Anna. *Swoboda działalności gospodarczej. Studium prawne*. Cracow: Księgarnia Akademicka, 1994.

Zawidzka, Anna. *Rynek wewnętrzny Wspólnoty Europejskiej a interes publiczny.* Warsaw: Wydawnictwo Prawo i Praktyka Gospodarcza, 2005.

Review of European and Comparative Law | **2023**
Vol. 52, No. 1, 127–142
https://doi.org/10.31743/recl.15120
Received: 17 January 2023 | Accepted: 5 February 2023 | Published: 30 March 2023

Business Interest versus Consumer Protection. Conflicts within the Safety Assurance System of NonFood Products – Selected Issues

Agnieszka Żywicka
Dr. habil., Assistant Professor, Faculty of Law and Social Science, Departament of Economic and Financial Law, Jan Kochanowski University in Kielce, correspondence address: Żeromskiego 5, 25-369, Kielce, Poland; e-mail: agnieszka.zywicka@onet.eu
https://orcid.org/0000-0002-5789-8355

Keywords:
product conformity assessment, entrepreneur, consumer

Abstract: Technological progress and the introduction of more and more new products to the market have intensified the process of changes in EU and national law within the product safety system. Legislative activities aimed at intensifying consumer protection have been observed in this area for several years. The primary role of instruments and legal mechanisms under this system is currently to guarantee consumer protection (protection of health and life) against the risks generated by various new products introduced to the market. In this respect, public law institutions adopted in this system play the leading role. These include market control and surveillance, product monitoring, and a coordinated system of informing about dangerous products.

However, due to the legal structure of the product safety system, it is not always possible for the interests of entrepreneurs and consumers to be protected at an appropriate level. The article analyses the problem of balancing the interests of consumers and entrepreneurs in the internal market, based on the free movement of goods, in the changing socio-economic reality (digital products, digitisation of services, online sales). Based on the legal institutions analysed, the article is a legal and dogmatic reflection on the conflict of values between consumer protection and entrepreneur

ISSN 2545-384X (Online)

protection. The study presents legal instruments, measures and mechanisms of the non-food product safety system from the perspective of the values it protects.

1. Introduction

With its roots in the free movement of goods and enterprise development, the non-food product safety system in the European Union aims at ensuring a high level of protection of consumer interests[1]. Since it was established, this institution has strived to safeguard effective competition in the goods market and reconcile the interests of entrepreneurs and consumers, which seem to be mutually exclusive. The first is to maximize product sales revenue under competitive market conditions, whereas the latter is for end users to have access to safe products. The institutions and legal mechanisms (along with the instruments involved in them) which comprise the EU product safety scheme are supposed to implement the legal transparency principle in respect of requirements for entrepreneurs placing products on the market. Consequently, individual groups (types) of products are subject to the same set of requirements. In parallel, these prerequisites are to guarantee a uniform quality of products (at a high level – as presupposed by the EU legislator), which is, in turn, to increase the level of product safety and thus protect consumers. It can be argued, therefore, that the legal mechanism for ensuring the safety of non-food products (conformity assessment and market surveillance) substantially secures the protection of consumer rights (including protection of their health and life) against the dangerous and harmful effects of products. At the same time, it stimulates economic development (and thus protects entrepreneurs) by introducing uniform technical requirements for products and transparent criteria for their verification on the EU market.

However, due to the legal structure of the non-food product safety system, it is not always possible for the interests of entrepreneurs and consumers to be protected to the same extent. This may cause a dilemma about whether to protect the consumer or the interests of the entrepreneur. The formulated problem of the clash of values is a legitimate

[1] Aleksander Cieśliński, ed., *Wspólnotowe prawo gospodarcze* (Warszawa: C.H. Beck, 2013), 273–280.

basis for presenting a range of legal instruments and mechanisms applied within the product safety system in terms of the values protected. This study aims to discern and display the areas within the regulations governing the product safety system where conflicts of interest do or may occur as well as to assess how effectively these regulations protect said interests.

2. The public economic law perspective on the values in the safety assurance system of non-food products

Given the dynamics and globalisation of economic relations (and hence the ever-changing methods in which public authorities try to interfere in their course), it is necessary to consider the values protected by public economic law in the light of the conflicting interests of trading participants, where the reference point is the state's involvement in the relationship between the business and the consumer. Prior to analysing the values protected by the safety assurance system of non-food items regarded as an institution of public economic law, I will make a few introductory remarks on the general values which manifest themselves both in legislation and the views of legal academics and commentators.

It is values that determine the order in the economy. They affect relations between public authorities and entrepreneurs as well as the entire field of economic activity. With public economic law[2] as a carrier of values, they are also a necessary premise for defining its principles. The dominant view in the literature is that the provisions of public economic law are addressed at public – economic – administration bodies, which are entrusted with the performance of various types of public functions by virtue of these standards. K. Kokocińska notes that the majority of the relevant literature is "analyses which focus on issues concerning the relationship between the state and the economy, and namely based on the paradigm that public administration bodies are the object of standards (...), whereas the provisions of (public economic) law determine the manner and scope in which public authorities encroach upon economic relations (...), assigning them with specific tasks and competences, intended primarily to

[2] Andrzej Powałowski, "Wprowadzenie do aksjologii prawa gospodarczego publicznego," *Acta Universitatis Wratislaviensis*, *Prawo,* no. 3977, t. 329 (2019): 221.

protect the public interest"[3]. The presented approach stems from the traditional method of interpreting the role of many institutions and legal constructions of a public nature. They are used by the State primarily to create conditions for conducting business activity and to define the mutual relations between the State and the entities carrying out such activity. It is, therefore, a case of normative determination of the system through which the state influences the economy[4]. However, as a result of the transformations and growth of economic relations affected by state interference, state-market relations have been viewed from a new angle[5], not only in literature but also in legislation. An example of it is the Act of March 6, 2018 – Entrepreneurs' Law [6], which fundamentally remodelled the system of principles (values) in the Polish legal order. The principles stipulated therein indicated that the values at its core focused on the protection of entrepreneurs' rights. Another equally important area under the intense influence of the legislator – both at the national and EU level – is the market position of consumers. The need to reinforce consumer protection in the face of new threats arising in economic relations has been increasingly emphasised, resulting in a change in national and EU regulations[7].

In the views of legal scholars and commentators, there are numerous examples of values protected by norms that are considered part of public economic law. There are also various attempts to define and correlate them[8],

---

3 Katarzyna Kokocińska, "Gwarancyjny charakter zasad prawa – rozważanie na tle ustawy – Prawo przedsiębiorców," in *Prawo przedsiębiorcy*, ed. Rafał Blicharz (Warszawa: C.H. Beck, 2019), 19–32; Leszek Bielecki, *Koncepcja rzeczy publicznej* (Kielce: Leszek Bielecki, 2013), 85–99.

4 Powałowski, "Wprowadzenie do aksjologii," 222–223.

5 Katarzyna Kokocińska, "Funkcjonalność i dysfunkcjonalność przepisów publicznego prawa gospodarczego z perspektywy kryterium wartości (zagadnienia ogólne)," in *Dysfunkcje publicznego prawa gospodarczego,* ed. Marian Zdyb, Emil Kruk and Grzegorz Lubeńczuk (Warszawa: C.H. Beck, 2018), 25–38.

6 Journal of Laws 2021 no. 162, as amended.

7 For more on this issue, see e.g. Małgorzata Ganczar, "Prawo odstąpienia od umowy zawartej na odległość w świetle prawa unijnego," in *Ochrona konsumentów i ich współczesne wyzwania*, ed. Małgorzata Ganczar and Elżbieta Sługocka-Krupa (Lublin: KUL, 2014), 367-377 and other studies included in this item.

8 Marzena Kordela, "Zasady publicznego prawa gospodarczego. Próba konceptualizacji," in *Państwo a gospodarka. Zasady-instytucje-procedury. Księga jubileuszowa dedykowana Profesor Bożenie Popowskiej,* ed. Piotr Lissoń, Michał Strzelbicki (Poznań:

which cannot be listed here in detail. However, we may highlight certain common, underlying values which ought to be respected by the virtue of legal principles. Among them, there are universal values for the entire legal order: human welfare, justice, morality, as well as values of particular importance in the area of public law regulation, i.e. legality, efficiency, and purposefulness of public administration. The catalogue of values also includes those legally protected by regulations in the area of public economic law, and resulting from statutory duties of the state. In particular, it includes freedom of economic activity, fair competition, and consumer protection. Together, they form a system of values in this field of law[9]. In essence, the value or set of values that should determine the final legal constructions is an important factor shaping the manner and scope of the state's influence on economic relations. These are the rules determining the permissibility of state interference in economy[10].

The system for ensuring the safety of non-food products is a compromise *sui generis* between the EU legislator and the national legislator in reconciling the interests of consumers and entrepreneurs in respect of product safety. In order to identify the values protected in this system, it is necessary to establish and then examine the foundations of the legal constructions

Wydawnictwo Poznańskie, 2020), 61; more on the principles: Artur Żurawik, "Zasady ogólne prawa publicznego gospodarczego;" Michał Biliński, "Zasady ogólne publicznego prawa gospodarczego," in *System Prawa Administracyjnego. Publiczne prawo gospodarcze,* vol. 8 A, ed. Roman Hauser, Zygmunt Konrad Niewiadomski, Andrzej Wróbel (Warszawa: C.H. Beck, 2018), 459–517.

9 Karol Kiczka, "Wartości w publicznym prawie gospodarczym (zagadnienia wybrane)," in *Wartości w prawie administracyjnym*, ed. Jan Zimmermann (Warszawa: Wolters Kluwer business, 2015), 250; Katarzyna Kokocińska, "Wspieranie rozwoju działalności gospodarczej w ujęciu zasad i wartości," *Ruch Prawniczy Ekonomiczny i Społeczny,* no. 4 (2018): 44–45; Marian Zdyb, "Aksjologiczne podstawy ingerencji państwa w sferę gospodarki rynkowej," in *Prawne instrumenty oddziaływania na gospodarkę*, ed. Andrzej Powałowski (Warszawa: C.H. Beck, 2016), 1–5.

10 Kazimierz Strzyczkowski, "Uwagi o zadaniach nauki o prawnych formach działania administracji gospodarczej," in *Instrumenty i prawne formy działania administracji gospodarczej*, ed. Bożena Popowska and Katarzyna Kokocińska (Poznań: Wydawnictwo Naukowe Uniwersytetu Adama Mickiewicza, 2009), 37–63; Kokocińska, "Funkcjonalność i dysfunkcyjność," 25–35; Bożena Popowska, "Niepomijalność standardów 'dobrej administracji' w publicznym prawie gospodarczym," *Acta Universitatis Wratislaviensis, Prawo*, no. 4001, vol. 331 (2020): 213–216.

adopted. The economic and non-economic objectives formulated at the EU and national level are of key importance as they shape the concept of the current economic order[11] (and protected values) in the sphere of product safety. The objectives mentioned above, which stem from the policy adopted and the resulting course of action, are determined by the current social and economic conditions[12].

At the EU level, the basic assumptions, objectives, legal institutions and legal instruments of the product safety system are regulated by Regulation (EC) No. 765/2008 of the European Parliament and of the Council of July 9, 2008 laying down requirements for accreditation and repealing Regulation (EEC) No. 339/ 93[13] and Regulation 2019/1020 EU of 20 June 2019 on market surveillance and product compliance and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011[14]. The values protected under the product safety assurance system are listed in recitals 1 and 2 of Regulation 765/2008 EC and recital 1 of Regulation 2019/1020 EU, where the EU legislator names the following values: health and safety in general, health and safety at work, consumer protection, environment protection, public safety and protection of any other public interest, and free movement of goods. A comprehensive analysis of the normative acts listed above also allows us to conclude that information security (the right to reliable information about products) constitutes an important value as well from the point of view of the interests protected.

In the Polish legal order, the legal framework of the product safety assurance system is created by the Act of 30 August 2002 on the conformity assessment system[15] and the Act of 13 April 2016 on conformity assessment and market surveillance systems[16]. It also codifies standards of the rank of

11 Katarzyna Kokocińska, "Wpływ traktatowych rozwiązań Unii Europejskiej na organizację procesów gospodarczych w Polsce (w kontekście zasady społecznej gospodarki rynkowej)," in *Unia Europejska wobec wyzwań przyszłości. Aspekty prawne, finansowe i handlowe,* ed. Ewa Małuszyńska, Grzegorz Mazur and Piotr Idczak (Poznań: Wydawnictwo Naukowe Uniwersytetu Ekonomicznego w Poznaniu, 2015), 36–46.

12 Kokocińska, *Wspieranie rozwoju działalności,* 42.

13 OJ L 218, 13 August 2008, consolidated text of 16 July 2021.

14 OJ L 169/1, 25 June 2019.

15 Journal of Laws 2021, item 1344, as amended, consolidated text.

16 Journal of Laws 2022, item 1854, consolidated text.

principles, forming a framework of values for the economic relations covered by these regulations. The wording of Article 2 of the Act on the conformity assessment system indicates such values as health, life, removal of technical barriers to trade and facilitation of international trade. These values are clarified and specified in Article 2 of the Act on conformity assessment and market surveillance systems, which states that the purpose of the Act is to ensure the competitiveness and innovativeness of the economy; eliminating health hazards posed by products and safety, including in the workplace, to protect consumers, property, environment and public safety; removing technical barriers to trade and facilitating trade in goods. The interpretation of the articles implies the paradigm of protecting the interests of entrepreneurs and consumers.

In general, the aim of this system is to ensure a coherent and efficient mechanism for verifying the safety of products entering the EU market, as well as stimulating the development of entrepreneurship and a competitive economy within the EU internal market. This calls for the application of unified, universal criteria for assessing the quality of products placed on the internal market, facilitating the flow of goods. At the same time, the public authority is obliged to protect the weaker party of legal relations, i.e. the consumer. It also ought to create a coherent legal framework ensuring protection of health and life against dangerous products[17].

3. Balance between the interests of entrepreneurs and consumers in the system ensures product safety

Constructed over many years of evolution, the product safety system in a broad sense consists of the following: legal instruments, i.e. basic or other requirements for products, standards and technical specifications for products, rules and standards regarding the competence of conformity assessment bodies, rules for granting accreditation, conformity assessment procedures (modes and rules regarding the CE marking); legal institutions (market surveillance, including control of products from third countries) and administrative structures of supervision (supervisory

[17] For more on this topic, see: Agnieszka Żywicka, "Nadzór nad wyrobami podlegającymi dyrektywom „nowego podejścia" w Polsce – kilka refleksji o koordynacji działań organów nadzoru, *"Acta Universitatis Wratislaviensis, Prawo*, no. 3977, vol. 329 (2019): 431–442.

authorities)[18], as well as legal tools (systems for informing about the dangerous properties of products). This complex legal structure is aimed at protecting the interests of entrepreneurs and consumers. In order to determine whether this is in fact the case, it is necessary to review the legal regulations which give rise to this system from the point of view of both consumers and entrepreneurs.

Product conformity assessment procedures and uniform product evaluation criteria as well as mutual recognition of products on the EU internal market meet the expectations of entrepreneurs in terms of implementing the freedom of movement of goods and ensuring freedom to conduct a business (freedom of enterprise). Uniform and transparent procedures ensure rational financing of laboratory tests conducted within conformity assessment, without unnecessary spending on extra tests and examinations. Thus, it is also imperative to protect the financial interests of entrepreneurs. Moreover, these procedures contribute to the competitive market equilibrium. The universal nature of compliance procedures also strengthens the sense of legal security for entrepreneurs (trust in public authorities) with market surveillance conducted by supervisory authorities. The point of reference for inspection are the legal criteria of the products subject to verification. Thus, it can be argued that this system pursues the interests of entrepreneurs. One may have a slightly different impression upon analysing the same legal solutions in terms of the same values, i.e. competitiveness and protection of financial interest, yet from the perspective of consumers. The idea that this protection is not always provided to a satisfactory degree is hard to resist. Various

[18] For more on the assumptions of the conformity assessment system, see: Notice of the EU Commission Blue Guide – Implementation of EU regulations on products 2022, (2022/C 247/01), EU C 247/1 of 29.6.2022; Leon Kieres, Andrzej Borkowski, Karol Kiczka, Tadeusz Kocowski, Maciej Guziński and Marek Szydło, "Instrumenty administracyjnoprawne w systemie oceny zgodności z zasadniczymi wymaganiami," in *Instrumenty i formy prawne działania administracji gospodarczej,* ed. Bożena Popowska and Katarzyna Kokocińska (Poznań: Wydawnictwo Naukowe Uniwersytetu Adama Mickiewicza, 2009), 228–247; Agnieszka Żywicka, "Instrumenty administracyjnoprawne w systemie zapewniania bezpieczeństwa wyrobów," in *Prawo administracyjne dziś i jutro*, ed. Jacek Jagielski and Marek Wierzbowski (Warszawa: Wolters Kluwer, 2018), 283–291; Bogdan Fisher, *Prawne aspekty norm technicznych. Normalizacja jako wsparcie legislacji administracyjnej* (Warszawa: Wolters Kluwer, 2017), 234–240.

dilemmas may arise in terms of consumer interests regarding the actual compliance with safety requirements by products subject to conformity assessment procedures. This is particularly relevant in the cases where only the product prototype undergoes examination instead of all the finished goods. Certain modules allow for the manufacturer to run the inspection themselves, without involving an external assessment unit. Furthermore, should a product fail to meet consumer expectations (not to mention endanger them), the consumer may incur extra expenses related to medical treatment or product return, although the reimbursement of costs incurred is possible based on the provisions of the civil law. It can be observed, therefore, that there is a clash between the values supposedly protected by the normative structure of the product compliance assessment system, and namely between consumer health and safety and the protection of product flow, enterprise development, and business profitability.

Strictly speaking, conformity assessment consists in examining the product in terms of the requirements contained in the New Approach directives. These acts are limited to formulating only the essential technical or functional requirements (technical standards) that must be met by products placed on the EU market. Technical standards are quality standards specifying a certain minimum level of compliance with specific product parameters[19]. Products manufactured in accordance with harmonised standards are presumed to conform with the relevant essential requirements of the relevant legislation. In some cases, the manufacturer may even use a simplified conformity assessment procedure, which is allowed by the modular conformity assessment system. The use of harmonised or other standards is optional. In fact, this solution increases the freedom of entrepreneurs in the process of production and marketing of goods. The manufacturer always has the right to choose to use technical specifications other than European standards to meet the requirements for products, but they are always obliged to demonstrate that such specifications meet the essential requirements of EU law, most often

[19] The technical specifications of products that meet the essential requirements set out in EU legislation are set out in harmonised standards.

through a process involving an external conformity assessment entity[20]. Conformity assessment, therefore, boils down to examining only a certain group (and not all) of the features of individual products – only those indicated in harmonised standards. A positive result of the conformity assessment means that the product meets at least the minimum quality level, which does not necessarily mean that it does not have any dangerous features. Conformity assessment examines whether the appropriate level of product quality has been met. It is not an *explicit* safety assessment, although it may indicate this indirectly, since a product of proven quality is supposed to be safe[21].

From the consumer's perspective, however, reducing safety standards only to "essential" requirements may raise concerns about product safety. Given the complex construction of many products available on the market, this observation is not without grounds. Moreover, a disturbing trend has been observed on the market, where the quality of products has been gradually reduced to the minimum requirements. This can be interpreted as a consequence of applying the procedures of the conformity assessment system. Manufacturers focus primarily on meeting the essential requirements resulting from technical standards, not always paying due attention to other parameters, which are important from the consumer's point of view and not regulated by law, such as product durability and service life. It is natural for producers to strive to reduce production costs and increase sales, e.g. by applying competitive prices. This may, however, adversely affect the quality of the product. The assumptions of the conformity assessment system facilitate this indirectly. On the other hand, the above solutions used in the conformity assessment system imply a wide range of products available on the market and the resulting price competitiveness, which is a very beneficial phenomenon for consumers[22].

---

20 For more information, see Commission Notice Blue Guide, 70–79.

21 Agnieszka Żywicka and Marek Wierzbowski, "Prawo do bezpiecznego produktu w porządku prawnym Unii Europejskiej," in *Ustroje – prawa człowieka – bezpieczeństwo – integracja europejska. Księga jubileuszowa z okazji 70-tych urodzin Profesora Jerzego Jaskierni,* vol. I, ed. Ryszard M. Czarny, Łukasz Baratyński, Paweł Ramiączek and Kamil Spryszak (Toruń: Adam Marszałek, 2020), 939–954.

22 For more on this topic, see: Agnieszka Żywicka and Mariusz Paździor, "Ochrona praw konsumenta w dyrektywach harmonizacji technicznej Unii Europejskiej – wybrane

It should also be remembered that tasks in the field of conformity assessment have been privatized. Consequently, they are performed predominantly by private entities (accredited notified bodies)[23], which are *de facto* entrepreneurs conducting business activities in the field of accreditation and, what should be emphasized, competing with each other. This is in line with the principle of freedom of establishment. Transferred to the private sphere, the commercial nature of these tasks can sometimes raise concerns about their reliability. It is up to the entrepreneur (product manufacturer or distributor) to choose a notified body to conduct the conformity assessment[24]. The manufacturer may have the procedure carried out by a notified body established in any EU country. The reliability of services in the field of conformity assessment is to be guaranteed by administrative and legal regulations that define detailed, rigorous requirements for entities applying for accreditation (the status of a notified body). The privatisation of conformity assessment procedures requires public authorities to ensure an effective and efficient normative market supervision mechanism for products placed on the market and to create appropriate systems for informing about dangerous products, i.e. taking actions that have traditionally belonged to public authorities. It is these institutions within the normative system of product safety, remaining in the sphere of administrative and legal regulation, that are crucial for the proper protection of consumer interests (protection of health, life, and safety).

The market surveillance framework (forms and mechanisms of cooperation between supervisory authorities, including international cooperation, procedures, surveillance measures, rules for placing products on the EU market) has been developed at the EU level in Regulation

zagadnienia," in *Regionalne systemy ochrony praw człowieka 70 lat po proklamowaniu Powszechnej deklaracji Praw Człowieka: osiągnięcia, bariery, nowe wyzwania i rozwiązania,* vol. 2, ed. Jerzy Jaskiernia and Kamil Spryszak (Toruń: Adam Marszałek, 2019), 440–447.

23 Agnieszka Żywicka, "Prywatyzacja zadań publicznych w metrologii na przykładzie zadań administracji miar," *Studia Prawno-Ekonomiczne*, vol. 116, (2020): 138–139, https://doi.org/10.26485/SPE/2020/116/8.

24 Agnieszka Żywicka, "Egzemplifikacje prawne wpływu harmonizacji technicznej na rozwój sektora przedsiębiorczości w Unii Europejskiej," in *Wpływ prawa Unii Europejskiej na gospodarkę i samorząd terytorialny państw członkowskich*, ed. Małgorzata Ganczar, Jarosław Król and Marcin Szewczak (Łódź: Wydawnictwo Afinance, 2016), 62–53.

2019/2020 EU. National authorities have been delegated to organise market surveillance, to control products placed on the market, to organise their activities, ensure coordination among themselves at national level, and to engage in cooperation at EU level, including the designation of a single liaison office. In the Polish legal system, the market surveillance model has been organised in the form of a network structure. Pursuant to Article 58 of the Act on conformity assessment and market surveillance systems, the scheme comprises a specialised industry economic administration: President of the Office of Competition and Consumer Protection, voivodeship inspectors of the Trade Inspection, labour inspectors and district labour inspectors, President of the Office of Rail Transport, President of the Office of Electronic Communications, President of the State Mining Authority, directors of maritime offices, construction supervision authorities, voivodeship road transport inspectors, directors of Regional Offices of Measures and the President of the Central Office of Measures, and customs authorities (National Revenue Administration). At the same time, the entities listed above remain in internal organisational systems. Given the wide range of products subject to conformity assessment, the adopted solution allows for the effective implementation of this supervision from the perspective of consumer protection.

It is noteworthy that consumer information security has become one of the core values protected under the normative safety assurance system of non-food products. A well-informed consumer is capable of avoiding products that do not comply with safety requirements or are simply dangerous. This is valuable in terms of risk prevention, particularly in the current market situation, visibly changed due to the pandemic and the economic crisis. For this reason, product information tools have been introduced to the system, available mostly on the Internet. The increasing influx of products from third countries over the recent years along with the resulting new risks for consumers have only highlighted the relevance of rapid information exchange with regard to products posing a risk and measures taken at both national and European level, as well as making this information available to consumers. The rapid alert system for dangerous non-food products RAPEX and the information and communication system

for market surveillance purposes ICSMS serve this particular purpose[25]. New fast supply chains (including distance selling) make it necessary to strengthen the reinforce the information security of consumers. It may be indicated as a special value in the catalogue of values protected in the normative system of product safety, which has been noticed by the legislator, who has introduced new mechanisms and legal instruments. In the EU legislation, there is an increasing activity in the creation of various forms of cooperation between EU and national administration bodies in the field of information exchange, the purpose of which is to carry out consistent supervision over products marketed offline and online, as exemplified by the EU Product Compliance Network. These activities are to ensure the effective functioning of market surveillance, and thus guarantee the protection of consumers against dangerous products.

4. Conclusions

The analysis of the general normative assumptions of the safety assurance system of non-food products in the EU, conducted in this article, allows us to conclude that the legal measures and mechanisms adopted in these regulations safeguard the values aimed at protecting entrepreneurs and consumers with the proper intervention of public authorities in economic relations by means of supervision and cooperation of administrative bodies.

The presented legal mechanism is an example of reconciling values important from the point of view of entrepreneurs and consumers in legal institutions. The institution of conformity assessment and minimum harmonisation of requirements for products provides for considerable freedom of action for entrepreneurs. In essence, it protects values that are important from the perspective of entrepreneurs. In order to reconcile the interests of entrepreneurs and consumers, the market surveillance system and control measures as well as the effective cooperation of market surveillance authorities (national and EU) are of key importance, as the actions

[25] The RAPEX system was created to ensure a high level of consumer health and safety protection in the area of the Single Market of the European Union. The legal basis for its operation is Directive 2001/95/EC of the European Parliament and of the Council of December 3, 2001 on general product safety, OJ L 11/4 of 3 December 2002.

of the economic administration within the competences granted to them ensure the proper functioning of the surveillance system and the elimination of dangerous products from the market.

References

Bielecki, Leszek. *Koncepcja rzeczy publicznej*. Kielce: Leszek Bielecki, 2013.

Cieśliński, Aleksander, ed. *Wspólnotowe prawo gospodarcze*. Warszawa: C.H. Beck, 2013.

Fisher, Bogdan. *Prawne aspekty norm technicznych. Normalizacja jako wsparcie legislacji administracyjnej*. Warszawa: Wolters Kluwer, 2017.

Ganczar, Małgorzata. "Prawo odstąpienia od umowy zawartej na odległość w świetle prawa unijnego." In *Ochrona konsumentów i ich współczesne wyzwania*, edited by Małgorzata Ganczar, Elżbieta Sługocka-Krupa, 367–377. Lublin: KUL, 2014.

Hauser, Roman, Zygmunt K. Niewiadomski, Andrzej Wróbel, ed. *System Prawa Administracyjnego. Publiczne prawo gospodarcze,* vol. 8 A, Warszawa: C.H. Beck, 2018.

Kiczka, Karol. "Wartości w publicznym prawie gospodarczym (zagadnienia wybrane)." In *Wartości w prawie administracyjnym*, edited by Jan Zimmermann, 250. Warszawa: Wolters Kluwer Business, 2015.

Kieres, Leon, Andrzej Borkowski, Karol Kiczka, Tadeusz Kocowski, Maciej Guziński and Marek Szydło. "Instrumenty administracyjnoprawne w systemie oceny zgodności z zasadniczymi wymaganiami." In *Instrumenty i formy prawne działania administracji gospodarczej,* edited by Bożena Popowska, and Katarzyna Kokocińska, 228–247, Poznań: Wydawnictwo Naukowe Uniwersytetu Adama Mickiewicza, 2009.

Kokocińska, Katarzyna. "Wpływ traktatowych rozwiązań Unii Europejskiej na organizację procesów gospodarczych w Polsce (w kontekście zasady społecznej gospodarki rynkowej)." In *Unia Europejska wobec wyzwań przyszłości. Aspekty prawne, finansowe i handlowe,* edited by Ewa Małuszyńska, Grzegorz Mazur and Piotr Idczak, 36–46. Poznań: Wydawnictwo Naukowe Uniwersytetu Ekonomicznego w Poznaniu, 2015.

Kokocińska, Katarzyna. "Funkcjonalność i dysfunkcjonalność przepisów publicznego prawa gospodarczego z perspektywy kryterium wartości (zagadnienia ogólne)." In *Dysfunkcje publicznego prawa gospodarczego,* edited by Marian Zdyb, Emil Kruk and Grzegorz Lubeńczuk, 25–38. Warszawa: C.H. Beck, 2018.

Kokocińska, Katarzyna. "Wspieranie rozwoju działalności gospodarczej w ujęciu zasad i wartości." *Ruch Prawniczy Ekonomiczny i Społeczny,* no. 4 (2018): 42, 44–45.

Kokocińska, Katarzyna. "Gwarancyjny charakter zasad prawa – rozważanie na tle ustawy – Prawo przedsiębiorców." In *Prawo przedsiębiorcy*, edited by Rafał Blicharz, 19–32, Warszawa: C.H. Beck, 2019.

Kordela, Marzena. "Zasady publicznego prawa gospodarczego. Próba konceptualizacji." In *Państwo a gospodarka. Zasady – instytucje – procedury. Księga jubileuszowa dedykowana Profesor Bożenie Popowskiej,* edited by Piotr Lissoń, Michał Strzelbicki, 61. Poznań: Wydawnictwo Poznańskie, 2020.

Popowska, Bożena. "Niepomijalność standardów 'dobrej administracji' w publicznym prawie gospodarczym." *Acta Universitatis Wratislaviensis, Prawo*, no. 4001, vol. 331 (2020): 213–216.

Powałowski, Andrzej. "Wprowadzenie do aksjologii prawa gospodarczego publicznego." *Acta Universitatis Wratislaviensis*, *Prawo,* no. 3977, vol. 329 (2019): 221.

Strzyczkowski, Kazimierz. "Uwagi o zadaniach nauki o prawnych formach działania administracji gospodarczej." In *Instrumenty i prawne formy działania administracji gospodarczej*, edited by Bożena Popowska and Katarzyna Kokocińska, 37–63. Poznań: Wydawnictwo Naukowe Uniwersytetu Adama Mickiewicza, 2009.

Zdyb, Marian. "Aksjologiczne podstawy ingerencji państwa w sferę gospodarki rynkowej." In *Prawne instrumenty oddziaływania na gospodarkę*, edited by Andrzej Powałowski, 1–5. Warszawa: C.H. Beck, 2016.

Żywicka, Agnieszka. "Egzemplifikacje prawne wpływu harmonizacji technicznej na rozwój sektora przedsiębiorczości w Unii Europejskiej." In *Wpływ prawa Unii Europejskiej na gospodarkę i samorząd terytorialny państw członkowskich*, edited by Małgorzata Ganczar, Jarosław Król and Marcin Szewczak, 62–53. Łódź: Wydawnictwo Afinance, 2016.

Żywicka, Agnieszka. "Instrumenty administracyjnoprawne w systemie zapewniania bezpieczeństwa wyrobów." In *Prawo administracyjne dziś i jutro*, edited by Jacek Jagielski and Marek Wierzbowski, 283–291. Warszawa: Wolters Kluwer, 2018.

Żywicka, Agnieszka. "Nadzór nad wyrobami podlegającymi dyrektywom „nowego podejścia" w Polsce – kilka refleksji o koordynacji działań organów nadzoru." *Acta Universitatis Wratislaviensis, Prawo*, no. 3977, vol. 329 (2019): 431–442.

Żywicka, Agnieszka, Mariusz Paździor. "Ochrona praw konsumenta w dyrektywach harmonizacji technicznej Unii Europejskiej – wybrane zagadnienia." In *Regionalne systemy ochrony praw człowieka 70 lat po proklamowaniu*

Powszechnej deklaracji Praw Człowieka: osiągnięcia, bariery, nowe wyzwania i rozwiązania, vol. 2, edited by Jerzy Jaskiernia and Kamil Spryszak, 440–447. Toruń: Adam Marszałek, 2019.

Żywicka, Agnieszka, Marek Wierzbowski. "Prawo do bezpiecznego produktu w porządku prawnym Unii Europejskiej." In *Ustroje – prawa człowieka – bezpieczeństwo – integracja europejska. Księga jubileuszowa z okazji 70-tych urodzin Profesora Jerzego Jaskierni,* vol. I, edited by Ryszard M. Czarny, Łukasz Baratyński, Paweł Ramiączek and Kamil Spryszak, 939–954. Toruń: Adam Marszałek, 2020.

Żywicka, Agnieszka. "Prywatyzacja zadań publicznych w metrologii na przykładzie zadań administracji miar." *Studia Prawno-Ekonomiczne*, vol. 116, (2020): 138–139. https://doi.org/10.26485/SPE/2020/116/8.

Review of European and Comparative Law | 2023
Vol. 52, No. 1, 143–168
https://doi.org/10.31743/recl.14630
Received: 19 October 2022 | Accepted: 22 January 2022 | Published: 30 March 2023

Harmonizing Duties of Board Members in the Anthropocene: When Expectations Meet Reality

Anne-Marie Weber
Dr., Assistant Professor, Faculty of Law and Administration, University of Warsaw, address: Krakowskie Przedmieście 26/28, 00-927 Warszawa, Poland; e-mail: a.weber@wpia.uw.edu.pl
https://orcid.org/0000-0001-7164-7571

Anne-Christin Mittwoch
Prof. Dr., Chair of Civil Law, European and International Business Law Martin-Luther-Universität Halle-Wittenberg, address: Universitätsplatz 3–5, Juridicum, Zi. 2.15, 06099 Halle (Saale), Germany; e-mail: anne-christin.mittwoch@jura.uni-halle.de
https://orcid.org/0000-0002-0465-3397

Keywords:
sunstability, board members, duty of care, company's interest, harmonisation

Abstract: The article confronts the European Commission's climate policy-seconded endeavors regarding board members' duties which it has expressed in its proposal for a Corporate Sustainability Due Diligence Directive (CSDDD Proposal) published in February 2022 with a comparative analysis of the current legal state of play in Germany and Poland. We claim that the Commission has neglected to adequately address the current understanding of board members' duties across the Member States, which has ultimately led to the deletion of the Proposals' provisions' referring to the board members' duty of care in the legislative work conducted within the Council of the European Union in November 2022. There is a possibility that these provisions (Art. 25 and 26 CSDDD Proposal) will be reinserted during the trialogue, but this is unlikely at this point. Notably, the Commission's declaration on a mere clarifying role of the proposed harmonization measure regarding board members' duties seems imprecise and prompts a weak interpretation of the proposed

The Authors' research has been supported by a grant from the Polish-German Science Foundation within the project "Das Unternehmensinteresse in Deutschland und Polen – eine rechtsvergleichende Analyse im Kontext der europäischen Sustainable Corporate Governance-Initiative".

ISSN 2545-384X (Online)

provisions, which contradicts the proclaimed policy goals. Germany might serve as an example of a Member State in which implementing the Commission's understanding of the board members' duty of care would not have significantly modified national company law, regardless of the interpretation chosen for the depth of the provision. If, however, a strong or medium mode of interpretation was applicable, Poland would actually be obliged to amend its legal framework fundamentally. Therefore, we contend that the legislative work on the discussed proposal was tainted by the flawed presumption that the proposed harmonization measure would merely summarize existing rules for board members' duties. Based on the observations from our emblematic comparative juxtaposition, we argue that the idiosyncratic concepts of board members' duties across Member States have not been sufficiently recognized as a harmonization challenge by the Commission. We contend that these methodological deficiencies led to an inconclusive wording of Article 25 of the Commission's proposal and ultimately created an insurmountable barrier to political agreement within the Council and the "fall" of the complete concept of setting a standard of due care for board members in the proposed directive. Consequently, we claim that when jostling such a controversial and deep harmonization measure, the Commission must play its legislative A-game to have a shot at approval by the Council and later effective implementation by the Member States.

1. Introductory remarks

In light of the newest evidence from the natural sciences,[1] human-induced climate change along with its social impacts is increasingly being understood as the defining global challenge of our age. This progressively resonates in political action and legislative measures. International commitments, such as the Paris Agreement[2] and UN Agenda for Sustainable

1 Intergovernmental Panel on Climate Change (IPCC), *Sixth Assessment Report – Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022).

2 United Nations, *Paris Agreement* (December 12, 2015).

Development 2030[3], are shaping the global direction of sustainability policy. In Brussels, the call for a sustainable economy is no longer seen as an ideological belief but as a fundamental determinant of the EU's political agenda: The European Green Deal[4] and the ensuing European Climate Law[5] intend to pave the way toward a sustainable economy.

Whereas public law instruments, for example, direct regulatory controls on emissions or market solutions (emission fees or tradeable emissions permits), have a long-standing tradition of serving as a policy instrument for protecting the environment, most recent legislative efforts are increasingly stressing the role of private law in implementing climate policy goals. Since the desired reorientation of the economy entails the necessity to adjust prevailing economic behaviors, companies, as crucial economic actors, must fall under scrutiny[6]. It is discussed whether company law reforms could 'repurpose' companies to align their strategy and conduct with climate policy objectives. 'Corporate sustainability' is the flag under which the emerging debate sails.

The EU is in the vanguard of recognizing companies as agents for the sustainability transformation. Pivotal regulatory milestones for a more substantial responsibility of companies to achieving sustainability objectives were the Non-Financial Reporting Directive 2014/95/EU and the Shareholder Rights Directive II 2017/828. While both directives did not interfere with the company laws of the EU member states *per se* and thus refrained from imposing any specific 'sustainability duties' onto companies and their

---

3 United Nations, "Transforming our world: the 2030 Agenda for Sustainable Development. UN-Doc. A/RES/70/1/L.1," Sustainable Development Goals. Knowledge Platform, accessed February 3, 2023, https://sustainabledevelopment.un.org/post2015/transformingourworld/publication.

4 European Commission, *The European Green Deal, COM(2019) 640 final* (Brussels: December 11, 2019).

5 European Parliament, European Council, *Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law')*, ABl. EU L 243/1, 9.7.2021 (June 30, 2021).

6 Beate Sjåfjell, Christopher M. Bruner, "Corporations and Sustainability," in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, ed. Beate Sjåfjell, Christopher M. Bruner (Cambridge: Cambridge University Press, 2020), 6; Lela Melon, *Shareholder Primacy and Global Business. Re-clothing the EU Corporate Law* (London: Routledge, 2019), 120–195.

board members, they certainly introduced the concept of sustainability to the corporate governance debate and practice[7]. Since the Action Plan on Financing Sustainable Growth in 2018, the idea of 'sustainable companies' has been firmly anchored in the EU Commission's political agenda[8]. Even though the Action Plan focused on how to finance the green transformation of the economy (sustainable finance), action No. 10 of the declared agenda envisaged the inclusion of corporate governance instruments into the policy toolbox.

Consequently, in July 2020, the Commission launched the Sustainable Corporate Governance Initiative ("SCG Initiative"), which aimed to adapt the EU's regulatory framework on company law and corporate governance to sustainability-driven challenges. The Commission's proposal of a directive on Corporate Sustainability Due Diligence ("CSDDD Proposal", "the Proposal", "the proposed Directive") was published on 23 February 2022,[9] having previously been red-carded twice by the Commission's regulatory scrutiny board. Aside from a complex regulatory framework on due diligence within the company's value chain, through Art. 25 sec. 1 of the CSDDD Proposal, the Commission has endeavored to introduce the sustainability idea into a harmonized understanding of the board members' duty of care. The legislative work on the original draft of the Commission's CSDDD Proposal was continued within the Council of the European Union (the "Council") under the French and then Czech presidencies throughout 2022 in order to develop a negotiating position for the European Parliament. On 30 November 2022, the Council adopted and presented a revised compromise text of the proposed Directive. Although the Council approved the Proposals framework regarding companies' due diligence duties

7 Peter Hommelhoff, "Nichtfinanzielle Ziele in Unternehmen von öffentlichem Interesse. Die Revolution übers Bilanzrecht," in *Festschrift für Bruno M. Kübler zum 70. Geburtstag*, ed. Reinhard Bork (München: C.H. Beck 2015), 291–299; Anne-Marie Weber, Zofia Mazur, Aleksandra Szczęsna, "Zrównoważony ład korporacyjny (sustainable corporate governance) kierunek ewolucji polskiego prawa spółek?," *Przegląd Prawa Handlowego,* no. 6 (Hürth: Wolters Kluwer, 2022): 23–25.

8 Anne-Christin Mittwoch, Florian Möslein "Der Europäische Aktionsplan zur Finanzierung eines nachhaltigen Wachstums," *Wertpapier-Mitteilungen*, no. 73 (2019): 481–489.

9 European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, 2022/0051(COD)* (Brussels: February 23, 2022).

throughout their value chain certain corrections, Article 25 of the proposed Directive was deleted entirely.

This article aims to confront the Commission's climate policy-backed expectations regarding board members' duties in the EU with the current legal state of play. We focus our assessment on the methodological aspects of how the Commission has executed its harmonization concept throughout the legislative pathway so far[10]. We claim that the Commission has neglected to adequately determine the current understanding of board members' duties across the Member States. As a consequence, the legislative work on the CSDDD Proposal was tainted by the flawed assertion[11] that Art. 25 of the Proposal would merely summarize existing rules for board members' duties. We contend that these methodological deficiencies have created an unsurmountable barrier to achieving approval in the Council and ultimately led to the expunction of the concept to regulate board members' duties in the CSDDD Proposal. Also, we argue that even if Article 25 of the CSDDD Proposal will be reintroduced in the course of the trilogue prodecure, the Commission's feebly grounded approach and the resulting wording of this provision will hinder its effective implementation across Member States' national legal regimes.

To that end, we structure this article as follows: First, we briefly describe the content of the Commission's idea regarding board members' duties as delineated in its February CSDDD Proposal (see sec. 2). We then adopt a comparative perspective to spotlight the issue of fundamental divergences regarding the current legal state of play in two Member States – Poland and Germany[12] (sec. 3). Based on the observations from this emblematic juxtaposition we claim that the idiosyncratic concepts of board members' duties across Member States have not been sufficiently recognized and addressed as a harmonization challenge by the Commission which led to the lack of political approval during the Councils work on the draft (sec. 4). The last section contains concluding remarks (sec. 5).

---

10 For the sake of complying with this publication's limitations of length, we do not elaborate on the substantive validity of the Commission's concept regarding board members' duties. In that respect see further: [...]

11 Explanatory Memorandum, 22.

12 To comply with this publication's limitations of length, we restrict the scope of our analysis to joint-stock companies, i.e., the German *Aktiengesellschaft* and the Polish *Spółka Akcyjna*.

2. The expectations: duties of board members in the CSDDD Proposal

2.1. Origination of the proposed measure

Following up on Action 10 of its 2018 Action Plan, the Commission launched the Sustainable Corporate Governance Initiative to "improve the EU regulatory framework on company law and corporate governance", "enable companies to focus on long-term sustainable value creation rather than short-term benefits" and "align the interests of companies, their shareholders, managers, stakeholders and society"[13]. The legislative goal was primarily to develop a proposal for a directive, which was accomplished by the publication of the CSDDD Proposal in February 2022.

Key components of the Commission's inceptive analytical work were two reports prepared by external advisors in 2020. The first report assessed due diligence procedures along a company's value chain in view of identifying, preventing, mitigating and enforcing liability in both social (i.e., violations of human rights, including children's rights and fundamental freedoms) and environmental (i.e., environmental damage, including climate damage) areas of sustainability[14]. The second report, prepared by E&Y, presented the results of a study on board members' duties in the context of sustainable corporate governance[15]. A key recommendation that emerged from this report was to adopt harmonizing measures regarding the inclusion of sustainability considerations into the scope of board members' duties. As part of the SCG Initiative, from October 2020 to February 2021, the Commission also conducted an open public consultation[16]. Upon its completion, a first draft directive was produced.

---

13 See: "About this initiative. Summary," European Commission, accessed October 18, 2022, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en.

14 "Study on due diligence requirements through the supply chain. Final Report, 20.02.2022," Publications Office of the European Union, accessed October 18, 2022, https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83–11ea-b8b7–01aa75ed71a1/language-en.

15 "Study on directors' duties and sustainable corporate governance. Final report, 29.07.2020," Publications Office of the European Union, accessed October 18, 2022, https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7–01aa75ed71a1/language-en.

16 See: "Summary of the consultation," European Commission, accessed October 18, 2022, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation_en.

The Commission's draft was first rejected by the Regulatory Scrutiny Board in May 2021 and then, despite the inclusion of various amendments, once more in November 2021[17]. Along the lines of the heated debate revolving around the E&Y report[18], the final CSDD Proposal received a mixed first reception in academic commentary[19]. The fierce debate regarding

17 See: "Regulatory Scrutiny Board Opinion, 26.11.2021, SEC(2022) 95," European Commission, accessed October 18, 2022, https://ec.europa.eu/transparency/documents-register/api/files/SEC(2022)95?ersIds=090166e5e99ec8f8; On the role of the EU Regulatory Scrutiny Board in the SCG Initiative see further: Klaas Hendrik Eller, Ioannis Kampourakis, "Quantifying 'Better Regulation': The EU Regulatory Scrutiny Board and the Sustainable Corporate Governance Initiative," Verfassungsblog, posted February 21, 2022, accessed May 18, 2022, https://verfassungsblog.de/quantifying-better-regulation.

18 "EC Corporate Governance Initiative Series: A Critique of the Study on Directors' Duties and Sustainable Corporate Governance Prepared by Ernst & Young for the European Commission," European Company Law Experts Group, posted October 14, 2020, https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-critique-study-directors; Marcello Bianchi, Mateja Milič, "EC Corporate Governance Initiative Series: European Companies are Short-Term Oriented: The Unconvincing Analysis and Conclusions of the Ernst & Young Study," *Oxford Business Law Blog,* posted October 13, 2020, https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-european-companies-are; Alexander Bassen, Kerstin Lopatta, "EC Corporate Governance Initiative Series: The EU Sustainable Corporate Governance Initiative – room for improvement," *Oxford Business Law Blog*, posted October 15, 2020, https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-eu-sustainable-corporate; Marco Corradi, "EC Corporate Governance Initiative Series: Corporate Opportunities Rules, Long-termism and Sustainability," *Oxford Business Law Blog*, posted October 29, 2020, https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-corporate-opportunities; Alex Edmans, "EC Corporate Governance Initiative Series: Diagnosis Before Treatment: the Use and Misuse of Evidence in Policymaking," *Oxford Business Law Blog*, posted October 30, 2020, https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-diagnosis-treatment-use-and; Florian Möslein, Karsten Engsig Sørensen, "Sustainable Corporate Governance. A Way Forward," *Law Working Paper*, no. 583 (2021): 1–13; Jesper Lau Hansen, "Zombies v. Subsidiarity – Opening on 8 December 2021," *Oxford Business Law Blog*, posted October 28, 2021, https://www.law.ox.ac.uk/business-law-blog/blog/2021/10/zombies-v-subsidiarity-opening-8-december-2021.

19 Critically see: Jesper Lau Hansen, "Unsustainable Sustainability," *Oxford Business Law Blog*, posted March 8, 2022, https://www.law.ox.ac.uk/business-law-blog/blog/2022/03/unsustainable-sustainability; moderately critical see: Alperen A. Gözlügöl, Wolf-Georg Ringe, "The EU Sustainable Corporate Governance Initiative: Where are We and Where are We Headed?," *Harvard Law School Forum on Corporate Governance*, posted March 18, 2022, https://

board members' duties in view of fostering sustainability-driven corporate governance tunes in with the broader discussion on the functions of private law and its europeanization[20]. In particular, the examined issue relates to the question of the assignment of authority to 'make' corporate law amongst the EU and its Member States[21], including dilemmas on social justice in European private law[22]. Consequently, it is also relevant for broader queries on European integration and economic governance in the EU[23], particularly regarding the integration of the 'new' Member States[24].

2.2. Content of the proposed measure

According to Art. 25 sec. 1 of the CSDDD Proposal, Member States were supposed to ensure that, when fulfilling their duty to act in the best interest

corpgov.law.harvard.edu/2022/03/18/the-eu-sustainable-corporate-governance-initiative-where-are-we-and-where-are-we-headed/?utm_content=buffer07f0c&utm_medium=social&utm_source=linkedin.com&utm_campaign=buffer; approvingly see: Beate Sjåfjell, Jukka Mähönen, "Corporate Purpose and the EU Corporate Sustainability Due Diligence Proposal," *Oxford Business Law Blog*, posted February 25, 2022, https://www.law.ox.ac.uk/business-law-blog/blog/2022/02/corporate-purpose-and-eu-corporate-sustainability-due-diligence; Stéphane Brabant, Claire Bright, Noah Neitzel, Daniel Schönfelder, "Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 1)," *Verfassungsblog*, posted March 15, 2022, https://verfassungsblog.de/due-diligence-around-the-world/; Daniel Bertram, "Green(wash)ing Global Commodity Chains: Light and Shadow in the EU Commission's Due Diligence Proposal," Verfassungsblog, posted 24.02.2022, https://verfassungsblog.de/greenwashing-global-commodity-chains/.

20 See: Stefan Grundmann, Hans-W. Micklitz, Moritz Renner, *New Private Law Theory* (Cambridge: Cambridge University Press, 2021); Hans-Wolfgang Micklitz, "The Transformative Politics of European Private Law," in *The Law of Political Economy Transformation in the Function of Law*, ed. Poul F. Kjaer (Cambridge: Cambridge University Press, 2020), 205–227.

21 John Armour, "Who Should Make Corporate Law? EC Legislation versus Regulatory Competition," *Current Legal Problems*, no. 58(1) (2005): 369–413.

22 Hans-W. Micklitz, *The Many Concepts of Social Justice in European Private Law* (Cheltenham: Edward Elgar Publishing, 2011).

23 Dariusz Adamski, *Redefining European Economic Integration* (Cambridge: Cambridge University Press, 2018)]; Herwig C.H. Hofmann, Katerina Pantazatou, Giovanni Zaccaroni, *The Metamorphosis of the European Economic Constitution* (Cheltenham: Edward Elgar Publishing, 2019).

24 Marek Safjan, Aneta Wiewiórska-Domagalska, "Political Foundations of European Private Law: Rethinking the East-West Division Lines," in *The Foundations of European Private Law*, ed. Roger Brownsword, Hans-W. Micklitz, Leone Niglia, Stephen Weatherill (Oxford and Portland: Hart Publishing, 2011), 265.

of the company, board members[25] act in the best interest of the company while taking "into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term. Further, Art. 25 sec. 2 of the CSDDD Proposal stipulated that Member States must ensure that their laws, regulations and administrative provisions providing for a breach of directors' duties are also applicable to the scope of duties referred to in Art. 25 sec. 1 of the CSDDD Proposal.

The Commission has embraced a noticeably concise wording of the board members' duty of care related to sustainability considerations. First, the material scope and content of the sustainability-related topics that ought to be addressed by the board members have only been vaguely indicated. The expression "sustainability matters" is nebulously circumscribed by a narrow catalog of examples, i.e., human rights, climate change and environmental consequences. There is no direct definition or referral to a definition of these "matters" to be found in the CSDDD Proposal.

Second, and most importantly, the CSDDD Proposal indistinctly stated that the board members' duty of care involved "taking into account" sustainability matters. Neither the CSDDD Proposal nor the Explanatory Memorandum provides guidance on how "taking into account" was supposed to be interpreted. It remained entirely unclear at what level of priority sustainability matters should be considered by the board members. In other words, the proposed wording of Art. 25 sec. 1 of the CSDDD Proposal did not allow for an unequivocal conclusion on whether sustainability matters (i) must be prioritized over other considerations, e.g., shareholder interests (strong interpretation option), (ii) must be considered at the same level of priority as other issues (medium interpretation option) or (iii) should be assigned a lower level of priority than other motives within the decision-making process (weak interpretation option).

While a contextual interpretation performed against the backdrop of the aggregate climate policy background which frames the CSDDD Proposal would support either the strong or medium interpretation

[25] The literal wording of the CSDDD Proposal uses the term „directors". This term is informed by the Anglo-American Corporate Governance discussion and does not perfectly grasp the situation in Continental Europe, where companies have boards rather than directors.

option, a literal interpretation allowed arguing for the weak option of interpretation. The emerging scholarship[26] and academic discussion clearly demonstrated that all of the interpretation options are being considered, confirming the vagueness of the provision's wording.

Unfortunately, the Commission's commentary on the content of Art. 25 of its CSDDD Proposal delivered in its Explanatory Memorandum only added to the confusion resulting from the provision's ambiguous wording. The Commission explained that a board member's general duty of care for the company "is present in the company law of all Member States" and is only "being clarified" by the proposed provision[27].

If one assumes the strong or the medium interpretation option to be applicable, the Commission's view of Art. 25 sec. 1 of the CSDDD Proposal as a mere clarification of the existing legal frameworks across Member States, would imply the assumption that the board members' duty of care to act in the interest of the company in all Member States already allows for sustainability matters to take priority over considerations on value delivered to shareholders. As we explain below, based on the example of Poland, either of these assumptions would be mistaken.

3. The reality: comparative observations on the current legal state of play

3.1. The relationship between a company's interest and board member's duties

The intersection of company law and sustainability is primarily being discussed in the literature with regard to the company's interest (Pol. *interes spółki*, Germ. *Unternehmensinteresse*, Fr. *intérêt social*). This is understandable, as the understanding of the company's interest permeates the entirety of company law institutions and therefore bears fundamental systemic importance[28]. In particular, the way in which the company's interest is defined delineates the duties of a company's board members[29]. Generally, a board member's fundamental duty of care consists of the obligation to act in the company's interest. The specific scope of a board member's

26 See fn. 25.

27 Explanatory Memorandum, 22.

28 Stefanicki, "Interest of the Company – the Discussion on Axiological Choices," *Review of European and Comparative Law*, 202, vol. 51, no. 4 (2022), 31.

29 Opalski, *Prawo zgrupowań spółek*, 145.

responsibilities is, therefore, *ad casum* dependent upon the interpretation of the company's interest and varies across Member States. In particular, in those jurisdictions whose company laws do not contain explicit provisions on the duties of board members, the understanding of the company's interest serves as a crucial interpretative tool. Consequently, the assessment of the legal state of play regarding the duties of board members must draw from the legal framework, the jurisprudence of the courts and the legal scholarship regarding the notion of the company's interest.

3.2. Germany

In international discussion, the German corporate governance system is usually qualified as a prime example of an interest-pluralist or stakeholder-value system.[30] This is done mainly with reference to the right of co-determination but also with regard to the legal construct of the company's interest.[31] However, probably surprisingly to the international audience, the normative conditions for such classification are also disputed in German company law, and the principle of shareholder primacy has already been gaining increasing support for some years now.[32]

---

30 See Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (London: Routledge, 2013), 42; Paddy Ireland, "Company Law and the Myth of Shareholder Ownership," *The Modern Law Review*, no. 62 (1999): 32; Jeswald W. Salacuse, "Corporate Governance, Culture and Convergence: Corporations American Style or with a European Touch," *Law and Business Review of the Americas*, no. 9 (2003): 33, 47; Shuangge Wen, "The Magnitude of Shareholder Value as the Overriding Objective in the UK – The Post-Crisis Perspective," *Journal of International Banking Law and Regulation*, no. 26 (2011): 325, 326.

31 With regard to the interest of the company Andreas Rühmkorf, "Shareholder Value versus Corporate Sustainability," in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, ed. Beate Sjåfjell, Christopher M. Bruner (Cambridge: Cambridge University Press, 2020), 232 ff.; with regard to codetermination Salacuse, "Corporate Governance, Culture and Convergence: Corporations American Style or with a European Touch," 33, 47; This usually overlooks the fact that the right of co-determination is visibly eroding, see Walter Bayer, "Die Erosion der deutschen Mitbestimmung," *Neue Juristische Wochenschrift*, no. 27 (2016): 1930.

32 Rühmkorf, "Shareholder Value versus Corporate Sustainability," 232 ff.; Max Birke, *Das Formalziel der Aktiengesellschaft* (Baden-Baden: Nomos, 2005), 155 ff., 199 ff.; Gregor von Bonin, *Die Leitung der Aktiengesellschaft zwischen Shareholder Value und Stakeholder-Interessen* (Baden-Baden: Nomos, 2004), 76 ff.; Peter O. Mülbert, "Shareholder Value aus rechtlicher Sicht," *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (1997): 129, 140 ff.

In fact, the German corporate governance discussion has historically been primarily based on the question of the relationship between the state (i.e. public or common good interests) and the market (i.e. private interests). This relationship is currently modelled in section 76 (1) of the German Stock Corporation Act (AktG), which, as interpreted by the judiciary and academia, obliges board members to act according to the interest of the company. Although the discussion on the company's interest reached its peak in the late 1970s and early 1980s, no concrete programme of action for corporate boards could ultimately be derived from this intensively conducted debate.

The German Corporate Governance Code takes up the discussion and, since 2009, has explicitly based its recommendations for good corporate governance on the pluralist approach. The foreword of the current version of the GCGC from 2022 states the following in this regard: "The Code highlights the obligation of Management Boards and Supervisory Boards – in line with the principles of the social market economy – to take into account the interests of the shareholders, the enterprise's workforce and the other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise's best interests)".[33] The significance of the GCGC is, however, fundamentally different from that of legal norms set by the state, especially with regard to legitimacy and binding force: The Code was drafted by a private commission appointed by the Federal Ministry of Justice, the regulations of the Code are thus merely non-binding recommendations for conduct. Therefore, they can, at best, reflect developments in discussions on company law but not anticipate their outcome *de lege ferenda*.

Nonetheless, the Commission's proposed wording of Art. 25 sec. 1 CS-DDD would not have introduced a substantial change to German company law. Establishing the relevance of the company's interest as a guiding principle for the board of directors would have, in fact, served as a mere

[33] "German Corporate Governance Code," Regierungskommission Deutscher Corporate Governance Kodex, current version of 2022, accessed October 19, 2022, https://www.dcgk.de/en/code.html.

clarification of the prevailing opinion in case law and literature.[34] An obligation of board members to take sustainability matters into account according to the strong or the medium interpretation option would by no means infringe German company law.

3.3. Poland

The existence of a board member's general duty of care follows from art. 337[1] Commercial Companies Code ("CCC")[35]. According to this provision, board members should perform their duties with due diligence resulting from the professional nature of their activity. The liability regime for a breach of the board member's duty of care is articulated in Art. 483 CCC. Since the board members' liability is construed as "towards the company", it should be inferred that the duty of care is owed to the company[36].

While the duty of care is embedded in Polish company law, no legal provision delivers guidance on the specific content of such duty. In other words, the elements of a board member's duty of care remain open to interpretation. In Polish scholarship and jurisprudence, it is generally accepted that such interpretation requires reference to the concept of the company's interest[37]. The fundamental substance of a board members' duty of care is to act according to the company's interest[38]. Consequently, board members' specific obligations within these ramifications should be understood as derivatives of the company's interest.

---

34 Claudia Schubert, *Das Unternehmensinteresse – Maßstab für die Organwalter der Aktiengesellschaft* (Baden-Baden: Nomos, 2020), 210 ff., 220; somewhat more reserved Peter Hommelhoff, "Die OECD.Priciples on Corporate Governance – ihre Chancen und Risiken aus dem Blickwinkel der deutschen corporate governance-Bewegung," *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (2001): 238, 250.

35 The same provision also expresses the board member's duty of loyalty.

36 Katarzyna Chałaczkiewicz-Ładna, Tomasz Sójka, Jędrzej Jerzmanowski, "To whom Polish directors owe their duties – between shareholder primacy and political agenda," *European Business Law Review* (forthcoming) – working paper on file with Authors, 2.

37 Opalski, *Prawo zgrupowań spółek*, 145.

38 Krzysztof Oplustil and Arkadiusz Radwan, "Company law in Poland: Between Autonomous Development and Legal Transplants," in *Private Law in Eastern Europe: Autonomous Developments or Legal Transplants?*, ed. Christa Jessel-Holst et al., (Tübingen: Mohr Siebeck, 2011), 482–494.

Polish company law does not contain a legal definition of the company's interest[39]. Therefore, the understanding of that term needs to be deduced from the courts' jurisprudence and the relevant scholarship. The prevailing view of the latter is that the company's interest emanates from the shareholders' interests[40]. Since the Polish Supreme Court Judgement of 5 November 2009 (I CSK 158/09), the interest of the company is repeatedly described (in both jurisprudence and scholarship) as a "resultant of the interests of the shareholders"[41]. As explained by the court, particular shareholders' interests need to be weighed appropriately, as legitimate minority shareholders' interests are part of determining the "resultant". Nonetheless, it is rightly being stressed that due to concentrated shareholding structures[42], majority shareholders *de facto* determine the company's interest[43].

In Poland, questions regarding the use of corporate governance mechanisms in fostering sustainability largely has for a long time remained outside of the academic agenda. While some authors have explained foreign scholarship developments and juxtaposed these with the current understanding of the company's interest in Polish literature and jurisprudence[44] the inclusion of sustainability matters in the process of determining the content of the company's purpose is rarely advocated in Polish legal scholarship[45].

---

39 Chałaczkiewicz-Ładna, Sójka, Jerzmanowski, "To whom Polish directors owe their duties – between shareholder primacy and political agenda," (forthcoming) – working paper on file with Authors, 9.

40 See: Krzysztof Oplustil, *Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej* (München: C.H. Beck, 2010), 175; Opalski, *Prawo zgrupowań spółek*, 167.

41 This expression was initially coined in legal scholarship, see: Adam Opalski, "O pojęciu interesu spółki handlowej," *Przegląd Prawa Handlowego*, no. 11 (2008): 16–23.

42 See further: Krzysztof Oplustil, Anne-Marie Weber, "Country Report Poland," in *Sustainable Finance in Poland*, ed. Jens Ekkenga, Martin Winner (Tübingen: Mohr Siebeck, 2023) (forthcoming) – working paper on file with Authors.

43 Chałaczkiewicz-Ładna, Sójka, Jerzmanowski, "To whom Polish directors owe their duties – between shareholder primacy and political agenda," (forthcoming) – working paper on file with Authors,11.

44 Mazur, "Nowy paradygmat ładu korporacyjnego. Globalne tendencje w dyskusji o interesie spółki i ich możliwy wpływ na prawo polskie," *Państwo I Prawo* (2022/7): 114–128.

45 Weber, Mazur, Szczęsna, "Zrównoważony ład korporacyjny (sustainable corporate governance) kierunek ewolucji polskiego prawa spółek?," 20–33; Anne-Marie Weber-Elżanowska, "Postulat zrównoważonego wzrostu gospodarczego jako wyzwanie dla polskiego prawa handlowego," in *Sto lat polskiego prawa handlowego. Księga jubileuszowa dedykowana Profesorowi*

Against the backdrop of the prevailing views, sustainability matters – if treated as distinct from shareholders' interests – could only be considered by board members, if they align with the company's interest (as determined by the shareholders' interests)[46]. If there is a collision between the company's interest and sustainability matters, the former prevails. This essentially corresponds to the concept of "enlightened shareholder value" as expressed in s. 172 of the UK Companies Act[47].

Despite a historically warranted closeness to German law[48], in light of the above, Poland is to be classified as a shareholder primacy jurisdiction[49]. Based on the dominating view of the company's interest, board members cannot consider sustainability matters at a higher level or the same level of priority as shareholders' interests.

As a consequence, both the strong and the medium options of interpreting Art. 25 sec. 1 of the CSDDD Proposal would have introduced a significant change to Polish company law. It follows that in the case of Poland, the Commission's assumption regarding an already existing, established board member's duty of care to take into account sustainability matters was thus erroneous.

Andrzejowi Kidybie. Tom I, ed. Małgorzata Dumkiewicz, Katarzyna Kopaczyńska-Pieczniak, Jerzy Szczotka (Warszawa: Wolters Kluwer, 2020), 218–229.

46 Oplustil, *Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej,* 175–177; Opalski, *Prawo zgrupowań spółek*, 165–174.

47 Chałaczkiewicz-Ładna, Sójka, Jerzmanowski, "To whom Polish directors owe their duties – between shareholder primacy and political agenda," (forthcoming) – working paper on file with Authors, 12.

48 See: Adam Opalski, "Poland. Introduction. Historical Development of the Polish Model of Company Law," in *Company Laws of the EU: A Handbook*, ed. Andrea Vicari, Alexander Schall (München: C.H. Beck, 2020), 661–664.

49 Dąbrowska, "Social Enterprises, Cooperatives or Benefit Corporations? On Reconciling Profit and the Common Good in Doing Business from a Polish Perspective," *Review of European and Comparative Law,* vol. 51, no. 4 (2022): 68; Pinior, "Duty of loyalty and due care of the board member under Polish law," *Review of European and Comparative Law,* vol. 51, no. 4 (2022): 15; Chałaczkiewicz-Ładna, Sójka, Jerzmanowski, "To whom Polish directors owe their duties – between shareholder primacy and political agenda," (forthcoming) – working paper on file with Authors, 2.

4. Dealing with harmonization challenges

As our comparative analysis has revealed, the strong or medium interpretation option of the Commission's proposed harmonization measure, which would constitute an assumption that the inclusion of sustainability matters already saturates board members' duty of care across the Member States, proves to be problematic. In Poland, the inclusion of sustainability matters in board members' decision-making processes in a manner that could collide with or hamper shareholders' interests would create liability risks for infringement of the company's interest. While such a conclusion might not explicitly follow from the wording of the relevant company laws and naturally can be subject to critique[50], the prevailing scholarship, courts' jurisprudence as well as market practice paint such a landscape. While Germany might serve as an example of a Member State in which the implementation of strong or medium interpretation of Art. 25 sec. 1 of the CSDDD Proposal would not alter the legal framework to any significant extent, Poland would need to profoundly reform its company laws in order to accomplish these interpretation options of the Commission's CSDDD proposal[51].

Since a strong or medium interpretation option of Art. 25 sec. 1 of the CSDDD Proposal cannot be by any means qualified as a mere "clarification" of the current legal *status quo* (at least in one (Poland), quite possibly in several Member States), and it remains entirely ambiguous whether any of these interpretation options should prevail, the methodological soundness of the Commission's legislative efforts must be critically scrutinized. Despite the limited scope of our research, which covered only two Member States, the example of Poland has exposed a methodological inconsistency in the Commission's work on the CSDDD Proposal.

The documentation of the legislative process does not reveal the source of the flawed assumption and wording of Art. 25 sec. 1 of the CSDDD Proposal, according to which it only constituted a "clarification" of board members' duties in the EU. We identify two possible reasons for the Commission's

50 See: Weber, Mazur, Szczęsna, "Zrównoważony ład korporacyjny (sustainable corporate governance) kierunek ewolucji polskiego prawa spółek?," 20–33; Weber-Elżanowska, "Postulat zrównoważonego wzrostu gospodarczego jako wyzwanie dla polskiego prawa handlowego," 218–229.

51 Weber, Mazur, Szczęsna, "Zrównoważony ład korporacyjny (sustainable corporate governance) kierunek ewolucji polskiego prawa spółek?," 32.

approach. First, the explanation could lie in an analytical error or deficiency of scope relating to the substantive research leading up to the CSDDD Proposal. In such a scenario, we would assume that the Commission unwillingly presented Art. 25 sec. 1 of the CSDDD Proposal as a clarifying provision, despite the fact that a medium or strong interpretation was intended. Second, the reason for mislabeling a deep harmonization measure could be the Commission's hope to "disguise" or "hide" a medium or strong interpretation option, i.e., a truly contentious issue, behind safe, invulnerable reasoning. This scenario would imply that the Commission intentionally presented Art. 25 sec. 1 of the CSDDD Proposal as a clarifying provision, although being aware it actually was not. Third, the Commission could have intended to propose a provision that should be understood according to the weak interpretation option.

If the first potential explanation was accurate, it would indicate that the Commission's overall research methodology was flawed. While it is impossible to pinpoint the exact moment of failure, the Commission is responsible for the whole research process that leads to their legislative proposal. Regardless of whether the error occurred in the scope of internal research activities or within the tasks performed by an outside expert, the responsibility to organize the research rests with the Commission. In particular, the Commission must actively engage with hired experts, including the verification of their proposed research methodologies.

If the second potential explanation was accurate, it would indicate a fundamental misconception regarding the prerequisites of enacting effective harmonization measures. Foremost, the achievement of a harmonization goal does not materialize in the simple adoption of the proposed legislative measure. The success of "pushing" a harmonization measure through the political bottleneck leading to adoption on the EU level is only of a technical nature. The true goal of harmonizing laws within the EU must be measured against the way these laws are implemented and consequently applied in the Member States. In the analyzed case, adopting the CSDDD Proposal regarding board members' duties would be futile if the Member States decided not to adjust their national company law regimes actively. "Disguising" a deep harmonization measure that actually seeks to remodel the company laws of some Member States as a minor clarification of the current legal *status quo* results in the Member States' reluctance

to change anything in their national legal regimes. Why would they, since the Commission admits it is only clarifying existing obligations? It follows that the methodological flaws in harmonizing board members' duties could likely frustrate the adoption of effective implementing laws in those Member States, whose current legal frameworks diverge from the Commission's envisaged concept.

If the third explanation was true, the Commission's declaration regarding a mere "clarification effect" would actually be correct. However, in such a scenario, a glaring incoherence with the richly motivated climate policy agenda of the CSDDD proposal would emerge.

Regardless of what reasons led to the puzzling reasoning regarding Art. 25 sec. 1 of the CSDDD Proposal, it needs to be stressed that the extent to which Member States' national legal regimes are being transformed is of fundamental importance for reaching harmonization objectives. In other words, the depth of interference with the national laws matters. The harmonization measures' profoundness must be mirrored in the evaluation criteria explored within the Impact Assessment. In addition, the Explanatory Memorandum should plainly depict that the regulation will actually alter existing legal regimes. In the case of the CSDDD Proposal regarding board members' duties, neither of these prerequisites was met. Even a significant collision between the harmonization measure and the Member States' "old" regulation is not a problem in itself. It only develops into a problematic issue, if an effective implementation is not accomplished.

In light of the above, one should not be surprised that the Regulatory Scrutiny Board was unsatisfied with the Commission's reasoning regarding the proposed measures on board members' duties. As has rightly been pointed out, the Commission should have assessed "how the proposed EU corporate sustainability governance rules would fit with the different national corporate governance models existing in the EU, given the national focus of company law"[52]. Moreover, one must agree with the Regulatory Scrutiny Board's opinion that the Commission was not clear about "why it is necessary to regulate directors' duties on top of due diligence

[52] See: "Regulatory Scrutiny Board Opinion, 26.11.2021, SEC (2022) 95," European Commission, accessed October 18, 2022, https://ec.europa.eu/transparency/documents-register/api/files/SEC(2022)95?ersIds=090166e5e99ec8f8, p. 4.

requirements"[53]. Since the Commission itself identified the provision tackling board members' duties as a mere clarification, it is indeed hard to extract and understand the value-added of this measure. If the harmonization of board members' duties is treated as a simple clarification, any conclusions as to the impact of this measure are *ab initio* distorted.

At the same time, the concerns voiced twice by the Regulatory Scrutiny Board suggest that it adopted a strong or medium interpretation of the proposed harmonisation measure: It was clearly assumed that Art. 25 of the CSRDDD Proposal would actually alter Member States' current company law regimes.

5. Conclusions

The Commission's political mandate to implement climate policy goals through company law is challenging. The question of whom companies should serve remains a perpetual subject of dispute in company law scholarship. This naturally stems from the fact that the company, as a conventional creation of the law "without a soul"[54], requires an external assignment of interest. Despite a bulging body of literature advocating a sustainability-driven remodeling of basic company law concepts[55], a substantial pushback

---

53 See: "Regulatory Scrutiny Board Opinion, 26.11.2021, SEC (2022) 95," European Commission, accessed October 18, 2022, https://ec.europa.eu/transparency/documents-register/api/files/SEC(2022)95?ersIds=090166e5e99ec8f8, p. 2.

54 As famously declared by Edward, First Baron Thurlow: "*Did you ever expect a Corporation to have conscience, when it has no soul to be damned, and no body to be kicked?*", cited and further explored by, John C. Coffee Jr., "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment," *Michigan Law Review*, no. 79(3) (1981): 386–459.

55 See in particular: Colin Mayer, *Prosperity: Better business makes the greater good* (Oxford: Oxford University Press, 2018); Barnali Choudhury, Martin Petrin, *Corporate Duties to the Public* (Oxford: Oxford University Press, 2019); Andrew Johnston, "Reforming English Company Law to Promote Sustainable Companies," *European Company Law,* no. 11(2) (2014): 63–66; Melon, *Shareholder Primacy and Global Business. Re-clothing the EU Corporate Law*; Nien-hê Hsieh, Marco Meyer, David Rodin, Jens van 't Klooster, "The social purpose of corporations," *Journal of the British Academy*, no. 6(1) (2018): 49–73; Beate Sjåfjell, "Sustainable Value Creation Within Planetary Boundaries–Reforming Corporate Purpose and Duties of the Corporate Board," *Sustainability*, no. 12, 6245 (2020): 1–15; Beate Sjåfjell, "Regulating for Corporate sustainability: Why the public–private divide misses the point," in *Understanding the company,* ed. Barnali Choudhury, Martin Petrin (Cambridge:

supporting the *status quo* of prevailing shareholder primacy approaches persists[56]. This is clearly displayed in the context of the intended harmonization of board members' duties, which are interpreted mainly through the lens of the company's interest.

As we have explained through our comparative analysis why the Commission's stance on a clarifying role of Art. 25 sec. 1 CSDDD is flawed and misleading. Whereas Germany might serve as an example of a Member State in which the strong or medium interpretation of Art. 25 sec. 1 of the CSDDD Proposal would not have substantially modified the national company laws, Poland would have been obliged to fundamentally amend its legal framework to accomplish the strong and medium interpretation options of the discussed proposal. Consequently, based on the actual implications of the envisaged harmonization measure regarding board members' duties, we claim that when jostling such a contentious and deep harmonization measure, the Commission should have played its legislative A-game to have a shot at approval from the Council and subsequent effective implementation by the Member States.

Cambridge University Press, 2017), 145–165; Dana Brakman Reiser, "Progress is Possible. Sustainability in US Corporate Law and Corporate Governance," in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, ed. Beate Sjåfjell, Christopher M. Bruner (Cambridge: Cambridge University Press, 2020), 131–145.

56 Lucian A. Bebchuk, Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, Working Draft, accessed October 18, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544978; Jill E. Fisch, Steven Davidoff Solomon, "Should Corporations have a Purpose?," *Texas Law Review*, no. 99 (2021): 1309, accessed February 3, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561164; Lucian A. Bebchuk, Kobi Kastiel, Roberto Tallarita, *For whom corporate leaders bargain*, Working Draft, accessed February 3, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677155; Pierre-Henri Cognac, "The reform of articles 1833 on social interest and 1835 on the purpose of the company in the French Civil Code: Recognition or Revolution," in *Festschrift für Karsten Schmidt zum 80. Geburtstag,* ed. Katharina Boele-Woelki et al. (München: C.H. Beck, 2019), 213–221; Oliver Hart, Luigi Zingales, "Companies Should Maximize Shareholder Welfare Not Market Value," *ECGI Finance Working Paper,* no. 521 (2017).

References

Adamski, Dariusz. *Redefining European Economic Integration*. Cambridge: Cambridge University Press, 2018.

Armour, John. "Who Should Make Corporate Law? EC Legislation versus Regulatory Competition." *Current Legal Problems* 58, no. 1 (2005): 369–413.

Bassen, Alexander, Kerstin Lopatta. "EC Corporate Governance Initiative Series: The EU Sustainable Corporate Governance Initiative – room for improvement." Accessed February 3, 2023. https://blogs.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-eu-sustainable-corporate.

Bayer, Walter. "Die Erosion der deutschen Mitbestimmung." *Neue Juristische Wochenschrift* 69, no. 27 (2016): 1930–1936.

Bianchi, Marcello, Mateja Milic. "EU Corporate Governance Initiative Series: European Companies are Short-Term Oriented: The Unconvincing Analysis and Conclusions of the Ernst & Young Study." Accessed February 3, 2023. https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-europeancompanies-are.

Birke, Max. *Das Formalziel der Aktiengesellschaft. Eine juristische und ökonomische Analyse der Pflicht der Organe der Aktiengesellschaft zur Berücksichtigung der Interessen von Nichtaktionären*. Baden-Baden: Nomos, 2005.

Bebchuk, Lucian A., Roberto Tallarita. "The Illusory Promise of Stakeholder Governance." Accessed February 3, 2023. https://corpgov.law.harvard.edu/2020/03/02/the-illusory-promise-of-stakeholder-governance/.

Bebchuk, Lucian A., Kobi Kastiel, Roberto Tallarita. "For whom corporate leaders bargain." Accessed February 3, 2023. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677155.

Bertram, Daniel. "Green(wash)ing Global Commodity Chains: Light and Shadow in the EU Commission's Due Diligence Proposal." Accessed February 3, 2023. https://verfassungsblog.de/greenwashing-global-commodity-chains/.

Brabandt, Stephane, Claire Bright, Noah Neitzel, Daniel Schönfelder. "Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 1)." Accessed February 3, 2023. https://verfassungsblog.de/due-diligence-around-the-world/.

Brakman Reiser, Dana. "Progress is Possible. Sustainability in US Corporate Law and Corporate Governance." In *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, edited by Beate Sjåfjell, Christopher M. Bruner, 131–145. Cambridge: Cambridge University Press, 2020.

Chałaczkiewicz-Ładna, Katarzyna, Tomasz Sójka, Jędrzej Jerzmanowski. "To whom Polish directors owe their duties – between shareholder primacy and political agenda." *European Business Law Review*, forthcoming.

Choudhury, Barnali, Martin Petrin. *Corporate Duties to the Public*. Oxford: Oxford University Press, 2019.

Coffee Jr., John C. "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment." *Michigan Law Review* 79, no. 3 (1981): 386–459.

Cognac, Pierre-Henri. "The reform of articles 1833 on social interest and 1835 on the purpose of the company in the French Civil Code: Recognition or Revolution." In *Festschrift für Karsten Schmidt zum 80. Geburtstag* edited by Katharina Boele-Woelki, Florian Faust, Matthias Jacobs, Thilo Kuntz et al., 213–221. München: C.H. Beck, 2019.

Corradi, Marco. "EC Corporate Governance Initiative Series. Corporate Opportunities Rules, Long-termism and Sustainability." Accessed February 3, 2023. https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-seriescorporate-opportunities.

Dąbrowska, Justyna. "Social Enterprises, Cooperatives or Benefit Corporations? On Reconciling Profit and the Common Good in Doing Business from a Polish Perspective." *Review of European and Comparative Law* 51, no. 4 (2022): 68.

Edmans, Alex. "EC Corporate Governance Initiative Series. Diagnosis Before Treatment: the Use and Misuse of Evidence in Policymaking." Accessed February 3, 2023. https://blogs.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-diagnosis-treatment-use-and.

Eller, Klaas Hendrik, Ioannis Kampourakis. "Quantifying 'Better Regulation': The EU Regulatory Scrutiny Board and the Sustainable Corporate Governance Initiative." Accessed February 3, 2023. https://verfassungsblog.de/quantifying-better-regulation.

European Commission. "Sustainable corporate governance. About this initiative" Accessed February 3, 2023. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporategovernance_en.

European Commission. "Sustainable corporate governance. About this consultation." Accessed February 3, 2023. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporategovernance/public-consultation_en.

European Commission. "Regulatory Scrutiny Board Opinion." SEC(2022) 95. Accessed February 3, 2023. https://ec.europa.eu/transparency/documents-register/detail?ref=SEC(2022)95&lang=en.

European Company Law Experts Group. "EC Corporate Governance Initiative Series: A Critique of the Study on Directors' Duties and Sustainable Corporate Governance Prepared by Ernst & Young for the European Commission." Accessed February 3, 2023. https://blogs.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-critique-study-directors.

Fisch, Jill E., Steven Davidoff Solomon. "Should Corporations have a Purpose?" Accessed February 3, 2023. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561164.

Gözlügöl, Alperen A., Wolf-Georg Ringe. "The EU Sustainable Corporate Governance Initiative: Where are We and Where are We Headed?" Accessed February 3, 2023. https://corpgov.law.harvard.edu/2022/03/18/the-eu-sustainable-corporate-governance-initiative-where-are-we-and-where-are-we-headed/.

Grundmann, Stefan, Hans-Wolfgang Micklitz, Moritz Renner. *New Private Law Theory*. Cambridge: Cambridge University Press, 2021.

Hansen, Jesper Lau. "Zombies v. Subsidiarity – Opening on 8 December 2021." Accessed February 3, 2023. https://www.law.ox.ac.uk/business-law-blog/blog/2021/10/zombies-v-subsidiarity-opening-8-december-2021.

Hansen, Jesper Lau. "Unsustainable Sustainability." Accessed February 3, 2023. https://www.law.ox.ac.uk/business-law-blog/blog/2022/03/unstainable-sustainability.

Hart, Oliver, Luigi Zingales. "Companies Should Maximize Shareholder Welfare Not Market Value." *ECGI Finance Working Paper* 521 (2017): 1–33.

Hofmann, Herwig C.H., Katerina Pantazatou and Giovanni Zaccaroni. *The Metamorphosis of the European Economic Constitution*. Cheltenham: Edward Elgar Publishing, 2019.

Hommelhoff, Peter. "Nichtfinanzielle Ziele in Unternehmen von öffentlichem Interesse, Die Revolution übers Bilanzrecht." In *Festschrift für Bruno M. Kübler zum 70. Geburtstag*, edited by Reinhard Bork, Godehard Kayser and Frank Kebekus, 291–299. Müchen: C.H. Beck, 2015.

Hommelhoff, Peter. "Die OECD.Priciples on Corporate Governance – ihre Chancen und Risiken aus dem Blickwinkel der deutschen corporate governance-Bewegung." *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 30, no. 2 (2001): 238–267.

Hsieh, Nien-hê; Marco Meyer, David Rodin, Jens van't Klooster, "The social purpose of corporations." *Journal of the British Academy* 6, no. 1 (2018): 49–73.

Ireland, Paddy. "Company Law and the Myth of Shareholder Ownership." *The Modern Law Review* 62 (1999): 32–57.

Johnston, Andrew. "Reforming English Company Law to Promote Sustainable Companies." *European Company Law* 11, no. 2 (2014): 63–66.

Keay, Andrew. *The Enlightened Shareholder Value Principle and Corporate Governance*. London: Routledge, 2013.

Mayer, Colin. *Prosperity: Better business makes the greater good*. Oxford: Oxford University Press, 2018.

Mazur, Paweł. "Nowy paradygmat ładu korporacyjnego. Globalne tendencje w dyskusji o interesie spółki i ich możliwy wpływ na prawo polskie." *Państwo i Prawo* 7 (2022): 114–128.

Mélon, Lela. *Shareholder Primacy and Global Business, Re-clothing the EU Corporate Law*. London: Routledge, 2021.

Micklitz, Hans-Wolfgang. "The Transformative Politics of European Private Law." In *The Law of Political Economy Transformation in the Function of Law*, edited by Poul F. Kjaer, 205–227. Cambridge: Cambridge University Press, 2020.

Micklitz, Hans-Wolfgang. *The Many Concepts of Social Justice in European Private Law*. Cheltenham: Edward Elgar Publishing, 2011.

Mittwoch, Anne-Christin, Florian Möslein. "Der Europäsiche Aktionsplan zur Finanzierung eines nachhaltigen Wachstums." *Wertpapier-Mitteilungen Zeitschrift für Wirtschafts-und Bankrecht* 11, no. 73 (2019): 481–489.

Möslein, Florian, Karsten Engsig Sørensen. "Sustainable Corporate Governance. A Way Forward." *ECGI – Law Working Paper* 583 (2021): 1–13.

Mülbert, Peter O. "Shareholder Value aus rechtlicher Sicht. "*Zeitschrift für Unternehmens- und Gesellschaftsrecht* 26, no. 2 (1997): 129–172.

Opalski, Adam. "Poland. Introduction. Historical Development of the Polish Model of Company Law." In *Company Laws of the EU: A Handbook,* edited by Andrea Vicari, Alexander Schall, 661–671. München: C.H. Beck, 2020.

Opalski, Adam. *Prawo zgrupowań spółek. Instytucje Prawa Prywatnego***.** Warszawa: C.H. Beck, 2012.

Opalski, Adam. "O pojęciu interesu spółki handlowej." *Przegląd Prawa Handlowego* 11 (2008): 16–23.

Oplustil, Krzysztof. *Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej*. Warszawa: C.H. Beck, 2010.

Oplustil, Krzysztof, Arkadiusz Radwan. "Company law in Poland: Between Autonomous Development and Legal Transplants." In *Private Law in Eastern Europe,* edited by Christa Jessel-Holst, Rainer Kilms, Alexander Trunk, 445–498. Tübingen: Mohr Siebeck, 2011.

Oplustil, Krzysztof, Anne-Marie Weber. "Country Report Poland." In *Sustainable Finance in Poland*, edited by Jens Ekkenga, Martin Winner. Tübingen: Mohr Siebeck, 2023, forthcoming.

Pinior, Piotr. "Duty of loyalty and due care of the board member under Polish law." *Review of European and Comparative Law* 51, no. 4 (2022): 15.

Publications Office of the European Union. "Study on due diligence requirements through the supply chain.", Accessed February 3, 2023. https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

Publications Office of the European Union. "'Study on directors' duties and sustainable corporate governance.", Accessed February 3, 2023. https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en.

Regierungskommission Deutscher Corporate Governance Kodex, "German Corporate Governance Code." Accessed February 3, 2023. https://www.dcgk.de/en/code//foreword.html.

Rühmkorf, Andreas. "Shareholder Value versus Corporate Sustainability." In *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, edited by Beate Sjåfjell, Christopher M. Bruner, 232–245. Cambridge: Cambridge University Press, 2020.

Schubert, Claudia. *Das Unternehmensinteresse – Maßstab für die Organwalter der Aktiengesellschaft*. Baden-Baden: Nomos, 2020.

Safjan, Marek, Aneta Wiewiórska-Domagalska. "Political Foundations of European Private Law: Rethinking the East-West Division Lines." In *The Foundations of European Private Law*, edited by Roger Brownsword, Hans-Wolfgang Micklitz, Leone Niglia, Stephen Weatherill, 265–284. Oxford, Portland: Hart Publishing, 2011.

Salacuse, Jeswald W. "Corporate Governance, Culture and Convergence: Corporations American Style or with a European Touch." *Law and Business Review of the Americas* 9, no. 1 (2003): 33–62.

Sjåfjell, Beate, Christopher M. Bruner. *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*. Cambridge: Cambridge University Press, 2020.

Sjåfjell, Beate, Christopher M. Bruner. "Regulating for Corporate sustainability: Why the public–private divide misses the point." In *Understanding the company*, edited by Barnali Choudhury, Martin Petrin, 145–164. Cambridge: Cambridge University Press, 2017.

Sjåfjell, Beate, Christopher M. Bruner. "Sustainable Value Creation Within Planetary Boundaries–Reforming Corporate Purpose and Duties of the Corporate Board." *Sustainability* 12, no. 15 (2020): 6245.

Sjåfjell, Beate, Jukka Mähönen. "Corporate Purpose and the EU Corporate Sustainability Due Diligence Proposal." Accessed February 3, 2023. https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/02/corporate-purpose-and-eu-corporate-sustainability-due-diligence.

Stefanicki, Robert. "Interest of the Company – the Discussion on Axiological Choices." In *Review of European and Comparative Law* 51, no. 4 (2022): 25–37.

United Nations. "Transforming our world: the 2023 Agenda for Sustainable Development." Accessed February 3, 2023. https://sustainabledevelopment.un.org/post2015/transformingourworld/publication.

Weber, Anne-Marie, Zofia Mazur, Aleksandra Szczęsna. "Zrównoważony ład korporacyjny (sustainable corporate governance) kierunek ewolucji polskiego prawa spółek?." *Przegląd Prawa Handlowego* 6 (2022): 20–33.

Weber, Anne-Marie, Zofia Mazur. "Postulat zrównoważonego wzrostu gospodarczego jako wyzwanie dla polskiego prawa handlowego." In *Sto lat polskiego prawa handlowego. Księga jubileuszowa dedykowana Profesorowi Andrzejowi Kidybie,* edited by Małgorzata Dumkiewicz, Katarzyna Kopaczyńska-Pieczniak, Jerzy Szczotka. 218–229. Warszawa: Wolters Kluwer, 2020.

Wen, Shuangge. "The Magnitude of Shareholder Value as the Overriding Objective in the UK – The Post-Crisis Perspective." *Journal of International Banking Law and Regulation* 26, no. 7 (2011): 325–338.

von Bonin, Gregor. *Die Leitung der Aktiengesellschaft zwischen Shareholder Value und Stakeholder-Interessen*. Baden-Baden: Nomos, 2004.

Review of European and Comparative Law | 2023
Vol. 52, No. 1, 169–181
https://doi.org/10.31743/recl.13995
Received: 11 July 2022 | Accepted: 22 January 2023 | Published: 30 March 2023

Applicable Law Concerning Obligations Arising from the Infringements of Personal Data Laws Due to the Use of Artificial Intelligence Systems

Marek Świerczyński
Dr. habil., Associate Professor, Institute of Legal Studies, the Cardinal Stefan Wyszyński University in Warsaw; correspondence address: ul. Wóycickiego 1/3, 01-938 Warszawa, b. 17, Poland; e-mail: m.swierczynski@uksw.edu.pl
https://orcid.org/0000-0002-4079-0487

Zbigniew Więckowski
Dr., Assistant Professor, Institute of Legal Studies, the Cardinal Stefan Wyszyński University in Warsaw; correspondence address: ul. Wóycickiego 1/3, 01-938 Warszawa, b. 17, Poland; e-mail: z.wieckowski@uksw.edu.pl
https://orcid.org/0000-0001-7753-3743

Keywords:
AI, personal data, data protection law, conflict-of-laws

Abstract: An issue that is characteristic of AI is data processing on a massive scale (*giga data*, Big Data). This issue is also important because of the proposition to require manufacturers to equip AI systems with a means to record information about the operation of the technology, in particular the type and magnitude of the risk posed by the technology and any negative effects that logging may have on the rights of others. Data gathering must be carried out in accordance with the applicable laws, particularly data protection laws and trade secret protection laws. Therefore, it is necessary to determine the applicable law in line with existing conflict-of-law regulations.

1. Introductory remarks

The scope of application of the Rome II Regulation excludes 'non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation' (Article 1(2)(g)), so the issues of protection of privacy and infringements made using AI algorithms requires a separate

ISSN 2545-384X (Online)

discussion[1]. There are also no corresponding provisions in the GDPR. That regulation contains only fragmentary provisions concerning international civil procedure (Article 79 et seq.)[2]. This results in a significant gap in the EU data protection regime[3]. Due to the increasingly widespread use of algorithms, AI requires urgent legislative intervention. To determine the proper law (a statute ancillary to the GDPR), courts must apply national legislation applicable to private international law[4], which regulates privacy protection in different ways.

This issue is becoming increasingly practical as lawsuits for compensation or redress for a damage suffered are starting to be initiated. An example is the judgment of the Circuit Court in Warsaw of 6 August 2020, case file XXV C 2596/19. This was the first judgment in Poland that granted compensation for unlawful disclosure of personal data. It was also a precursor to further proceedings, which will necessarily also concern cases of automated processing of personal data[5]. Despite the complexity of the case, which involved not only the GDPR but also sector-specific regulations, the court correctly applied the personal data protection regulations and drew the right conclusions. The difficulty in properly adjudicating cases will be greater for cross-border disputes, due to the fact that the automated data processing

---

1 See further: Marek Świerczyński, "Prawo właściwe dla zobowiązań deliktowych wynikających z naruszenia zasad ochrony danych osobowych przyjętych w RODO," *Problemy Prawa Prywatnego Międzynarodowego* 27 (2019): 39–59.

2 Marek Świerczyński, "Jurysdykcja krajowa w świetle rozporządzenia ogólnego o ochronie danych osobowych," *Europejski Przegląd Sądowy* 12 (2016): 15–20.

3 Cf.: Andrzej Całus, "Znaczenie rozporządzenia Rzym II dla unifikacji prawa właściwego dla czynów niedozwolonych w państwach członkowskich Unii Europejskiej," in *Czyny niedozwolone w prawie polskim i w prawie*, ed. Mirosław Nesterowicz (Warsaw: Wolters Kluwer: 2012), 110–145.

4 Maja Brkan, "Data Protection and Conflict-of-Laws: A Challenging Relationship," *European Data Protection Law Review 2,* no. 3 (2016): 337.

5 Cf.: Guido Noto La Diega, "Against the Dehumanisation of Decision-Making: Algorithmic Decisions at the Crossroads of Intellectual Property, Data Protection and Freedom of Information," *Journal of Intellectual Property, Information Technology and E-Commerce Law* 9, no. 3 (2018): 11–16; Antoinette Royvroy, *Of Data and Men. Fundamental Rights and Freedoms in a World of Big Data. Report for the Bureau of the Consultative Committee of the Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data, Council of Europe,* TD-PD-BUR 2016, accessed February 7, 2023, https://rm.coe.int/16806a6020.

performed by AI algorithms is carried out by corporations domiciled in other countries[6].

We believe it is essential that the adjudicating body in each case – regardless of the member state where it operates – apply the same law to assess the data subject's claims concerning AI infringements related to data processing[7]. The conflict-of-law mechanism adopted that protects privacy should ensure a balance between the parties. Solutions that provide excessive protection to only one party should be avoided[8]. An example of a solution that is flawed in our opinion is adoption as proper law of the law of the state where the injured party's habitual residence is located. Despite its simple application, this solution raises concerns about its neutrality and reasonableness in the event of an infringement of the personal data protection regime.

2. In search of the proper legal basis

According to Article 16(1) of the Polish Act on private international law adopted in 2011, an individual's personal rights are governed by the law of his or her country. That law determines the catalogue of personal rights and accompanying subjective rights, as well as their emergence, content, scope, and cessation. On the other hand, the proper law for the protection of personal rights must be identified by applying the provisions of Article 16(2 and 3). Pursuant to Article 16(2), an individual whose personal rights are threatened by an infringement or has been infringed may demand protection under the law of the country in the territory of which the event causing the threatened infringement or infringement took place, or the law

6 E.g. in the context of profiling, see: Natalia Domagała, Bartłomiej Oręziak, Marek Świerczyński, "Profiling in the recruitment of subjects for clinical trials in the light of GDPR," *Zeszyty Prawnicze* 20, no. 2 (2020): 265–280; cf.: Dimitra Kamarinou, Christopher Millard, Jatinder Singh, "Machine Learning with Personal Data," Queen Mary School of Law Legal Studies Research Paper no. 247/2016: 1–23.

7 Cf.: judgments of the Court of Justice of the European Union of 30 November 1976 in case 21/76, Handelskwekerij G.J. Bier BV v. Mines de potasse d'Alsace SA; of 7 March 1995 in case C-68/93, Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA and of 25 November 2011 in joined cases C509/09 eDate Advertising GmbH v. X and C161/10 Olivier Martinez, Robert Martinez v. MGN Limited.

8 Ornella Feraci, «La legge applicabile alla tutela dei diritti della personalità nella prospettiva comunitaria,» *Rivista di diritto internazionale*, no. 4 (2009): 1020–1085.

of the country in the territory of which the consequences of the infringement occurred. Thus, proper law can be indicated according to one of two options[9]. If an infringement on the GDPR principles is classified as a violation of personal rights (privacy), the data subject may make this indication, which increases the risk of manipulation of the proper law.

However, it is not clear whether the above provisions will or should apply to infringements of the data protection regime established in the GDPR. Before applying the provisions in question, it is first necessary to make a conflict-of-law classification of GDPR infringements. It is well known that the GDPR is separate from regulations aimed to protect personal rights[10]. This is highlighted by the creation of separate grounds for claims by data subjects, both in the text of the GDPR and under the new Polish Act on personal data protection of 2018[11]. This leads to the question of whether the conflict-of-law rules set forth in the Rome II Regulation should be applied to determine the applicable law[12].

---

9 Cf.: Justyna Balcarczyk, ''Wybrane problemy związane z projektem ustawy – Prawo prywatne międzynarodowe," *Rejent*, no. 7–8 (2009): 140.

10 Cf.: Joanna Braciak, *Prawo do prywatności* (Warsaw: Wydawnictwo Sejmowe, 2004), 92.

11 Journal of Laws of 2018, item 1000, consolidated text: Journal of Laws of 2019, item 1781.

12 The Rome II Regulation is the subject of many publications. A majority of them express critical opinions about the exclusion of torts related to privacy from the scope of the Regulation. In particular, see: Andrew Dickinson, *The Rome II Regulation* (Oxford: Oxford University Press, 2010), 1–1076; Richard Plender, Michael Wilderspin, *European Private International Law of Obligation* (London: Sweet & Maxwell, 2020), 1–854; John Ahern, William Binehy, *Rome II Regulation on Law Applicable to Non-Contractual Obligations* (Leiden: Brill, 2009), 1–477; James Fawcett, Janeen Carruthets, Peter North, *Private International Law* (Oxford: Oxford University Press, 2017), Part IV:20; Gralf-Peter Calliess, ed., *Rome Regulations: Commentary on the European Rules of the Conflict of law. Part Two*, [b.m.] (2011), 358–654; *Rome II Regulation*, ed. Peter Huber, (Munich, 2011); Adam Rushworth, Andrew Scott, "Rome II: Choice of law for non-contractual obligations," *LMCLQ* (2008): 274–306; Trevor Hartley, "Choice of Law for Non-Contractual Liability: Selected Problems under the Rome II Regulation", *ICLQ* 57, (2008): 899–908; Carine Briere, "Le reglement (CE) no 864/2007 du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles (Rome II)," *Journal de droit international* 135 (2008): 31; Stefan Leible, Matthias Lechmann, "Die neue EG-Verordnung über aufervertragliche Schuldverhältnisse anzuwendende Recht (Rom II)", *Recht der Internationalen Wirtschaft* 53, (2007): 721; Thomas Graziano, Das auf aufservertragliche Schuldverhältnisse anzuwendende Recht nacht Inkraftreten der Rom II – Verordnung, *RabelsZ* 73, (2009): 1–177; Tim Dornis, "When in Rome, do as the Romans do? – a defense of the lex domicilii communis: in the Rome II Regulation," *European Legal*

This solution has significant advantages, which arise from the modern, balanced, and flexible rules of the determination of the proper law adopted in the Rome II Regulation. A key argument is the possibility of convergent interpretation of the criteria adopted for the application of the GDPR (Article 3) and the general connecting factors of the conflict-of-law norms of the Rome II Regulations, which is crucial in the case of AI infringements.

3. The provisions of the GDPR

It must be emphasised that the GDPR does not lead to the exclusion of the application of the existing provisions of private international law (conflict-of-law rules). The fact that the EU legislator tried to define the scope of application of the GDPR as precisely as possible (in some places even casuistically) does not mean that this regulation constitutes a complete legal system. It is not a complete (exhaustive) regulation or a substitute for national legal systems in terms of civil-law consequences of infringements of personal data protection principles. A supporting statute (domestic law) is required to resolve specific issues. An example is the rules for granting compensation (redress) to a person whose rights and freedoms have been violated due to an unauthorised processing of his or her personal data. However, applying the conflict-of-law rules in isolation from the applicability criteria adopted in the GDPR undermines the international effectiveness and protective nature of this regulation. Failure to adequately clarify the relationship of these provisions leads to differences in case law. For example, courts of one country may apply their domestic law, justifying it by the provisions of the GDPR, while courts of another country apply their own domestic law, justifying it by the provisions of private international law.

There should be no doubt that the basis for determining the proper law is not the provisions of Article 82(6) of the GDPR. The article indicates that court proceedings concerning compensation shall be brought before the court having jurisdiction under the domestic law of the member

Forum 4 (2007): 152–159; Symeon Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity," *AJCL* 56, no. 1 (2008): 173–222; Phaedon Kozyris, "Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' Missed Opportunity," *AJCL* 56 (2008): 471–497; Janeen Carruthers, Elizabeth Crawford, "Variations on a theme of Rome II. Reflections on proposed choice of law rules for non-contractual obligations: Part I," *Edinbourgh Law Review* 9 (2005): 65–97; Part II, *Edinbourgh Law Review* 9 (2005): 238–266.

state referred to in Article 79(2) of the GDPR. Despite its ambiguous wording, this provision does not constitute a conflict-of-law rule that determines the proper law for compensation for unlawful processing of personal data, but instead it merely extends the jurisdictional rules set forth in Article 79(2) (concerning legal remedies) to include actions for compensation.

The provisions of the GDPR with respect to civil-law aspects of privacy protection are rudimentary (an example is Article 82 of the GDPR, which provides a direct basis for pursuing tort claims[13]). When assessing a case from the standpoint of Polish conflict-of-law rules, it must be noted that the provisions of the GDPR are predominantly public-law provisions. Their primary purpose is to impose certain public-law obligations on the data controller and the entity processing data on its behalf (data processor). In order to effectively achieve this objective, the EU legislator sought to clearly define the scope of application of the GDPR[14]. Most personal data of individuals residing in the EU is processed outside of the EU, but the laws of third countries do not provide protection that is in line with the GDPR[15].

Article 3 of the GDPR shows that three main connecting factors (criteria) are used to determine the scope of application of the GDPR: 1) existence of an organisational unit within the EU; 2) offering goods and services within the EU to persons residing within the EU; and 3) monitoring their behaviour. These criteria also serve to determine the scope of application of national laws that supplement the GDPR[16], including the Polish Act on personal data protection of 10 May 2018. Correct interpretation of the above criteria is facilitated by the existing case law of the CJEU on the protection of data subject.[17]

---

13 More information can be found in: Paweł Litwiński, commentar

14 Paul Voigt, Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR). A Practical Guide* (Cham: Springer, 2017), 22.

15 Gérard Haas, *La réglamentation sur la protection des données personnelles* (St Herblain: Éditions ENI, 2018), 20.

16 More information can be found in: Heinrich Wolff, Stefan Brink, ed., *Beck'scher Online-Kommentar Datenschutzrecht*, (Munich: C.H. Beck, 2017), Rn. 1-–46.

17 Michał Czerniawski, "Zakres terytorialny a pojęcie 'jednostki organizacyjnej' w przepisach ogólnego rozporządzenia o ochronie danych – zarys problemu," in *Ogólne rozporządzenie o ochronie danych. Aktualne problemy prawnej ochrony danych osobowych*, ed. Grzegorz Sibiga (Warsaw 2016), 22–23.

It is not without reason that the first criterion listed in the GDPR is the flexible[18] criterion of the location of an organisational unit of the personal data processor[19]. It should be understood more broadly than the existing domicile criterion[20]. In fact, the GDPR refers with this new (in the Polish language version) concept to a flexible interpretation of domicile in private international law. Its interpretation, however, is very problematic[21]. The use of the term 'organisational unit' itself is questionable. The GDPR does not provide its definition. Recital 22 of the preamble merely indicates that the processing of personal data in the context of activities carried out by an organisational unit of a data controller or processor in the EU should be carried out in accordance with the GDPR, regardless of whether the processing itself takes place in the EU. Additionally, it is stated that the term 'organisational unit' implies an effective and actual conduct of business through stable structures. The legal form of such structures, whether a branch or an incorporated subsidiary, is not a determining factor in this regard[22].

Even if a data processor does not have an organisational unit in the EU, it will have to apply the provisions of the GDPR as long as it offers goods and services in the EU to persons located in the EU[23]. This issue is addressed by the second criterion provided in Article 3 of the GDPR.

---

18 Voigt, von dem Bussche, *The EU General Data Protection Regulation (GDPR). A Practical Guide*, 22.

19 As emphasised from the beginning at the stage of drafting of the regulation; see: Paul de Hert, Vagelis Papakonstantinou, "The proposed data protection Regulation replacing Directive 95/46/EC: A sound system for the protection of individuals," *Computer Law & Security Review* 28, no. 2 (April 2012): 130–142.

20 Dan Svantesson, "Article 4(1)(A) 'Establishment of the Controller,' in EU Data Privacy Law – Time to Rein in this Expanding Concept?," *International Data Privacy Law* 6, no. 3, (2016): 210.

21 Paul De Hert, Michał Czerniawski, "Expanding the European data protection scope beyond territory: Article 3 of the General Data Protection Regulation in its wider context," *International Data Protection Law* 6, no. 3 (2016): 230.

22 Cf.: Voigt, von dem Bussche, *The EU General Data Protection Regulation (GDPR). A Practical Guide*, 23.

23 Cf.: William Long, Géraldine Scali, Francesca Blythe, Alan Raul, "European Union overview", in *Data Protection and Cybersecurity Law Review*, ed. Alan Raul(London: The LawReviews, 2015), 12.

According to Article 3(2)(a) of the GDPR and recital 23 of its preamble, in order for natural persons not to be deprived of the protection afforded to them under that Regulation, the processing of the personal data of data subjects located in the EU by a data controller or processor who does not have an organisational unit in the EU should be subject to the GDPR if the processing activities are connected with offering of goods or services to such persons, whether or not this entails payment.

In order to determine whether a data controller or processor offers goods or services to data subjects located in the EU, it is necessary to establish whether it is clear that the data controller or processor plans to offer services to data subjects in at least one member state of the EU[24]. The availability in the EU of the controller's, processor's, or intermediary's website, email address, or other contact details, or the use of a language commonly spoken in a third country in which the controller's organisational unit is located, is not sufficient to establish such intent[25]. However, factors such as the use of a language or currency commonly used in at least one EU member state and the ability to order goods and services in that language, or a mention of customers or users located in the EU are relevant[26].

The processing of personal data of persons located in the EU by a data controller or processor who does not have an organisational unit in the European Union is subject to the GDPR also in cases where it involves monitoring of the behaviour of such persons, as long as that behaviour takes place within the EU. This is the third criterion specified in Article 3 of the GDPR. To establish whether processing can be considered as 'monitoring of the behaviour' of persons, it must be determined whether the activities of natural persons are observed in any way (e.g. Internet activity tracked through cookies or information provided by search engines, physical movements tracked through data provided by cell phones, etc.)[27]. It should be emphasised that the above criterion will be met regard-

24 Frédéric Lecomte, *Nouvelle donne pour les données; le RGPD en quelques principes pour être prêt le 25 mai 2018* (Paris: Fauves, 2018), 24–25.

25 Haas, *La réglementation sur la protection des données personnelles*, 18–20.

26 Cf.: Voigt, von dem Bussche, *The EU General Data Protection Regulation (GDPR). A Practical Guide,* 26.

27 Cf.: Dan Svantesson, *Extraterritoriality in Data Privacy Law* (Copenhagen: Ex Tuto Publishing, 2013), 226; Prudence Cadio, Thomas Livenais, "Photographie du champ territorial

less of whether data processing techniques involving profiling of natural persons are later applied to the data so collected, in particular to make a decision concerning the person or to analyse or predict the person's personal preferences, behaviour, and attitudes[28].

Due to interpretive difficulties, in late 2019 the European Data Protection Board (EDPB) published guidance on the territorial scope of application of the GDPR[29]. These guidelines take into account the specific characteristics of AI only to a small extent.

As can be seen, as technology advances, the interpretation of the criteria for determination to which international situations the GDPR applies is broadening, which indeed must affect the process of determination of the proper law in case of a breach of the protective regime established in the GDPR. What we have in mind is not only the location of the infringer itself (establishing its domicile or its organisation unit), but also the 'location' of its activity resulting in a breach of the GDPR and giving rise to tort liability on the part of the infringer. There is a need for uniform use of the aforementioned guidance, for the purpose of determination of both the scope of application of the GDPR and the civil-law consequences of an infringement of the data protection principles adopted therein. The above circumstances further justify recourse to the codified conflict-of-law rules set forth in the Rome II Regulation and adoption of an interpretation of the connecting factors used therein in the spirit of the criteria adopted in Article 3 of the GDPR.

4. Summary and conclusions

The future model of liability for AI damages should cover also infringements relating to data privacy protection. The inclusion of this issue in the future convention of the Council of Europe on Artificial Intelligence is a natural consequence of the application of the modernised Convention 108+ and the Council of Europe's Guidelines on Artificial Intelligence and

---

du reglement données personnelles: de nouveaux opérateurs concernées?," in *Le RGDP*, ed. Stéphanie Prévost and Erwan Royer (Paris: Dalloz, 2018), 33–35.

28 Voigt, von dem Bussche, *The EU General Data Protection*, 27.

29 Accessible: accessed May 8, 2022, https://edpb.europa.eu/our-work-tools/general-guidance/gdpr-guidelines-recommendations-best-practices_en.

Data Protection. However, this will not exclude the necessity to determine the applicable law in line with current conflict-of-law rules.

The lack of consistency in the liability model among different states could be further augmented due to the lack of inclusion of the applicable conflict-of-law regulations to the existing legal framework and their relevance to the determination of the principles of liability for damages caused by AI systems. In the European Parliament submitted draft on the principles of civil liability for damages caused by AI systems[30], one can notice that there is no reference to the Rome II Regulation concerning the applicable law to non-contractual obligations. The same concerns Proposal for a Directive on adapting non contractual civil liability rules to artificial intelligence 2022/0303(COD). This constitutes a significant gap. Both documents follows outdated view on conflict-of-law solutions instead of the modern and differentiated ones adopted in the Rome II Regulation. In further stages of the work on draft Directive, the indicated shortcomings should be eliminated.

References

Ahern, John, and Wiliam Binehy. *Rome II Regulation on Law Applicable to Non-Contractual Obligations*. Leiden: Brill, 2009.

Balcarczyk, Justyna. "Wybrane problemy związane z projektem ustawy – Prawo prywatne międzynarodowe." *Rejent*, no. 7–8 (2009): 9–25.

Braciak, Joanna. *Prawo do prywatności*. Warsaw: Wydawnictwo Sejmowe, 2004.

Briere, Carine. "Le reglement (CE) no 864/2007 du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles (Rome II)." *Journal de droit international* 135 (2008): 31–74.

Brkan, Maja. "Data Protection and Conflict-of-Laws: A Challenging Relationship. *European Data Protection Law Review* 2, no. 3 (2016): 324–341. https://doi.org/10.21552/EDPL/2016/3/8.

Cadio, Prudence, and Thomas Livenais. "Photographie du champ territorial du reglement données personnelles: de nouveaux opérateurs con-

[30] *Civil liability regime for artificial intelligence*, resolution of the European Parliament, 20.10.2020, accessed Feburary 7, 2023, https://www.europarl.europa.eu/doceo/document/TA-9–2020–0276_EN.html

cernées?." In *Le RGDP*, edited by Stéphanie Prévost, Erwan Royer, 31–36. Paris: Dalloz, 2018.

Całus, Andrzej. "Znaczenie rozporządzenia Rzym II dla unifikacji prawa właściwego dla czynów niedozwolonych w państwach członkowskich Unii Europejskiej." In *Czyny niedozwolone w prawie polskim i w prawie porównawczym* edited by Mirosław Nesterowicz, 146–110. Warsaw: Wolters Kluwer, 2012.

Carruthers, Janeen, and Elizabeth Crawford. "Variations on a theme of Rome II. Reflections on proposed choice of law rules for non-contractual obligations: Part I." *Edinbourgh Law Review* 9 (2005): 65–97; Part II, *Edinbourgh Law Review* 9 (2005): 238–266.

Czerniawski, Michał. "Zakres terytorialny a pojęcie 'jednostki organizacyjnej' w przepisach ogólnego rozporządzenia o ochronie danych – zarys problemu." In *Ogólne rozporządzenie o ochronie danych. Aktualne problemy prawnej ochrony danych osobowych,* edited by Grzegorz Sibiga, 22–28. Warsaw: C.H. Beck, 2016.

de Hert, Paul, and Michał Czerniawski. "Expanding the European data protection scope beyond territory: Article 3 of the General Data Protection Regulation in its wider context." *International Data Protection Law* 6, no. 3 (2016): 230–243. https://doi.org/10.1093/idpl/ipw008.

de Hert, Paul, and Papakonstantinou, Vagelis. "The proposed data protection Regulation replacing Directive 95/46/EC: A sound system for the protection of individuals." *Computer Law & Security Review* 28, no. 2 (April 2012): 130–142. https://doi.org/10.1016/j.clsr.2012.01.011.

Dickinson, Andrew. *The Rome II Regulation*. Oxford: Oxford University Press, 2010.

Domagała, Natalia, Bartłomiej Oręziak and Marek Świerczyński, "Profiling in the recruitment of subjects for clinical trials in the light of GDPR." *Zeszyty Prawnicze* 20, no. 2 (2020): 265–280. https://doi.org/10.21697/zp.2020.20.2.14.

Dornis, Tim. "When in Rome, do as the Romans do? – a defense of the lex domicilii communis: in the Rome II Regulation." *European Legal Forum* 4 (2007): 152–159.

Fawcett, James, and Janeen Carruthets, and Peter North. *Private International Law*. Oxford: Oxford University Press, 2017.

Feraci, Ornella. "La legge applicabile alla tutela dei diritti della personalità nella prospettiva comunitaria." *Rivista di diritto internazionale*, no. 4 (2009): 1020–1085.

Gömann, Merlin. "The new territorial scope of EU data protection law: deconstructing a revolutionary achievement." *Common Market Law Review* 54, no. 2 (2017): 567–690. https://doi.org/10.54648/cola2017035.

Graziano, Thomas. "Das auf aufservertragliche Schuldverhältnisse anzuwendende Recht nacht Inkraftreten der Rom II – Verordnung." *RabelsZ* 73 (2009): 1–177.

Haas, Gérard. *La réglamentation sur la protection des données personnelles*. St Herblain: Éditions ENI, 2018.

Hartley, Trevor. "Choice of Law for Non-Contractual Liability: Selected Problems under the Rome II Regulation." *ICLQ* 57 (2008): 899–908.

Kamarinou, Dimitra, and Christopher Millard, Jatinder Singh. "Machine Learning with Personal Data." *Queen Mary School of Law Legal Studies Research Paper*, no. 247(2016): 1–23.

Kozyris, Phaedon. "Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' Missed Opportunity." *AJCL* 56 (2008): 471–497.

Lecomte, Frédéric. *Nouvelle donne pour les données; le RGPD en quelques principes pour être prêt le 25 mai 2018*. Paris: Fauves, 2018.

Leible, Stefan, and Matthias Lechmann. "Die neue EG-Verordnung über aufervertragliche Schuldverhältnisse anzuwendende Recht (Rom II)." *Recht der Internationalen Wirtschaft* 53 (2007): 721–734.

Litwiński, Paweł, and Maciej Kawecki. *Rozporządzenie UE w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i swobodnym przepływem takich danych. Komentarz*. Warsaw: Wolters Kluwer, 2017.

Long, William, and Géraldine Scali, Francesca Blythe, Alan Raul. "European Union overview." In *Data Protection and Cybersecurity Law Review*, edited by Alan Raul Raul, 25–26. London: The Law Reviews, 2015.

Noto La Diega, Guido. "Against the Dehumanisation of Decision-Making: Algorithmic Decisions at the Crossroads of Intellectual Property, Data Protection and Freedom of Information." *Journal of Intellectual Property, Information Technology and E-Commerce Law* 9, no. 1 (2018): 3–34.

Plender, Richard, and Michael Wilderspin. *European Private International Law of Obligation*. London: Sweet and Maxwell, 2020.

Royvroy, Antoinette. "Of Data and Men. Fundamental Rights and Freedoms in a World of Big Data. Report for the Bureau of the Consultative Committee of the Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data." Council of Europe, TD-PD-BUR 2016. Accessed February 7, 2023. https://rm.coe.int/16806a6020.

Rushworth, Adam, and Andrew Scott. "Rome II: Choice of law for non-contractual obligations." *LMCLQ* (2008): 274–306.

Svantesson, Dan. "Article 4(1)(A) 'Establishment of the Controller' in EU Data Privacy Law – Time to Rein in this Expanding Concept?." *International Data Privacy Law* 6, no. 3, (2016): 210–221. https://doi.org/10.1093/idpl/ipw013.

Symeonides, Symeon. "Rome II and Tort Conflicts: A Missed Opportunity." *AJCL* 56, no. 1 (2008): 173–222.

Świerczyński, Marek. "Jurysdykcja krajowa w świetle rozporządzenia ogólnego o ochronie danych osobowych." *Europejski Przegląd Sądowy* 12 (2016): 21–28.

Świerczyński, Marek. "Prawo właściwe dla zobowiązań deliktowych wynikających z naruszenia zasad ochrony danych osobowych przyjętych w RODO." *Problemy Prawa Prywatnego Międzynarodowego* 27 (2019): 39–59. https://doi.org/10.31261/PPPM.2020.27.02.

Voigt, Paul, and Axel von dem Bussche. *The EU General Data Protection Regulation (GDPR). A Practical Guide* Cham: Springer, 2017.

Wolff, Heinrich, and Stefan Brink, ed. *Beck'scher Online-Kommentar Datenschutzrecht*, Munich: C.H. Beck, 2017, Rn. 1–46.

Review of European and Comparative Law | 2023
Vol. 52, No. 1, 183–200
https://doi.org/10.31743/recl.14942
Received: 27 December 2022 | Accepted: 23 Janurary 2023 | Published: 30 March 2023

Transformation of Migration Terminology: From 'Illegal Migrant' to 'Irregular Migrant' (English-Ukrainian Aspect)

Serhii Matvieiev
Dr., Associate Professor, Department of General Theoretical Legal and Social-and-Humanitarian Disciplines, Kyiv University of Law, correspondence address: Akademika Dobrokhotova st., 7A, 03142 Kyiv, Ukraine; e-mail: semat34@gmail.com
https://orcid.org/0000-0002-0037-004X

Svitlana Matvieieva
Dr. hab., Professor, Academic Centre of Social Sciences, Arts and Humanities, Kaunas University of Technology, correspondence address: Mickevičiaus g. 37, LT-44244 Kaunas, Lithuania; e-mail: svitlana.matvieieva@ktu.lt
https://orcid.org/0000-0002-8357-9366

Keywords:
illegal migrant, irregular migrant, undocumented migrant, terminology, translation

Abstract: This article deals with the study of the semantic transformation of terminological units for migration law. The question of standardization of national terminology, as well as inter- and intra-linguistic harmonization and unification of migration units is raised and substantiated. It is noted that changes in English terminology cause difficulties in national terminology due to, on the one hand, the need to find the most accurate and correct equivalent of the unit of the source language, and on the other – differences in the semantic volume of units of different languages. The article considers English terms for migrants: *illegal migrant, irregular migrant, undocumented migrant*. Analysis of international normative and advisory documents, as well as data from lexicographic sources of English and Ukrainian languages allow the authors to provide recommendations for the use of the Ukrainian equivalent to these terms – *мігрант із неврегульованим статусом*. At the same time, the authors note that the current Ukrainian legal documents operate on the term *нелегальний мігрант*, despite the long-standing recommendations of the Council of Europe and the UN to replace the term *illegal migrant* in national legislation with *irregular migrant* or *undocumented migrant*.

ISSN 2545-384X (Online)

1. Introduction

Modern discourse science is characterized by going beyond the limits of the text to the level of analysis of the systemic interaction of cognition / thinking and language / speech through understanding of the cognitive mechanisms of meaning formation and the correlation between the conceptual and linguistic levels. Currently, there is every reason to talk about the cognitive essence of terms in general (P. Faber & M. Cabezas-García[1]) and legal terms in particular (M. Bajčić[2], L. Kucheruk[3]), which are used to objectify fragments of the legal worldview (B. Brożek & W. Kluwer[4]) through specific conceptual structures of terminological nature – cognitive terminological structures as "units of professional consciousness, in which fragments of the professional worldview are concentrated and which are verbalised through the terms"[5].

Recently, along with the established terms, the legal terminological system has been actively replenished with new units that acquire a terminological character under the influence of extralinguistic factors, and is also experiencing a period of active modification of cognitive structures and, accordingly, the terms of this sphere, which reflects social changes.

Such terminological units include the lexemes *migrant* (English) / *мігрант* (Ukrainian), the semantics of which was formed and transformed under the influence of socio-historical and ethno-cultural factors and which were integrated into the legal terminology systems of the English and Ukrainian languages. Preliminary observations of the origin of this structure made it possible to identify a common Proto-Indo-European basis (*migrare* – in the sense of 'to remove, depart, to move from one place

---

1 Pamela Faber, Melania Cabezas-García, "Specialized Knowledge Representation: from Terms to Frames," *Research in Language*, 2 (2019): 197–211.

2 Martina Bajčić, *New Insights into the Semantics of Legal Concepts and the Legal Dictionary* (Amsterdam: John Benjamins Publishing Company, 2017), 7–59.

3 Liliya Kucheruk, *Modern English Legal Terminology: linguistic and cognitive aspects* (PhD diss., Bordeaux: Université Michel de Montaigne-Bordeaux III, 2013), 84–87.

4 Bartosz Brozek, *Rationality and Discourse: Towards a Normative Model of Applying Law* (Warsaw, Wolters Kluwer Polska, 2007), 13–18.

5 Світлана Матвєєва, "*Лінгвістична реконструкція когнітивної терміноструктури REFUGEE / БІЖЕНЕЦЬ в англо-українському корпусі юридичних текстів*" (Дис. д. філол. наук, Київ: Національний педагогічний університет імені М. П. Драгоманова, 2020), 8.

to another'), which gives grounds to talk about the presence of a common mental background and purposeful cognitive motivation for the formation of their conceptual base.

2. Objective and methodology

The study of the concept with an emphasis on the specifics of the development of its linguistic implementations and the peculiarities of the current discursive situation allows us to understand the ways of verbalizing mental images through linguistic representations, systematizing linguistic ways of representing concepts and reconstructing fragments of professional language worldview. That is, the study of the language form opens up opportunities for understanding the internal structure of the concept.

The purpose of the paper is to analyse and compare the semantic scope of terminological units for migrants (in English and Ukrainian), as well as to provide practical recommendations for determining the correct Ukrainian equivalents for English terms *illegal immigrant*, *irregular migrant*, *undocumented migrant*.

The methodological framework of the study is based on a comparative approach to the analysis of terminological structures, which led to the involvement of general scientific (induction and deduction; analysis and synthesis; analytical search) and special linguistic (structural (with component and definitive analysis); comparative-typological) research methods and techniques.

3. Results

Migration is a complex social process, which, on the one hand, often critically affects the coexistence of people and states, national and international policies[6], and, on the other hand, undergoes significant changes due to new conflicting circumstances and factors highlighting the key points between language, language policy and mobility[7]. The continuous process of formation of the terminological layer of migration law metalanguage, the constant transformation of the semantics of terminological units due to the changing

6 Tony Capstick, *Language and Migration* (London: Routledge, 2020), 1–34.

7 Christopher Alexander Houtkamp, *Language and motility of migrant communities in Europe* (PhD diss., Amsterdam: Amsterdam School for Regional, Transnational and European Studies, 2020), 14–19.

nature of migration processes, the incomplete standardization of national terminology and the need for interlingual harmonization of this terminology system – these and other factors necessitate a rethinking and reinterpretation of selected language units and complete multifaceted approaches to the nomination of certain phenomena.

Today, there is a process of partial modification or complete replacement of terms that call phenomena and things of objective reality causing contradictory, ambiguous ethical attitudes, with alternative ones. Among such language units are words and constructions to denote migration processes and their participants.

Migrant is "a person who travels to another place or country, usually in order to find work"[8]. The lexeme *migrant* in its modern spelling has been found since 1672[9]. *Online Etymology Dictionary* provides information that the first use of the noun *migrant* meaning 'person who migrates' was recorded in 1760. It is noted that the noun is formed from the adjective *migrant* – "changing place, migratory", which comes "from Latin *migrantem* (nominative *migrans*), present participle of *migrare* 'to remove, depart, to move from one place to another'[10].

The genesis of each term is closely related to its distribution and collocations, in which this term is combined with other linguistic units. Thus, the term *migrant* comes into contact with adjectives characterizing the type of persons that this unit names from a legal point of view.

The issue of naming migrants in English-language law was first raised at the United Nations General Assembly in 1975: "The General Assembly … requests the United Nations organs and the specialized agencies concerned to utilize in all official documents the term '*non-documented* or *irregular migrant workers*' to define those workers who illegally and / or surreptitiously enter another country to obtain work"[11]. Later the resolution of the Parliamentary Assembly of the Council of Europe "Human rights of irregular migrants", promulgated in 2006, stated "the Assembly prefers to use the term '*irregular migrant*' to other terms such as '*illegal migrant*'

8 "Cambridge Dictionary," accessed November 10, 2022, https://dictionary.cambridge.org.
9 "Merriam-Webster," accessed November 10, 2022, https://www.merriam-webster.com.
10 "Online Etymology Dictionary," accessed November 12, 2022, https://www.etymonline.com.
11 A/RES/3449(XXX), 9 December 1975.

or '*migrant without papers*'. This term is more neutral and does not carry, for example, the stigmatisation of the term '*illegal*'. It is also the term increasingly favoured by international organisations working on migration issues"[12]. In 2009, the European Parliament called "on the EU institutions and Member States to stop using the term '*illegal immigrants*', which has very negative connotations, and instead to refer to '*irregular / undocumented workers / migrants*'"[13]. The same position was supported by the United Nations High Commissioner for Human Rights, who stated that the term "'*illegal immigrants*' should be avoided and replaced by the internationally accepted definitions of '*irregular*' or '*undocumented*' migrants, which more accurately describe the situation"[14].

Today, the official website of the Council of Europe raises the issue of applying certain nominations to determine migrants and their status, in view of the problem of human rights protection: "Never call migrants in an irregular situation '*illegal migrants*' as this would be inaccurate and harmful"[15]. Initiatives are emerging that address today's global challenges, gaining international support. For example, PICUM, the Platform for International Cooperation on Undocumented Migrants is a network of organizations working to ensure social justice and human rights for migrants who do not have the necessary documents. One of the projects of the Platform is the "Words Matter!" campaign[16], which works to raise awareness of the impact of discriminatory vocabulary, offers accurate, humane terminology and provides sound recommendations for avoiding the use of the term *illegal migrant*.

As a rule, situations with the replacement of special terminology in one language have some difficulties in translating and adapting new

12 Parliamentary Assembly, Resolution 1509 (2006), Human rights of irregular migrants, Assembly debate on 27 June 2006 (18th Sitting).

13 A6–0479/2008, 14 January 2009, § 158.

14 Pillay Navi, UN High Commissioner for Human Rights. 12th session of the Human Rights Council, 22 September 2009.

15 Nils Muižnieks, "Without papers but not without rights: the basic social rights of irregular migrants," *Council of Europe*, accessed October 30, 2022, https://www.coe.int/en/web/commissioner/-/without-papers-but-not-without-rights-the-basic-social-rights-of-irregular-migrants.

16 "Why Words Matter," Platform for International Cooperation on Undocumented Migrants, accessed October 30, 2022, https://picum.org/words-matter.

nominations in other languages. And while glossaries and recommendations for the translation of new terms are being developed for the languages of the European Union member states, the rest of the countries (including Ukraine) are trying to solve the problem of terminological harmonization on their own, which in this country, unfortunately, is almost unsystematic.

Thus, the named factors make it necessary to address the issue of the functioning of terms for migrants and refugees in the Ukrainian language. We propose to consider this problem from two positions: taking into account the data enshrined in general and special dictionaries (monolingual and multilingual), as well as considering the use of terminological nominations in the texts of legislative documents.

Cambridge Dictionary provides the following definition of the construction *illegal immigrant*: "someone who lives or works in another country when they do not have the legal right to do this"[17]. It is further noted that "this term is considered offensive by most people. Use *undocumented immigrant* or *undocumented person* instead"[18]. But it seems that more objective factors speak against the use of this adjective. We support the statement by M. Paspalanova that "only an act can be illegal whereas a person cannot be '*illegal*' or '*criminal*'. It is the act that falls under the provisions of the penal (in the case of criminal offences) or administrative (in the case of non-criminal offences) code of a country and it is respectively punished, rather than the person per se"[19].

Speaking about *irregular* and *undocumented*, we find only the definition of these adjectives, but there are no constructions to denote *migrants* with these units in the dictionary:

irregular – "(of behaviour or actions) not according to usual rules or what is expected"[20];

undocumented – "not supported by written proof; not having any documents to prove that you are living or working in a country legally"[21].

17 "Cambridge Dictionary."

18 "Cambridge Dictionary."

19 Mila Paspalanova, "Undocumented vs. Illegal Migrant: toward terminological coherence," *Migraciones Internacionales*, vol. 4, núm. 3 (2008): 82.

20 "Cambridge Dictionary."

21 "Cambridge Dictionary."

Another picture is observed in the dictionary *Glossary on Migration*, which does not contain a definition of *illegal migrant*, but only refers to the dictionary entries *migrant in an irregular situation* ("a person who moves or has moved across an international border and is not authorized to enter or to stay in a State pursuant to the law of that State and to international agreements to which that State is a party")[22] and *undocumented migrant* ("a non-national who enters or stays in a country without the appropriate documentation")[23].

One of the aspects that contribute to understanding of the deep essence of the phenomenon and its place in society's communication is an indicator of the dynamics of its naming, which can be traced by a quantitative assessment of the frequency of use of verbalizers of this concept in various styles. Such data is provided, for example, by the *Google Trends*[24] search and analytical tool, which gives access to mostly unfiltered samples of actual Google searches. These data are categorized (by indicating the topic of the search query) and summarized (united in a group), which allows us to highlight interest in a certain topic according to certain criteria: we can choose a region, a time period, a category. Quantitative indicators demonstrate the popularity of a search term relative to the highest point on the graph: 100 is the peak of the term's popularity; 50 means that the popularity of the term is half as much; 0 means there was not enough data for that term. For our research, the function of comparing different search queries under the same conditions (region, time, language, scope) is of particular interest.

To analyse the frequency of queries with the search terms *illegal migrant*, *irregular migrant* and *undocumented migrant*, the following criteria and observation characteristics were chosen (see Fig. 1):

1) region – worldwide. This is an irrelevant criterion, since this study does not involve a comparison of the regional specificity of the verbalization of the studied concept in English;
2) time period – since 2014 up to date. The time period was chosen taking into account the activation of social events in Ukraine that the term refers to (directly and indirectly) and on which the current functioning

22 A.C. Bauloz Sironi and M. Emmanuel, eds., *Glossary on Migration* (Geneva: IOM, 2019): 133.
23 Bauloz and Emmanuel, *Glossary on Migration*, 223.
24 "Google Trends," Google, accessed December 01, 2022, https://www.google.com/trends.

depends, as well as the set and trends of transformation in the characteristics of the verbalizers of the concept *migrant / мігрант*;

3) the language of search requests is English as the language of international communication and as the official language of organizations that conclude and ratify normative documents regulating migration law and issues related to it at the international level;
4) category – Law & Government. The chosen field of application suggests that these queries were mostly made by professional users from the field of law and government, and therefore, with a high degree of probability, these units are terms serving the specified fields.

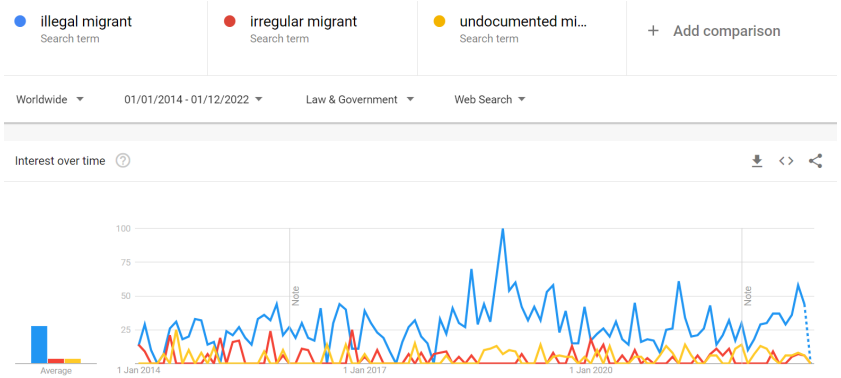


Fig. 1. Search popularity for *illegal migrant* (blue), *irregular migrant* (red) and *undocumented migrant* (yellow); timeframe – 01.01.2014–01.12.2022; region – worldwide; query language – English; category – Law & Government[25].

The obtained data demonstrate differences in the frequency of requests of the studied units in favour of the term *illegal migrant*, which is not recommended at the official level. At the same time, we observe similarities in the use of the terms *irregular migrant* and *undocumented migrant* – low rate (max 19 of 100 for *irregular migrant*; max 13 of 100 for *undocumented migrant*) compared to *illegal migrant* (100 of 100 at the peak), which indicates the predominant use by speakers of the term, which was formed

[25] Google, "Google Trends."

and acquired active functioning in speech naturally, and the insufficient assimilation of the recommended terms *irregular migrant* and *undocumented migrant* by English-speaking users.

Regarding the data contained in the sources of the Ukrainian language, first of all, we note that the appeal to the "National Bank of standardized scientific and technical terms"[26] did not bring any positive result (search query for the root *-міґр-* showed Ø results). We consider it possible to base our study on the analysis of the lexical meaning and available equivalents in both non-specialized and terminological dictionaries.

Referring to the available machine translation systems demonstrates the results shown in Table 1.

Table 1. Comparative translation (from English into Ukrainian) of legal terms *illegal migrant*, *irregular migrant*, and *undocumented migrant* using machine translation systems

	Google Translate[27]	DeepL[28]	Reverso Translation[29]	Microsoft Bing[30]	M-translate[31]
illegal migrant	нелегальний мігрант; незаконний мігрант	нелегальний мігрант; незаконний мігрант; нелегал	незаконний мігрант	нелегальний мігрант	нелегальний мігрант
irregular migrant	нелегальний мігрант; незаконний мігрант	нелегальний мігрант; неврегульований мігрант; незаконний мігрант	нерегулярний мігрант	нерегулярні мігранти	нелегальний мігрант
undocumented migrant	мігрант без документів; незареєстрований мігрант	нелегальний мігрант; недокументований мігрант; незареєстрований мігрант; мігрант без документів	недокумен-то-ваний мігрант	мігрант без документів	мігрант без документів

26 "Національний банк стандартизованих науково-технічних термінів", Український науково-дослідний і навчальний центр проблем стандартизації, сертифікації та якості, accessed November 10, 2022, http://uas.org.ua/ua/bank-danih/natsionalniy-bank-terminiv.

27 "Google Translation," Google, accessed September 25, 2022, https://translate.google.com.

28 "DeepL Translator," DeepL, accessed September 25, 2022, https://www.deepl.com/en/translator.

29 "Reverso Translation," Reverso, accessed September 25, 2022, https://www.reverso.net/text-translation.

30 "Microsoft Bing," Microsoft, accessed September 25, 2022, https://www.bing.com/translator.

31 "M-translate," Національний online перекладач, accessed September 25, 2022, https://www.m-translate.com.ua.

The obtained results demonstrate a rather extensive synonymic series to the terminological constructions, which, by the nature of the term itself, should be unambiguous. Therefore, we will try to use the data of explanatory dictionaries for a deeper understanding of the semantic content of the studied units.

Explanatory dictionaries of the Ukrainian language contain the following definitions of the studied adjectives:

нелегальний: "заборонений законом; підпільний, незаконний" [prohibited by law; underground, illegal[32]][33]. It is interesting to note that the phrase '*нелегальні іммігранти*' [*illegal immigrants*] is illustrative material for this definition in the *Great Explanatory Dictionary of the Modern Ukrainian Language*;

незаконний: "який забороняється законом, порушує закон; // який суперечить законові, йде врозріз з ним; // не оформлений юридично; позашлюбний" [which is prohibited by law, violates the law; // which contradicts the law, goes against it; // not legalized; extramarital][34];

неврегульований: "що не є врегульованим, улагодженим (на основі згоди сторін)" [unsettled (by agreement of the parties)][35];

недокументований: dictionaries do not contain the definition of this unit; its lexical meaning can be deduced through the analysis of the process of word formation and grammatical meaning of morphemes: verb *документувати* (обґрунтовувати документами [to justify with documents][36]) + participle suffix *-н-* → participle *документований* + negative particle *не-* → participle *недокументований*.

Considering the lexical meaning of the language units, we refer to bilingual dictionaries, which provide data on the equivalents of lexical units in different languages and contribute to the unambiguity and accuracy of translation, which, in turn, should ensure proper legal interlanguage interaction.

---

32 Hereinafter translated by the authors of this paper.

33 В'ячеслав Бусел, уклад., *Великий тлумачний словник сучасної української мови* (Київ; Ірпінь: ВТФ "Перун", 2005), 766.

34 Бусел, *Великий тлумачний словник словник сучасної української мови*, 760.

35 Бусел, *Великий тлумачний словник словник сучасної української мови*, 751.

36 Іван Білодід, ред., *Словник української мови* (Київ: Наукова думка, 1971), т. 2, 356.

Adjective *illegal* has the following equivalents in bilingual dictionaries of common vocabulary: '*незаконний, нелегальний*'[37]. As for the dictionaries of legal terminology, they offer the following equivalents to reproduce the unit *illegal*: "1) особа на нелегальному положенні, нелегал, таємний агент за кордоном; 2) незаконний, протизаконний, протиправний; неправомірний; неправосудний; несанкціонований, заборонений; нелегальний, підпільний, лихварський"[38], "незаконний, нелегальний, заборонений"[39], "1) особа на нелегальному положенні, нелегал; 2) незаконний, протизаконний, протиправний, неправомірний; нелегальний"[40], "1) особа у нелегальному становищі, нелегал; 2) незаконний, протизаконний, протиправний, неправомірний, нелегальний"[41].

These dictionaries also contain terminological phrases to denote migrants and migration, namely:

"illegal alien – незаконний іммігрант; іноземець, який незаконно перебуває на території країни; іноземець-нелегал"[42], "нелегальні емігранти (які не мають дозволу на виїзд у США, часто з Мексики)"[43];

"illegal entrant – нелегальний іммігрант; особа, яка нелегально в'їжджає (в'їхала) до країни"[44];

"illegal immigrant – нелегальний іммігрант"[45];

"illegal immigration – незаконна (нелегальна) імміграція"[46];

"illegal migration – незаконна міграція, незаконне пересування"[47].

---

37 В.Ф. Малишев, уклад., *Новий англо-український та українсько-англійський словник* (Харків: Друкарський центр "Єдинорог", 2000), 203.

38 В'ячеслав Карабан, *Англо-український юридичний словник* (Вінниця: Нова книга, 2003), 501.

39 Ігор Бик, ред., *Англо-український дипломатичний словник* (Київ: Знання, 2006), 258.

40 В.І. Муравйов, ред., Л.І. Шевченко, ред., *Англо-український словник міжнародного, порівняльного і європейського права* (Київ: Арій: 2009), 243.

41 І.О. Голубовська et al., *Багатомовний юридичний словник-довідник* (Київ: Київський університет, 2012), 174.

42 Карабан, *Англо-український юридичний словник*, 501.

43 Бик, *Англо-український дипломатичний словник*, 258.

44 Карабан, *Англо-український юридичний словник*, 501.

45 Карабан, *Англо-український юридичний словник*, 502.

46 Карабан, *Англо-український юридичний словник*, 502.

47 Карабан, *Англо-український юридичний словник*, 502.

It is suggested to translate the adjective *irregular* with the following equivalents: "1) неправильний; 2) незаконний; 3) нерегулярний, нерівномірний; 4) безладний, розпущений; 5) нестандартний; 6) несиметричний; 7) нерівний (*про поверхню*); 8) *грам.* неправильний (*про дієслово*)"[48]. And the dictionaries of legal terminology record the following equivalents: "ненормальний; неправильний; неналежний; недостатній; неправомірний; незаконний"[49], "1) неправильний; який не відповідає нормам / правилам; неприйнятий; незвичайний; 2) *військ.* нерегулярний"[50], "1) неправильний; неналежний; недостатній; 2) ірегулярний"[51].

It is interesting to note that the use of this adjective to denote migration processes and their participants is not currently recorded in the available English-Ukrainian dictionaries of legal terminology.

We object to the use of the adjective *нерегулярний* to translate the construction *irregular migrant*, because in Ukrainian the adjective *нерегулярний* means "1) який здійснюється, виконується з перервами; нерівномірний; 2) який не має правильної постійної організації, систематичного навчання (про армію, військо і т.ін.)" [1) which is carried out, performed intermittently; uneven; 2) which does not have the correct permanent organization, systematic training (about the army, military forces, etc.][52], which does not correspond to the meaning of the English-language unit *irregular* (see above).

We also do not consider it correct to translate construction *irregular migrant* with the adjective *нерегульований*, which means "такий, що не піддається регулюванню, не регулюється" [uncontrollable, unregulated][53].

As for the adjective *undocumented*, English-Ukrainian dictionaries of common vocabulary available to us do not contain entries with this adjective. At the same time, dictionaries of legal terms provide information

---

48 С.М. Крисенко, уклад., *Новітній англо-український, українсько-англійський словник* (Харків: ВАТ "Харківська книжкова фабрика ім. М.В. Фрунзе", 2005), 324.

49 Карабан, *Англо-український юридичний словник*, 562.

50 Бик, *Англо-український дипломатичний словник*, 282.

51 Муравйов and Шевченко, *Англо-український словник міжнародного, порівняльного і європейського права*, 269.

52 Бусел, *Великий тлумачний словник словник сучасної української мови*, 777.

53 Бусел, *Великий тлумачний словник словник сучасної української мови*, 777.

that in the legal field this unit should be translated as "недокументований, незадокументований; не обґрунтований документами; не підкріплений документами; нелегальний (про іммігранта, працівника)"[54], "не підкріплений документами, недокументований"[55].

Besides these data are accompanied by terminological constructions, namely:

"undocumented immigration – нелегальна імміграція"[56];

"undocumented alien – іноземець, який перебуває на території країни без необхідних для цього документів"[57].

The Ukrainian-English explanatory dictionary of international terminology in the field of migration for the construction *irregular migrant* suggests using the equivalent *мігрант із неврегульованим статусом*, which means "особа, яка внаслідок незаконного в'їзду або закінчення встановлених строків перебування не має законного статусу в транзитній або приймаючій країні. Також поняття включає тих осіб, які законно прибули в транзитну країну або країну призначення, але лишились на триваліший час, ніж дозволено або, як наслідок, були незаконно працевлаштовані" [a person who, due to illegal entry or the expiration of the established periods of stay, does not have a legal status in the transit or receiving country. Also, the concept includes those persons who legally arrived in the transit country or the country of destination, but stayed longer than allowed or, as a result, were illegally employed][58]. The dictionary contains information about other terms that are close in meaning, namely:

illegal migrant – незаконний мігрант, нелегальний мігрант;

undocumented migrant – недокументований мігрант;

unauthorised migrant – мігрант, який перебуває з порушенням законодавства.

---

54 Карабан, *Англо-український юридичний словник*, 1036.

55 Муравйов and Шевченко, *Англо-український словник міжнародного, порівняльного і європейського права*, 512.

56 Карабан, *Англо-український юридичний словник*, 1036.

57 Карабан, *Англо-український юридичний словник*, 1036.

58 Міжнародна організація з міграції, *Міжнародна термінологія у сфері міграції: українсько-англійський тлумачний словник* (Київ: БЛАНК-ПРЕС: 2015), 15.

The dictionary provides some recommendations as for the use of the adverbs *irregular* and *illegal*: "in international practices, there is a tendency to limit the use of the term *незаконний (нелегальний) мігрант* due to its punitive nature, thus replacing it with the alternative term *мігрант з неврегульованим статусом* or *недокументований мігрант*. The term *нелегальний мігрант* is used only when the case involves the smuggling of migrants and human trafficking"[59]; "the term *irregular* is more applicable than *illegal*, since the latter carries a criminal connotation and is considered to degrade the dignity of the migrant"[60].

Ukrainian migration researchers (following the experts of the European Union) also prefer adjectives other than *нелегальний*, and emphasize the criminally defined semantics of this unit. Thus, V. Levkovskyi (2007) notes that "since the late 80s of the last century, migration has ceased to be planned and forced, and as a result, its criminogenic potential has increased significantly. Therefore, the appearance of such concepts as *нелегальна міграція*, *незаконна міграція*, *криміногенна міграція* and *кримінальна міграція* in modern scientific literature seems quite natural"[61]. At the same time, sometimes the scientific literature does not emphasize the differences in the semantics of the language units used to name the studied phenomenon: "to denote migrants who arrive or stay in the country illegally, violate other migration rules, the following terms are used in modern scientific literature: *недокументована, незаконна, нелегальна, недозволена, неврегульована, підпільна, напівлегальна*, etc., which can be considered as synonyms or as individual concepts with different meanings"[62]. In most cases, there is no mention of the industry differentiation of terminology (legal, political, social, pedagogical and other fields). Such a situation is unacceptable for the legal sphere, since the legal term chosen for codification in legislation and special normative dictionaries "must convey the legal concept as accurately as possible, have a precise and clearly defined meaning (definition), be unambiguous within the term

59 "Міжнародна організація з міграції," 15.

60 "Міжнародна організація з міграції," 15.

61 Володимир Левковський, "Нелегальна міграція – загроза національній безпеці України," *Боротьба з організованою злочинністю і корупцією (теорія і практика)*, 16 (2007): 92.

62 Юрій Марусик, "Неврегульована міграція як сучасний політичний інструмент," *Молодий вчений*, 6(46) (2019): 39.

system, be characterized by stylistic neutrality, functional stability, to correspond to the structural-semantic and word-form features of the Ukrainian language"[63].

In this connection, the question of using these terms directly when translating regulatory documents from English and in the original Ukrainian-language legislative texts arises. Thus, the Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons" operates with the term *нелегальний мігрант* (for which the construction *irregular immigrant* is used in the official English translation), that nominates "a foreigner or stateless person who crossed the border outside the border crossing points or using the latter, but avoiding border control, and failed to immediately apply for refugee status or asylum in Ukraine, as well as a foreigner or stateless person who arrived legally to Ukraine, but after the expiration of the prescribed period of stay lost the grounds for further stay and avoid exiting Ukraine" (the official translation)[64]. As you can see, in this context (violation of legislation, rules) the use of the term *нелегальний мігрант* is appropriate and correct.

4. Discussion and conclusion

In recent years, Ukraine has seen an increase in migration activity both within the country and at its borders. It is clear that such processes require correct legal regulation and, accordingly, the availability of unambiguous and precise terminology.

Summarizing the recommendations contained in international normative and advisory documents, as well as taking into account the data of lexicographic sources of the English and Ukrainian languages, we believe that today the term of the Ukrainian language that most accurately and most fully reflects the meaning of the internationally recommended construction *irregular migrant* is the term *мігрант із неврегульованим статусом*, and for the *irregular migration*, we suggest using the equivalent *неврегульована міграція*.

---

63 Наталія Артикуца, "Методичний інструментарій юридичного термінознавства," *Наукові записки НаУКМА. Юридичні науки*, том 129 (2012): 55.

64 Закон України "Про правовий статус іноземців та осіб без громадянства", 2011, no. 3773-VI.

This work describes only one case of the absence of a stable Ukrainian equivalent of an English term. In this regard, the issue of nomination and definition of legal and migration concepts require detailed study, and the terms themselves need inter- and intra-lingual harmonization and unification.

The questions that, according to our data, do not have a solution today and require a comprehensive study within the framework of the general problem under investigation are the following:

1) content and semantic volume of the lexemes *migrant* / *мігрант* in the term systems of various scientific fields and jurisprudence, in particular,
2) extralinguistic factors affecting the content and semantic changes in the meaning of the terms *migrant* / *мігрант* and the constructions they form,
3) the specificity of the linguistic implementation of constructions with cognitive term structures *migrant* / *мігрант* in modern English and Ukrainian languages.

Remaining a complex problem and still not solved in various spheres of society's life, migration issues require the special attention of specialists in the social and humanitarian fields of science from different points of view. We consider the study of the specifics of the functioning and translation of migration terminology in English and Ukrainian with an emphasis on ethnocultural, social, historical, linguistic and other properties of mono- and multinational communities as a research perspective.

References

Bajčić, Martina. *New Insights into the Semantics of Legal Concepts and the Legal Dictionary*. Amsterdam: John Benjamins Publishing Company, 2017.

Brozek, Bartosz. *Rationality and Discourse: Towards a Normative Model of Applying Law*. Warsaw: , 2007.

Capstick, Tony. *Language and Migration*. London: Routledge, 2020.

Faber, Pamela, and Cabezas-García, Melania. "Specialized Knowledge Representation: from Terms to Frames." *Research in Language*, 2 (2019): 197–211.

Houtkamp, Christopher Alexander. *Language and motility of migrant communities in Europe*. PhD diss., Amsterdam: Amsterdam School for Regional, Transnational and European Studies, 2020.

Kucheruk, Liliya. *Modern English Legal Terminology: linguistic and cognitive aspects*. PhD diss., Bordeaux: Université Michel de Montaigne-Bordeaux III, 2013.

Muižnieks, Nils. "Without papers but not without rights: the basic social rights of irregular migrants." *Council of Europe*, August 20, 2015. Accessed October 30, 2022. https://www.coe.int/en/web/commissioner/-/without-papers-but-not-without-rights-the-basic-social-rights-of-irregular-migrants.

Navi, Pillay. UN High Commissioner for Human Rights. 12th session of the Human Rights Council, 22 September 2009.

Paspalanova, Mila. "Undocumented vs. Illegal Migrant: toward terminological coherence." *Migraciones Internacionales* vol. 4, núm. 3 (2008): 79–90.

Platform for International Cooperation on Undocumented Migrants. "Why Words Matter." Accessed October 30, 2022. https://picum.org/words-matter.

Reverso. "Reverso Translation." Accessed September 25, 2022. https://www.reverso.net/text-translation.

Sironi, A. C. Bauloz, and Emmanuel, M. (eds.). *Glossary on Migration*. Geneva: IOM, 2019.

Артикуца, Наталія. "Методичний інструментарій юридичного термінознавства." *Наукові записки НаУКМА. Юридичні науки*, том 129 (2012): 53–59.

Бик, Ігор. (ред.). *Англо-український дипломатичний словник*. Київ: Знання, 2006.

Білодід, Іван (ред.). *Словник української мови*. Т. 2. Київ: Наукова думка, 1971.

Бусел, В'ячеслав (уклад.). *Великий тлумачний словник сучасної української мови*. Київ; Ірпінь: ВТФ "Перун", 2005.

Голубовська, І.О., Шовковий, В.М., Лефтерова, О.М., Лазер-Паньків, О.В., Штиченко, І.Ю., Письменна, Ю.О., Корольов, І.Р., Ничаюк, С.П., Соколова, Ю.О. *Багатомовний юридичний словник-довідник*. Київ: Київський університет, 2012.

Карабан, В'ячеслав. *Англо-український юридичний словник*. Вінниця: Нова книга, 2003.

Крисенко, С.М. (уклад.). *Новітній англо-український, українсько-англійський словник*. Харків: ВАТ "Харківська книжкова фабрика ім. М.В. Фрунзе", 2005.

Левковський, Володимир. "Нелегальна міграція – загроза національній безпеці України." *Боротьба з організованою злочинністю і корупцією (теорія і практика)*, 16 (2007): 89–98.

Малишев, В.Ф. (уклад.). *Новий англо-український та українсько-англійський словник*. Харків: Друкарський центр "Єдиноріг", 2000.

Марусик, Юрій. "Неврегульована міграція як сучасний політичний інструмент." *Молодий вчений*, 6(46) (2019): 38–43.

Матвєєва, Світлана. "*Лінгвістична реконструкція когнітивної терміноструктури REFUGEE / БІЖЕНЕЦЬ в англо-українському корпусі юридичних текстів*." Дис. д. філол. наук, Київ: Національний педагогічний університет імені М. П. Драгоманова, 2020.

Міжнародна організація з міграції. *Міжнародна термінологія у сфері міграції: українсько-англійський тлумачний словник.* Київ: БЛАНК-ПРЕС: 2015.

Муравйов, В.І. (ред.), Шевченко, Л.І. (ред.). *Англо-український словник міжнародного, порівняльного і європейського права.* Київ: Арій: 2009.

Національний online перекладач. "M-translate." Accessed September 25, 2022. https://www.m-translate.com.ua.

Український науково-дослідний і навчальний центр проблем стандартизації, сертифікації та якості. *Національний банк стандартизованих науково-технічних термінів*. Accessed November 10, 2022. http://uas.org.ua/ua/bank-danih/natsionalniy-bank-terminiv.

Review of European and Comparative Law | 2023
Vol. 52, No. 1, 201–218
https://doi.org/10.31743/recl.15011
Received: 1 January 2023 | Accepted: 2 February 2023 | Published: 30 March 2023

Gloss to the Decision of the European Court of Human Rights of May 15, 2018, Case Number 2451/16, Association of Academics v. Iceland, Hudoc.int Gloss of Approval

Karol Sołtys
MA, Faculty of Law, Canon Law and Administration, The John Paul II Catholic University of Lublin, correspondence address: Al. Racławickie 14, 20-950 Lublin, Poland; e-mail: karol.soltys@kul.pl
https://orcid.org/0000-0002-5101-3878

Keywords:
Right to strike, Compulsory Arbitration, Collective Labor Law, collective dispute resolution, European collective labor law

Abstract: In the judgment of the ECtHR in the case of Association of Academics v. Iceland, the Court commented on two important issues concerning the broadly understood procedure for resolving collective disputes. Firstly, the Court pointed out that "found that the taking of industrial action should be accorded the status of an essential element of the Article 11 guarantee but it is clear that strike action is protected by Article 11 as it is considered to be a part of trade union activity". Secondly, it considered that the institution of mandatory arbitration could be a substitute for the right to strike, which was prohibited due to the need to protect the health of Icelandic citizens. In the context of the issues outlined in this way, the aim of the gloss is to verify the two theses mentioned above. First, the thesis was analyzed according to which the right to strike is not an essential element of freedom of association. For this reason, the jurisprudence of the Tribunal has been discussed against the background of ILO standards, taking into account the doctrine's views on the status of the right to strike in the system of human rights protection and its relationship with other irenic methods of dispute resolution. Secondly, the thesis of the ECtHR was verified, according to which the mandatory arbitration established by the Icelandic legislator in the circumstances presented in the facts of the case does not constitute a violation

ISSN 2545-384X (Online)

of the right to strike. As part of the second thesis, the concept of mandatory arbitration and its status in the jurisprudence of the Court, as well as ILO bodies and labor law doctrine were analyzed. Finally, the relationship between the right to strike and social arbitration was examined.

First Thesis:

"So far the Court has not found that the taking of industrial action should be accorded the status of an essential element of the Article 11 guarantee but it is clear that strike action is protected by Article 11 as it is considered to be a part of trade union activity"

Second Thesis:

"Before the domestic courts, it was not disputed between the parties that the restrictions on the member unions' strike actions and the imposition of compulsory arbitration constituted an interference with their right to freedom of association, nor was it disputed that the interference was prescribed by law. As to the aim of the interference, the Supreme Court concluded that the restrictions pursued the legitimate aim of being in the interest of public safety and for the protection of the rights of others. The Court sees no reason to disagree"

In December 2014, a collective dispute was initiated between individual trade unions, which are members of the Association of Academics trade unions, and the Icelandic state acting as the employer. The dispute concerned the content of a new collective bargaining agreement to replace the previous one, which was to expire on February 28, 2015. However, due to the fact that no agreement could be reached during the negotiations, most of the affiliated trade unions in the Association of Academics decided to start strike action. Despite the start of negotiations and mediation, the first strikes were launched already in April 2015. Some of the trade unions decided to go on strikes indefinitely, while others launched strikes lasting four hours. The last of the affiliated trade unions decided to initiate an indefinite strike only on June 2, 2015. At the end of May 2015, a trade union representing the nursing profession, not affiliated to the Association

of Academics, joined the strikes. Until the date of the ban on strikes, unions exercised the right to strike from 11 to 67 days.

On June 13, 2015, the Parliament of Iceland passed Act No. 31/2015, which prohibited strikes and other collective actions for all members of the Association of Academics, regardless of whether they were on strike at the date of entry into force. The Act also provided that if no agreement was reached between the trade unions and the employers by 1 July 2015, the Supreme Court of Iceland would be obliged to appoint an Arbitration Tribunal whose decision on the resolution of the dispute would be binding on the parties on the basis of a collective agreement. Due to the lack of an agreement, the Court of Arbitration established by the Supreme Court of Iceland decided to extend the existing collective labor agreement with some amendments until August 31, 2017.

Proceedings before the District Court commenced in June 2015. The applicant trade union association requested the Court to declare Act No. 31/2015 incompatible with the Constitution of Iceland and Article 11 sec. 1 of the European Convention on Human Rights[1], both in terms of the prohibition of a strike and the settlement of a dispute by the Arbitration Court. The court of first instance rejected the Association of Academics' complaint, stating that although the right to strike is protected by the ECHR, it is subject to certain restrictions. The statutory ban on strikes, in the opinion of the Court, was established to protect the public interest, which was demonstrated in the justification to the act, according to which ongoing strikes threatened the functioning of state health care institutions, and strike demands could not be implemented without undermining the economic stability of the state. According to the Court of First Instance, some of the strikes lasted 67 days until their ban came into force, and there was no prospect of their end after that time. And the establishment of mandatory arbitration in lieu of a strike did not, in the Court's view, constitute a violation of the right to strike and freedom of association,

[1] 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.

and moreover was in line with the precedent established by the Supreme Court of Iceland.

In August, the case went to the Supreme Court of Iceland. There, the position of the District Court was mostly upheld. The Supreme Court additionally indicated that the main argument for prohibiting the right to strike was the impact of strikes on lowering the level of health protection below an acceptable level, which in turn led to a violation of the public interest and the constitutional rights of Icelandic citizens. The necessity to establish a ban on strikes resulted from the fact that on the date of entry into force of the Act prohibiting strikes and establishing mandatory arbitration, indefinite strikes were still in progress. Thus, they posed a threat to the public interest and there was no prospect of an agreement. As emphasized by the Supreme Court of Iceland, trade unions had unfettered freedom to organize their activities for some time by organizing strikes. Following the latest ruling, the trade union association decided on 21 December 2015 to lodge a complaint with the European Court of Human Rights.

In the application, the trade union association sought the Court's recognition that, by enacting Act no. 31/2015, prohibiting strike action and imposing mandatory arbitration on trade unions, the Government had made illusory the applicant's right to protection of trade union interests and had disproportionately and unjustifiably restricted the rights and freedoms under Section 11 of the Convention. Alternatively, the application alleged that the Government of Iceland had restricted the rights and freedoms under Article 11 of the Convention of those member unions which were not engaged in collective action at the time. Furthermore, the applicant submitted that the Supreme Court, in upholding the law at issue, had failed to examine the case in accordance with the Court's case-law.

At the beginning of its argumentation, the European Court of Human Rights indicated the scope of protection of freedom of association specified in Art. 11 sec. 1 ECHR. According to the Tribunal, its essence boils down to, on the one hand, the establishment of sufficient measures in a given legal order, thanks to which it is possible to ensure this freedom, and, on the other hand, the special protection of "essential element" of freedom of association, without which this freedom could not be exercised. When enumerating these elements as an example, the Court

pointed out that the right to strike has not yet been recognized as one of them. However, "it is clear that strike action is protected by Article 11 as it is considered to be a part of trade union activity". However, the fact that the applicant's right to strike did not bring the desired effect does not mean that its implementation was illusory. In the second part of the judgment, the Tribunal decided, following the Supreme Court of Iceland, that if, during the ongoing strike, there is no prospect of the implementation of the strike demands and, additionally, the strike is a threat to the values protected in a democratic society, it is necessary, within the meaning of Art. 11 sec. 2 of the ECHR to prohibit it and oblige the parties to submit to arbitration. According to the Tribunal, such action by the legislator does not constitute a violation of the content of the freedom of association expressed in Art. 11 sec. 1 ECHR. As indicated by the Tribunal, the content of the right to strike does not include the right to convince the employer, just as the right to collective bargaining does not include the right to conclude a collective agreement. In accordance with this thesis, the Tribunal considered the complaint to be manifestly unfounded and rejected it.

In the context of the thesis of the commented decision, two main problems should be pointed out on which the Tribunal focused and which will be the subject of the commentary. First, the Court addressed the status of the right to strike under Art. 11 sec. 1 of the Convention, denying this right the status of an essential element of freedom of association. The second issue dealt with by the Court was the decision that the establishment of mandatory arbitration in place of a prohibited strike, in certain circumstances, did not constitute a violation of that right or freedom of association.

According to Art. 11 sec. 1 of the ECHR, everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his or her interests. This provision, similarly to Art. 3 of ILO Convention No. 87[2], does not explicitly mention the right to strike as an object of protection. This right, similarly to the ILO system, was interpreted from the freedom of association through a creative interpretation of the Tribunal, which has been dealing with the issue of the right to strike for at least 50 years.

[2] International Labour Organization (ILO), Freedom of Association and Protection of the Right to Organise Convention, San Francisco, 9 July 1948, C87.

Its jurisprudence was not and still is not sufficiently clear, especially in terms of determining the nature and status of this right in terms of freedom of association. Not granting the right to strike directly, however, is not a rule in the content of international conventions concerning the protection of human rights. This law was literally recognized by, among others, in art. 8 sec. 1 of the International Covenant on Economic, Social and Cultural Rights [3], article 6 sec. 4 of the European Social Charter [4], whether in art. 28 of the Charter of Fundamental Rights [5].

It followed from the first judgments of the Court concerning the right to strike that the Convention, in accordance with its literal wording in Art. 11 sec. 1, only guarantees the right to protection of employees' interests, which means that it grants individual employees the right to have their trade union heard by the employer[6]. Within such a general wording of this right, the national legislator could freely determine what measures are sufficient to implement it. In particular, the competing right to mandatory collective bargaining and the right to strike were cited as the most important examples in the jurisprudence of the Court. In the judgment of 6 February 1976 in the case of Schmidt and Dahlström v. Sweden [7], The Court pointed out that one of the most important means of protecting employees' interests may be the right to strike, but it is not the only one. However, due to the fact that this right is not explicitly mentioned in Art. 11 sec. 1 of the ECHR, it may be subject to further restrictions under national law. Similarly in Wilson, National Union of Journalists and Others v. Great Britain [8] The Court has defined the right to strike as the most important means of protecting employees' interests, which may constitute an alternative form of implementing Art. 11 ECHR, also in the absence of the right

3 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

4 Council of Europe, European Social Charter, Turin, 18 October 1961 ETS No 35.

5 EU (2000) Charter of Fundamental Rights of the European Union, 2000/C 364/01, 7 December 2000.

6 ECtHR Judgement of 27 October 1975, Case National Union of Belgian Police, application no. 4464/70, hudoc.int.

7 ECtHR Judgement of 6 February 1976, Case Schmidt i Dahlström v. Sweden, application no. 5589/72, hudoc.int.

8 ECtHR Judgement of 2 July 2002, Case Wilson, National Union of Journalists and Others v. United Kingdom, application no. 30668/96, hudoc.int.

to obligatory negotiations. Then, in a different case of 10.01.2002, UNISON v. Great Britain[9], which directly concerned the prohibition of the right to strike, the Court confirmed its status as an alternative to other measures, however, given the importance of strikes, it also considered that their prohibition could constitute a violation of Art. 11 sec. 1 of the ECHR, and therefore should be assessed under Art. 11 sec. 2 of the Convention.

Important for the determination of the status of the right to strike in Art. 11 sec. 1 of the Convention were two judgments[10]. The first concerned the case of November 12, 2008, Demir and Baykara v. Turkey [11], which directly related to the right to collective bargaining. However, this ruling was crucial to the right to strike for at least two reasons. Firstly, by synthesizing the existing jurisprudence, the Tribunal stated that the essential elements of the freedom of association include: the right to establish and join trade unions, the prohibition of concluding agreements between an employer and a trade union concerning the employment of trade unionists only, and the right of a trade union to attempt to convince the employer to hear what the union has to say on behalf of its members. In the context of the last-mentioned right, the Court considered for the first time that the right to collective bargaining should be singled out *expressis verbis* as the fourth essential element of freedom of association. Secondly, the Tribunal, using a dynamic interpretation of Art. 11 sec. 1 of the ECHR, made it possible to use it to strengthen the right to strike in its subsequent jurisprudence. The consequence of the judgment in the case of Demir and Baykara v. Turkey was the judgment of November 6, 2009 in the case of Enerji Yapi-Yol Sen v. Turkey [12], which already concerned directly the right to strike. The significance of this judgment lies in the fact that for the first time the Tribunal did not define the strike merely as one

9 ECtHR Judgement of 10 January 2002, Case UNISON v. United Kingdom, application no. 53374/99, hudoc.int.

10 Piotr Grzebyk, *Od rządów siły do rządów prawa. Polski model prawa do strajku na tle standardów unijnego i międzynarodowego prawa pracy* (Warsaw: Wydawnictwo naukowe SCHOLAR, 2019), 100 et seq.

11 ECtHR Judgement of 12 November 2008, Case Demir and Baykara v. Turkey, application no. 34503/97, hudoc.int.

12 ECtHR Judgement of 6 November 2009, Case Enerji Yapi-Yol Sen v. Turkey, application no. 68959/01, hudoc.int.

of the measures implementing the right to protect workers' interests. Instead, referring to ILO and ESC standards, it considered them to be an integral part of freedom of association under Art. 11 sec. 1 ECHR. Thus, any interference with the right to strike should meet the conditions set out in Art. 11 sec. 2 ECHR[13].

However, the Demir and Baykara v. Turkey ruling did not resolve the question of whether a strike, like negotiations, is an essential element of freedom of association. Including a given right in this category of elements guarantees the broadest protection, because without them it is impossible to implement the provisions of Art. 11 ECHR. On the other hand, as regards the remaining elements, it is up to the national legislator to choose between them such measures that, in general terms, can implement the freedom of association[14].

This doubt has not been resolved by the subsequent jurisprudence of the Court. In the case of Hrvatski liječnički sindikat v. Croatia [15], The Court found that limiting the right to strike for a period of more than 3 years constituted a violation of Art. 11 ECHR. Thus, the Court confirmed that the right to strike, as the most powerful means of protecting employees' interests, is justified by the content of the freedom of association, and its disproportionate limitation constitutes in itself a violation of Art. 11 sec. 1 ECHR. Particularly noteworthy in the context of the aforementioned judgment is the dissenting opinion of Judge Pinto de Albuquerque, who, referring to the judgment of Demir and Baykara, in which the Tribunal mentioned, among the essential elements of the freedom of association, i.a. "the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members", pointed out that this wording meant the right to strike. In addition, he argued, since the right to take collective action is the core of the freedom of association, the right to strike is a central element of this core, and therefore should have the status

13 Paweł Nowik, "European Collective Labor Law," in *Międzynarodowe Publiczne Prawo Pracy*, ed. Krzysztof Baran (Warsaw: Wolters Kluwer, 2020), 1025.

14 Marek Nowicki, "Commentary on the Convention for the Protection of Human Rights and Fundamental Freedoms," in *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, ed. Marek Nowicki (Warsaw: Wolters Kluwer, 2021), 1015–1016.

15 ECtHR Judgement of 27 November 2014, Case Hrvatski liječnički sindikat v. Croatia, application no. 36701/09, hudoc.int.

of an essential element of the freedom of association referred to in Art. 11 sec. 1 ECHR.

The Court took a completely different tone in the National Union of Rail, Maritime and Transport Workers v. Great Britain case [16]. In this ruling, it was recognized that the secondary strike action is not fundamental to the content of the freedom of association, but only ancillary. This means that this type of strike can be prohibited, which does not violate Art. 11 ECHR. Also in this judgment, the dissenting opinion of the Polish judge K. Wojtyczek deserves attention, who criticized the use of dynamic interpretation, accusing it of excessive extension of the competences of the ECtHR. The Polish judge also pointed out that the right to strike is not indisputable under international human rights law. In addition, he emphasized that raising the standards of protection of the right to strike may be associated with excessive narrowing of the implementation of the rights and interests of other people.

In the commented decision, as for example on May 3, 2016, in the case of Unite the union v. Great Britain [17], The Tribunal, listing the examples of essential elements of the freedom of association consistently, not only omitted the right to strike, but also confirmed that the Tribunal had not granted it this status so far. When listing the essential elements of freedom of association, he once again used the general phrase "the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members". The content of the commented decision seems to confirm the thesis about the ambiguous position of the right to strike among the elements of freedom of association. On the one hand, this right has not yet been recognized as an essential element of freedom of association, on the other hand, it has been stated that a strike is protected by Art. 11, since it is considered part of trade union activities. On the other hand, as it results from previous judgments, its total prohibition or suspension for a significant period constitutes a disproportionate and unacceptable violation of Article 3 11 of the Convention.

---

16 ECtHR Judgement of 8 April 2014, Case National Union of Rail, Maritime and Transport Workers v.United Kingdom, application no. 31045/10, hudoc.int.

17 ECtHR Judgement of 3 May 2016, Case Unite the union v. United Kingdom, application no. 65397/13, hudoc.int.

While it is not clear what powers lie behind the enigmatic "right to compel the employer to hear what the union has to say on behalf of its members," it must be recognized, contrary to the dissenting opinion of Judge Pinto de Albuquerque, that it is not obvious that there is mainly the right to strike. The content of the said right to induce the employer therefore remains opaque. This is especially due to the fact that since 2008 it does not include the right to collective bargaining, which for a longer period was mentioned next to the strike as an important means of protecting employee interests and which in the EKS system is considered a source of the right to strike[18].

The jurisprudence of the Tribunal also does not allow to determine the position of the strike in the procedure of resolving collective disputes. This is an obvious conclusion. The Court must take into account the diversity of legal traditions and cultures of national legislators that are Parties to the Convention. However, the separation of the right to collective bargaining as an essential element of freedom of association and the thesis according to which a total ban on strikes or its long-term limitation would constitute a violation of Art. 11 sec. 1 of the ECHR, allow us to conclude that both of these rights should be present within the framework of a given national legislation, although this right to strike can and should be subject to greater restrictions, however, applying to Art. 11 sec. 2 ECHR. It seems, therefore, that the Court sufficiently protects the right to strike, which is of a special nature related to its negative impact on the interests, rights and freedoms of others, as well as on the public interest. In axiological and ethical terms, the struggle of social partners, manifested by a strike, can only be undertaken when the postulates of social justice cannot be restored by peaceful means. Although it is not possible to organize collective labor relations in such a way as to exclude the use of strikes, actions should be taken to limit them to the necessary minimum[19]. Negotiations, mediation and arbitration are non-irreactive methods of resolving collective disputes, the aim of which is to prevent, limit or mitigate the effects of

18 Nowik, "European Collective Labor Law," 1028–1029.

19 Karol Wojtyła, *Katolicka etyka społeczna* (Lublin: Wydawnictwo św. Stanisława BM Krakau, 2018), 130–134.

strikes[20]. For this reason, they, or at least the right to bargain in particular, deserve a special, higher scope of protection expressed by granting it the status of an essential element of the freedom of association.

Comparing the human rights protection systems of the ECHR and the ILO, the right to strike has a stronger status under the latter. This is primarily due to the statements of the ILO Committee on Freedom of Association, according to which this right is an integral and basic means of employees and their organizations to defend their interests[21]. Moreover, the ILO organs indicated that the right to strike is fundamental and fundamental, however, due to its negative consequences, it cannot be an end in itself and must be subject to certain restrictions, and in specific situations it may be prohibited. The ILO Committee on Freedom of Association includes such situations, as does the Court in this decision, as a threat to health protection[22].

In the commented decision, the ECtHR approved the position of the Icelandic legislator and the Icelandic courts, according to which in the event of a deadlock during the strike, and at the same time a threat to the health of Icelandic residents posed by a prolonged strike, it is permissible to prohibit it and submit the matter to mandatory social arbitration. This thesis raises some doubts regarding, first of all, the very concept of mandatory arbitration and the permissibility of substituting a strike with it, or the assessment of the conditions that should be met for such a substitution to take place.

The concept of mandatory arbitration causes controversy not only in the doctrine of law[23], but also among human rights protection authorities. Traditional arbitration is one of the non-irenic dispute resolution methods. Its most important constitutive features, in the traditional approach, include the private nature of the arbitration body and

---

20 Walery Masewicz, *Strajk. Studium prawno-socjologiczne* (Warsaw: Instytut wydawniczy związków zawodowych, 1986), 98–100.

21 Grzebyk, *Od rządów siły do rządów prawa*, 55–57.

22 International Labour Organization, *Freedom of Association: digest of decisions and principles of Freedom of Association Committee of the Governing Body of the ILO* (Geneva: International Labour Office, 2013), 581–582.

23 Aleksandra Orzeł-Jakubowska, *Sądownictwo polubowne w świetle standardów konstytucyjnych* (Warsaw: Wolters Kluwer, 2021), 27 et seq.

consensuality consisting, among others, of by granting the arbitrator, pursuant to declarations of will of the parties themselves, in principle, authoritative powers to resolve the dispute. The parties to arbitration should have a certain degree of autonomy not only in determining who the arbitrator will be, but also how and on what terms the arbitrator will resolve the dispute. Within the concept of arbitration outlined in this way, the institution of "obligatory arbitration" does not fit. From this perspective, as noted by A. Orzeł-Jakubowska, the expression itself is an oxymoron[24]. However, in this form, this phenomenon is known not only in national law, but also in the jurisprudence of the ECtHR and in the ILO labor rights protection system.

Due to the diversity of traditions and legal cultures of national legislators, mandatory arbitration may take various forms[25]. First of all, the obligatory feature may result from two sources. Firstly, from the content of the provisions of the adhesion agreement, which are particularly popular in the United States. Secondly, the law. In the latter approach, mandatory arbitration is carried out by arbitrators appointed or proposed by the state or related to the common judiciary. The use of the term "arbitration" in this context is justified only by the fact that the procedure itself is informal and may draw some elements from the institution of voluntary arbitration[26], for example granting a certain degree of autonomy to the parties to a dispute, e.g. for the selection of members of the arbitration panel. The doctrine even indicates that this form of arbitration, in the ECHR system, is just another name for court proceedings[27].

Although mandatory arbitration is highly controversial[28], especially due to the possible limitation of the right to a court and a fair trial, or

---

24 Orzeł-Jakubowska, *Sądownictwo polubowne w świetle standardów konstytucyjnych,* 29–55.

25 Walery Masewicz, *Strajk. Studium prawno-socjologiczne* (Warsaw: Instytut wydawniczy związków zawodowych, 1986), 116–121.

26 Jean Sternlight, "Creeping Mandatory Arbitration," *Stanford Law Review* 57, no. 5 (April 2005): 1647.

27 Martina Závodná, "The European Convention on Human Rights and Arbitration" (Bachelor's thesis, Masaryk University, 2014), 32.

28 Jean Sternlight, "Creeping Mandatory Arbitration," *Stanford Law Review* 57, no. 5 (April 2005): 1632–1638.

allegations according to which this form of arbitration is unfair[29], however, from the perspective of the ECtHR, it is not inconsistent with Art. 6 sec. 1 ECHR. Due to the fact that the parties have little freedom, whether in determining the subject matter of the case or choosing the legal system on the basis of which the dispute should be settled, or in determining procedural issues[30], the Tribunal emphasized that, similarly to proceedings before a common court, the mandatory arbitration procedure must meet the standards provided for in Art. 6 sec. 1 ECHR. In particular, the jurisprudence of the ECtHR emphasizes the need to guarantee the independence of arbitrators from the pressures of the executive and the parties themselves, as well as, as a rule[31], the transparency of the proceedings[32].

The most important doubt that exists in the doctrine in the context of the institution of obligatory arbitration is whether it can implement the postulates of justice. This doubt, however, arises on the basis of mandatory arbitration, the source of which are the provisions of the adhesion agreement, under which the stronger party to the legal relationship, using arbitration, deprives the weaker party of the protection of common courts. In the case of mandatory arbitration, the source of which is the Act, these doubts are not so strong. Firstly, the described form of arbitration, similarly to a court trial, can effectively serve to achieve a fair solution in the material sense. Secondly, in the context of procedural fairness, it is possible to establish such standards of mandatory arbitration that it arouses a sense of fair treatment, e.g. by giving the parties the opportunity to hear the parties, present their arguments, or at least guarantee them a balance in the selection of members of the arbitration body[33]. This fact is confirmed by the jurisprudence of the ECtHR itself, according to which

29 Sternlight, "Creeping Mandatory Arbitration," 1670 et seq.

30 ECtHR Judgement of 12 December 1983, Case Lars Bramelid I Anne Marie Malmstrom v. Sweden, application no. 8589/79, hudoc.int.

31 ECtHR Judgement of 7 March 1984, Case Sir William Lithgow and Others v. United Kingdom, application no. 9006/80, hudoc.int.

32 ECtHR Judgement of 21 October 1998, Case Norman Scarth v. United Kingdom, application no. 33745/96, hudoc.int.

33 Yuval Feldman, *The law of good people* (Cambridge: Cambridge University Press, 2008), 75–77.

Art. 6 sec. 1 ECHR[34]. Making the procedure less formal may have a positive impact on reaching a satisfactory solution for both parties to the dispute. The literature also emphasizes the function of justice in social and individual terms. Also in this respect, the institution of obligatory arbitration may, contrary to the court process, implement both of these aspects. In individual terms, the need to guarantee the parties a quick, cheap and easily accessible procedure is indicated[35]. These demands, in contrast to court proceedings, can be implemented by informalizing the arbitration procedure. The social aspect of justice, in turn, is achieved primarily through the implementation of the principle of legal certainty, as well as prevention and education of citizens. Therefore, it is crucial to guarantee a certain degree of openness of the proceedings in the framework of the mandatory arbitration procedure, including the need to publish its decisions[36]. The institution of mandatory arbitration has a certain potential that can positively influence the procedure of collective disputes. However, it is important to be aware of its limitations under collective labor law. This form of arbitration undermines the autonomy of social partners and freedom of association. Its use must therefore be limited to exceptional situations, as was the case in the present case.

The uniqueness of the commented decision, in the context of the already well-established view as to the possibility of applying mandatory arbitration, is that it has been recognized as an acceptable substitute for the right to strike, should it be prohibited. The Court's decision in this respect is in line with the statements of the ILO Committee on Freedom of Association. In the light of these views, mandatory arbitration may replace negotiations and other consensual-irenic methods of dispute resolution, and therefore strikes even more so. However, this substitution can only be made exceptionally, i.e. only when at least two conditions are met[37]. The first one mentioned by the ILO Committee on Freedom of As-

34 Jean Sternlight, "Creeping Mandatory Arbitration," *Stanford Law Review* 57, no. 5 (April 2005): 1671.

35 Sternlight, "Creeping Mandatory Arbitration," 1668.

36 Sternlight, "Creeping Mandatory Arbitration," 1672.

37 International Labour Organization, *Freedom of Association: digest of decisions and principles of Freedom of Association Committee of the Governing Body of the ILO* (Geneva: International Labour Office, 2013), 1003–1005.

sociation is the existence of a deadlock, i.e. a situation in which it is not possible to resolve the dispute by strike. The second premise, which must occur cumulatively, is a threat to the values protected in a democratic state, such as protection of citizens' health. The ILO Committee on Freedom of Association also commented directly on the relationship between the right to strike and mandatory arbitration, but these statements concerned arbitration as a substitute for the right to strike in a situation where it was ex ante limited or prohibited for a specific group of workers[38]. The Tribunal, on the other hand, ruled on the replacement of mandatory arbitration with an already ongoing strike, which was banned ex post. In the context of the ILO system, it should be emphasized that mandatory arbitration is only an exception to the rule, i.e. consensual-irenic methods of resolving collective disputes, including voluntary arbitration, which is referred to, inter alia, in point 6 of the ILO Recommendation No. 92 on voluntary conciliation and arbitration.

Also in the context of academic considerations on the relationship between the right to strike and mandatory social arbitration, there are discrepancies regarding the extent to which mandatory arbitration could replace a strike. On the one hand, it is indicated that it should be a substitute for the right to strike, only if its organization was not or ceased to be ethically justified. The lack of ethical justification for strikes concerns, in particular, some employees employed in services considered essential, e.g. employed in health care[39]. On the other hand, arbitration is considered a competitor to the right to strike. In this context, it is indicated that due to the development of irenic methods of resolving collective disputes, the strike, which causes a number of negative consequences, should be completely replaced, among others, by state arbitration[40][41]. Proponents of this view therefore contest the very legal admissibility of a strike

38 International Labour Organization, *Freedom of Association: digest of decisions and principles of Freedom of Association Committee of the Governing Body of the ILO* (Geneva: International Labour Office, 2013), 564–569.

39 Antoni Szymański and Ludwik Górski, *Kodeks społeczny: zarys katolickiej syntezy społecznej* (Lublin: Towarzystwo Wiedzy Chrześcijańskiej, 1934), 86.

40 Czesław Strzeszewski, *Praca ludzka* (Lublin: Towarzystwo Naukowe KUL, 1978), 247.

41 Arthur Fridolin Utz, "Is a right to strike a human right?," *Washington University Law Review* 65, no. 4 (1987): 755.

as a means of resolving disputes. Importantly, both of these institutions of collective labor law show some similarities in terms of their functions and possible place in the structure of the collective dispute resolution model. Obligatory arbitration, like a strike, may be a source of pressure on the parties to a collective dispute to resolve the dispute as quickly and consensually as possible, either by negotiation or mediation. Due to the fact that mandatory arbitration constitutes the legislator's interference in the autonomy of social partners, which is contrary to the content of freedom of association and the principle of subsidiarity, this form of arbitration should always be perceived – similarly to the strike – as the *ultima ratio*[42].

According to the thesis of the ECtHR, mandatory arbitration established instead of the right to strike, due to the impossibility of settling the dispute by means of it and the increasing threat to the protection of citizens' health, does not constitute a violation of Art. 11 sec. 1 ECHR. This thesis is consistent with the previous statements of the ILO Committee on Freedom of Association and part of the doctrine. It should be emphasized that the impasse reached in the ongoing dispute is not a sufficient reason for the establishment of mandatory arbitration in place of a strike. The Court, like the ILO's Committee on Freedom of Association, expressed the view that it was necessary for the strike to additionally threaten the values particularly protected in a democratic society. In addition, disregarding the dispute as to whether the obligatory feature excludes the described institution from the semantic scope of arbitration as such, it should be stated that the measure called "compulsory arbitration" may meet the demands of justice and, under certain conditions, positively influence the resolution of the dispute. However, due to the fact that the strike is a recognized means of resolving collective disputes in international human rights law, which, as the Court has emphasized, is "the most powerful means of protecting workers' interests" and is justified by the content of freedom of association, and therefore fits in with the idea of trade union autonomy and the principle of proportionality, should not be replaced by arbitration, but only substituted by it, should the organization of a strike turn out to be illegal. These arguments mean that the position of the Tribunal regarding the admissibility

[42] Karol Wojtyła, *Katolicka etyka społeczna* (Lublin: Wydawnictwo św. Stanisława BM Krakau, 2018), 143–144.

of exceptional substitution of a strike with mandatory arbitration deserves approval and is consistent with the views of the ILO.

In the commented decision, both theses of the Tribunal deserve approval and both are also in line with the views of the ILO, which, due to its narrow specialization in the protection of workers' rights, has unquestionable authority. The right to strike is a right protected under both the ECHR and the ILO Convention. The only difference between them comes down to the status of the right to strike, which according to the ILO Committee on Freedom of Association is a fundamental right. In the wording of the commented decision, the Tribunal once again decided not to use similar terms. However, this does not change the fact that due to the need to apply restrictions to the right to strike, especially due to its invasive nature, the level of protection provided by the Convention seems to be sufficient. It is also worth noting that the Tribunal appreciated collective bargaining, the function of which is, inter alia, to minimizing the risk of going on strike. The Court also remains in line with the views of the ILO regarding the exceptional admissibility of mandatory arbitration in lieu of a strike under strict conditions. Mandatory arbitration is not part of the content of freedom of association, but is a form of state intervention. For these reasons, its use can only be justified in a situation of a significant threat to the values essential in a democratic society, when the parties have used all means falling within the limits of freedom of association.

References

Feldman, Yuval. *The law of good people. Challenging States' Abilities to Regulate Human Behavior*. Cambridge: Cambridge University Press, 2008.

Grzebyk, Piotr. *Od rządów siły do rządów prawa. Polski model prawa do strajku na tle standardów unijnego i międzynarodowego prawa pracy.* Warsaw: Wydawnictwo naukowe SCHOLAR, 2019.

International Labour Organization. *Freedom of Association: digest of decisions and principles of Freedom of Association Committee of the Governing Body of the ILO*. Geneva: International Labour Office, 2013.

Masewicz, Walery. *Strajk. Studium prawno-socjologiczne*. Warsaw: Instytut Wydawniczy Związków Zawodowych, 1986.

Nowicki, Marek. "Commentary on the Convention for the Protection of Human Rights and Fundamental Freedoms." In *Wokół konwencji europejskiej.*

Komentarz do Europejskiej Konwencji Praw Człowieka, edited by Marek Nowicki, 985–1022. Warsaw: Wolters Kluwer, 2021.

Nowik, Paweł. "European Collective Labor Law." In *Międzynarodowe publiczne prawo pracy*, edited by Krzysztof Baran, 939–1093. Warsaw: Wolters Kluwer, 2020.

Orzeł-Jakubowska, Aleksandra. *Sądownictwo polubowne w świetle standardów konstytucyjnych.* Warsaw: Wolters Kluwer, 2021.

Sternlight, Jean. "Creeping Mandatory Arbitration." *Stanford Law Review* 57, no. 5 (April 2005): 1631–1675.

Strzeszewski, Czesław. *Praca ludzka.* Lublin: Towarzystwo Naukowe KUL, 1978.

Szymański, Antoni, and Ludwik Górski. *Kodeks społeczny: Zarys katolickiej syntezy społecznej.* Lublin: Towarzystwo Wiedzy Chrześcijańskiej, 1934.

Utz, Arthur Fridolin. "Is a right to strike a human right?" *Washington University Law Review* 65, no. 4 (1987): 732–757.

Wojtyła, Karol. *Katolicka etyka społeczna.* Lublin: Wydawnictwo św. Stanisława BM Krakau, 2018.

Závodná, Martina. "The European Convention on Human Rights and Arbitration." Bachelor's thesis, Masaryk University, 2014.