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# The circumventing of the law in public economic law – on the verge of a conflict between private law and public law values

Obejście prawa w publicznym prawie gospodarczym – na granicy konfliktu wartości prawa prywatnego i publicznego

Обход закона в публичном хозяйственном праве – на границе конфликта ценностей частного и публичного права

Обхід закону в публічному господарському праві – на межі конфлікту цінностей приватного та публічного права

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**Summary:** This article aims to discuss the functioning of circumvention in public economic law. The present research attempts to present the possible limit of qualifying complex (combined) actions by entrepreneurs in public law as a circumvention of the law. The article uses the linguistic and logical method by analysing the provisions of the acts, their systematisation, combination and determination of the proper meaning of legal norms. The research results were as follows: there is a range of activities not provided for but also not prohibited by law; these are subject to consumption by lawful activity and the circumvention of the law is purely factual in this aspect. In public law, circumvention can also be done with conceivable intent, and as such, entrepreneurs making complex (combined actions in law) always risk exceeding the limits of circumventing the law.

**Key words:** circumventing the law in good faith, purposefully circumventing the law, circumventing the law in public economic law, limit of legally permissible acts

**Streszczenie:** Tekst prezentuje ujęcie instytucji obejścia prawa w publicznym prawie gospodarczym. W artykule przedstawiono funkcjonowanie relacji sprzecznych wartości w publicznym prawie gospodarczym, czynności obejścia prawa oraz dokonywania czynności niestanowiących obejścia prawa. W celu dokładnego wyjaśnienia działania zmierzającego do obejścia prawa, dokonano również podziału na obejścia prawa w dobrej i złej wierze. W artykule wyrażono stanowisko, zgodnie z którym badanie obejścia prawa w prawie publicznym nie powinno ograniczać się jedynie do celu (zamiaru) podmiotu. W tym aspekcie obejście prawa pełni funkcję dodatkowej kontroli legalności działań podmiotów.

**Słowa kluczowe:** obejście prawa w dobrej wierze, celowość obejścia prawa, obejście prawa w prawie publicznym, obejście prawa jako gwarancja ochrony wartości

**Резюме:** В тексте представлена трактовка института обхода закона в публичном хозяйственном праве. Представлено функционирование отношений противоречивых ценностей в публичном хозяйственном праве, актов обхода закона и совершения действий не являющихся обходом закона. Также проводится разграничение между добросовестными и недобросовестными действиями по обходу закона с целью детального разъяснения действий по обходу закона. В статье высказывается мнение о том, что рассмотрение обхода закона в публичном праве не должно ограничиваться только целью (намерением) субъекта. В этом аспекте обход закона выполняет функцию дополнительного контроля за законностью действий субъектов.

**Ключевые слова:** добросовестный обход закона, целенаправленность обхода закона, обход закона в публичном праве, обход закона как гарантия защиты ценностей

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**Резюме:** У тексті представлено дослідження інституту обходу права у публічному господарському праві. У статті презентовано функціонування відносин конфліктуючих цінностей у публічному господарському праві, дії в обхід права та вчинення дій, які не є в обхід права. З метою більш детального роз'яснення дій в обхід права проводиться розмежування між добросовісними та недобросовісними діями в обхід права. У статті висловлюється думка, що дослідження обходу права в публічному праві не повинно обмежуватися лише метою (наміром) суб'єкта. У цьому аспекті обхід закону виконує функцію додаткового контролю правомірності дій суб'єктів.

**Ключові слова:** добросовісне обходження права, ціль обходу права, обхід права у публічному праві, обхід права як гарантія захисту цінностей

## Introduction

Circumvention of the law traditionally derives from private law. Generally speaking, it is a legal institution of a controlling nature, with the occurrence of the premise of circumventing the law leading to the invalidity of a legal act. The predominant view in the literature is that this refers to cases where an act that does not contain elements prohibited by law nevertheless serves an objective prohibited by law.[1] When examining the legitimacy of an entity's actions, the focus so far has been strictly on the purpose (unjust intent of the parties) for the entities to perform a legal act and the definition of a prohibiting norm (*ius cognes*).[2] Currently, this institution is incorporated into the various normative acts of the Polish legal system, including public law. At the same time, it is not regulated comprehensively and applies to selected situations only. Therefore, applying this institution in the field of public law causes many interpretation doubts, both in doctrine and jurisprudence. The fundamental problem concerns the examination of the person's intentions, i.e. whether they must have an *a priori* intention to act in order to circumvent the law or whether they can also do so unconsciously. The indicated problem is particularly significant in public economic law because, on the one hand, entities can take actions freely, and on the other, they must comply with rigid rules on regulated activities; in practice, due to the complexity of the normative matter, it is difficult to indicate the point at which an action is still lawful.

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1 M. Świerczyński, in: *Kodeks cywilny. Komentarz*, ed. M. Załucki, 2023 [Legalis database], Commentary on Article 58, no. 6; see also: P. Machnikowski, in: *Kodeks cywilny. Komentarz*, eds. E. Gniewek, P. Machnikowski, 2021 [Legalis database], Commentary on Article 58, no. 9.

2 J. Parchomiuk, *Nadużycie prawa w prawie administracyjnym*, Warszawa 2018, p. 70; D. Miler, *Czynności mające na celu obejście ustawy na tle orzecznictwa sądów polskich*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 2019, vol. 81, no. 4, pp. 116–117.

It seems that since the same institution is a form of control over the interpretation and application of legal provisions by legal system entities (including over provisions containing general clauses and legal principles), it should cover the widest possible range of regulation, including cases where the perpetrators are unaware of the nature of their acts. The wide range of control also justifies the character of public law regulations. Accordingly, the following thesis can be formulated: in public economic law, investigating circumvention of the law is not limited only to the person's intention but also concerns the effect (implementation of the action taken), and in this respect, circumvention of the law is also unplanned by the person. The person may, within legal limits, perform complex activities under the law. Thus, the assessment of circumvention of the law would essentially be reduced to a simultaneous assessment of the intent and the effect it had.

This article aims to characterise the function and applicability of the institution of circumvention in public economic law.

To thoroughly examine the relation among the provisions, their interconnection and systematisation pertaining to the circumvention of the law, the paper uses the logical and linguistic analysis method.

## 1. Circumventing the law and values important for the legal system

First, it is necessary to characterise the matter for the institution of circumvention of the law. Circumvention of the law is part of the legal system; it is a control element.[3] The rationale for its activation occurs when a violation of legal norms is detected.[4] Thus, it is necessary to characterise the value and functioning of values in the Polish legal order. The concept of value is not uniformly understood in philosophical sciences; one can briefly define value as a subjective, internal imperative that accounts for the sense of action taken by a subject, whereby their actions are influenced by emotion, experience and thought.[5] Further, a value denotes a socially accepted way of conduct.[6] In law, a value provides the direction and criteria for lawmaking and law application, for which the object of law consists not of social

3 J. Misztal-Konecka, *Ugoda w postępowaniu cywilnym. Studium z zakresu prawa polskiego na tle prawa rzymskiego*, Lublin 2019, p. 287.

4 J. Parchomiuk, *Nadużycie prawa*…, p. 71.

5 É. Bréhier, *Problemy filozoficzne XX wieku*, Warszawa 1958, p. 65.

6 D. von Hildebrand, *Serce. Rozważania o uczuciowości ludzkiej i uczuciowości Boga-Człowieka*, Poznań 1985, p. 159.

phenomena but, above all, of obligations under legal norms.[7] The legal theory and philosophy literature introduces two important breakdowns concerning provisions directly referring to values. The first is made based on the following sources: international (EU), constitutional, and statutory.[8] The breakdown according to sources of universally binding law may reflect a hierarchy of values in the Polish legal system, whereas the hierarchy of sources[9] would in turn directly determine both the importance of values in law and the power of the rationale of those who apply it.[10] This seems unjustified given the aforementioned facts. To ensure complete protection and simultaneous observance of all values in law, exclusive hierarchisation cannot be asserted. Hierarchisation would lead to an unequal distribution of power and thus to a contradiction of values in the legal system; in other words, it would result in a complete lack of protection for values included in special provisions (weaker) or outside the legal system, favouring values generally regulated by higher-order (stronger) legislation instead. As a rule, legal norms stemming from special provisions should not contradict acts of a higher order; however, it is reasonable to state that each legal norm contained in a special provision does, to some extent, limit the application of another general norm due to general provisions contained in higher-order acts – *lex specialis derogat legi generali* – which always results in a collision of values.[11] The existence of multi-source values in the legal system is supported by the second breakdown, originating in legal theory and philosophy literature, into values contained in legal principles (systemic values – rules of law) and general clauses (non-systemic values – customary values).[12] The legal regulations allow in some situations to directly apply non-system norms. These often have a huge impact on the application of the law (with its limits); they constitute a criterion and assessment as to the correctness of the solution applied to the actual circumstances.

The law applier, acting within the available scope of discretion, is obliged to comply with the applicable hierarchy of law sources and strive for such an interpretation

7 Z. Duniewska, in: *System Prawa Administracyjnego*, vol. 7. *Prawo administracyjne materialne*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2012, p. 129.

8 L. Leszczyński, G. Maroń, *Zasady prawa i generalne klauzule odsyłające w operatywnej wykładni prawa*, Annales Universitatis Mariae Curie-Skłodowska. Sectio G 2013, vol. 60, no. 2, pp. 147–148.

9 The sources of law are understood broadly under Article 9 and 87 of the Polish Constitution. The view in the literature is that the Constitution incorporates international law including customary norms (soft law), see: M. Masternak-Kubiak, *Przestrzeganie prawa międzynarodowego w świetle Konstytucji Rzeczypospolitej Polskiej*, Kraków 2003, p. 16; see also: Ruling of the Constitutional Tribunal of 11 May 2005, K 18/04, LEX no. 155502.

10 E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, Państwo i Prawo 2005, no. 4, pp. 3–4.

11 W. Brzozowski, *Obejście konstytucji*, Państwo i Prawo 2014, no. 9, p. 7.

12 L. Leszczyński, G. Maroń, *Zasady prawa*…, p. 146.

of the law as to ensure that the norm best protects the given factual state, thus prioritising one stronger value while safeguarding the weaker value. The above proves the existence of a vertical-hierarchical relationship of values in the Polish legal system. Therefore, the essential feature of the values contained in legal norms and their vertical functioning in the system is also their collision suitability. The conflict of values is particularly visible in the juxtaposition by the legislator of the interest of the person (group of persons) and the interest of the state (good of the community).[13] This clash is caused by the value of freedom (Article 30 of the Constitution of the Republic of Poland) and respect for common values, goals and needs of society (Article 1 of the Constitution of the Republic of Poland).[14] The essence of the functioning of values in law is their constant weighing and application to the facts. The law provides norms for securing values that are less protected in specific factual situations. The laws contain norms for safeguarding the values with weaker protection in concrete cases. An essential institution is the principle of proportionality under Article 2 and 31 (3) of the Constitution of the Republic of Poland, based on which the limitation of values must not be excessive; it must necessarily be the implementation of the stronger value.[15] The resolution of the public authority who is the law applier must also be adequately justified factually and legally (e.g. Article 107 (1) (6) of the Code of Administrative Procedure). In addition, if jurisprudence expresses concerns about the quality of laws, demands are made to the legislator to create appropriate blanket provisions. Laws restricting values should be sufficiently detailed while avoiding excessive regulation.[16] Relating the previous background to the institution of circumvention of the law based on public law, one may note that a conflict occurs each time between the values of business freedom and public law regulations protecting the public interest (e.g.: concessions, licenses, permits – the rights and obligations arising from them). The value in the legal system is the socially recognised and established practice of conduct. In turn, an established practice translates into the scope of the normalisation of laws and the creation of meta-norms (hierarchically more important intra-system legal principles). This established practice of conduct is related to the state's reaction expressed in the institution of circumventing the law, aimed at securing the already existing

13 As an example of this juxtaposition, the following clauses can be mentioned: individual taxpayer interest and public interest (Article 67a (1) of Tax Ordinance); see also: E. Komierzyńska, M. Zdyb, *Klauzula interesu publicznego w działaniach administracji publicznej*, Annales Universitatis Mariae Curie-Skłodowska. Sectio G 2016, vol. 63, no. 2, pp. 161–179.

14 R. Blicharz, in: *Aksjologia publicznego prawa gospodarczego*, ed. A. Powałowski, Warszawa 2022, p. 34–35.

15 Ruling of the Constitutional Tribunal of 25 February 1999, K 23/98, LEX no. 36178.

16 Ruling of the Supreme Administrative Court of 9 December 2021, II GSK 2311/21, LEX no. 3336078.

coherent and hierarchically arranged system of values included in legal norms.[17] In principle, controlling circumvention of the law is carried out like monitoring compliance with systemic norms, but to the extent that the law refers to non-systemic norms – and also regarding these norms. The literature indicates that the weighing of values concerns not only the making and application of the law but also compliance with it.[18] The legal system features many general clauses that tend to simplify or modify its existing provisions.[19] These affect the extent to which a person can make such a modification, as well as the consequences in cases where the entrepreneur's goal is, from the very outset, to rightfully (economically, in an economically justified manner) modify the application of norms even though their actions may be deemed *in fraudem legis* due to faulty reasoning.

## 2. Circumvention of the law in public law provisions

Actions relating to circumventing the law, as indicated by the legislator, are regulated by the provisions of many special laws. This chapter focuses on the public law provisions regulating the most general circumventions of the law – i.e. procedural ones – taking into account the criterion of the universality of application of these norms to the facts. Beginning with administrative law, the provision that directly refers to the circumvention clause is Article 60 of the Law of the Administrative Courts Procedure. The provision defines a procedural action for revoking other procedural actions (withdrawal of a complaint), with revocation being subject to a legality review by the WSA based on an exhaustive catalogue of prerequisites listed in the provision. The literal wording of Article 60 of the Law of the Administrative Courts Procedure points to an action that "is intended to" circumvent the law, i.e. it does not indicate the intentional action of the subject but rather the nature of the action. Other similar procedures in Polish law include Article 184 of the Code of Civil Procedure and Article 107 of the Code of Criminal Procedure. The norms contained in these provisions are systemically interrelated due to the public law nature of regulation. Thus, to understand the application of the circumvention clause in public law, the latter should also be interpreted based on other procedures and substantive law (as described below). The Code of Civil Procedure refers most extensively to circumventing the law in the

17 S. Grzybowski, in: *System Prawa Cywilnego. Część ogólna*, ed. S. Grzybowski, Wrocław 1985, p. 60.
18 R. Blicharz, in: *Aksjologia*…, p. 32.
19 Ibidem, p. 77.

following provisions: Article 183[14] (3), Article 184, Article 203 (4), Article 213 (2), Article 247, Article 339 (2), Article 479[30c] (3), Article 782[1] (1), Article 1161[1] (2). Considering the need for further conclusions, Article 184, Article 247 and Article 339 (2) deserve special attention because their assessment may be closely related to substantive legal norms. In Article 247 of the Code of Civil Procedure (which regulates the admissibility of counter-evidence), the legislator has, as an exception, circumvented legal provisions indicated in the article (as regulated in the Civil Code). As a rule, it should be that since the parties to a legal action have already prepared evidence (document evidence) to prove its existence, the content (validity of this document) should not be challenged by other evidence. The validity of the act may be challenged in exceptional cases, but legal acts made in written form under pain of nullity cannot be denied in this way. According to this provision, actions under the rules of procedure (provisions of the Civil Procedure Code) cannot nullify substantive actions and their effects (provisions of the Civil Code). The structure Article 247 of the Code of Civil Procedure indicates that the legislator equates the concept of circumvention of the law only with *contra legem* acts because the provision is so specific that it cannot also apply to circumventions of the law included in the views of the doctrine.[20] A person's action may only be classifiable as either lawful or unlawful.[21] Moreover, the legislator is rigid about the circumvention of norms under the law (the provisions regulating the reserved, specific form in law). Interestingly, here, the legislator uses a different verb to describe the person's action – "if this does not result in." This phrase refers to a different action than the "is intended to" analysed above and emphasises that it is strictly concerned with achieving a certain effect. Thus, this provision is a special kind of exception in civil procedure by the express will of the legislature. Also subject to scrutiny is Article 339 (2) of the Code of Civil Procedure, which deals with the examination of the claims contained in the plaintiff's procedural actions and is the only one that directly indicates the action's intentionality – wrongful intention (*in fraudem legis*) – but this provision refers to circumvention of the law in a broad sense. Still different is the case with Article 184 of the Code of Civil Procedure. The provision regulates the settlement agreement,[22] a complex act of a procedural and substantive law nature, and as such, the substantive provisions of the Civil Code, particularly its

20 An activity that is not directly prohibited by law but is taken to achieve a goal prohibited by it, Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna*, Warszawa 2013, p. 285.

21 Ruling of the Supreme Court of 13 November 1973, I CR 678/73, Legalis no. 17484: "Article 247 KPC does not at all concern the question of whether what the parties declared in the contract is true. In particular, this provision does not exclude evidence from witnesses or the hearing of the parties to prove the deceptive nature of the contract."

22 J. Lapierre, *Ugoda sądowa w polskim procesie cywilnym*, Przegląd Sądowy 1996, no. 2, pp. 13–14.

Article 58, apply appropriately to the interpretation of the circumvention of the law as set out in this provision. Further, the provision in question also narrows down the examination of a person's intentional, i.e. wrongful, action. Controlling the circumvention of the law is complex and concerns such things as: 1) *in fraudem legis* control of the consensual legitimate purpose of the parties, as set out in the agreement, in terms of producing substantive legal effects; 2) general control of whether their mutual will (purpose – content of agreement), as set out in the voluntary agreement, does not seek to produce an effect prohibited by law.[23] This is similar to the case of Article 107 of the Code of Criminal Procedure (the mediation settlement agreement).[24] The legislator protects norms derived from both the law and extra-legal systems. Thus, in this case, the legislator distinguishes a complex circumvention control consisting of a general premise from the Code of Civil Procedure and a special one from the Civil Code. A linguistic analysis of the procedural provisions on circumvention of the law makes it possible to establish the nature of how this clause is used in the rules of procedure and their connection with the provision of Article 58 of the Civil Code. As implied by this argument, the nature of the action of circumvention of the law has an identical meaning, in *lege non distinguente* terms. On the other hand, the extent of standardisation of the premise assessment may vary. In public law regulations, the general rule seems to be a wide range of control, covering the effect of the person's action. Moreover, the control of circumvention of the law may be subject to double evaluation when combining procedural and substantive norms. The narrowing down of the control contained in this institution results from the specific provisions of public law and is effected by defining the scope of the norms and provisions in question or examining and assessing the willfulness of the subject's action, and therefore, viewing their action's effect as *in fraudem legis*. Due to the nature of the systemic legal principle of particular importance for public law norms: *ignorantia iuris nocet* (Article 2 of the Constitution of the Republic of Poland), it should also be noted that all addressees are under obligation to comply with legal norms.[25] Accordingly, it should be assumed that control of circumvention of the law – the application of systemic fundamental values important to the law[26] – does not make it possible to avoid liability by pleading the absence of a deliberate aim, i.e. wrongful intent to circumvent the

23 Cf. J. Misztal-Konecka, *Ugoda*…, pp. 289–290.

24 This is the only provision in the criminal procedure that refers to circumvention of the law.

25 E. Smogorzewski, *Korzystanie z fachowej pomocy prawnej jako przyczyna błędu co do prawa*, Monitor Prawniczy 2016, no. 4, p. 205.

26 W. Wąsowicz, *Obejście prawa jako przyczyna nieważności czynności prawnej*, Kwartalnik Prawa Prywatnego 1999, vol. 8, no. 1, pp. 94–95.

law.[27] Ignorance would therefore have to be viewed as potentially intentional, with the person performing a complicated action being aware that it may contradict the norms of the system.[28] When viewed in this way, the wilfulness that makes up the intentionality of circumventing norms set out in special provisions can be understood as a simplification of their application, a kind of presumption that if the wrongful intent of the subject is detected, the action is always *in fraudem legis* – without specifically indicating the prohibiting provision (which may be difficult in a particular state of facts).[29] Since this institution is mentioned only in specific provisions, it seems, *prima facie*, that it is applicable only in the indicated situations – the legislator did not choose to regulate the clause of circumvention of the law in such a way as e.g. the abuse of rights (Article 5 of the Civil Code and Article $4^1$ of the Code of Civil Procedure; these provisions are regulated in the general part of normative acts). On the other hand, however, it would appear from the procedural rules that circumvention applies more widely. The lack of a general regulation of this clause may be due to the legislature's concern that virtually any action could be considered a circumvention of the law if supported by proper argumentation.[30]

## 3. Circumvention of the law as contrasted with actions not provided for by the law

The literature divides the forms of non-compliance with the law into contra legem (against the law) and praeter legem (outside the law) actions. The first is defined as

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27 Cf. D. Miler, *Czynności mające na celu obejście*…, pp. 117–118; cf. the reasoning of the Voivodeship Administrative Court in Warszawa, which did not share the party's allegation of circumvention of the law, arguing as follows: "Making this kind of allegation, however possible, requires that the circumstances of the case directly indicate not only the circumvention of the law, but also the intention to do so, i.e. to consciously ignore a legal obligation – thus acting in fraudem legis," Ruling of the Voivodeship Administrative Court in Warszawa of 12 January 2022, VII SA/Wa 2074/21, LEX no. 3335977; see S. Wronkowska, in: S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa*, Poznań 2001, p. 197.

28 A similar view has been expressed in the private law doctrine: "Circumvention of the law does not have to be intentional; it is irrelevant whether the parties to a legal action were aware of the existence and content of legal norms. A different stance would reward ignorance of the law," P. Sobolewski, in: *Kodeks cywilny. Komentarz*, eds. K. Osajda, W. Borysiak, 2022 [Legalis database], no. 84; see also: W. Wąsowicz, *Obejście prawa*…, pp. 83–84.

29 Cf. Ruling of the Supreme Court of 14 October 2016, I CSK 648/15, LEX no. 2188610 and of 30 November 2005, I UK 61/05, LEX no. 607105.

30 T. Stawecki, in: *Nadużycie prawa. Konferencja Wydziału Prawa i Administracji, 1 marca 2002 roku*, eds. H. Izdebski, A. Stępkowski, Warszawa 2003, p. 87.

contrary to the disposition of the absolute norm (ius cogens); this action amounts to engaging in behaviour prohibited by the norm or failing to implement it.[31] The second is defined as an intentional action to achieve a prohibited goal through behaviour that ostensibly constitutes an application of an otherwise legitimate norm.[32] However, an analysis of the facts (as discussed below) may lead to the conclusion that there is also a margin of indirect actions – those not provided for but also not prohibited by the legal system (not contrary to any norm).[33] In other words, it is about actions not provided for by the legislator that do not undermine the values contained in other norms because they are lawful in certain situations. Yet another crucial provision in interpreting the institution of circumvention of the law is Article 58 of the Civil Code, which defines, *expressis verbis*, the limits of the formation of private-legal actions (and seemingly also their relationship with public law[34]) and determines the effect of exceeding such limits.[35] Exceeding these limits brings such effects as the invalidity of the action (absolute), or the action not producing the legal effects intended by the party – i.e. being wrongful. This provision indicates the effect of performing such an action, and therefore, can be deemed a general rule for interpreting the circumvention clause in the legal system.[36] It refers to the criterion of division into contra legem and praeter legem actions and, importantly, secundum legem actions (a contrario Article 58 (1) of the Civil Code). According to the views of the doctrine, a secundum legem interpretation means, as a rule, interpreting a provision in accordance with its linguistic content.[37] However, in cases where this interpretation is sharply unfair, secundum legem, according to the systemic interpretation, is the criterion of the norm's compliance with the legal system,[38] including with the principles of legal interpretation accepted by the jurisprudence and principles of equity (good practices) [emphasis added by O.B.]. Therefore, it is necessary to consider whether there can be a circumvention act that the legislator allows to exist in law. It may be helpful to distinguish between circumvention ac-

31 T. Chauvin, T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warszawa 2016, p. 184.

32 Ibidem, p. 186.

33 For example: legally permitted outsourcing of rights and obligations on licensed activity, see: J. Byrski, *Outsourcing w działalności dostawców usług płatniczych*, Warszawa 2018, pp. 9–10.

34 This stems from the assumption that control involves compliance with the norms of the entire legal system, P. Sobolewski, in: *Kodeks cywilny*…, no. 22.

35 "Although circumventing the law is a construction of civil origin, it is of a general nature and also occurs in other branches of law, including administrative law," Ruling of the Voivodeship Administrative Court in Lublin of 3 March 2022, II SA/Lu 367/21, Legalis no. 2786210.

36 It should be emphasised that the effects of circumvention are also described in Article 119a of the Tax Ordinance, even though the provision limits its application to the assessment of tax effects only.

37 L. Morawski, *Zasady wykładni prawa*, Toruń 2010, p. 94.

38 Ibidem, pp. 94–95.

tions taken in good and bad faith. Circumvention acts taken in good faith (compliant in fact and in law) would simply be combined acts but structured in accordance with the law, whether provided for or not, but also not expressly prohibited by law. Structurally, they resemble actions aimed at circumventing the law but taken for a legitimate purpose (e.g. economically justified) within the limits of the law. Such actions would alternatively secure the rights and obligations of the parties or expedite the proceedings better than a legal institution in a given state of facts and, above all, would not violate the interests of the state or third parties; thus, they should not be qualified as ones aimed at circumventing the law (*in fraudem legis*). The actions in question comprise 1) a functioning legal institution (the institution must have such a general scope of norms that it will consume another institution) – a consummating action;[39] 2) additions – inspired by another institution covering the indicated situation (including the action that may consist of extra-system norms) – a consummating action; 3) the legitimate aim of the subject (lack of intention to violate legal norms), persisting throughout the action's performance. An example of such an action in the field of private law could be the issue of the appropriate patent protection quality for an invention. An entrepreneur, in accordance with Article 11 (2) of the Act on Combating Unfair Competition, may shape such a strategy to protect a business secret (due diligence) that would protect his invention in a similar way (factual monopoly) as a patent (legal monopoly), with such protection as a business secret lasting longer than in the case of a patent.[40] In turn, another public law example, as described by A. Haładyj, refers to a structural gap in environmental law (substantive administrative law): where there is a lack of an appropriate legal regulation (structural gap), administrative law appliers cannot, as a rule, apply analogy. While it would be advisable to do so in order to speed up proceedings, this would violate the principle of legalism.[41] Individuals can, under Article 7a of the Code of Administrative Procedure, invoke the principle of resolving legal doubts in favour of a party [legitimate action of an authority – O.B.] and

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39 Here, it seems appropriate to refer to the definition of a similar phenomenon in the doctrine of criminal law. The rule of consumption developed in criminal law concerns the improper concurrence of offences. According to this rule, the absorbing provision overrules the absorbed one – *lex consumens derogat legi consumptae*. This occurs when one provision fulfils the function of another; however, consumption cannot lead to the mitigation of the penalty established under the consumed provision if the consuming provision provides for a lighter sanction, see: *Prawo karne materialne. Część ogólna*, ed. M. Mozgawa, Warszawa 2020, pp. 420–421.

40 K. Czub, *Prawo własności intelektualnej*, Warszawa 2021, p. 362.

41 A. Haładyj, *Luki konstrukcyjne w prawie ochrony środowiska – wykładnia i stosowanie*, Studia Prawnicze KUL 2018, no. 3, p. 83.

interpret any missing norms in favour of the party on its basis and within its limits.[42] Thus, Article 7a of the Code of Administrative Procedure would allow the authority to reconstruct any missing legal norms, and this complex law structure would comply with both the principle of speed of proceedings (Article 12 of the Code of Administrative Procedure) and the principle of legalism (Article 6 of the Code of Administrative Procedure). The last example, representing the legislator's direct consent to a bona fide circumvention act, is Part Five of the K.p.c., which allows the parties, in situations specified thereunder (Article 1157 of the Code of Civil Procedure), to submit the resolution of the case to an alternative non-state court. Of key significance here is Article 1165 (1) of the Code of Civil Procedure, which states that the non-state court becomes exclusively competent to adjudicate (resolve) the dispute by operation of law if the arbitration clause is valid. Under this structure, the parties are free, within the limits of the Code of Civil Procedure, to shape the rules of proceedings before the arbitration court (including the arbitrator selection process, the number of instances, etc.). On the other hand, the state court controls (in terms of lawfulness) the activity of arbitration courts and the issued decisions.[43] The above examples prove that persons can, within the limits of the systemic norms, add specific norms based on the selected extra-systemic norms in cases where this is directly authorised by the legislature, with the latter controlling their legality. A mala fide act of the circumvention of law (*de facto* compliant, de iure incompatible) – would be a planned act, guided by an unlawful purpose from the very outset (*a priori*), and aiming to contradict the system of law.[44] Given the previous conclusions, the function of this clause should be viewed as limited to controlling the combined actions performed by legal entities. The institution of circumvention of the law reflects the legislator's assurance of, firstly, the effectiveness of the statutory regulation, and secondly, respect for the legal norms established in the legislation. Therefore, it provides comprehensive control, which also covers extra-systemic norms like equity (good of the community). With such a breakdown into good faith and bad faith circumvention actions, it seems that the situation would be quite simple. However, in practice, it is difficult to distinguish the point at which a circumvention act in good faith turns into one in bad faith; this should be evaluated on

42 Ibidem, p. 84.

43 E. Gapska, *Skuteczność zapisu na sąd polubowny zawartego w umowie podwykonawczej wobec inwestora ponoszącego odpowiedzialność solidarną na podstawie art. 647 (1) § 5 k.c.*, Przegląd Prawa Handlowego 2017, no. 1, pp. 38–39.

44 M. Gordon, *Obejście prawa czy unikanie opodatkowania? Uwagi terminologiczne*, Toruński Rocznik Podatkowy 2013, p. 175.

a case-by-case basis.[45] Theoretically, this should be evidenced by the doer's legitimate intention and the purpose of their entire action but due to the legal system's complexity and the legislative errors of the legislator in a particular state of affairs, the doer may ultimately unknowingly act *in fraudem legis*, even though their actions had been legitimate at first and they believe they are acting lawfully and intend for their actions to stay that way (contradiction of the intention and the action's implementation). As indicated earlier, the rule of law must take precedence in such situations and the act must remain lawful throughout its course. Moreover, its aim must be objective and take into account all legal obstacles to the performance of the combined act. The person performing such an action is thus burdened with the risk of potential circumvention.

## Conclusion

Summarising the temporal analysis and conclusions, it should be concluded as follows: the law contains a margin for actions not provided for but also not prohibited by it. A factual action is not viewed as one carrying inherent legal consequences. An action may also be evaluated under provisions applicable to another action in the law: instead of the legal consequences of the factual action, other legal consequences (or consequences of another action) will be imposed in its place. Therefore, persons are obliged to comply with properly established legal norms. It should also be assumed that if they perform complex actions in law, they must bear the risk of their qualification as a circumvention of the law, regardless of whether it was deliberate or not. Circumvention of the law and control of the integrity of systemic values should be applied in public economic law based on the general principles of interpretation of public law. Notably, the legislator does not indicate in public law the purpose of circumvention of the law as is the case in special regulations, so the subject's intention, whether right or wrong, may facilitate the control of circumvention of the law. As a rule, the factual action is within the limits of other lawful action if the intent is rightful and outside the boundaries of the legally permissible, due to a collision with the prohibiting norm, if it is wrongful. Circumvention, on the other hand, will primarily be evidenced by the effect of the action (implementation), i.e. whether or not it violated values crucial to the system. Circumvention

[45] A similar view has been expressed in the literature, see: T. Chauvin, T. Stawecki, P. Winczorek, *Wstęp*…, p. 184.

of the law in public economic law would typically apply to private-law acts – concerning the norms of public law. Therefore, the circumvention would be evaluated in accordance with the provisions of the Civil Code supplemented by the norms of public law – control of a complex nature. Notably, legally permissible circumvention of the law would consist in the implementation of the ratio legis of a given regulation through the use of and subordination to another statutory norm (while not clashing with values vital to the system).

## Bibliography


Blicharz R., in: *Aksjologia publicznego prawa gospodarczego*, ed. A. Powałowski, Warszawa 2022.

Bréhier É., *Problemy filozoficzne XX wieku*, Warszawa 1958.

Brzozowski W., *Obejście konstytucji*, Państwo i Prawo 2014, no. 9.

Byrski J., *Outsourcing w działalności dostawców usług płatniczych*, Warszawa 2018.

Chauvin T., Stawecki T., Winczorek P., *Wstęp do prawoznawstwa*, Warszawa 2016.

Czub K., *Prawo własności intelektualnej*, Warszawa 2021.

Duniewska Z., in: *System Prawa Administracyjnego*, vol. 7. *Prawo administracyjne materialne*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2012.

Gapska E., *Skuteczność zapisu na sąd polubowny zawartego w umowie podwykonawczej wobec inwestora ponoszącego odpowiedzialność solidarną na podstawie art. 647 (1) § 5 k.c.*, Przegląd Prawa Handlowego 2017, no. 1.

Gordon M., *Obejście prawa czy unikanie opodatkowania? Uwagi terminologiczne*, Toruński Rocznik Podatkowy 2013.

Grzybowski S., in: *System Prawa Cywilnego. Część ogólna*, ed. S. Grzybowski, Wrocław 1985.

Haładyj A., *Luki konstrukcyjne w prawie ochrony środowiska – wykładnia i stosowanie*, Studia Prawnicze KUL 2018, no. 3.

von Hildebrand D., *Serce. Rozważania o uczuciowości ludzkiej i uczuciowości Boga-Człowieka*, Poznań 1987.

Komierzyńska E., Zdyb M., *Klauzula interesu publicznego w działaniach administracji publicznej*, Annales Universitatis Mariae Curie-Skłodowska. Sectio G 2016, vol. 63, no. 2.

Lapierre L., *Ugoda sądowa w polskim procesie cywilnym*, Przegląd Sądowy 1996, no. 2.

Leszczyński L., Maroń G., *Zasady prawa i generalne klauzule odsyłające w operatywnej wykładni prawa*, Annales Universitatis Mariae Curie-Skłodowska. Sectio G 2013, vol. 60, no. 2.

Łętowska E., *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, Państwo i Prawo 2005, no. 4.

Machnikowski P., in: *Kodeks cywilny. Komentarz*, eds. E. Gniewek, P. Machnikowski, 2021 [Legalis database], Commentary on Article 58.

Masternak-Kubiak M., *Przestrzeganie prawa międzynarodowego w świetle Konstytucji Rzeczypospolitej Polskiej*, Kraków 2003.
Miler D., *Czynności mające na celu obejście ustawy na tle orzecznictwa sądów polskich*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 2019, vol. 81, no. 4.
Misztal-Konecka J., *Ugoda w postępowaniu cywilnym. Studium z zakresu prawa polskiego na tle prawa rzymskiego*, Lublin 2019.
Morawski L., *Zasady wykładni prawa*, Toruń 2010.
Parchomiuk J., *Nadużycie prawa w prawie administracyjnym*, Warszawa 2018.
*Prawo karne materialne. Część ogólna*, ed. M. Mozgawa, Warszawa 2020.
Radwański Z., Olejniczak A., *Prawo cywilne – część ogólna*, Warszawa 2013.
Smogorzewski E., *Korzystanie z fachowej pomocy prawnej jako przyczyna błędu co do prawa*, Monitor Prawniczy 2016, no. 4.
Sobolewski P., in: *Kodeks cywilny. Komentarz*, eds. K. Osajda, W. Borysiak, 2022 [Legalis database].
Stawecki T., in: *Nadużycie prawa. Konferencja Wydziału Prawa i Administracji, 1 marca 2002 roku*, eds. H. Izdebski, A. Stępkowski, Warszawa 2003.
Świerczyński M., in: *Kodeks cywilny. Komentarz*, ed. M. Załucki, 2023 [Legalis database], Commentary on Article 58.
Wąsowicz W., *Obejście prawa jako przyczyna nieważności czynności prawnej*, Kwartalnik Prawa Prywatnego 1999, vol. 8, no. 1.