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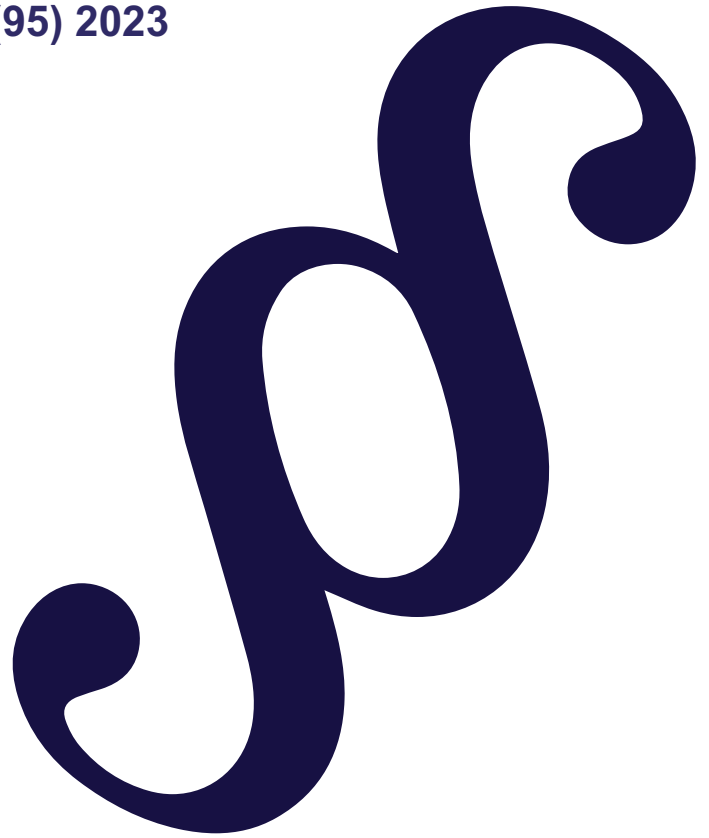

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Studia i artykuły /
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STUDIA PRAWNICZE KUL
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Freedom of economic activity as a specific value and a principle of public economic law

Wolność działalności gospodarczej jako szczególna wartość i zasada publicznego prawa gospodarczego

Свобода предпринимательской деятельности как особая ценность и принцип публичного хозяйственного права

Свобода господарської діяльності як особлива цинність і принцип публічного господарського права

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Summary: The subject of research in this study concerns the value issues in public economic law. The aim of the research is to examine the axiology of law and the axiology of economic law from the perspective of freedom of economic activity, and then to formulate the final conclusions derived from the analysis with reference to the institution of freedom of economic activity. I considered an analytical-dogmatic method as helpful for my analysis. The obtained result shows that the freedom of economic activity exhibits the features of a legal institution equipped with an axiological content and as a norm and principle of law, in particular of public economic law.

Key words: freedom of economic activity, values, public economic law, axiology of law, axiology of public economic law

Streszczenie: Przedmiotem niniejszego opracowania są kwestie dotyczące wartości w prawie publicznym gospodarczym. Celem badań jest aksjologia prawa oraz aksjologia prawa gospodarczego w perspektywie wolności działalności gospodarczej, a następnie sformułowanie wniosków końcowych odniesionych do instytucji wolności działalności gospodarczej. Za pomocną uznałem metodę analityczno-dogmatyczną. Rezultat analizy przekonuje, że wolność działalności gospodarczej wykazuje cechy instytucji prawnej wyposażonej w ładunek aksjologiczny oraz jako normę i zasadę prawa, a w szczególności prawa gospodarczego publicznego.

Słowa kluczowe: wolność działalności gospodarczej, wartości, publiczne prawo gospodarcze, aksjologia prawa, aksjologia prawa publicznego gospodarczego

Резюме: Предметом данной статьи являются вопросы ценностей в публичном хозяйственном праве. Целью исследования является рассмотрение правовой аксиологии и аксиологии хозяйственного права в перспективе свободы предпринимательской деятельности, чтобы сформулировать окончательные выводы, связанные с институтом свободы предпринимательской деятельности. В статье автор целесообразным посчитал применить аналитико-догматический метод. Результат анализа убеждает в том, что свобода предпринимательской деятельности проявляет черты правового института, наделенного аксиологическим содержанием, а также является нормой и принципом права, в частности публичного хозяйственного права.

Ключевые слова: свобода предпринимательской деятельности, ценности, публичное хозяйственное право, правовая аксиология, аксиология публичного хозяйственного права

Рецензія: Предметом дослідження є питання цинності в публічному господарському праві. Метою дослідження є аксіологія права та аксіологія господарського права в ракурсі свободи господарської

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діяльності, а потім формулювання остаточних висновків щодо інституту свободи господарської діяльності. В статті застосовано аналітико-догматичний метод. Результат аналізу доводить, що свобода господарської діяльності має ознаки правового інституту, наділеного аксіологічним навантаженням, і як норма і принцип права, зокрема публічного господарського права.

Ключові слова: свобода господарської діяльності, цінності, публічне господарське право, аксіологія права, аксіологія публічного господарського права

Introduction

My attempt in the present paper is to present the freedom of economic activity as, in my opinion, a particular value and a principle of public economic law. The existing studies presented below describe freedom of economic activity either as a value of public economic law or as a principle of this law. Therefore, the analysis in this regard is still valid and the research method applied to carry it out will be an analytical-dogmatic one.

The freedom in question derives from the provisions of the Constitution of the Republic of Poland,[1] and then from the currently applicable Entrepreneurs Act.[2]

There are many theories, definitions and interpretations of the term 'value of law' and the term 'principle of law' in legal science. These are also formulated in relation to the issue of freedom of economic activity. The aforementioned issues comprise the problem of the axiology of business law.

First of all, the issue of the axiology of law and the axiology of economic law in the perspective of freedom of economic activity will be discussed as research objectives and then the conclusions drawn from such an analysis will be referred to the institution of freedom of economic activity.

1. Problems regarding the axiology of law

By a dictionary definition, axiology is the study of values and the criteria of valuation.[3] Thus, it is important to answer the question of whether law is a value in itself

1 The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dziennik Ustaw] 1997 no. 78, item 483 as amended.

2 The Act of 6 March 2018 – Entrepreneurs Act, consolidated text: Journal of Laws 2021 item 162 as amended.

3 https://sjp.pwn.pl/slowniki/aksjologiczny.html [access: 23.02.2022].

or whether it is dependent on other values from which it derives its source? Can law be free of values or not? First of all, however, it must be pointed out that traditional and contemporary legal science has never denied the important role of axiology in the consideration of law, both in the practical and theoretical spheres. Values are most often presented as alien elements in relation to the law, which, albeit entering into multiple relations with the law, never cease to constitute a clearly distinguishable object either influencing the law or taking the form of an object of influence of the law.[4] However, assuming that the law can be a value in itself, reference should be made to the tradition of legal positivism and legal normativism. Legal positivism attributed particular importance to the rule of law in the formal sense, emphasising the separation of law and morality. Scientific reflection on the law envisaged its analysis as positive law, rather than what the law should be because of an assumed value system or because of the social consequences brought about by the validity of norms with a certain content in a given community. In legal positivism, the object of interest of legal sciences was exclusively the law applicable at a particular place and time, i.e. in a dogmatic sense.[5] The legal norm raised interest mainly with regard to the way of formation, construction and the interrelationship of competence among norms.[6] Therefore, the origin of the legal norm and its axiological basis were not investigated. This leads to the conclusion that law is a self-existent value.[7]

The above position has, however, been questioned by arguing that the 'letter of the law,' statutory law, is not a value in itself, and it is not the task of the legislator to formulate a legal rule in such a way that the role of the body applying the law is reduced to mechanical subsumption.[8] The key flaw of legal positivism in its classical form was that it attributed value to the law itself. Consequently, it can be argued that law is not free from morality, for it leads to relativism in the sphere of values and fosters the view that everything remains relative. On the other hand, the liberation of law from values, its relativisation, especially of economic law, will always give rise to the temptation to instrumentalise it.

The concept of natural law that operated well before legal positivism is outside the visions of the positivist legal theory. The law of nature is a set of norms or

4 That is the way of argumentation of K. Działocha, *Hierarchia norm konstytucyjnych i jej rola w rozstrzyganiu kolizji norm*, in: *Charakter i struktura norm konstytucji*, ed. J. Trzciński, Warszawa 1997, p. 91.

5 S. Wronkowska, *Spory o sposób pojmowania prawa*, in: A. Redelbach, S. Wronkowska, Z. Ziembiński, *Zarys teorii państwa i prawa*, Warszawa 1994, pp. 97–99.

6 H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, Leipzig 1934, p. 77.

7 H. Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, Harvard Law Review, vol. 55, in: M. Sobolewski, *Podstawy teorii państwa*, Kraków 1986, p. 68.

8 M. Zdyb, *Publiczne prawo gospodarcze*, Lublin 1995, p. 29. A similar opinion is presented by idem, *Publiczne prawo gospodarcze*, Kraków 1998, p. 103.

judgments that provide axiologically defined meaning to norms, and concern human conduct and behaviour also regulated by positive law. Absoluteness of norms does not depend on the choice of a certain type of behaviour by man. Natural law is an order distinct from positive law. Some people assume that natural law has an overriding character over positive law and determines the content of positive law. The norms of natural law apply independently of acts of state authority because they are grounded in absolute evaluations and are, as it were, necessary norms. Judgments and norms are characterised by immutability and stability, as they relate to essential issues such as the world order, human nature or a particular community. A basic claim for the concept of the law of nature, irrespective of whether one considers God, nature or human dignity or the nature of society as its source, is that the law exists objectively.[9] It is of the utmost importance that these absolute values are the basis of the law in force.[10] It must be emphasised that the juridical--natural area offers the possibility of searching for the values of law, including public economic law.

Besides the main concepts of the essence of law in the stratum of its definition, including through axiology, other also important intermediate concepts have emerged, i.e. primarily legal realism and legal hermeneutics, theories of argumentation or legal rhetoric, as well as psychological theories of law but they are not the most important ones in the scope under discussion.

When summarising the matter under consideration, hybrid concepts concerning the understanding of legal theory cannot be ignored and not elaborated upon. In this regard, special attention must be paid to Ronald Dworkin's concept, which is referred to as the neoliberal concept. According to this concept, law is saturated with values but does not take into account legal-natural assumptions in their entirety. Rules are norms of conduct and they are binding because they have been properly established. Furthermore, they establish goals that are outlined for given collectivities. A value-oriented understanding of law is expressed through the concept of law not only in the fact that in addition to rules, the law includes the principles which prescribe the implementation of defined goals through specific rulings in specific cases. The law in the scope in question is an institutionalised social practice imbued with values, integrated and coherent. The adjudicator of a particular case takes the system of norms of conduct, i.e. rules and principles, as coherent as

9 S. Wronkowska, *Spory*…, p. 106.

10 G.L. Seidler, H. Groszyk, J. Malarczyk, *Wstęp do teorii państwa i prawa*, Lublin 1991, p. 180.

possible and adjudicates in such a way that the axiological integrity of the system is preserved at the highest level.[11]

Taking the abovementioned aspects into consideration, it should be stated that there is a constant need to look for a pattern or model of creating values, which appear as unshakeable foundations necessary for building a specific system of legal norms, including the norms of public economic law for developing the institution of freedom of economic activity. The concept of natural rights, as well as the partial application of neo-liberal concepts, may be conducive to it. In my opinion, it would be a mistake to present a concept according to which the freedom of economic activity derives specifically from a particular system of axiological concepts of law. After all, the justification for its validity derives from precisely mixed concepts. Thus, individual freedom in the sphere of economic activity is legal and natural, but the justification of its location in the provisions of constitutional rank indicates, in a way, the neo-liberal pragmatism of the legislator, who, in my opinion, established the goal for this freedom, which is a positive possibility for the economic system of the state to undertake and carry out economic activity by subjects of law in the least regulated manner possible.

2. Problems of the axiology of public economic law from the perspective of freedom of economic activity

Public economic law is a branch of the Polish legal system covering issues of economic activity and entities conducting economic activity. Constitutional economic freedom determines the directions of regulation of public economic law. Basically, it is the constitutional values that determine the socio-economic system of the state, in which the position of the subjects of economic activity is defined by the regulations determined by the constitutional freedom of entrepreneurship. All aspects pertaining to public economic law possess some kind of value content, which results in the implementation of the said values into the specific regulations of public economic law concerning the provisions on entrepreneurship, the relations among entrepreneurs and the entrepreneur-state relationship. An economic system without a constitutionally framed affirmation of economic freedom would be illusory, without specific market mechanisms and legal institutions. Therefore, economic freedom and all the freedoms related to it determine the way in which economic ac-

[11] S. Wronkowska, *Spory*…, pp. 124–125.

tivity is exercised. The meaning given to the freedom of economic activity in the Constitution is primarily determined by its links to entrepreneurship and the situation of entrepreneurial subjects in the social market economy, which constitutes the basis of Poland's economic system. By its reference to and inseparable connection with the social market economy, economic freedom thus becomes an element and function of the social market economy. Together with all other values of the social market economy, it also characterises the economic system of the state – it forms the basis of the economic system of the Republic of Poland.[12] It is beyond scholarly dispute in the doctrine of public economic law to accord special significance to economic freedom in a constitutional view of the situation of an individual: 'it belongs to values that are precious to the individual.'[13] The Constitutional Tribunal distinguishes the features of economic freedom, characterising it as the right, realised in acts of will, to undertake and determine the object of economic activity, to conduct it in the form chosen and to terminate it.[14] Economic freedom is a value of a specific nature. In fact, its source is the freedom of man,[15] which is objective in nature and independent of the will of public authorities. The association of economic freedom with the freedom of man grants it the same expression of independence and objectivity that belongs to the freedom of the human person. It means that economic freedom has not been created by any legislator. The legislator, using legal terminology, merely confirms that economic freedom exists and is necessary for the proper functioning of market mechanisms.[16] Therefore, since the freedom of economic activity derives from the freedom of man as a natural being, or derives from God, then, in view of the dignity of the human person, it cannot be put in any other way than as an undeniable value in itself, expressed in the provisions of constitutional rank and ordinary laws.

Public economic law remaining within the circle of disciplines of a dogmatic nature is also characterised by certain values, which constitute the basis of each law framed in a system. Nevertheless, it has certain axiological distinctions that shape and impact the overall axiological assessment of the legal system in the state. In this respect, the axiological dimension of business legislation and issues related to the interpretation of business law are of particular importance. Undoubtedly,

12 Judgment of the Constitutional Tribunal of 30 January 2001, K 17/00, OTK 2001, no. 1, item 4.

13 K. Wojtyczek, *Horyzontalny wymiar praw człowieka zagwarantowanych w Konstytucji RP*, Kwartalnik Prawa Prywatnego 1999, no. 2, p. 27.

14 Judgment of the Constitutional Tribunal of 29 April 2003, SK 24/02, OTK 2003, no. 4A, item 33.

15 K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, p. 37.

16 Judgment of the Constitutional Tribunal of 14 June 2004, SK 21/03, OTK 2004, no. 6A, item 45.

the institution of freedom of economic activity remains a key value for public economic law.[17] The Entrepreneurs Act should be mentioned in particular with regard to ordinary laws in the field of the regulation of freedom of economic activity. The preamble to this law, which emphasises the importance of freedom of economic activity, is indeed noteworthy. The preamble indicates that freedom of economic activity was the determinant for the enactment of the said law, furthermore, that the freedom in question should be protected and promoted given its contribution to the development of the economy and the growth of social welfare. It must be clearly emphasised that the freedom of economic activity already standardised in the preamble to the Entrepreneurs Act 'stems' from the Constitution. It is an expression of the constitutional value that the freedom of economic activity is. Thus, it does not remain in isolation from the values expressed by the Constitution. It must therefore express and elaborate the constitutional freedom in the ordinary law. Furthermore, specific values bring tangible benefits. Indeed, public economic law doctrine argues that the embedding of legal norms in values influences the content and modus operandi of public authorities.[18] Thanks to accepted values, entities applying the law act on the basis of fixed axiological assumptions.[19] Legal institutions, organisational structures, forms of action of public administration are not axiologically indifferent, and a value-based element should be taken into account when shaping them.[20] Thus, it can be concluded that the value of freedom of economic activity is of fundamental importance not only for the economic system of the state but also for the entire legal system. Carrying a certain axiological load, it influences the axiology of the entire system of law, constituting an essential part of it.

Therefore, following the issues raised on the question of values, since freedom of economic activity is of fundamental importance for the legal system, and in particular for public economic law, the question of rules of law naturally arises. However, it is first necessary to distinguish them from the rules of law using methods derived from neoliberal concepts of law. Principles differ from legal rules not only in the basis of their validity but also in their internal structure. Rules take the form of orders (prohibitions) of a definitive nature, setting out an obligation of behaviour

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17 A similar opinion is presented by A. Powałowski, *Wprowadzenie do aksjologii prawa gospodarczego publicznego*, in: *Państwo a przedsiębiorca. Aktualne wyzwania*, eds. A. Borkowski, W. Małecki, Wrocław 2019, p. 228.

18 M. Zieliński, M. Ziembiński, *Uzasadnienie twierdzeń, ocen i norm w prawoznawstwie*, Warszawa 1988, p. 57.

19 J. Zimmermann, *Aksjomaty prawa administracyjnego*, Warszawa 2013, p. 43.

20 K. Strzyczkowski, *Uwagi o zadaniach nauki o prawnych formach działania administracji gospodarczej*, in: *Instrumenty i formy prawne działania administracji gospodarczej*, eds. B. Popowska, K. Kokocińska, Poznań 2009, p. 35.

in such a way that only its complete fulfilment allows the action (omission) of the addressee to be qualified as lawful. In this view, the category of partial fulfilment of a rule creates an expression that is contradictory, as the act of fulfilling the rule is either complete or there is no rule at all. Principles of law, on the other hand, while protecting certain rights of an individual, impose obligations to achieve certain states of affairs only to the extent that they do not upset the relevant equilibrium of the system or a part of it, in particular, by encroaching on the rights of others or by unjustifiably drawing on the public good.[21] Principles can also be seen as optimisation precepts of an idealistic nature. Of course, they are a type of legal norms but they have a separate status in relation to the so-called norm-rules. The differentiating element in this respect is the category of obligation. Principles formulate precepts to achieve certain states of affairs, while their implementation is guided by a kind of meta-directive – an obligation to generate the indicated effect to such an extent as the factual and legal possibility allows.[22]

One should agree with the view that if a value of a certain type is recognised by the legislator as a necessary element of the legal order, he will incorporate a directive statement into the legal system in such a formulation that the entity applying the law will read it as a rule of conduct. In the system of law, principles are the normative form of values and are used to introduce certain values into the system of law and not types of behaviour or certain states of affairs that are the subject of an obligation. Admittedly, the degree of generality of the obligation determined by the principles belongs to the catalogue of prognostic features differentiating the ordinary norms from the fundamental norms but this generality does not result from an explicit intention of the legislator to cover a relatively wide range of future situations by means of a precept or prohibition. The use of such names is determined by the order of the language of axiology, i.e. the field into which the legislator enters when reaching for statements about the status of principles.[23]

Moreover, in the above perspective, freedom of economic activity as a value turns out to be a principle of law derived from the Constitution and the Entrepreneurs Act introduced into these legal acts by means of directive statements expressed in the content of legal norms, and recorded through grammatical expressions in the form of legal provisions. In constitutional terms, it is the principle of freedom of economic activity. Article 20 of the Constitution in force defines the economic

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21 M. Kordela, *Zasady prawa jako normatywna postać wartości*, Ruch Ekonomiczny, Prawniczy i Socjologiczny 2006, vol. 68, no. 1, pp. 39–40.

22 L. Morawski, *Zasady prawne – komentarz krytyczny*, in: *Studia z filozofii prawa*, ed. J. Stelmach, Kraków 2001, p. 71.

23 T. Gizbert-Studnicki, A. Grabowski, *Normy programowe w konstytucji*, in: *Charakter i struktura*…, p. 100.

system of the Republic of Poland as a synthesis of the so-called welfare state and the free market.[24] Such a symbiosis is based on one of the pillars defined as freedom of economic activity. Therefore, as it was mentioned above, the freedom of economic activity is one of the principles of the economic system of the Republic of Poland. Thus, it is a systemic principle regulated by the Constitution of the Republic of Poland.[25] At the same time, it is worth noting that the freedom of economic activity is a legal norm, in the content of which the word 'principle' does not appear. However, due to its content and its designated function, it may be treated as a principle, a norm of a special kind in relation to other norms of the Constitution.[26] Its location in Chapter I of the Constitution of the Republic of Poland, entitled 'The Republic', makes it necessary to perceive it as a systemic principle, i.e. as a constitutional principle of law.[27] It should also be noted that the freedom of economic activity, on the one hand, constitutes a constitutional systemic principle, and on the other hand, has the character of a public subjective right.[28]

Taking into account the regulations of the Entrepreneurs Act, the content of the subjective right is the right to freely undertake, perform and terminate business activity. Thus, this right encompasses the sphere of free economic activity, free from state interference,[29] apart from the exceptions indicated in Article 22 of the

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24 L. Bielecki, J. Stelmasiak, *Zasada wolności gospodarczej. Zagadnienia podstawowe*, in: *Granice wolności gospodarczej w systemie społecznej gospodarki rynkowej. Księga jubileuszowa z okazji 40-lecia pracy naukowej prof. dr. hab. Jana Grabowskiego*, Katowice 2004, pp. 278–286 and L. Bielecki, *Zasada wolności gospodarczej w okresie transformacji ustrojowej w Polsce*, Studia Iuridica Lubliniensia 2003, vol. 1, pp. 61 ff.

25 L. Bielecki, P. Ruczkowski, *Koncesja w prawie lotniczym. Zagadnienia administracyjnoprawne*, Kielce 2010, p. 25. A similar view is held by A. Bierć, *Sytuacja prawna przedsiębiorcy. Zagadnienia wybrane*, Studia Prawnicze 1998, no. 3, p. 7, as well as by C. Kosikowski, *Prawo gospodarcze publiczne*, Warszawa 1995, p. 245.

26 J. Kuciński, W.J. Wołpiuk, in: *Zasady ustroju III Rzeczypospolitej Polskiej*, ed. D. Dudek, Warszawa 2009, p. 139.

27 M. Florianczyk, *Wolność gospodarcza a konkurencja,* in: *Konstytucyjna zasada wolności gospodarczej*, eds. W. Szwajdler, H. Nowicki, Toruń 2009, p. 70. Similarly K. Zaradkiewicz, *Komentarz do art. 20 Konstytucji*, in: *Konstytucja RP*, vol. 1. *Komentarz do art. 1–86*, eds. M. Safjan, L. Bosek, Warszawa 2015, p. 522, cited after: I. Grądzka, *Wolność gospodarcza jako zasada ustrojowa i prawo podmiotowe*, in: *Działalność gospodarcza w dobie przemian. Aspekty prawne, ekonomiczne i etyczne*, eds. A. Szyszka, R. Frey, Kielce 2018, pp. 160–162. Similar views are represented by C. Kosikowski, *Wolność gospodarcza w prawie polskim*, Warszawa 1995, pp. 43–44 and P. Wrześniewski, *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Warszawa 2010, p. 37.

28 A. Żurawik, *Zasada wolności działalności gospodarczej i jej ograniczenia*, in: *System Prawa Administracyjnego*, vol. 8A. *Publiczne prawo gospodarcze*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2013, p. 449.

29 C. Banasiński, *Konstytucyjne podstawy ustroju gospodarczego*, in: *Prawo gospodarcze. Zagadnienia administracyjnoprawne*, eds. H. Gronkiewicz-Waltz, M. Wierzbowski, Warszawa 2017, p. 75.

Constitution of the Republic of Poland, which limit the said principle according to the criteria indicated in Article 31 (3) of the Constitution. The subject of the principle of economic freedom is in any case a person,[30] and sometimes an organisational unit created by him or her, if he or she carries out economic activity falling within the concept of economic freedom.[31] It should be emphasised that economic freedom is not absolute, as it is subject, as communicated above, to limitations, also in terms of its subjectivity. The limitations in this respect consist, firstly, in allowing only entities with a legally required organisational and legal form to undertake and carry out certain economic activities, or, secondly, in excluding the possibility for certain categories of entities to carry out economic activities.[32]

Taking the above mentioned facts into consideration, it should be stated that undoubtedly, public economic law is a set of norms concerning the entrepreneurship in a general sense, which is guided by values taking their origin in the Constitution of the Republic of Poland. One of the most important values in this respect, if not the most important one, is the freedom of economic activity, on the one hand as a constitutional principle and on the other hand as a principle of an ordinary law, the Entrepreneurs Act.

Conclusions

The result of the conducted analysis of the functioning of the freedom of economic activity in the sphere of values and principles allows us to formulate certain conclusions.

Undoubtedly, situating economic freedom in the provisions of the constitutional rank and then in the provisions of the ordinary law known as the Business Constitution, in the light of the research carried out, leads one to claim that the nature of freedom of economic activity is that of a value-norm-principle one.

The freedom of economic activity bears the name of a legal institution that has such a momentous axiological significance that, in my opinion, intrinsically fulfils the definition of values as something that is regarded as important and valuable for a human being and a society and is worthy of being desired and associated with

30 J. Ablewicz, *Istota wolności gospodarczej w ujęciu filozoficznoprawnym*, Warszawa 2014, p. 102.

31 R. Biskup, *Wolność gospodarcza w wymiarze podmiotowym*, Lublin 2011, pp. 231–233.

32 E. Komierzyńska-Orlińska, *Ustawa Prawo przedsiębiorców, Rozdział 1, Przepisy ogólne*, in: *Konstytucja biznesu. Komentarz*, ed. M. Wierzbowski, Warszawa 2019, p. 43. This was also confirmed by the Constitutional Tribunal in its Ruling of 7 May 2011, K 19/00, LEX no. 48035.

certain positive experiences. Values represent some of the most essential elements in the functioning of human beings in their lives and in the life of the society. Material and spiritual values can be mentioned as the most important ones in this respect. They give meaning to human life and guide human behaviour. Economic freedom is contained in the value of human self-development, including entrepreneurship. It is an absolutely fundamental principle for the economic system of the state, from a legal and economic point of view. At this level, it is therefore impossible to deny the value of entrepreneurial freedom, which allows the social market economy to function. Without the aforementioned value, the social market economy would be a dead letter. Furthermore, the freedom of economic activity is a legal value in axiological terms, and thus enshrined in law through a legal norm from which a legal provision is derived. Only the most important issues in social life have such a high axiological-legal status. The position of economic freedom is also strengthened by the fact that it is situated in the Constitution of the Republic of Poland, which also proves that it is a derivative of human freedom and undoubtedly also belongs to the so-called constitutional freedoms. In general, 'economic freedom' has been recognised as a legally protected good and, which is particularly important, as a human right.[33]

The freedom of economic activity is also a rule of conduct, reconstructed from the provisions of law, indicating to whom and under what circumstances a specific behaviour is permitted. In the scope in question, norms-rules and norms-principles can be distinguished. The first of them are norms-rules, determining prohibitions or orders that govern a specific type of behaviour, and norms-rules containing a model of behaviour, with which each action can be compared and determined as to whether it corresponds or contradicts the presented model. The second type of norms that make up the system of statute law are norms-principles that prescribe the realisation of the state of affairs, often generally defined.[34] The freedom of economic activity as a general norm of conduct defines its addressee, indicating the common characteristics of a certain social group, for example, those engaged in economic activity. In addition, it is abstract in nature, as it establishes a specific content, for example, with regard to undertaking, exercising and terminating a business activity.

What is more, the freedom of economic activity has a character of a legal principle, primarily in a directive sense, as it is explicitly stated in the legal text. The manner

33 J. Reszczyński, *O pojęciu wolności gospodarczej w ekonomii i naukach prawnych*, Studia Ekonomiczne. Gospodarka – Społeczeństwo – Środowisko 2018, no. 1, p. 8.

34 M. Sługocka, *Wolność działalności gospodarczej jako norma – zasada*, in: *Acta Erasmiana*, vol. 3. *Prace prawnicze*, eds. M. Sadowski, P. Szymaniec, Wrocław 2012, p. 135.

and place in which the indicated freedom is included in the Constitution and in ordinary law determines the essence of its meaning. It has been constituted as one of the basic pillars of the economic system of the state and is a constitutional principle. The content of Article 233 (3) of the Constitution of the Republic of Poland allows the derivation of the thesis that the freedom of economic activity should not only be perceived as a constitutional principle, but also as a fundamental freedom of a person and a citizen. It is not accidental that the doctrine of law sees the features of a subjective right in this freedom.[35] The view expressed by A. Bierć, according to whom the freedom of economic activity is doubly conditioned, deserves to be approved. On the one hand, it undoubtedly has the character of a principle of the economic system (within the framework of the social market economy idea) and, on the other hand, it has the features of a public subjective right, constituting an element of freedom of choice and the freedom of exercising a profession.[36] Consequently, economic freedom is also determined by the provisions of Articles 65 (1) and 31 (3) and Articles 77–81 of the Constitution of the Republic of Poland, i.e. the guarantors of freedoms, human and civil rights. By contrast, the content of the subjective right is to entitle every citizen to take up and conduct business activity. Thus, on the one hand, the state authority protects a certain sphere of the possibilities of an individual against its interference and restrictions, while on the other hand, it narrows the scope of the state's decisions. In this way, the role of the state is reduced to verifying only whether the entrepreneur has complied with the conditions laid down by law in this respect.[37]

In conclusion, it should be stated that the freedom of economic activity has an extremely important significance in the sphere of legal values of constitutional nature and of ordinary laws, expressed in a normative manner in these legal acts, at the same time constituting a legal principle. Thus, it constitutes a complete expression of the functioning and validity of a legal institution equipped with an axiological, normative element and as a rule of conduct characteristic of the system of law and, in particular, of the system of public economic law.

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35 M. Magdziarczyk, *Wolność działalności gospodarczej – od idei do zasady ustrojowej*, Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach 2018, no. 349, p. 139. Similarly K. Zapolska, *Ewolucja podstaw normatywnych wolności gospodarczej w Polsce w XX wieku*, Miscellanea Historico-Iuridica, vol. 18, no. 2, pp. 278–281.

36 A. Bierć, *Sytuacja prawna przedsiębiorcy*…, p. 7; L. Bielecki, *Zasada wolności gospodarczej*…, p. 65.

37 A. Bierć, *Sytuacja prawna przedsiębiorcy*…, p. 7.

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The conflict of values in antitrust proceedings before the President of the Office of Competition and Consumer Protection

Konflikt wartości w postępowaniu antymonopolowym przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów

Конфликт ценностей в антимонопольном разбирательстве перед председателем Управления по защите конкуренции и защите прав потребителей

Конфлікт цінностей в антимонопольному провадженні перед Головою Управління з питань захисту конкуренції та прав споживачів

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Summary: The decisions of the President of the OCCP in antitrust cases usually resolve the dilemma as to which (constitutional) value should be given priority: economic freedom or fair competition. The purpose of the present article is to examine what considerations and factors guide the President of the OCCP when there is a conflict between the values indicated and what decisions and of what content can potentially be made. The present paper focuses on the proceedings in cases of restrictive practices and approvals for mergers and acqiusitions of entrepreneurs. The study has indicated the reasons why the President of the OCCP, at the expense of competition protection, allows the existence of agreements between entrepreneurs or approvals of the concentration of entrepreneurs. The research has used the dogmatic legal and formal-legal method, based on the Polish law and EU law; in addition, the content of existing decisions of the President of the OCCP has been analysed.

Key words: business mergers and acqiusitions, competition authority, concentration approval, economic freedom

Streszczenie: Decyzje Prezesa Urzędu Ochrony Konkurencji i Konsumentów w sprawach antymonopolowych rozwiązują zazwyczaj dylemat, której wartości (konstytucyjnej) nadać priorytet: wolności gospodarczej czy uczciwej konkurencji. Celem artykułu jest zbadanie, jakimi przesłankami i czynnikami kieruje się Prezes UOKiK w przypadku konfliktu pomiędzy wskazanymi wartościami i decyzje jakiej treści mogą być potencjalnie podejmowane. Uwzględniono przede wszystkim postępowania w sprawach praktyk ograniczających konkurencję oraz zgód na koncentrację przedsiębiorców. Wskazano przyczyny, dla których Prezes UOKiK, kosztem ochrony konkurencji, pozwala na istnienie porozumień pomiędzy przedsiębiorcami albo wyraża zgodę na koncentrację przedsiębiorców. W badaniach wykorzystano metodę dogmatyczno-prawną i formalno-prawną, bazując na prawie polskim i prawie Unii Europejskiej; uzupełniająco zaś analizowano treść istniejących decyzji Prezesa UOKiK.

Słowa kluczowe: koncentracje przedsiębiorców, urząd ochrony konkurencji, zgoda na koncentrację, wolność gospodarcza

Резюме: Решения председателя Управления по защите конкуренции и защите прав потребителей Республики Польша (UOKiK) в антимонопольных делах обычно разрешают дилемму о том, какой (конституционной) ценности отдать предпочтение: свободе предпринимательской деятельности или добросовестной конкуренции. Цель данной статьи – рассмотреть, какими предпосылками и факторами

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руководствуется председатель UOKiK, когда возникает конфликт между указанными ценностями, и какие решения потенциально могут быть приняты. Основное внимание уделяется производствам по делам о соглашениях, ограничивающих конкуренцию, а также по решениям о согласии на экономическую концентрацию. Были указаны причины, по которым председатель UOKiK, в ущерб защите конкуренции, допускает существование соглашений между предпринимателями или дает согласие на экономическую концентрацию. В исследовании использовались догматико-правовой и формально-юридический методы, основываясь на польском законодательстве и законодательстве Европейского союза; также было проанализировано содержание существующих постановлений председателя UOKiK.

Ключевые слова: экономическая концентрация, Управление по защите конкуренции, согласие на экономическую концентрацию, свобода предпринимательской деятельности

Резюме: Рішення Голови Управління з питань захисту конкуренції та прав споживачів у антимонопольних справах зазвичай вирішують дилему, якій (конституційній) цінності віддати пріоритет: економічній свободі чи чесній конкуренції. Метою статті є дослідити, якими передумовами та чинниками керується Голова УОКіК у разі конфлікту між вказаними цінностями та які рішення потенційно можуть бути прийняті. Насамперед, бралися до уваги провадження у справах про дії які обмежують концентрацію та дозволів на концентрацію підприємців. Зазначено причини, з яких Голова УОКіК на шкоду захисту конкуренції допускає наявність угод між підприємцями або дає згоду на концентрацію підприємців. У дослідженні використано догматично-правовий та формально-юридичний методи, зосереджуючись на польському праві та праві Європейського Союзу; додатково проаналізовано зміст чинних рішень Голови УОКіК.

Ключові слова: концентрація підприємців, управління захисту конкуренції, згода на концентрацію, економічна свобода

Introduction

When defining the basis of the economic system (Article 20), the Constitution of the Republic of Poland of 2 April 1997, indicates, among other things, economic freedom as one of its elements. In turn, Article 9 of the Act – the Entrepreneurs Act[1] demands that entrepreneurs, while performing business activities, do so 'in observance of the principles of fair competition, and with respect for good manners and legitimate interests of other entrepreneurs.' The essence of competition is the rivalry between independent entities in order to gain an advantage permitting maximum economic benefit, as a rule, by freely chosen means, consistent with the law.[2] Thus, economic freedom as a subjective right reaches its limits where the freedoms of other entitled persons are realised.

Economic freedom manifests itself not only in the opportunity for an unfettered decision concerning the fact of undertaking (or not) economic activity; the scope (including territorial), its subject matter and the absence of possible administrative

1 The Act of 6 March 2018 – Entrepreneurs Act, Journal of Laws [Dziennik Ustaw] 2021 item 162 as amended.

2 K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2008, p. 45.

restrictions on its undertaking and conduct (such as the requirement to obtain licences, permits). Economic freedom is also the exercise of freedom of contract (concluded on many levels – with suppliers and customers, with competitors, with consumers[3]) and freedom to choose an organisational and legal form in which business activities will be conducted. In addition, economic freedom becomes a reality through the freedom to set prices in such a way as to gain an advantage over rivals in the market game. Economic freedom is also the freedom to form coalitions, to cooperate, to make alliances and agreements. The implementation of most of the said formulas is subject to evaluation by competition authorities. In turn, a restriction of freedom can only occur due to an important public interest, such as security, public order, freedoms and rights of others (Article 31), and be a solution that is proportional to the protected good.[4] In the same way, the public interest justifying the restriction of constitutional economic freedom should be seen in the maintenance of free, equal and fair competition as a right of entrepreneurs and the flywheel of economic growth as well as the contribution of competition between entrepreneurs to the welfare of citizens (consumers). The essence and content of freedom of economic activity as a constitutional freedom has received considerable attention in both the constitutional law literature[5] and the literature on public economic law;[6] in contrast to the very conflict that may arise between economic freedom and the protection of competition understood as a right of entrepreneurs.

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3 M. Łolik, *Kilka uwag o zasadzie swobody umów w świetle zasad ogólnych prawa unijnego*, Europejski Przegląd Sądowy 2022, no. 3, pp. 15–22.

4 P. Tuleja, *Komentarz do art. 31*, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, 2021 [LEX database]; L. Garlicki, M. Zubik, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 2, 2nd ed. [LEX database]; K. Strzyczkowski, *Wolność gospodarcza w świetle konstytucji gospodarczej RP*, Studia Prawnoustrojowe 2011, no. 14.

5 Inter alia: K. Stępniak, *Wolność gospodarcza i jej gwarancje konstytucyjne*, Studia Prawnicze i Administracyjne 2018, no. 23 (1), pp. 19–23; A. Rytel-Warzocha, *Wolność działalności gospodarczej w świetle orzecznictwa polskiego Trybunału Konstytucyjnego*, Gdańskie Studia Prawnicze 2017, vol. 37, pp. 155–166; J. Ciapała, *Konstytucyjna wolność działalności gospodarczej w Rzeczypospolitej Polskiej*, Szczecin 2009; K. Klecha, *Wolność działalności gospodarczej w Konstytucji RP*, Warszawa 2009; A. Wilczyńska, *Interes publiczny w prawie stanowionym i orzecznictwie Trybunału Konstytucyjnego*, Przegląd Prawa Handlowego 2009, no. 6, pp. 48–55.

6 E.g.: P. Adamczewski, in: *Prawo konkurencji – 25 lat. Pierwszy Polski Kongres Prawa Konkurencji, Stosowanie prawa konkurencji na rynkach regulowanych – udział państwa w gospodarce a ochrona konkurencji*, ed. T. Skoczny, Warszawa 2015; J. Ciechanowicz-McLean, *Konstytucyjna zasada wolności gospodarczej a ochrona środowiska*, Gdańskie Studia Prawnicze 2014, vol. 31, pp. 99–108; A. Powałowski, *Społeczna gospodarka rynkowa w prawie polskim*, Gdańskie Studia Prawnicze 2017, vol. 37, pp. 51–62; M. Szydło, *Wolność działalności gospodarczej jako prawo podstawowe*, Bydgoszcz–Wrocław 2011; A. Żurawik, *Klauzula interesu publicznego w prawie gospodarczym krajowym i unijnym*, Europejski Przegląd Sądowy 2012, no. 12, pp. 24–30.

Therefore, the present article focuses on the dilemmas faced by the President of the Office of Competition and Consumer Protection (OCCP) when conducting antitrust proceedings.

The basis for a resolution in favour of one of these values should be included in legal acts of statutory rank. Meanwhile, these restrictions sometimes derive from executive regulations or even *soft law* documents, which can be considered an undesirable phenomenon.

In antitrust proceedings, the President of the OCCP actually seeks a balance between implementing economic freedom as a constitutional value and contributing to the maintenance of free, equal and fair competition by entrepreneurs, in the public interest. In particular, it applies to the effects of restrictive agreements used by entrepreneurs (such as overpricing, market sharing, rationing of supply, squeezing competitors out of the market) and concentration of entrepreneurs. Thus, the right of entrepreneurs and the public interest; economic freedom and fair, equal competition; fair competition and public interest stand in opposition to one another, while the scales of gravity do not always tilt in the same direction, which is particularly evident in the content of the decisions of the President of the OCCP issued in antitrust cases, when the public interest once becomes a reason to prohibit a concentration, at other times it becomes a reason to grant permission, despite the violation of competition.

1. Decisions on practices limiting competition

The prohibition against agreements between entrepreneurs, introduced to protect the public interest, is generally a more highly placed value than the right to carry out business activities in a free manner and the freedom to enter into contracts. Nevertheless, the legally established exceptions to the categorically negative assessment of agreements between entrepreneurs mean that the President of the OCCP is often faced with the dilemma as to which statutory value – economic freedom or fair competition – should be given priority. In addition, he should consider which agreements are able to pose a real threat to competition.[7]

The *rule of reason* derived from American law allows for certain categories of agreements, despite their negative effects on competition. The European law, in

[7] *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. T. Skoczny, Warszawa 2014, p. 336; K. Kohutek, M. Sieradzka, *Ustawa o ochronie*…, p. 311.

turn, provides for three types of exceptions to the ban on agreements, followed by the Polish law. These are the so-called '*de minimis* agreements,' agreements regarded as compatible with competition under one of the block exemptions, and individually assessed agreements deemed permissible.

The EU *Notice de minimis agreements*[8] is a guideline on how to reconcile attempts to gain market advantage with methods regarded as fair with regard to competitors and consumers. It provides a non-binding benchmark on which the EU member states should rely. While the Notice as a *soft law* act is not binding on national authorities, in resolving the conflict between economic freedom and fair competition, national authorities should be inspired by it, if only on the basis of the general principle of loyal cooperation resulting from the TFEU (Treaty on the Functioning of the European Union). The Polish legislator acknowledges that due to the small scale of their impact, *de minimis* agreements are not able to restrict competition in a noticeable way. Thus, the legislator assumes that there is no conflict between economic freedom (freedom to contract) and fair competition. For the domestic market, unimportance limits of 5% and 10% of the share in the relevant market have been adopted (Article 7 of the Office of Competition and Consumer Protection),[9] for participants in horizontal and vertical agreements, respectively. One has to agree with the view,[10] that increasing the entrepreneurial freedom of action, including the creation of alliances and groups by small and medium-sized entrepreneurs, would contribute to competition rather than be detrimental to it, as it would create a counterbalance to the already existing players in a given market. The framework in which entrepreneurs have to operate reduces their chances of stabilising their position in the market while implementing innovations.[11]

In addition, looking for a compromise between the freedom to create agreements and the protection of competition touches the issue of entrepreneurs' intentions. The EC notice assumes that no exemption is possible for any agreement if its

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8 Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 (1) of the Treaty on the Functioning of the European Union (De Minimis Notice), OJ C 291, 30.08.2014, p. 1. K. Wiese, *Porozumienia o antykonkurencyjnym celu w nowym zawiadomieniu de minimis,* Monitor Prawniczy 2015, no. 16, p. 865; P. Podrecki, in: *System Prawa Prywatnego*, vol. 15. *Prawo konkurencji*, ed. M. Kępiński, Warszawa 2013, p. 825.

9 The Act of 16 February 2007 on competition and consumer protection, consolidated text: Journal of Laws 2021 item 275 as amended.

10 A. Stawicki, *Gdzie jesteśmy i dokąd zmierzamy? Refleksje wokół możliwych kierunków zmian przepisów polskiego prawa konkurencji*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2021, no. 5 (10), p. 51.

11 R. Molski, *Prawo antymonopolowe a polityka wspierania rozwoju małych i średnich przedsiębiorców*, Acta Universitatis Wratislaviensis no. 3977. Prawo 2019, no. 329, pp. 372, 376.

purpose is (and not merely the effect, however unintentional) to restrict or infringe competition. The perceptibility of the effects is presumed in the cases in question, regardless of the size of the relevant market shares of the participants in such an agreement. The indicated point of view, included in the notice, is the fruit of, among other things, the Court's (preliminary) ruling)[12] of 13 December 2012 in the EXPEDIA case, in which it was pointed out that it was not the market share thresholds held, that ultimately determined whether competition was actually affected or infringed, but the purpose of the action and the actual impact of the agreements on the relevant market, and that, as an agreement restricting competition by virtue of its purpose, it was automatically deemed to be noticeable for competition.[13] The entrepreneurs' freedom to decide whether and to what extent they may enter into alliances is therefore subject to automatic narrowing due to the purpose of the actions taken. If, on the other hand, the anticompetitive effects are unavoidable then it must be assumed that the restriction of competition was intentional.

Meanwhile, Article 7 of the Competition and Consumer Protection Act does not add the abovementioned proviso and allows, ruling in favour of economic freedom, to consider as permissible even those agreements whose objective was the restriction of competition, as long as the size of the agreements remained trivial.[14] In the context of weighing values, it does not seem to be an appropriate approach. On the other hand, the dilemma of whether to give primacy to freedom of economic activity or fair competition is resolved by the legislator in favour of protecting free, equal and fair competition by stipulating that agreements (even of the smallest size) do not enjoy the privilege of admissibility if they constitute a price cartel, a quota cartel, establish market sharing or constitute a procurement agreement. It is thus acknowledged that the said agreements intrinsically distort competition, without having to examine the factual and economic impact of such agreements on the market.[15]

The law (in Article 8 of the OCCP), modelling itself on Article 101 (3) of the TFEU (Treaty on the Functioning of the European Union), also permits agreements that simultaneously: a) contribute to the improvement of production, distribution

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12 The Ruling of the Court (Second Chamber) of 13 December 2012, EXPEDIA Inc. v. Autorité de la concurrence et Others, C-226/11, ECLI:EU:C:2012:795, p. 6.

13 J. Polański, *O ramach analitycznych przy badaniu naruszeń „ze względu na cel"*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2019, no. 4 (8), p. 122.

14 D. Kostecka-Jurczyk, *Zastosowanie art. 101 ust. 1 TFUE przez krajowe organy antymonopolowe w sytuacji, gdy porozumienie ograniczające konkurencję spełnia kryteria de minimis, a konkurencja zostaje w znacznym stopniu ograniczona – glosa do orzeczenia z dnia 13 grudnia 2012 r. w sprawie C-226/11 Expedia*, Acta Universitatis Wratislaviensis no. 3614. Prawo 2015, no. 317, p. 212.

15 K. Kohutek, M. Sieradzka, *Ustawa o ochronie…*, pp. 303–304.

of goods, or to technical or economic progress; b) ensure that the buyer or user receives a fair share of the benefits arising from the agreements; furthermore, c) do not impose restrictions on the entrepreneurs concerned that are not necessary to achieve those objectives; and d) do not create opportunities for those entrepreneurs to eliminate competition in the relevant market for a substantial part of certain goods. Meeting the above-mentioned premises may constitute a basis for the introduction of general, generic exemptions from the prohibition (established by the Council of Ministers), as well as individual exemptions issued on the basis of each assessment of the facts by the President of the OCCP, in anti-trust proceedings.

The legislator, by making a derogation to the prohibition of agreements, by establishing such forms of them that benefit from block exemptions again, does not so much tip the scales towards economic freedom, at the expense of protecting competition, as it does for the benefit of consumers. Block exemptions, established by regulations of the Council of Ministers[16] indicate those types of agreements (including those divided into vertical and horizontal) and their subject matter whose existence may not interfere with fair competition in the relevant market. However, due to their preventive effect, the provisions of the Regulations limit the freedom of contractors by listing which clauses may constitute the content of an agreement, which may not, and for how long such agreements may be concluded. Thus, the content of the regulations directly affects the freedom of contracting and the formation of mutual rights and obligations of entrepreneurs, with a view to striking a balance between the freedom of entrepreneurs and the protection of fair, free and equal competition. The primary value emerging victorious from this dispute is the interests of consumers.

The fulfilment of all four conditions referred to in Article 8 (1) of the OCCP, implies greater freedom of action for entrepreneurs, despite the concomitant and undisputed harm to competition. The responsibility of proving the circumstances, of course, rests with the entrepreneurs, and it is up to the antitrust authority to assess which value – competition or freedom of economic activity – should prevail in a given situation. Entrepreneurs should demonstrate that the proportions of the benefits and negative effects resulting from the existence of the agreement argue in

16 Including those on specialisation agreements, technology transfer, research and innovation, car servicing. These are often modelled on EU normative acts similar in content such as the Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.04.2010, p. 1 or Commission Regulation (EU) No. 461/2010 of 27 May 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 129, 28.05.2010, p. 52.

favour of the fact that it is the freedom of economic activity and the instruments for gaining a competitive advantage that should prevail.

One of the echoing decisions of the President of the OCCP permitting the agreement individually is the Decision on the case of the Pieniny Raftsmen. In the said case – in spite of the evident violation of the principle of competition – and despite the fact that the exception of Article 8 of the OCCP does not apply to price agreements, the President of the OCCP did not prohibit the agreement.[17] Basing only on an analysis of effects, the President of the Office decided that the agreement adopted by the Association of the Pieniny Raftsmen on the Dunajec River in Sromowce Niżne in the form of a resolution of the general meeting, determining, among other things, the prices and the place of provision of the tourist service of rafting on the Dunajec River, fulfilled the premise referred to in Article 8 (1) (1) of the OCCP. In the opinion of the President of the Office of Competition and Consumer Protection, the joint determination of prices and terms of service contributes to the provision of services in a more efficient manner and thus results in improved distribution of the indicated services. Moreover, the benefits of standardised prices have been passed on to consumers, not forced to engage in individual negotiations with rafters and possibly pay an inflated price.[18]

Continuing the same topic area, the issue of an alleged price cartel in the activities of the Circle of Sudetic Guides at the PTTK 'Western Sudetes' Branch in Jelenia Gora[19] accused of setting prices for guiding services, is worth mentioning. However, the relevant resolution of the said organisation included only the suggested prices leaving the guides free to ultimately apply or change them (both upward and downward). Thus, price competition was maintained as an instrument of competition for customers. It was further argued that an agreement, having the nature of a price agreement covering almost the entire share of the relevant market, did not have to be prohibited if it was not designed to restrict competition. The constitutional entrepreneurial freedom granted to entrepreneurs took precedence. In that case, it should have been assumed that the price agreement did not exist at all, since there was no firm price fixing, and consequently the proceeding should have been declared pointless.

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17 The Decision of the President of the Office for Competition and Consumer Protection of 4 November 2011, RKT-33/2011, https://decyzje.uokik.gov.pl/bp/dec_prez.nsf [access: 3.07.2023].

18 A. Jurkowska-Gomułka, *Stosowanie zakazu porozumień ograniczających konkurencję zorientowane na ocenę skutków ekonomicznych? Uwagi na tle praktyki decyzyjnej Prezesa Urzędu Ochrony Konkurencji i Konsumentów w odniesieniu do ustawy o ochronie konkurencji i konsumentów z 2007 roku*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2012, no. 1 (1), p. 42.

19 The Decision of the President of the Office for Competition and Consumer Protection of 29 November 2011, RKT-37/2011, https://decyzje.uokik.gov.pl/bp/dec_prez.nsf [access: 3.07.2023].

The Act – Entrepreneurs Act, commonly referred to as the Constitution for Business, indicates, among other things, the guiding principles for exercising freedom of business activity. It includes the obligation of businessmen to observe good morals as well as to take into account the legitimate interests of other entrepreneurs. They represent legally protected values. Given that fair competition is not only a right but also an obligation of entrepreneurs conducting business, the scope of the said subjective right is determined by the limits of the rights granted to other co-participants in the market as well as by extra-normative values. Undeniably, the law, in order to be applied, should reflect universally recognised social and moral values. Therefore, in order to protect fair competition as much as possible, entrepreneurs themselves should guarantee each other's loyalty and consideration of interests – including intangible assets (e.g., good name). The leniency program is one of the solutions used in antitrust proceedings to help detect antitrust agreements. This program subjects businessmen to a test of loyalty and mutual trust. What is contrasted here is the effectiveness of combating violations of competition and good morals. Indeed, the indicated programme bases on voluntary disclosure by entrepreneurs of the existence of an agreement. The trouble is that the greatest benefit (in the form of exemption from fines) goes to the entrepreneur who is the first to provide the President with evidence of the existence of an agreement, worsening the situation of the other participants in the agreement.[20] In this case, the strongest conflict may seem to be the one between the restoration of fair, free and equal competition (which is a matter of public interest), and good morals as well as the consideration of the interests of entrepreneurs. While the denunciation of a cooperating entrepreneur, and at the same time a competitor, can hardly be considered an action undertaken in accordance with good morals, it is difficult to call it a 'legitimate' interest to keep an entrepreneur's violation of the law secret from the antitrust authority. The value by far superior under these circumstances remains that of free, equal and fair competition. This is not, in my opinion, a just solution.[21] The legislator who takes seriously the issues of business ethics should by no means create this kind of dilemma and conflict between the effectiveness of the law and morally reprehensible behaviour.

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20 E. Weinar, *Program łagodzenia kar (leniency) w Polsce i we Francji – analiza prawno-porównawcza*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2020, no. 5 (9), p. 176.

21 A. Dobaczewska, *Program łagodzenia kar jako przyczynek do ujawniania porozumień naruszających konkurencję*, Przegląd Naukowy Disputatio 2015, vol. 19, pp. 33–44.

2. Decisions on giving consent to entrepreneurs' concentration

The second type of antitrust proceedings (in addition to practices restricting competition), is the procedure aimed at providing consent to a concentration of entrepreneurs. The law provides for four forms of concentration, including a merger of entrepreneurs, an acquisition of control over another entrepreneur (including through the acquisition of a block of his shares), an acquisition of a statutorily designated amount of property of another enterprise, or a joint establishment of a new entrepreneur. With these types of transactions, the freedom of entrepreneurs to create the legal form and size of their enterprises is carried out. Not all such transactions necessarily pose a threat to fair competition. The concentrations of smaller sizes, again guided by the so-called rule of reason, are regarded by both EU and national regulations as not conflictive with competition.[22] Concentrations planned by entrepreneurs who jointly achieve a turnover below the legally indicated ceilings in the relevant market (worldwide or internal/Polish, respectively) are understood as the ones that do not pose a threat to competition.[23] The triviality of the concentrations means that the legislator, followed by the antitrust authority, does not see a conflict between the creation of capital structures and the need to protect competition and does not require the filing of a notification of intent to concentrate.

An exemption from the need to obtain approval for a concentration is also granted in the situations specified in Article 13 (2) of the OCCP. The acquisition of control of another undertaking by a financial institution, or by a creditor to secure debts, could as such distort competition if it were not for their temporary nature. Therefore, already at the stage of the law-making process, it was acknowledged to be unnecessary to assess the consequences of such a concentration, as long as the acquirer was not going to exercise the voting rights of the acquired shares, i.e. de facto did not affect the state of competition among the participants in the relevant market. Thus, competition is protected at the price of limiting the freedom of contract and property rights.

The subject of examination in antitrust proceedings is determining whether competition may be restricted as a result of the concentration, in particular through the creation or strengthening of a dominant position in the relevant market. Where

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22 K. Kohutek, M. Sieradzka, *Ustawa o ochronie*…, pp. 560–561.

23 According to Article 13 of the Competition and Consumer Protection Office, it is respectively EUR 1 billion and EUR 50 million; and according to Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 20.01.2004, vol. 8, the turnover ceiling for concentrations with a Community dimension is EUR 5 billion on the world market or EUR 250 million on the internal market.

the President of the Office for Competition and Consumer Protection, after conducting a proper investigation, sees no threat to fair competition, he permits the concentration without resolving the conflict between the values in question. However, if, in the opinion of the antitrust authority, competition would be threatened by the concentration, additional conditions may be stipulated, and the applicants may be required to meet them. In addition, the approval for a concentration, known as extraordinary approval, can also be granted.

In case of conditional approval, the conflict between the obligation to guarantee fair and free competition and the freedom of contracting and shaping the form and size of business activities is eliminated. Should the entrepreneurs fail to fulfil the conditions imposed on them in the decision within a specified period of time, the President of the OCCP is obliged to revoke his decision and decide the case once again. It can be assumed that he will then absolutely stand on the side of fair and equal competition, blocking the right to do business freely. By disapproving a concentration or setting conditions for it, the President limits the manifestations of economic freedom and the building of market position by entrepreneurs. However, this is done in order to maintain the rules of fair market play.

A slightly more complicated matter is the issuance of the so-called 'extraordinary approval,' mentioned above, by the President of the OCCP. The solution provided for in Article 20 (2) of the OCCP is that the anti-trust authority issues its consent to concentrations (without imposing additional requirements) despite the existence of circumstances that unequivocally negatively affect competition. The extraordinary nature of the consent stems from the fact that it is issued only insofar as it is justified by other (read: higher placed) goods or values serving the public interest. The essence of the said procedure is its two-stage nature. The first one establishes the threat to fair competition, understood as the public interest. The basic premise, included in the wording stating that the President gives his consent 'in the event that a waiver of the concentration ban is justified' can turn out to be problematic and it is so general that in fact it does not provide practically sufficient guidance as to the circumstances that should be taken into account in evaluating the notified concentration.[24]

[24] Guidance can be provided by EC decision-making practice and guidelines from the Commission. Cf.: Wytyczne w sprawie oceny horyzontalnego połączenia przedsiębiorstw na mocy rozporządzenia Rady w sprawie kontroli koncentracji przedsiębiorstw, OJ C 31, 5.02.2004 and Wytyczne w sprawie oceny niehoryzontalnych połączeń przedsiębiorstw na mocy rozporządzenia Rady w sprawie kontroli koncentracji przedsiębiorstw, OJ C 265, 18.10.2008, p. 7.

After all, if the public interest were not to be jeopardized, the interference of the President of the OCCP would be unnecessary, as is clear from Article 1 of the OCCP,[25] and there would at most be grounds for issuing consent on the basis of Article 18 of the OCCP. In the second stage, an inference is made as to whether there are other values sufficiently justifying the concentration. Thus, the following analysis of the effects of the intended concentration is provided for: initially from the point of view of the public interest in protecting competition, and then from the point of view of the public interest pursuing other values.[26] The cases in which the President of the OCCP faced such an axiological choice were not particularly numerous, and they occurred mainly during the period of building a free market economic system. Invariably, the value placed above fair competition should be economy-wide goods. The legislator pointed to several examples in Article 20 (2), including: economic development, technical progress and other positive impacts on the national economy.

Thus, the Act makes use of a general clause, an open-ended list of reasons for granting extraordinary approval, indicating only by way of example the public interest manifested in, among other things, social and economic benefits other than fair competition.[27] Thus, it is up to the President of the OCCP to decide whether, and to what extent, these other values are relevant. At this point, it is worth noting that part of the doctrine[28] maintains that it is the role of the President of the OCCP (and not the applicants concerned) to demonstrate the existence of the premises necessary for the issuance of emergency approval. However, it seems that although the host of the proceedings is the administrative body supposed to strive for a comprehensive explanation of the case, given that the application (notification of the intention of concentration) is filed by entrepreneurs and it is they who derive the effects from the statement that the concentration will be the best solution for the public interest, then it is on their side to prove their case. As a side note, it is worth mentioning that the European Commission's Horizontal Concentration Guidelines[29]

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25 T. Skoczny, M. Kolasiński, in: *Ustawa o ochronie*…, ed. T. Skoczny, p. 721.

26 Ibidem, p. 718.

27 J. Olszewski, *Nadzór nad koncentracją przedsiębiorców jako forma prewencyjnej ochrony konkurencji*, Rzeszów 2004, p. 344; M. Wierzbowski, K. Karasiewicz, R. Stankiewicz, *System Prawa Prywatnego*, vol. 15, p. 1088.

28 M. Idźkowski, *Nadzwyczajna zgoda Prezesa UOKiK na dokonanie koncentracji*, Studia Prawnoustrojowe 2015, no. 30, p. 119; A. Jurkowska-Gomułka, in: *Ustawa o ochronie*…, ed. T. Skoczny, p. 908. A different opinion is presented by M. Błachucki, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2016, p. 304, arguing that it is up to traders to demonstrate that the proposed concentration will have an overall economic benefit.

29 As a side note, it is worth highlighting that the European Commission, in its guidelines on horizontal concentrations, explicitly states that the onus is on applicants to demonstrate the superiority of values

unequivocally state that the onus is on applicants to demonstrate the superiority of values in favour of consent.

The President of the OCCP should precede his decisions with an economic test, assessing whether and to what extent competition will be infringed and calculating which scenario will be more profitable for the public. He will always resolve the conflict between two values – fair competition and the value presented in the application – when issuing an emergency approval.

The examples of rulings by the President of the Office of Competition and Consumer Protection and possible case law come to the rescue when weighing the values to be used as a basis for extraordinary approval. The creation of an effective structure of the relevant market,[30] national security,[31] energy security and implementation of state economic policy,[32] the creation of a financially stable and technologically strong (state) entrepreneur capable of international competition,[33] an increase in budget revenues,[34] environmental protection,[35] consumer protection, protection or creation of jobs[36] turned out to be the goods classified in this way, belonging to the broadly understood public interest, standing in opposition to the state of violation of fair competition found earlier. Among other things, energy security and guarantees of continuity of supply,[37] pluralism of the media (televisions), opportunities to improve production technology and improve quality,[38] the emergence of new products on the market,[39] the implementation of restructuring

in favour of consent, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.02.2004, point 91.

30 The Decision of the President of the OCCP of 6 August 2002, DDI-61/2002, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

31 Ibidem.

32 The Decision of the President of the OCCP of 22 December 2006, DOK-163/2006; the Decision of 27 September 2007, DKK-32/2007; the Decision of the President of the OCCP of 8 March 2007, DOK 29/2007, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

33 The Decision of the President of the OCCP of 15 November 2003, RWA-16/2003, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

34 Ibidem.

35 The Decision of the President of the OCCP of 5 March 2004, RPZ-4/04, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

36 The Decision of the President of the OCCP of 15 November 2003, RWA-16/2003, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

37 The Decision of the President of the OCCP of 5 March 2004, RPZ-4/04, https://decyzje.uokik.gov.pl [access: 3.07.2023].

38 The Decision of the President of the OCCP of 22 December 2006, DOK-163/2006, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

39 Ibidem; the Decision of the President of the OCCP of 17 July 2006, RKT-48/2006, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

strategies and ownership transformations in the sector (for example, aviation and radio-electric sectors)[40] were placed on the scales against fair competition.

The argument of economic efficiency was used on several occasions, including in the case,[41] in which a merger of entrepreneurs in the digital pay-TV market was allowed (it was Cyfra+ and UPC), recognising that one operator must have a sufficient number of customers for its services in a certain area to ensure that its business was profitable; whereas in the case of a co-existence of more competitors, it would not be able to acquire a sufficiently large number of customers. Monopoly was therefore a condition for the survival of any service provider. Thus, despite the violation of competition in a significant way, the Decision of the President of the OCCP was made in favour of this 'other' value.

The value placed higher than maintaining the market balance of the participants turned out to be the public safety and the implementation of the strategy of structuring the relevant market on the basis of previously adopted strategies.[42] Namely, that was when PHZ Bumar Limited Liability Company took control of more than a dozen companies producing weapons, explosives, chemicals, measuring tools and many others. Despite the unambiguous acquisition of a dominant position in the relevant market by the merged entrepreneurs, the President of the Office of Competition and Consumer Protection (OCCP) agreed to the concentration, recognising that it would allow them to better compete abroad, since individual bids would be technologically less attractive to (potential) buyers.[43]

It should be noted that the rationale for granting extraordinary approval cannot be the positive impact of the concentration on the parties involved. The benefits for those who seek concentration approval may at best coincide with the public interest, but are not a sufficient premise. The legislator unequivocally requires that the President of the OCCP demonstrates the existence of a public interest, e.g. in the form of technical progress, and therefore a benefit for many entrepreneurs, the entire industry and even the entire economy.[44] The decision taken by the President

40 The Decision of the President of the OCCP of 29 August 2002, DDI-70/2002; the Decision of the President of the OCCP of 8 March 2007, DOK-29/2007, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

41 The Decision of the President of the OCCP of 5 April 2005, RPZ-9/2005 and the subsequent ruling XVII Ama 52/98 non-publ. and XVII Ama 12/01 after T. Skoczny, M. Kolasiński, in: *Ustawa o ochronie*…, ed. T. Skoczny, p. 724.

42 Strategy for Structural Transformation of the Industrial Defence Potential in 2002–2005, The Resolution of the Council of Ministers of 14 May 2002.

43 The Decision of the President of OCCP of 17 July 2006, RKT 48/2006, https://decyzje.uokik.gov.pl/ [access: 3.07.2023].

44 E. Modzelewska-Wąchal, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2002, p. 171.

of the OCCP approving the concentration turned out to be at least questionable, for yet another reason – a divergent assessment as to the existence of a conflict of values as such in this case. This is because the justification for the decision did not show that the concentration would cause negative effects on competition. Thus, since it had not been documented at the first stage of the evidentiary proceedings that there would be a significant infringement of competition, the issuance of emergency approval was essentially pointless. The President of the Office of Competition and Consumer Protection had a stable basis for issuing the consent under Article 20 (1) of the OCCP.

Another reason why the antitrust authority decides to give extraordinary approval is sometimes social concerns. Considering that the result of competition is gaining an advantage at the expense of the failure of rivals and often the bankruptcy of the latter, antitrust authorities may consent to a merger of entrepreneurs, among other things, to prevent the social consequences of such bankruptcy. It cannot be ruled out that the social costs resulting from the loss of jobs (if the entrepreneur's assets were not allowed to be taken over) would be far higher than those from the creation of a dominant position in the relevant market. Preserving workplaces is a higher value in this case. Similarly, the situation of a takeover of a failing bank (described as *too big to fail*), constitutes an example of saving the savings of many consumers and counteracting the problems of many households as a good placed higher than the threat to fair competition by an entity gaining a dominant position in the relevant market. The antitrust authority should, in the situation of a projected bankruptcy of an entrepreneur, assess the effects of this event on the relevant market and competition also with regard to the scenario if the planned concentration had not taken place. The authority should assess what would happen if, in the absence of concentration approval, the entrepreneur were to go bankrupt, since then there would be one less competitor left on the market anyway (and what share of the relevant market would be taken by its market competitors). The said argument is referred to as the *failing company defence*, and the President of the OCCP should take it into account before deciding whether to approve the concentration.[45]

Concentrations may also potentially affect other constitutional values such as democratic order (including the freedom of speech), equal access to goods and services, changes in the ownership structure (nationalisation). All concentrations should be consistent with constitutional economic, social and political order; regardless of any harm done to fair competition. The provisions of Article 20 (2) of the OCCP – like any general clause – are potentially subject to an abuse of

45 T. Skoczny, M. Kolasiński, in: *Ustawa o ochronie*…, ed. T. Skoczny, p. 725.

interpretation. The greater the certainty as to the permissible understanding of the content of the provision, the more advantages for the entrepreneurs concerned, but also for the public interest. It would not be unreasonable, therefore, for the President of the OCCP to issue guidelines relating to the manner of interpreting the used terms 'economic development' or 'positive impact on the national economy.'

The principles of merging businesses or acquiring control over them are contained in several other normative acts, imposing additional restrictions. In the case of entities subject to financial supervision, the outcome of antitrust proceedings is subject to prior approval by the KNF (eng. the Polish Financial Supervision Authority). When, under Article 25h of the Banking Law[46] KNF determines that a concentration is not possible, not because it opposes fair competition, but because, for example, it is 'justified by the need for prudent and stable management of a national bank' (Article 25h (1) point 3 or because 'the submitter of the notifications gives the assurance of exercising its rights and obligations in a manner that duly safeguards the interests of the customers of the national bank and ensures the safety of funds collected in the national bank' (Article 25h (2) point 1), or when the bank's capital does not meet prudential requirements'; then the overriding value is consumer safety and market stability.

Another example of special regulations with regard to concentrations of entrepreneurs are the provisions of the Law on Principles of Management of Property of the State Treasury.[47] They either exclude completely or make concentrations of entrepreneurs of particular importance for the national economy, with regard to shares owned by the State Treasury or state legal persons, subject to the approval of the Council of Ministers. The law imposes an absolute ban on trading in shares of certain (explicitly mentioned) companies owned by the Treasury that are of special importance to the public interest. The public interest is therefore always a reason for not approving a concentration in their case. The applicants for approval should also document whether they can also guarantee protection of the interests of the employees of the company whose shares are to be divested. If such a transaction simultaneously meets the premises for a concentration included in the Law on Competition and Consumer Protection, the consent of the Council of Ministers is not a substitute for conducting anti-trust proceedings. Moreover, the assessment of the President of the OCCP of a given transaction may be completely different, as being based on other premises.

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46 Act of 29 August 1997 – Banking Law, Journal of Laws 2021 item 2439 as amended.

47 Act of 16 December 2016 on the principles of state property management, Journal of Laws 2021 item 1933 as amended.

Conclusions

The President of the OCCP faces a dilemma in almost every antitrust proceeding he conducts, whether to protect free competition as a value relevant to the economic system, or economic freedom as constitutionally guaranteed subjective rights of entrepreneurs (occurring in many guises), even though it may seem that the two values coexist and reinforce each other. The decisions of the President of the OCCP are admittedly made in conditions where the conflict between these values does not exist for its elimination has already taken place at the stage of law-making, such as *de minimis* agreements and concentrations. However, more often than not, the President of the OCCP, by virtue of his administrative decision, is obliged to eliminate or reduce this conflict through individual exemptions of agreements, or conditional approvals of concentrations. Occasionally, though, decisions are made despite the (continued) existence of a conflict of values between economic freedom and fair competition, giving one of them priority in the process of weighing the said values. Such is the case with emergency approval of a concentration. Thus, the application of the law does not always make it possible to eliminate the conflict of values. Even more so, the legislator does not succeed, in specific provisions, in eliminating this conflict a priori.

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STUDIA PRAWNICZE KUL
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The principles of issuing a crucial decision (selected problems)

Zasady wydawania decyzji zasadniczej (zagadnienia wybrane)
Принципы выдачи фундаментального решения (избранные вопросы)
Принципи видачі основного рішення (вибрані питання)

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Summary: The erection and commissioning of a nuclear power plant requires a number of administrative procedures. At the same time, in the majority of cases, it concerns proceedings that are mainly regulated outside the provisions on nuclear energy, and thus have already been discussed many times in the doctrine (e.g. cases regarding the building permit).

Against the background of the above, the procedure for issuing a crucial decision stands out. This is because this decision is not present outside the regulations concerning nuclear energy. However, it should be noted that the decision in question is of key importance as far as the possibility of starting the construction and operation of nuclear power is concerned. Thus it is surprising that the manner in which this ruling is regulated does not allow for determining such basic issues as the character of the crucial decision or the premises for issuing it. The goal of this study is to solve these dilemmas. The adopted research method is the dogmatic and legal method.

On the basis of the conducted analysis, it was established that in the current legal status, the crucial decision is of a binding nature, and the premises for its issuance are included in Article 22 Section 3 of the Act of 29 June 2011 on preparing and implementing investments in the field of nuclear power facilities and accompanying investments. It should be added that the presented results of the interpretative analysis are inconsistent with the position of the doctrine. In the literature, it is assumed that the crucial decision has a discretionary ('political') character. Moreover, the wording of the aforementioned act does not specify the conditions for issuing a crucial decision. Instead, it is suggested to look for them within the so-called legislative materials.
Key words: a crucial decision, a nuclear power plant, administration's discretion

Streszczenie: Zbudowanie i uruchomienie elektrowni jądrowej wymaga przeprowadzenia szeregu postępowań administracyjnych. Znakomita większość z nich została uregulowana poza prawem jądrowym, a w związku z tym wielokrotnie stanowiły one przedmiot analiz doktryny (np. postępowanie w sprawie wydania pozwolenia na budowę).

Na tle powyższego wyróżnia się procedura dotycząca wydawania decyzji zasadniczej. Dzieje się tak dlatego, że decyzja ta nie występuje poza regulacjami dotyczącymi energetyki jądrowej. Należy podkreślić, że przedmiotowa decyzja ma kluczowe znaczenie dla możliwości rozpoczęcia budowy i eksploatacji energetyki jądrowej. Może więc dziwić fakt, że sposób uregulowania tego rozstrzygnięcia nie pozwala na ustalenie tak podstawowych kwestii, jak charakter rzeczonej decyzji czy też przesłanki jej wydania. Celem badania jest rozwiązanie tych dylematów. Przyjętą metodą badawczą jest metoda dogmatyczno-prawna.

W toku analizy ustalono, że w obecnym stanie prawnym decyzja zasadnicza ma charakter związany, a przesłanki jej wydania zawiera art. 22 ust. 3 ustawy z dnia 29 czerwca 2011 r. o przygotowaniu i realizacji inwestycji w zakresie obiektów energetyki jądrowej oraz inwestycji towarzyszących. Należy dodać, że przedstawione wyniki analizy interpretacyjnej są niezgodne ze stanowiskiem doktryny. W literaturze przyjmuje się bowiem, że decyzja zasadnicza ma charakter uznaniowy („polityczny"), a treść ww. ustawy nie precyzuje przesłanek wydania kluczowej decyzji. Zamiast tego sugeruje się poszukiwanie ich w tzw. materiałach legislacyjnych.
Słowa kluczowe: kluczowa decyzja, elektrownia jądrowa, uznanie administracji

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Резюме: Строительство и ввод в эксплуатацию атомной электростанции требует выполнения ряда административных процедур. Подавляющее большинство из них регулируется вне рамок ядерного права и, как таковое, неоднократно становилось предметом доктринального анализа (например, процедура выдачи разрешения на строительство).

На фоне вышесказанного выделяется процедура выдачи фундаментального решения. Это связано с тем, что данное решение не существует вне нормативных актов по атомной энергетике. Следует подчеркнуть, что это решение является решающим для возможности начала строительства и эксплуатации атомной энергетики. Поэтому может вызвать удивление, что порядок регулирования данного решения не позволяет определить такие основные вопросы, как природа данного решения или предпосылки для его принятия. Данное исследование направлено на разрешение этих дилемм. В качестве метода исследования принят догматико-правовой метод.

В ходе анализа было установлено, что в современном правовом государстве фундаментальное решение носит обязательный характер, а предпосылки для его выдачи содержатся в статье 22.3 закона от 29 июня 2011 года «О подготовке и осуществлении инвестиций в объекты атомной энергетики и сопутствующие инвестиции». Следует добавить, что представленные результаты интерпретационного анализа не согласуются с позицией доктрины. Действительно, в литературе предполагается, что фундаментальное решение носит дискреционный («политический») характер, а содержание вышеупомянутого закона не определяет предпосылки для принятия ключевого решения. Вместо этого предлагается искать их в так называемых законодательных материалах.
Ключевые слова: ключевое решение, атомная электростанция, усмотрение администрации

Резюме: Будівництво та введення в експлуатацію атомної електростанції потребує низки адміністративних процедур. Переважна більшість із них регулювалася поза ядерним законодавством, і тому вони неодноразово були предметом доктринального аналізу (наприклад, провадження щодо видачі дозволу на будівництво).

На фоні викладеного виділяється провадження щодо винесення основного рішення. Це пояснюється тим, що це рішення не виходить за межі нормативних актів щодо атомної енергетики. Слід підкреслити, що дане рішення має ключове значення для можливості початку будівництва та експлуатації атомної енергетики. Тому здивування може викликати факт, що спосіб регулювання цієї проблеми не дозволяє визначити такі принципові питання, як характер зазначеного рішення чи підстави для його винесення. Метою дослідження є вирішення цих дилем. Застосованим методом дослідження є догматично-правовий метод.

У ході аналізу встановлено, що в чинному правовому статусі основне рішення є обов'язковим, а передумови для його винесення містяться у ст. 22 абз. 3 Закону від 29 червня 2011 року про підготовку та здійснення інвестицій в плані об'єктів ядерної енергетики та супутніх інвестицій. Слід додати, що наведені результати інтерпретаційного аналізу не відповідають позиції доктрини. У літературі передбачається, що основне рішення має дискреційний («політичний») характер, а зміст згаданого вище Закону не визначає умов видачі ключового рішення. Натомість пропонується шукати їх у т. зв. законодавчих матеріалах.
Ключові слова: ключове рішення, атомна електростанція, дискреційність адміністрації

Introduction

The first nuclear reactor was created more than two billion years ago.[1] Obviously the functionality of this first reactor was based on the forces of nature with water

1 P. Ball, *Ancient Nuclear Power Controlled by Water*, Nature 2004.

acting as a peculiar driving force and 'a neutron moderator'[2] which enabled development of appropriate chain reactions.[3] Interestingly this ancient nuclear reactor was discovered as late as in 1972,[4] i.e. less than 20 years after launching the first human-built nuclear power plant.[5] In this context it is prudent to take note that operations of both this particular human-built nuclear reactor and its contemporary[6] counterparts require, similarly to the aforementioned 'ancient nuclear power plant,' utilizing water.[7] On these grounds we may state that the act of humans turning to nuclear energy is a specific reference to operations of nature and, consequently, a repeat of the natural processes. Despite that generating atomic energy is plagued with bad publicity.[8] On one hand it is a result of inevitably associating nuclear power plants with an atomic bomb[9] and on the other hand with the fear of nuclear power plant disasters.[10] In the Polish context we should mention suspending works on erecting a domestic nuclear power plant as a consequence of e.g. numerous public protests.[11]

Taking the above facts into consideration we must make note that currently public reception of nuclear power plants is changing.[12] Along with the shift in public perception the policies of Polish state are also changing as evidenced by e.g. adopting the Resolution no. 114 of 2 October 2020 regarding updating the

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2 A. Meshlik, *The Workings of an Ancient Nuclear Reactor*, Scientific American 2005, no. 293 (5), pp. 35 ff.

3 Ibidem.

4 More on the subject: J.C. Kotz, P.M. Treichel, J. Townsend, D. Treichel, *Chemistry & Chemical Reactivity*, Stamford 2014, pp. 975 ff.

5 The first nuclear power plant was erected in 1954 in USSR, L.S. Johns et al. (International Security and Commerce Program of the Office of Technology Assessment Team), *Technology and Soviet Energy Availability*, Washington 1981, p. 111.

6 "This plant […] operated for almost 50 years. Its final shutdown was on April 29, 2002."

7 More on the subject: L.-J.Li, G.-Y. Qiu, C.-H. Yan, *Relationship between Water Use and Energy Generation from Different Power Generation Types in a Megacity Facing Water Shortages: A Case Study in Shenzhen*, Water 2022, no. 14 (20); E.V. Giusti, E.L. Meyer, *Water Consumption by Nuclear Powerplants and Some Hydrological Implications*, Geological Survey Circular 1977, no. 745.

8 See: A.-S. Hacquin, S. Altay, L. Aarøe, H. Mercier, *Fear of Contamination and Public Opinion on Nuclear Energy*, PsyArXiv2020, https://psyarxiv.com/wdvuq/ [access: 25.11.2022].

9 See: J. Baron, S. Herzog, *Public Opinion on Nuclear Energy and Nuclear Weapons: The Attitudinal Nexus in the United States*, Energy Research & Social Science 2020, vol. 68.

10 See: N. Watts, *'Deconstructing Chernobyl' – The Meaning and Legacy of Chernobyl for European Citizens*, in: *Atomkraft als Risiko: Analysen und Konsequenzen nach Tschernobyl*, eds. L. Mez, L. Gerhold, G. de Haan, Frankfurt am Main 2010, p. 53.

11 See: J. Waluszko, *Protesty przeciwko budowie elektrowni jądrowej Żarnowiec w latach 1985–1990*, Warszawa 2013.

12 *Poparcie społeczne dla budowy elektrowni jądrowej w Polsce – badania z listopada 2020 r. (62,5% of Poles is in Favour of Erecting Nuclear Power Plants in Poland)*, https://www.gov.pl/web/klimat/poparcie-spoleczne-dla-budowy-elektrowni-jadrowej-w-polsce---badania-z-listopada-2020-r. [access: 24.11.2022].

"Polish Nuclear Energy Programme"[13] multiannual plan which projects e.g. putting two nuclear power plants into operation by 2043.[14] Obviously such plans require preparing appropriate legal 'implements'.

The regulations regarding nuclear power are primarily contained within the Nuclear Power Law Act of 29 November 2000[15] (hereinafter: the Nuclear Power Law) and in the Act of 29 June 2011 on preparing and realizing investments in the field of nuclear power facilities and supporting investments[16] (hereinafter: the special purpose act on nuclear power). The issues regarding erecting a nuclear power plant were primarily included in the latter act. The contents of the special purpose act on nuclear power indicate a number of resolutions which have to be issued prior to putting a nuclear power plant into operation. In this context the fact that a separate chapter was devoted solely to a single decision draws attention. We mean the so called crucial decision indicated in chapter three of the special purpose act on nuclear power. Securing this resolution is a prerequisite for applying for issuing a permit regarding erecting a nuclear power plant.[17] On this basis we may adopt that according to the legislator a crucial decision is of particular significance. Therefore the minimalism of the regulations referring to a crucial decision is surprising. The issue consists of encapsulating the entirety of the regulations in merely two editorial units combined with the simultaneous lack of indication of the freedom of operations of a body issuing a crucial decision. Thus a view emerged in the doctrine in relation to the above according to which the premises for issuing a ruling related to this matter should be sought outside of the statutory text.[18] In the light of the aforementioned importance of crucial decisions the invoked statement may rise doubts.

Taking the aforementioned facts into consideration it has been adopted that the goals of this study consist of determining the character of a crucial decision and the premises for issuing it. Furthermore, in speaking of the character of this resolution, we are interested in determining whether it is a constrained decision or an arbitrary decision. In turn, the opinion invoked hereinabove will serve as a reference point.

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13 Monitor Polski 2020 item 946.

14 Ibidem, p. 28.

15 Consolidated text: Journal of Laws [Dziennik Ustaw] 2023 item 1173.

16 Consolidated text: Journal of Laws 2021 item 1484.

17 Article 22 of the special purpose act on nuclear energy.

18 Ł. Młynarkiewicz, *Decyzja zasadnicza w procesie przygotowania i realizacji inwestycji w zakresie obiektów energetyki jądrowej*, Sopot 2020, p. 166.

1. A nuclear power plant

In the introduction we should explain that the contents of both the Nuclear Power Law and the special purpose act on nuclear power discuss, respectively, a nuclear facility and a nuclear power plant. The legal definitions of both these objects consist of listing individual structures related to nuclear power. Simultaneously we must explain that both mentioned concepts do not possess the same meaning, not only as a result of a ban on synonymous interpretation, but also as a result of wording of, respectively, Article 3 point 17 of the Nuclear Power Law and Article 2 point 2 of the special purpose act on nuclear power.

On the grounds of the contents of the invoked provisions we must indicate that both a nuclear facility and a nuclear power plant cover such common structures as a nuclear power plant. an isotopic enrichment facility, a nuclear fuel manufacturing plant, a spent nuclear fuel treatment plant, a spent nuclear fuel storage facility and a facility for storing radioactive wast. In turn the difference between a nuclear power plant and a nuclear facility consists of the latter also covering a research reactor and the fact that a uranium and thorium ore excavation and preliminary processing plants are also considered to be nuclear facilities.

As indicated previously the crucial decision was regulated under the special purpose act on nuclear power. Therefore this ruling pertains solely to nuclear power plants. However, in order to facilitate reception of the further contents of this study terms nuclear power plant, atomic power plant and nuclear facility shall be used interchangeably in this paper.

2. An axiological 'void'

Adoption of the special purpose act on nuclear power was justified with the fact that the provisions effective at that time were supposedly preventing carrying out investment proceedings concerning nuclear power plants efficiently.[19] Adopting within the framework of the special purpose act on nuclear power such solutions as e.g. shortening selected proceedings or restricting the opportunities for launching extraordinary proceedings was supposed to remedy the situation.[20] Thus it must be

[19] *Uzasadnienie projektu ustawy – o przygotowaniu i realizacji inwestycji w zakresie obiektów energetyki jądrowej oraz inwestycji towarzyszących*, Parliamentary Document no. 3937, p. 2.

[20] More on the subject: Ł. Dubiński, *Legal Perspective on the Development of a Nuclear Energy in Poland*, in: *Towards the Polish-German Green Deal*, ed. O. Hałub-Kowalczyk, Toruń 2022, pp. 209–223.

noted that the provisions adopted in the invoked act concern the matters regulated under different legal acts. A construction permit may serve as an example.[21] Therefore we cannot speak of a uniform and cohesive axiological system in regards to the entirety of the special purpose act on nuclear power. At most we may indicate the goal of this legal act indicated in the introduction.

Taking the aforementioned facts into consideration it must be emphasized that a crucial decision is not present in any legal act apart from the special purpose act on nuclear power. Therefore there is no act which would define the axiological paradigm for making the analyzed ruling. We also cannot state that adopting the regulations concerning a crucial decision translates into shortening the time required for concluding the entirety of the proceedings carried out prior to erecting a nuclear power plant and putting it into operation. On the contrary, it should be stated that adopting the regulations concerning a crucial decision results in extending the time required for erecting a nuclear facility. Introduction of the concept of a crucial decision as it is currently defined into the legal system is equivalent to adding an obligation of carrying out additional administrative proceedings. Furthermore, in relation to the proceedings concerning issuing a crucial decision, the legislator did not reserve the option for applying all the procedural solutions of the special purpose act on nuclear power which are aimed at shortening the processing period for a given case.[22] Thus we must not interpret the goal of adoption of the special purpose act on nuclear power as the axiological perspective for interpretation of the provisions concerning a crucial decision.

Bearing the above facts in mind we should turn our attention to the fact that the provisions of the special purpose act on nuclear power constitute only a part of the regulations concerning nuclear power. The basic act in this regard is, obviously, the Nuclear Power Law.[23] Thus it would appear that the axiological perspective of this act should be taken into consideration when interpreting individual regulations pertaining to nuclear power. Thus it must be indicated that the provisions of the Nuclear Power Law were subordinated to realization of the singular value of nuclear security understood as achieving appropriate exploitation conditions,

21 Articles 15 and following of the special purpose act on nuclear energy.

22 For instance, the solution consisting of imposing a fine on a body which fails to meet the deadline for resolving a case was not reserved.

23 This statement is based on three arguments. Firstly it should be noted that labelling this legal act as 'law' suggests that similarly to a code it is an act of crucial importance for a specific field of law. Secondly the Nuclear Law contains the general solutions pertaining to nuclear power. Finally it must be noted that consistently with Article 1 Section 2 of the special purpose act on nuclear power the provisions of this act do not apply to the matters regulated under the provisions of the Nuclear Power Law.

preventing failures and alleviating results of failures and, in consequence, guarding employees and general populace against the dangers of the ionizing radiation produced by nuclear facilities.[24]

In connection with the above, it is worth noting that when creating regulations of the atomic law, the legislator directly refers to the provisions of the constitution. Of course, this is about regulations that determine 'security.' It should be noted that this concept appears in the constitution in a number of contexts as many as eighteen times. Such a large presence of 'security' in the Constitution should not be surprising. It should be pointed out that "so far the most perfect form of securing the needs of the individual and individual social groups in the field of security is the state."[25] It is therefore obvious that security should be mentioned in the basic legal act, which is undoubtedly the constitution. It should be noted, however, that there is no legal definition of this term.[26] However, this procedure on the part of the legislator can be considered accurate. In this way, the understanding of 'security' can be adapted to the changing economic and social reality, and thus also to the plans for the development of nuclear energy.

The analysis of security issues in constitutional terms goes beyond the scope of this study. For the purposes of this text, attention should be paid primarily to Article 5 of the Constitution,[27] which makes the state responsible for the security of citizens. In the context of nuclear energy, the aspect of protecting the society against the risks associated with the use of nuclear power plants will come to the fore. Of course, it will be about both legislative actions (i.e. adoption of appropriate legal acts) and actual actions (e.g. conducting inspections of nuclear power plants).

Bearing in mind the issues of nuclear energy, it is also worth noting Article 31 Section 3 of the Constitution. This provision provides for the introduction of restrictions on the exercise of constitutional freedoms and rights, e.g. for security reasons. Therefore, it should be stated that on the basis of the Constitution itself, one can speak of the need to respect 'nuclear security' in the context of interpreting and applying the provisions of the nuclear law. This concerns in particular the assumption that the aforementioned value justifies limiting the freedom to build and operate nuclear power plants.

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24 Article 3 point 2 of the Nuclear Power Law.

25 M. Serowaniec, W. Włoch, *Kategoria bezpieczeństwa w ujęciu prawno-filozoficznym*, Studia Iuridica Toruniensia 2016, vol. 18, p. 162.

26 P. Lisowski, *Pojęcie bezpieczeństwa w obowiązującym systemie prawa – kilka refleksji na temat normatywizacji problematyki bezpieczeństwa*, Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji 2016, no. 106, p. 44.

27 The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997 no. 78, item 483.

Therefore on the basis of the above claim we could ascertain that the nuclear security should also constitute a reference point for interpretation of the regulations concerning a crucial decision. However, it must be noted that the Nuclear Law defines precise regulations concerning rationing of all the nuclear security aspects contained in the previously invoked legal definition of this term.[28] Furthermore, attention should be drawn to the fact that the issue of nuclear security is subject of one of the proceedings preceding launching operations of a nuclear power plant.[29] Therefore it would be intolerable to consider this issue under the proceedings concerning crucial decisions. In adopting a different approach we should simultaneously accept a situation in which the same issues (i.e. the issue of nuclear security or its selected aspects) become a subject of more than one proceedings. Therefore it would appear that rooting a crucial decision outside of the Nuclear Power Law (i.e. in the special purpose act on nuclear power) was an intentional act of the legislator (*argumentum a rubrica*) performed with the goal of removing the necessity of analyzing and interpreting the issue subjectively through the lens of nuclear security.

The presented remarks lead to the conclusion that we cannot speak of a specific axiology concerning the regulations for issuing a crucial decision. In consequence the body handling the proceedings regarding resolving this matter may at most refer to the values commonly protected under the Polish legal system. The literature on the subject presents a different view. The doctrine indicates that the economic and policy interests[30] should constitute the values which should be considered by the body issuing a crucial decision. In this context we must take note that the presented approach is not consistent with the legal text. It is so because the invoked view is based primarily on the contents of the justification for the draft of the special purpose act on nuclear power.[31] Furthermore, the necessity of reaching out to the invoked legislative material is being justified with the regulations for issuing a crucial decision being inadequately specific.[32] As a result verification of the presented view requires checking whether the contents of the special purpose act on nuclear power contain the premises for issuing a crucial decision – the issue which shall be covered in the subsequent part of our deliberations.

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28 See Article 2 of the Nuclear Power Law.

29 This case refers to the issue of issuing a permit for erecting a nuclear facility. See: Ł. Dubiński, *Specustawa jądrowa i prawo atomowe (ocena wybranych planów legislacyjnych)*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2022, vol. 11, no. 2, pp. 89 ff.

30 Ł. Młynarkiewicz, *Decyzja zasadnicza*…, p. 437.

31 Ibidem, pp. 11 ff.

32 Ibidem.

3. Premises for issuing a crucial decision

The doctrine adopts that the contents of the special purpose act on nuclear power "lack defined premises or material and legal criteria which must be taken into consideration by the minister appropriate for energy affairs when issuing a positive or a negative ruling."[33] As indicated previously it is being assumed under this approach that the conditions for issuing a crucial decision should be sought for in the justification for the draft of the invoked act.[34] Therefore in this context we should remind that in both the doctrine and the case law we may come across two principally different approaches regarding whether the so called legislative materials can be used for the purpose of interpreting legal provisions. On one hand the statement is being put forward that only this is meaningful "What the legislator stated and not what legislator intended to state."[35] Consistently with this view the interpretation should be contained within the boundaries of the statutory text. On the other hand it is being indicated that on the basis of legislative materials the true intent of the legislator can be recreated.[36] Therefore under this approach e.g. the justification for the draft of an act can be utilized as a *de facto* essential part of the interpretation process. Undoubtedly the deliberations concerning both these views are beyond the scope of this study. We only wish to indicate that the author is inclined more towards the former view (expressed by the so called 'textualists'). However, for the purpose of this paper we shall engage in the deliberations pertaining not to the issue of reaching out to legislative materials at all but to the issue of whether it is necessary to utilize legislative materials in the case of determining the regulations for issuing a crucial decision. In other words – can we recreate the premises which should be taken into consideration by the body resolving the matter of issuing a crucial decision solely on the basis of the text of the special purpose act on nuclear power?

Taking the above into consideration we should take note that the task of determining the premises for issuing an administrative decision may be approached in various ways. The legislator may restrict himself to listing the reasons for issuing

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33 Ibidem, p. 166.

34 See: P. Wysocka, P. Nowakowska, *Rola decyzji zasadniczej w procesie inwestycyjnym elektrowni jądrowej. Rozważania na tle aktualnego stanu prawnego i projektowanej nowelizacji*, Nowa Energia 2022, no. 5–6 (86), pp. 53–54.

35 Z. Tobor, *W poszukiwaniu intencji prawodawcy*, Warszawa 2013, p. 123. See also: A. Bielska-Brodziak, *Śladami prawodawcy faktycznego. Materiały legislacyjne jako narzędzie wykładni prawa*, Warszawa 2017.

36 More on the subject: Z. Tobor, *Rola materiałów legislacyjnych w porządku prawnym*, Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji 2016, no. 104, pp. 171–181.

a refusal. In such case a phrase may be used like "we reject issuing a permit […] if […]."[37] By the same token, provisions may specify solely the premises meeting which is equivalent to securing a positive resolution of a case. In such cases phrases are used like "the permit is being issued to an entity which meets the statutory requirements and if: […]."[38] Therefore it is prudent to turn attention to the contents of Article 22 Section 3 of the special purpose act on nuclear power according to which a crucial decision may be issued to an investor who:

1) is established in a member state of the European Union or in a member state of the European Free Trade Agreement which is a party to the European Economic Area Agreement;
2) shall indicate that either himself or an entity related in terms of equity was over the last 10 years engaged for a period of at least 1 year in exploitation of large power plants with the total installed power of at least 1000 MWe, including at least one large power plant with installed power of at least 200 MWe;
3) will secure a decision regarding determining location for the investment consisting of erecting a nuclear power facility.

Looking upon the invoked regulation from the perspective of the *a contrario* reasoning it would be appropriate to state that consistently with the invoked provision the refusal to issue a crucial decision occurs in the case of not meeting the three criteria indicated hereinabove. We should also take note that the similarity is visible between the wording used in Article 22 Section 3 of the special purpose act on nuclear power "may be issued to an investor who" and the previously indicated example of the regulation concerning the criteria for issuing an administrative decision. Therefore we can undoubtedly adopt that the invoked contents discuss the requirements for issuing a crucial decision. We must also note that the premises contained within the contents of the invoked provision were formulated unambiguously and thus their interpretation does not require referring to e.g. the axiological justification behind the presence of a crucial decision in the special purpose act on nuclear power. As a result the view presented in the doctrine should be rejected. It is so because referring to the justification for the draft of the special purpose act on nuclear power in order to determine the premises for issuing a crucial decision is not necessary.

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37 Article 399 Section 1 of the Water Law Act of 20 July 2017, consolidated text: Journal of Laws 2022 item 2625 as amended. More on the subject: K. Flipek, P. Michalski, M. Soberski, *Prawo wodne – analiza wybranych zagadnień*, Warszawa 2022.

38 Article 148 of the Telecommunications Law Act of 16 of July 2004, consolidated text: Journal of Laws 2022 item 1648 as amended. More on the subject: S. Piątek, *Prawo telekomunikacyjne. Komentarz*, Warszawa 2019.

For the sake of completeness it is also prudent to draw attention to the parliamentary works on amending the special purpose act on nuclear power.[39] The designs of the legislator include supplementing the invoked act with Article 3d Section 1 consistently with which the minister appropriate for energy affairs issues a crucial decision or refuses to issue a crucial decision within 90 days from the date of receiving the application for issuing a crucial decision in consideration of public interest, in particular:

1) the goals of state policies, including the energy policy, jointly with the current and projected national demand for electric energy and heat;
2) the influence of investments in the field of erecting a nuclear power facility on the internal security of the state.

It must be underscored that the legislator projects removal of the previously invoked Article 22 Section 3 of the special purpose act on nuclear power. Therefore we may not claim that the regulations of the planned Article 3d Section 1 of the special purpose act on nuclear power are to serve as a reference point for interpretation of the previously presented premises concerning issuing a crucial decision. Instead one set of premises is to be exchanged for a different set of premises. Thus it is appropriate to adopt that legislator's designs indirectly confirm the thesis according to which under the current legislation the premises for issuing a crucial decision should be sought for in the contents of Article 22 Section 3 of the special purpose act on nuclear power. Simultaneously it should be emphasized that referring to the designs of the legislator is solely auxiliary in character if only due to the possibility of these designs being susceptible to change at any given time. In turn, as indicated previously, in order to determine the rationales for issuing a crucial decision it is sufficient to analyze the contents of the special purpose act on nuclear power, Article 22 of the act to be specific.

4. The degree of freedom of the body issuing a crucial decision

The issuance of a crucial decision is directly governed by two provisions. The first provision is Article 22 Section 2 of the special purpose act on nuclear power. Consistently with this provision a crucial decision is issued by the minister appropriate

[39] See: *Rządowy projekt ustawy o zmianie ustawy o przygotowaniu i realizacji inwestycji w zakresie obiektów energetyki jądrowej oraz inwestycji towarzyszących oraz niektórych innych ustaw*, https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=C8A3F3F3018D9444C12588B7004892B1 [access: 6.12.2022].

for energy upon the application of an investor, following consulting with the head of the National Security Agency on the issue of influence of the investment on the internal national security. *At a first glance* it would appear that the invoked provision is decisive for the constrained character of a crucial decision. The basis for such assumption could consist of using a phrase 'issues' in the wording of Article 22 Section 2 of the special purpose act on nuclear power.

Taking the above fact into consideration we should invoke the second of the provisions directly governing issuing crucial decisions. It is the previously invoked Article 22 Section 3 of the special purpose act on nuclear power, specifically in the part stating that "a crucial decision may be issued to an investor […]." On the basis of contents of this provision it is possible to claim that a crucial decision is of an arbitrary character. The basis for such assumption would obviously consist of the fact of using word 'may' in Article 22 Section 3 of the special purpose act on nuclear power.

It is undoubtedly unacceptable to accept both presented interpretations simultaneously. Therefore it is prudent to turn attention to the function of the first of the invoked provisions. Article 22 Section 2 of the special purpose act on nuclear power lists the bodies participating in the proceedings concerning issuing a crucial decision. The same provision also lists the tasks of these bodies (i.e. issuing a decision and an opinion). Thus it must be stated that the invoked provision is not decisive for the scope of freedom of the body issuing a crucial decision. Instead the meaning of Article 22 Section 2 of the special purpose act on nuclear power consists in determining competences of the bodies participating in the proceedings which concern issuing a crucial decision. The presented interpretation is indirectly confirmed by the fact that the analogous approach can be observed in case of other acts.[40]

The proposition presented hereinabove concerning the understanding of Article 22 Section 2 of the special purpose act on nuclear power does not automatically translate into acceptance of the opinion claiming that a crucial decision is of an arbitrary character. However, it must be admitted that the previously indicated use of word 'may' in the wording of the invoked provision is being put forward by the majority of authors as an argument for qualifying the determined resolution

[40] For instance, consistently with Article 4 Section 6 point 1 of the Act of 10 July 2007 on fertilizers and fertilizing (consolidated text: Journal of Laws 2023 item 569 as amended) the minister appropriate for agriculture issues a decision regarding the permit for introducing into circulation a fertilizer or plant growth supplement indicated in Article 3 Section 2 following securing opinions of authorized organizational units issued on the basis of the conducted research confirming that […].

as arbitrary in character.[41] Such approach is also presented in the doctrine in the context of the regulations concerning issuing a crucial decision.[42]

Taking note of the aforementioned facts it seems worthwhile to quote the *omnia sunt interpretanda*[43] adage. On its basis we should claim that it would be inappropriate to determine the regulations for issuing crucial decisions solely on the basis of the dictionary definition of word 'may.' To be more specific, the essence lies in the obvious assertion consistently with which if the subject of interpretation consist of an entire regulation its interpretation should not be limited to a single word. This premise is even more significant for the analyzed case because currently phrase 'may issue a decision'[44] is not equivalent to indicating the arbitrary character of a given resolution. On a different tangent, we can remark that the 'and' connective should be treated analogously as its presence in specific sentence structures may translate into its different meaning.[45] For instance, the 'and' connective can mean 'as well as.'[46]

Returning to the issue in question we should refer to the view according to which whether in a given case we should speak of administration's discretion may [!] result from both using a particular phrase as well as the entirety of the regulation.[47] Thus referring to the placement of word 'may' in the analyzed case we should remind that, as previously determined, the invoked word precedes the list of unambiguously formulated conditions and premises for issuing a crucial decision. Therefore there is no place for freedom of interpretation and decision making. The

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41 See: M. Stahl, *Formy prawne w sferze działań zewnętrznych administracji publicznej*, in: *System Prawa Administracyjnego*, vol. 5. *Prawne formy działania administracji*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2013 [Legalis database].

42 Ł. Młynarkiewicz, *Decyzja zasadnicza*…, p. 447.

43 For the meaning of this principle see: M. Zieliński, *Derywacyjna koncepcja wykładni jako koncepcja zintegrowana*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 2006, no. 3, p. 100.

44 Taking into consideration the current regulations we should invoke Article 16 Section 2 of Act on collective supply in water and collective discharge of waste water of 7 June 2001 (consolidated text: Journal of Laws 2023 item 537 as amended) consistently with which the permit may be issued upon the application of a water and sewerage company which […]. In the light of the above the doctrine indicates that "a permit is being issued by a village mayor (town mayor, city mayor) through a constrained decision." The phrase 'the permit may be issued' used by the legislator in Article 16 Section 2 may be misleading, J. Rotko, in: P. Bojarski, W. Radecki, J. Rotko, *Ustawa o zbiorowym zaopatrzeniu w wodę i zbiorowym odprowadzaniu ścieków. Komentarz*, Warszawa 2011 [LEX database], Commentary on Article 16.

45 See: E. Magner, *Koniunkcja w ekstensjonalnej logice a spójnik międzyzdaniowy „i" w języku naturalnym*, Studia Philosophiae Christianae 2005, vol. 41, no. 1, pp. 101–114.

46 M. Zeifert, *Problem wieloznaczności składniowej w przepisach zawierających wyliczenia wierszowe*, Studia Iuridica 2020, no. 83, pp. 267–268.

47 E. Ochendowski, *Prawo administracyjne. Część ogólna*, Toruń 1998, p. 123.

conditions indicated in Article 22 Section 3 of the special purpose act on nuclear power can or cannot be met.

Furthermore, attention must be drawn to the consequences of subscribing to the view according to which a crucial decision is supposed to be an arbitrary resolution. In such case we should simultaneously adopt that the body issuing a crucial decision enjoys the same degree of freedom when deciding rights of an individual and such interpretation is not supported by the legal text. Even the opponents of recognizing a crucial decision as a constrained decision admit that the criteria for issuing such resolution should be sought for outside of the contents of the special purpose act on nuclear power; to be more specific in the legislative materials developed during works on the draft of this act.[48] Under the discussed context we must admit that using legislative materials is not prohibited during the course of interpretation. Despite the decisively critical attitude towards the presented phenomenon in relation to the need for maintaining objective approach we shall also mention that there are cases of breaching the literal meaning of provisions due to the contents of the legislative materials. However, it must be recorded that the very advocates of referring to these documents during the course of the interpretation process frequently emphasize the similarity of such action to reaching for dictionaries.[49] Thus we must take note that the discussed case is not strictly concerned with breaching the literal interpretation but with developing a new regulation which would define the premises for issuing a crucial decision. In other words, in consequence of accepting the previously presented view expressed in the doctrine the so called legislative materials would have to be recognized as a foundation for issuing an administrative decision. Such approach would, in turn, be equivalent to violating Article 7 of the Basic Law according to which public authority bodies are operating on the basis and within the boundaries of law. Consistently with the invoked view legislative materials would not serve as an interpretation aid but would *de facto* serve as competing source of law.

Conclusion

Currently the administrative proceedings regarding investing in the field of nuclear power plants are not being carried out. However, taking into consideration the growing demand for *de facto* each type of energy we may expect that such cases will begin

48 Ł. Młynarkiewicz, *Decyzja zasadnicza*…, p. 128.

49 See: Z. Tobor, *W poszukiwaniu*…; A. Bielska-Brodziak, *Śladami prawodawcy faktycznego*…

to be considered in the forthcoming future. Thus it is to be expected that the manner in which appropriate procedures will be regulated will not mean solely adopting a subsequent special purpose act which will be primarily devoted to limiting the duration of each administrative procedure. It is so because such short proceedings cannot (at least in theory) forgo the time devoted to considering the manner of understanding of individual relations, including the meaning of a word 'may.' Such trite word may [!] spark a major dispute further devolving into a never-ending debate between textualists and supporters of the concept of a legislative intent.

Classifying word 'may' as 'trite' certainly results from the fact that its meaning in a legal text should not, in principle, raise any doubts. However, if a language is only a deficient copy of reality then constituent components of a language not always 'fit in with' the context created by the legislator. When considering the essence of the dispute described in this paper we could state that the introduction of word 'may' into the special purpose act on nuclear power could reflect at least some of the premises resulting from the justification for the draft of this act if not for the remaining structure of the provision. Taking this fact into consideration we could state that creating a transparent and clear law should not boil down to simply preserving provisions of proper legislation but should also encompass ensuring that the contents of the act are reflected in the plans expressed under legislative materials. Thus the idea is not for the parliament to become a 'hostage' of act's justification but to be able to expect that the final draft of the act submitted to the president will be accompanied by a consistent documentation which would be produced e.g. as a result of deliberations of an appropriate commission. However, it must be emphasized that even the most complete and credible legislative materials should not modify the text which is to be published as a legal act.

In turn in the analysis of a crucial decision we should adopt that owing to the unambiguous character of the criteria for issuing a crucial decision the invoked resolution is constrained in character. The very same reasoning also leads to the conclusion that in order to properly interpret the solutions concerning issuing a crucial decision it is unnecessary to refer to a specific axiology (i.e. the axiology determined in a given legal act). At the same time we should take note that we cannot speak of a coherent system of values under the special purpose act on nuclear power as an obvious result of the fact that this act contains fragmented solutions which concern issues regulated under different legal acts. It should be added that, the premises for issuance of the crucial decison are included Article 22 Section 3 of the special purpose act on nuclear power.

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Public commercial law and private law rules and values. Remarks in the light of the observable 'privatization' of public law

Prawo gospodarcze publiczne a normy i wartości prywatnoprawne. Uwagi na kanwie obserwowanej „prywatyzacji" prawa publicznego

Публичное хозяйственное право и нормы и ценности частного права. Замечания по поводу наблюдаемой «приватизации» публичного права

Публічне господарське право а приватноправові норми і цінності. Зауваження що до «приватизації» публічного права

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Summary: Public commercial law is a branch of law regulating the influence of the state and its bodies on economic and commercial processes. It is traditionally considered to be a component of a broader, more complex discipline – commercial law. Currently we can observe with an increasing frequency that private law regulations are being applied by the legislator, also within the framework of the regulations traditionally considered as a part of public commercial law. However, this practice may cause certain difficulties and setbacks, also in relation to the internal axiological consistency of the discussed law discipline.

Key words: privatization of public law, values in law and economics, public commercial law

Streszczenie: Prawo gospodarcze publiczne to gałąź prawa normująca oddziaływanie państwa i jego organów na procesy gospodarcze. Przyjęło się, że jest to element szerszej, kompleksowej dyscypliny – prawa gospodarczego. W ostatnim czasie coraz częściej daje się zaobserwować posługiwanie się przez prawodawcę prywatnoprawną metodą regulacji także w ramach unormowań tradycyjnie zaliczanych do prawa gospodarczego publicznego. Tego typu praktyka może jednak prowadzić do pewnych komplikacji, w tym również w odniesieniu do wewnętrznej spójności omawianej dyscypliny na płaszczyźnie aksjologicznej.

Słowa kluczowe: prywatyzacja prawa publicznego, wartości w prawie gospodarczym, prawo gospodarcze publiczne

Резюме: Публичное хозяйственное право – это отрасль права, которая нормирует влияние государства и его органов на экономические процессы. Предполагается, что оно является частью более широкой, комплексной дисциплины – хозяйственного права. В последнее время все более распространенным становится использование законодателем частноправового метода регулирования и в рамках норм, традиционно относимых к публичному хозяйственному праву. Однако подобная практика может привести к определенным сложностям, в том числе и в отношении внутренней согласованности рассматриваемой дисциплины на аксиологическом уровне.

Ключевые слова: приватизация публичного права, ценности в хозяйственном праве, публичное хозяйственное право

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Резюме: Публічне господарське право встановлює закони, що регулюють вплив держави та її органів на економічні процеси. Прийнято вважати його елементом ширшої і більш комплексної дисципліни – господарського права. Останнім часом все частіше помічається, що законодавець використовує приватноправовий метод регулювання, також у рамках норм, які класифікуються як публічне господарське право. Такий тип практики може призвести до певних ускладнень, також щодо внутрішньої узгодженості обговорюваної дисципліни на аксонологічному рівні.

Ключові слова: приватизація господарського права, цінності господарського права, публічне господарське право

Introductory remarks

As once noted by Jerzy Bafia any law by itself is not enough to establish a state governed by the rule of law. What is needed is law which exemplifies the ideas symbolizing the values formed as a result of the development of culture, the values which are displayed through social development and allude to the common, expressing the will and interest of the society (e.g., justice, equality, freedom, fraternity of man or human dignity).[1] Therefore, these rules of law which embody the appropriate values are perceived more favourably by the recipients of said laws and reinforce the notion of respecting the law. It is of particular importance for these parts of the legal system which impose restrictions or additional obligations upon normal private operators. One such discipline is public commercial law.

The traditional division of commercial law into private and public commercial law assumes separating the issues related to the horizontal legal relations characteristic to private law from the vertical legal relations which are characteristic to administrative law. The fact that certain representatives of the doctrine treated commercial law as a complex yet separate branch of law (or even one of the basic branches of law) did not result in developing uniform dogmatic standards expanded with comprehensive theoretical studies for this group of regulations. Thus, the further development of commercial law proceeded within the framework of its two basic disciplines: private commercial law and public commercial law.

Currently, on the grounds of public commercial law, we may observe the trend of the lawmaker applying also private law legal solutions with an increasing frequency. Such an approach undeniably transforms the original administrative commercial law into a discipline of a new and complex character where values characteristic for public law and private law clash. The aim of this study is an attempt to examine the aforementioned changes occurring within the framework of public commercial

1 J. Bafia, *Praworządność*, Warszawa 1985, p. 11.

law, also, in the context of the possible conflicts of values which may increasingly frequently materialize within the framework of the broadly understood public commercial law.

1. Commercial law and public commercial law

Consistently with the adopted convention, public commercial law is a component of a broader group of rules defined as commercial law. This broader discipline covers with its scope any and all rules of law crucial from the point of view of economic activity.[2] The debate regarding existence, scope and criteria for isolating commercial law has been perpetuated with greater or lesser intensity since the concept of separate commercial law became more common, i.e., since the Twenties of the XX century.[3]

Certain clues regarding the character and scope of commercial law can be drawn from the origins of this discipline. As it is rather commonly indicated the idea of a separate commercial law is a result of the state rejecting the traditional liberal concepts, under which economic and commercial relations were regulated relatively lightly, in favour of regulations assuming direct responsibility for the shape and functioning of the economic system.[4]

Therefore, the state stops intervening in economic processes only incidentally, only when the necessity of protecting the basic rights and goods such as life and health of citizens arises, and instead engages in actively shaping and developing economical processes by introducing specific social solutions rooted in the solidarity-based and socialist ideas which have been in development since the XIX century.[5]

C. Kosikowski rightfully noted that "the type of behaviour and attitude of the state towards the economy influences and determines the scope of behaviours and attitudes of the said state in the field of lawmaking";[6] As a consequence, "the scope

2 K. Strzyczkowski, *Prawo gospodarcze publiczne*, Warszawa 2007, p. 33.

3 J. Wiszniewski, *Prawo gospodarcze*, Warszawa 1982, pp. 10–11.

4 At times an earlier period is being indicated as the time of emergence of the commercial law. See: R. Blicharz, J. Grabowski, in: *System Prawa Administracyjnego*, t. 8A. *Publiczne prawo gospodarcze*, ed. R. Hauser, Warszawa 2018, pp. 16–18.

5 A. Chełmoński, *Prawo gospodarcze*, Gazeta Sądowa Warszawska 1924, no. 36, p. 553; S. Włodyka, *Prawo gospodarcze. Zarys systemu. Część ogólna*, Warszawa 1981, pp. 11–12.

6 C. Kosikowski, *Idea prawa gospodarczego i jego działy*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 1993, vol. 55, no. 1, p. 16.

of legal regulation of the economical processes is not permanent."[7] This is particularly noticeable in the context of the contemporary history of countries in central and eastern Europe. Under the conditions of the centrally planned economy a need existed to develop an expansive legal regulation concerning economic relations. In turn during the period of economic reforms the significant part of the regulations previously forming the core of former commercial law became obsolete. The scope of commercial law was expanded with the regulations important from the point of view of operations and functioning of the market economy. Further change in this area as well as in the character of commercial law was effected by the prospects of and eventual accession of Poland to the European Union. Thus, commercial law is not a discipline of law with clear and permanently determined boundaries. It makes formulating certain opinions regarding the values which are supposed to be upheld by commercial law slightly more difficult.

From among the various concepts of commercial law presented in Polish literature the concept of commercial law as a complex branch of law is being most frequently invoked. Under this concept commercial law consists of specific elements of the traditional branches of law regulating economic processes. In particular commercial law consists of the components of state (constitutional) law referring to the principles of economic system or the ownership system, the elements of administrative law regulating operations of the so-called economic administration and this part of civil law regulations that governs the framework of the private law entities (natural persons, legal persons and imperfect legal persons) as well as the civil law actions taken by the said entities within the framework of their commercial operations (specifically particular contracts).[8]

As J. Wiszniewski indicates, "rules of commercial law, despite belonging to various branches of law, form in their whole a specific system. The system is understood as a functional whole, i.e., the whole which has a specific goal and structure – specific and determined relations between elements of the system. The goal of the system of commercial law is to ensure adequate functioning and development of the economy. The legal norms are elements of this legal system. These norms are formed and interpreted in a manner ensuring their contribution to the realization of the goals of the system. The affiliation of each of commercial law legal norms with one of the basic branches of law does not contravene their character resulting from a given norm being affiliated also with the system of commercial law. Each

7 Ibidem.

8 Apart from its key components commercial law understood in this particular manner also consists of certain regulations drawn from financial, criminal and labour law. See also: J. Wiszniewski, *Prawo gospodarcze*, pp. 7–8.

of the basic branches of law also forms a system. Systems of the basic branches of law have their goals. These goals are, however, qualified as values of a more general character."[9]

Subsequent divisions are effected within the framework of commercial law understood in this manner. The division in regard to the subjective criterion is the most significant. As a result of this division, we can distinguish private commercial law regulating the mutual legal rights and obligations of the participants of commercial exchange (horizontal relations) and public commercial law regulating the legal rights and obligations of economic entities towards the state as well as competencies of public bodies towards the entities engaged in commercial activity (vertical relations).[10]

Commercial law approached as a whole is currently not being subjected to thorough theoretical deliberations. As the doctrine indicates the representatives of public commercial law and private commercial law do not aspire to establishing a common concept of commercial law or even certain common research areas.[11] It is particularly noticeable that the norms of commercial law understood in this particular manner do not display the peculiar characteristics enabling aggregating these norms into an independent branch of law. On the contrary, these norms display the characteristics of classical branches of law they derive from, i.e., civil law and administrative law in particular.[12]

Thus, isolating commercial law is primarily of importance to systematizing efforts. Doing so enables observing specific legal regulations from the perspective of their influence on functioning of the economy. It is particularly significant within the framework of the principle of unity of civil law and departing from the classical regulations of commercial law effective in the Polish legal order. However, as it has been previously indicated, commercial law is usually considered when its two basic fields are being determined: private commercial law and public commercial law. The studies on commercial law as a separate branch (either a basic or complex branch), including the studies referring to the values upheld by regulations of this law, are not currently carried out.[13] As A. Bator indicates, commercial law "did not

9 J. Wiszniewski, *Prawo gospodarcze*, p. 8.

10 C. Kosikowski, *Idea prawa gospodarczego*…, p. 16.

11 G. Góralczyk, *Samodzielność pojęciowa prawa gospodarczego jako problem analitycznej teorii prawa*, Acta Universitatis Wratislaviensis no. 3337. Prawo 2011, no. 312, p. 144.

12 L. Kieres, in: A. Borkowski, A. Chełmoński, M. Guziński, K. Kiczka, L. Kieres, T. Kocowski, *Administracyjne prawo gospodarcze*, Wrocław 2005, p. 20.

13 The doctrine indicates that the usefulness of commercial law may be displayed in treating it as a platform "for the inter-branch synthesis effected on the higher echelon than within the framework of the basic departments of the taxonomy of law and aimed at integrating the results produced previously

develop its own lexical subsystem to the extent that would enable it to categorize the elements of the extra-linguistic reality significant to commercial operations. In turn, commercial law draws extensively from other industry dictionaries […]. Under these circumstances it is difficult to expect emergence of a relatively consistent industry dogma (specific science) of commercial law."[14]

Therefore, commercial law understood in this manner is primarily a carrier for the values developed on the level of individual basic branches of law from which commercial law draws its rules. Because these rules, and thus the said values, are drawn from such diverse legal systems as civil law or administrative law these rules, by the virtue of commercial law understood in this particular manner, shall produce possible conflicts of values. German doctrine even presents a separate concept of "commercial law as a collection of rules used to resolve conflicts between the contradictory interests involved in economy."[15]

2. Private law norms and values in the context of public commercial law

The scope and, in consequence, also the character of commercial law are subject to rather frequent changes. It is so because the form of commercial law is always a reflection of the attitude of the broadly understood state towards the economy. As T. Długosz rightfully notes, all changes in this attitude are always a result of ideological entanglement. "Liberalism advocates limited participation of the state in the economy whereas other ideologies are aiming for the state which enjoys a stronger or more active participation in the economy, e.g., the «intermediate» ideologies include the doctrine of the welfare state or the concept of the social market economy. Each model of state interventionism is supported by a selection of values which

in these departments (S. Włodyka, A. Chełmoński). The ultimate goal of the integration studies may consists in developing new legal institutions, frequently of complex and heterogeneous legal nature, which serve to improve the regulatory functions of law in specific areas of economic life (e.g., land use planning, special economic areas, public procurements, public–private partnership agreements, certain types of licenses, legal implements for regulating international goods exchange etc.). However, we may claim otherwise – that commercial law understood as a peculiar method of researching legal phenomena is a specific mode of observing and assessing the traditional legal institutions in term of their adequateness for reaching the stipulated economic goals", R. Blicharz, J. Grabowski, in: *System Prawa Administracyjnego*, vol. 8A, pp. 21–22.

14 A. Bator, *Czy powinniśmy wyodrębniać prawo gospodarcze?*, in: *Współczesne funkcje państwa wobec gospodarki. Księga jubileuszowa Profesora Tadeusza Kocowskiego*, eds. K. Kiczka, W. Małecki, Wrocław 2022, pp. 66–67.

15 S. Włodyka, *Prawo gospodarcze*…, p. 12.

are based on historical experiences, achievements, tradition and culture of a given social and legal community. The ideological stance and experiences of a given community are changing and thus the scope, intensity and form of the state intervention in economy are also changing and it may happen that the attitude of the state towards the economic processes will change in absence of normative changes."[16]

Contemporary commercial law is adjusted to the demands of the social market economy. Thus, over the past decades its basic function has changed. Within the framework of the market economy system commercial law becomes "more useful for the purpose of protecting economic entities rather than for legitimizing economic rulership of the state."[17] The character and function of the discussed branch of law were modified gradually. In the initial stage of the transformation the very important components of public commercial law consisted of e.g., the regulations concerning commercialization and privatization of the state-owned enterprises, the application of which nowadays considered a thing of the past. Currently, within the framework of the broadly understood administering of public property, the public procurement regulation appears to be the primary object of interest of the doctrine and practice.

Similarly to commercial law the modern public commercial law is an example of a complex law discipline. On one hand public commercial law is a part of a more expansive system of norms under the umbrella of commercial law. On the other the individual components of public commercial law may be treated as elements of other branches of law. During its development commercial law underwent numerous changes in regard to its character and scope. In particular within the framework of public commercial law we may currently observe not only the norms regulating vertical relations, which are characteristic to the administrative law method of regulating affairs, but increasingly numerous norms concerning and shaping horizontal relations which are typical of civil law. The complexity of the regulations of public commercial law may induce search for structural and theoretical similarities between this discipline of law and commercial law. However, we must immediately draw attention to the fact that whereas the complexity of commercial law is a result of the essential characteristics of this discipline, which covers with its scope the entirety of regulations referring to economic processes, the complex approach to public commercial law is a result of the intentional actions of the legislator. It is so because public commercial law is frequently a product of utilizing legal instruments

16 T. Długosz, *Kompetencja w publicznym prawie gospodarczym*, Warszawa 2021, p. 32.

17 C. Kosikowski, *Idea prawa gospodarczego*…, p. 16.

specific to private law where it is possible (and at times even desirable) to use public law regulations.

The aforementioned intertwining character of civil-law and administrative law provisions "is related to increasingly evident phenomenon of «publicization» of private law and privatization of public law."[18] The indicated processes, progressing not only within the framework of public commercial law, are a result of the lawmaker departing from the traditional manner of formulating acts of law. Frequently these acts do not cover with their scope the regulations from a single basic branch of law but regulate given issues in a complex manner – by utilizing private law and administrative law method of applying regulations. Such practice frequently makes it more difficult to unambiguously qualify a given regulation as a public-law or private law regulation; this, in turn, may at times result in the regulation itself being classified differently by different representatives of the doctrine. As K. Horubski notes "apart from the normative restrictions imposed upon the entities governed by private law with the goal of protecting the values equated with – due to their supra--individual character – the public interest, the process of publicization of private law is characterized by the public law instruments (in particular the administrative--legal implements but also the criminal-law implements as well as mixed implements – administrative-criminal) encroaching «upon the area formerly reserved solely for the private law implements». These instruments are a specific «supplement» to private law regulations and therefore they complement civil law solutions. However, the discussed process is not accompanied by eliminating the methods for regulating social and economic relations which are typical of private law."[19]

The process of publicization of private law characterized hereinabove may consist of either supplementing the legal structures from the field of private law ("without questioning the essence of their function and intentionality") with selected implements of public law (a phenomenon particularly visible in the field of public procurements) or modifying traditional private law solutions with the goal

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18 Z. Duniewska, in: *System Prawa Administracyjnego*, vol. 1. *Instytucje prawa administracyjnego*, ed. R. Hauser, Warszawa 2015, p. 176. As noted by J. Habermas, *Strukturalne przeobrażenia sfery publicznej*, Warszawa 2007, p. 291: "As early as following the conclusion of the First World War law begun to evolve to a certain degree alongside the society and gave birth to the complex mixed process initially recorded under the name of «publicization of private law» (»*Publizierung des Privatrechts*«); later we got used to considering the very same process from the opposite point of view, mainly as privatization of public law."

19 K. Horubski, *Publicyzacja prawa prywatnego w obszarze prawa zamówień publicznych*, Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 2018, no. 540, p. 83. See also: M. Safjan, *Pojęcie i systematyka prawa prywatnego*, in: *System Prawa Prywatnego*, vol. 1. *Prawo cywilne – część ogólna*, ed. M. Safjan, Warszawa 2007, p. 49.

of "creating a space more conducive for their functioning under the conditions of modern market."[20]

The recent years brought significant growth in interest in specific disciplines of public commercial law. Such disciplines as competition law, infrastructure sectors' law or public procurement law were the subject of a sizable number of practical and theoretical studies. In turn the more general aspects of public commercial law did not enjoy greater interest.[21] Unfortunately, the noticeable direction of public commercial law development is not conducive to the more expansive theoretical deliberations on the essence or the basic values characterizing this discipline. The dynamic development of specific disciplines of public commercial law, frequently regulated through complex legal acts, may in time lead to isolating these disciplines entirely. Public commercial law may at such time transform into a peculiar 'general part' of public law regulations regarding economic processes. However, forgoing a more thorough reflection on the subject of public commercial law as a whole may in the longer perspective lead to disintegration of this discipline.

The potential threats to integrity of public commercial law include concepts aimed at isolating private law provisions from this complex branch of law. The assemblage of norms obtained in this manner would supposedly constitute a foundation for a separate "scientific and educational discipline devoted to applying private law in the public sector"[22] which would, however, constitute an element of civil law. Isolating such "public sector private law" would possibly enable the civil law science to cover with its scope these public commercial law provisions which utilize private

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20 M. Safjan, *Pojęcie i systematyka*…, p. 49.

21 A. Powałowski, *Wprowadzenie do aksjologii prawa gospodarczego publicznego*, Acta Universitatis Wratislaviensis no. 3977. Prawo 2019, no. 329, p. 222.

22 R. Szczepaniak, *Stosowanie prawa cywilnego a podział na prawo publiczne i prywatne*, in: *Problemy pogranicza prawa cywilnego*, ed. R. Szczepaniak, Warszawa 2022, p. 158. The author refers to the concepts developed on the grounds of German science where two phenomena became subject of deliberations "the so called private administrative law (*Verwaltungsprivatrecht*) and the application of civil law within the boundaries of administrative law. […] In terms of German science we may even speak of two trends of deliberations. *The Verwaltungsprivatrecht* is a specific private administrative law in the normative and science-education meaning. Whether it is a part of the broadly understood administrative law (the idea supported by the majority of German scholars) or a sub-discipline of civil law is a subject to a debate. This does not change the fact that in the normative understanding it is concerned with regulating civil-law relations in the public sector. In the majority of cases it is also subjected to the jurisdiction of civil law courts. The second research and studies trend was devoted to applying provisions of civil law within the framework of administrative law (*Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht*) and is interested in a different phenomenon, mainly the previously indicated phenomenon of «developing» administrative law «at the expense of civil law.» It is so because in this case we are dealing with the aspect reserved for administrative law, i.e. administrative law relations."

law mode of regulation and thus would introduce civil institutions and values into public law. According to R. Szafrański the broadly understood public sector is contemporarily one of the main areas for applying civil law regulations. Exclusion of such important regulations from the spectrum of interest of representatives of civil law doctrine is thus, in his opinion, unjustified.[23]

Concepts also emerge according to which the mutual intertwining of private-law and public-law regulations (also in the field of public commercial law) may be treated as a potential threat to the values protected by public law. In the process of its historical development public law developed an adequate system of legal protection instruments which can be utilized by private entities in the case of unlawful and unchecked operations of the bodies of public administration. In turn private law does not have such protection implements in place. The civil-law relations based on the principle of formal equality of the subjects of law favour the materially stronger entities which are frequently able to impose their will on a formally equivalent but materially weaker entity. Thus, as rightfully noted by E. Łętowska, the peculiar 'privatization' of the operations of state authority bodies, until now operating in the public area, may be viewed as a sort of "departure from a more rigorous public law regime. Private law regime is less afflictive and poignant for a stronger entity because it restricts and controls such an entity to a lesser degree."[24]

Conclusion

Intertwining of the values specific to public and private branches of law has been always a quality specific to commercial law which aggregates determined norms solely on the basis of the subjective criteria regardless of the applied method of regulation. Further division of commercial law into private and public commercial law was to be, in principle, based on the subjective criterion under which the applied method of regulation plays a crucial role.

However, as the above deliberations indicate, the original criteria separating public commercial law from private commercial law are currently not being respected. In particular the introduction of the provisions utilizing private-law regulations within public commercial law, including regulations directly referencing the Civil Code, is a challenge for the public commercial law doctrine, specifically

23 R. Szczepaniak, *Stosowanie prawa cywilnego*…, pp. 158–159.

24 E. Łętowska, *Prawo cywilne: złudzenia – kamuflaże – manipulacje*, in: *Problemy pogranicza*…, pp. 43–44.

in the aspect of the values these regulations represent. The harmonious coexistence of the norms expressing the idea of the freedom of an individual and the norms which restrict this freedom within the framework of the same branch of law may result in certain difficulties with interpretation. These difficulties may be remedied through referring to a certain system of values common for the entirety of public commercial law. These values primarily stem from the constitutional regulations shaping the entirety of the economic system of the Republic of Poland among which the principle of a democratic state governed by the rule of law and materializing the principles of social justice and the concept of social market economy are of primary importance.[25]

Too extensive application of private-law regulations in the field of public commercial law gives birth to new threats. On one hand the civil-law components of public commercial law spark understandable interest among representatives of the doctrine of civil law. The voices advocating for exclusion of these regulations from public commercial law emerging in this context may gave birth to justified concerns among representatives of this legal doctrine. On the other hand the excessive privatization of public commercial law may be perceived as a phenomenon violating the legal instruments of public law utilized for protecting rights of an individual. Forasmuch private law is not an adequate instrument for resolving disputes emerging in the context of applying regulations primarily aimed at protecting the multi-aspect public interest in the field of economic relations.

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STUDIA PRAWNICZE KUL
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On the premise of suspending the running of the limitation period of a tax liability under Article 70 § 6 (1) of the Tax Ordinance. Expectations and the direction of changes

O przesłance zawieszenia biegu terminu przedawnienia zobowiązania podatkowego z art. 70 § 6 pkt 1 Ordynacji podatkowej. Oczekiwania i kierunek zmian

О предпосылке приостановления течения срока исковой давности по налоговому обязательству в статье 70 § 6 п. 1 Налогового кодекса. Ожидания и направления изменений

Передумова для призупинення нарахування строку давності податкового зобов'язання, передбаченого ст. 70 § 6 пункт 1 податкового закону. Очікування та напрямок змін

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Summary: It should be noted that one can find quite extensive studies on the suspension of the limitation period of a tax liability in literature, however, the present issue as covered by the project of abolishing the premise of suspension of the limitation period of a tax liability in connection with the commencement of the proceedings for a fiscal offence or a fiscal misdemeanour provides a completely new perspective. The paper proves that it is, in fact, unjustified to maintain the premise of suspension of the course of the statute of limitations in its construction, which is referred to in Article 70 § 6 (1) of the Tax Ordinance. In view of the above, the aim of the paper will be to assess, against the background of the current legal regulations, the directions of changes in the analysed institution. The tackled issues entail the inevitability of analysing the legal issues in the indicated area from the point of view of the character of changes, as well as the practical problems related to them.

Key words: tax liability, tax arrears, statute of limitations, taxpayer, instrumental initiation of fiscal criminal proceedings

Streszczenie: Należy stwierdzić, iż w literaturze można spotkać się z dość obszernymi opracowaniami dotyczącymi zawieszenia biegu terminu przedawnienia zobowiązania podatkowego, natomiast niniejsze zagadnienie w ujęciu projektu zniesienia przesłanki zawieszenia biegu terminu przedawnienia zobowiązania podatkowego w związku z wszczęciem postępowania w sprawie o przestępstwo skarbowe lub wykroczenie skarbowe stwarza zupełnie nową perspektywę. Praca będzie dowodzić, iż w istocie niezasadne jest utrzymywanie w konstrukcji przedawnienia przesłanki zawieszenia biegu jego terminu, o której mowa w art. 70 § 6 pkt 1 Ordynacji podatkowej. W związku z powyższym celem artykułu będzie ocena na tle obowiązujących przepisów prawnych, jakie są kierunki zmian analizowanej instytucji. Przedstawiona problematyka pociąga za sobą nieuchronność analizy zagadnień prawnych z tego zakresu pod kątem charakteru zmian, ale również problemów praktycznych z tym związanych.

Słowa kluczowe: zobowiązanie podatkowe, zaległość podatkowa, przedawnienie, podatnik, instrumentalne wszczynanie postępowań karnych skarbowych

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Резюме: Следует отметить, что в литературе можно найти достаточно обширные исследования, посвященные приостановлению течения срока исковой давности по налоговому обязательству, в то время как данный вопрос в части проекта отмены предпосылки приостановления течения срока исковой давности по налоговому обязательству в связи с возбуждением дела о налоговом преступлении или налоговом правонарушении создает совершенно новую перспективу. В статье будут приведены аргументы в пользу того, что фактически необоснованно сохранять в конструкции срока давности предпосылку для приостановления течения его срока, упомянутую в статье 70 § 6 п. 1 Налогового кодекса. В связи с вышесказанным, целью статьи будет оценка на фоне действующих правовых норм, каковы направления изменений анализируемого института. Представленные проблемы неизбежно влекут за собой анализ правовых вопросов в этой области с точки зрения характера изменений, но также и связанных с этим практических проблем.

Ключевые слова: налоговое обязательство, недоимка по налогам, срок исковой давности, налогоплательщик, инструментальное возбуждение уголовного налогового производства

Резюме: Слід зазначити, що в літературі можна знайти досить суттєві дослідження щодо призупинення нарахування строку давності податкового зобов'язання, тоді як це питання в проекті скасування передумови для призупинення нарахування строку давності податкового зобов'язання у зв'язку з ініціюванням провадження у справі про податковий або фіскальний злочин створює абсолютно нову перспективу. У статті буде доведено, що фактично невиправдано підтримувати передумову про призупинення нарахування його строку, про яку йдеться у ст. 70 § 6 пункт 1 податкового закону. У зв'язку з вищевикладеним, метою статті буде оцінити на тлі чинних правових норм, які є напрямки змін аналізованого інституту. Представлені проблеми зумовлюють неминучість аналізу правових питань у цій галузі з точки зору характеру змін, а також пов'язаних з ними практичних проблем.

Ключові слова: податкове зобов'язання, податкова заборгованість, строк давності, платник податків, порушення кримінально-податкової справи

Introduction

The discussion on the role and the function of the suspension of the statute of limitations of a tax liability is still ongoing. There is still no answer as to how to counteract the practice of instrumental initiation of fiscal criminal proceedings. It is undoubtedly one of the most frequent objections addressed at tax administration bodies. Apart from this, the issue of the premises for suspending the limitation period of a tax liability poses serious doubts of a constitutional nature as well.[1] It is perfectly illustrated by not only the abstract motion filed by the Ombudsman in this case, but mainly by the ever-increasing number of constitutional taxpayers' complaints themselves. It is hardly surprising, by the way, since the aforementioned application of the Ombudsman was filed in 2014 and the Constitutional Tribunal

[1] See: Article 43 and 44 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dziennik Ustaw] 1997 no. 78, item 483 as amended; the Supreme Court, inter alia, in its Decision of 2 July 2002 in the case II KK 143/02, stated that there was no protected right of limitation, LEX no. 55526.

nearly five years ago postponed the ruling without setting a deadline.[2] As a result, the Ombudsman drew the attention of the Minister of Finance to a legal dilemma not resolved for years in subsequent amendments to the Tax Ordinance.[3] Since 1 January 2003,[4] the running of the limitation period has been suspended as a result of the commencement of proceedings for a fiscal offence or fiscal misdemeanour.[5] Another amendment to the Tax Ordinance decided that the suspension of the running of the limitation period should take place as a result of the commencement of proceedings in a case of a tax offence or a tax misdemeanour, if the suspicion of a tax offence or misdemeanour involved the non-performance of that obligation.[6] The Decision of the Constitutional Tribunal of 17 July 2012 in case P 30/11[7] resulted in another statutory change, according to which the suspension of the running of the limitation period takes place as a consequence of the commencement of proceedings for a tax offence or misdemeanour resulting from failure to fulfil the tax liability, provided that the taxpayer was informed of the commencement of such proceedings before the expiry of the statutory limitation period.[8] Finally, the current regulation provides that the limitation period for a tax liability does not commence, and that the period commenced shall be suspended, on the date on which proceedings are instituted for a tax offence or tax misdemeanor of which the taxpayer has been notified, if the suspicion of the offence is related to the non-performance of that obligation.[9]

Generally speaking, the essence of the problem is that the running of the limitation period is affected by the commencement of proceedings in a case (the issuance of a decision on the commencement of an investigation or enquiry) and not against a person (although the purpose of conducting proceedings in a case is to detect the

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2 The Letter from the Ombudsman of 20 June 2022, https://bip.brpo.gov.pl/sites/default/files/2022-06/Do_MF_Ordynacja_Podatkowa_20.06.2022.pdf [access: 26.08.2022], pp. 2–3.

3 The Act of 29 August 1997 – Tax Ordinance, consolidated text: Journal of Laws 2022 item 2651.

4 The Act of 12 September 2002 amending the Act – Tax Ordinance and certain other acts, Journal of Laws 2002 no. 169, item 1387 as amended.

5 From 1 January 2003 until 31 August 2005, the premise for suspending the running of the limitation period was only the commencement of criminal proceedings or proceedings for a fiscal offence or fiscal misdemeanour.

6 The Act of 30 June 2005 on amending the Act – Tax Ordinance and certain other acts, Journal of Laws 2005 no. 143, item 1199 as amended.

7 The Ruling of the Constitutional Tribunal of 17 July 2012, P 30/11, Journal of Laws 2012 item 848.

8 I. Andrzejewska-Czernek, W. Morawski, *Konsekwencje wyroku Trybunału Konstytucyjnego z dnia 17 lipca 2012 r. w sprawie niezgodności z Konstytucją zawieszania biegu terminu przedawnienia, o którym podatnik nie został powiadomiony*, Przegląd Podatkowy 2013, no. 7, pp. 36–44.

9 Cf. Article 70 § 6 (1) of the Tax Ordinance.

perpetrator, and Article 70 § 6 (1) of the Tax Ordinance actually presupposes the presence of a suspect).[10]

There is an opinion in legal studies that one of the intentions behind the implementation of the institution of the statute of limitations in the legal system was to guarantee the stability of legal transactions by means of the liquidation of overdue tax liabilities due to the lapse of statutory time.[11] One would rather conclude that this is an extremely ineffective safeguard in the rules of procedure by the simplest means. The above can be supplemented by the conviction of A. Sarna, who bases the institution of the statute of limitations of a tax liability ultimately on constitutional values.[12] Nevertheless, there is no norm in the Basic Law explicitly referring to the limitation mechanism. Irrespective of the above, however, the Author of the Glossary to the Act of the Supreme Administrative Court of 18 June 2018 in the case I FPS 1/18 correctly assumes that the expiry of a tax liability should occur within a reasonable period of time.

The judicature has also paid attention to the issue under consideration. It is sufficient to mention almost a hundred rulings of the last two years relating to the suspension of the limitation period of a tax liability.[13] Undoubtedly, it is worthwhile, in this context, to cite at least some of the statements of the Supreme Administrative Court, guiding the jurisprudence of administrative courts.[14] For this reason, the ju-

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10 B. Brzeziński, E. Szot, *Skutki wyroku Trybunału Konstytucyjnego z dnia 17 lipca 2012 r. (sygn. P 30/11) w świetle orzecznictwa sądów administracyjnych*, Przegląd Orzecznictwa Podatkowego 2013, vol. 22, no. 3, pp. 205–211.

11 B. Banaszak, *O konstytucyjności ustawowej regulacji zawieszenia przedawnienia zobowiązań podatkowych*, Zeszyty Naukowe Sądownictwa Administracyjnego 2011, no. 1 (34), p. 12.

12 A. Sarna, *Zawieszenie biegu terminu przedawnienia – o czym organ podatkowy musi powiadomić podatnika?*, Przegląd Podatkowy 2018, no. 12, p. 40.

13 Cf., inter alia, the Ruling of the Voivodeship Administrative Court in Gliwice of 19 July 2022, I SA/Gl 249/22, LEX no. 3375603; the Ruling of the Voivodeship Administrative Court in Gliwice of 7 July 2022, I SA/Gl 1090/21, LEX no. 3369371; the Ruling of the Voivodeship Administrative Court in Olsztyn of 7 July 2022, I SA/Ol 240/22, LEX no. 3367780; the Ruling of the Voivodeship Administrative Court in Łódź of 6 July 2022, I SA/Łd 141/22, LEX no. 3369163; the Ruling of the Voivodeship Administrative Court in Poznań of 15 June 2022, I SA/Po 42/22, LEX no. 3370981; the Ruling of the Voivodeship Administrative Court in Gdańsk of 14 December 2021, I SA/Gd 928/21, LEX no. 3274693; the Ruling of the Voivodeship Administrative Court in Kraków of 14 December 2021, I SA/Kr 216/21, LEX no. 3285641; the Ruling of the Voivodeship Administrative Court in Kraków of 30 November 2021, I SA/Kr 873/21, LEX no. 3273071; the Ruling of the Voivodeship Administrative Court in Kraków of 30 November 2021, I SA/Kr 1231/21, LEX no. 3271944; the Ruling of the Supreme Administrative Court of 25 November 2021, I FSK 1574/21, LEX no. 3302679; the Ruling of the Voivodeship Administrative Court in Gdańsk of 23 November 2021, I SA/Gd 1115/21, LEX no. 3264291.

14 L. Kaligowska, *Instrumentalne wszczęcie postępowania karnego skarbowego w świetle najnowszego orzecznictwa sądów administracyjnych*, Przegląd Podatkowy 2021, no. 11, pp. 47–48.

dicature came to the conclusion, inter alia, that if the course of the limitation period of a liability was suspended pursuant to Article 70 § 6 (1) of the Code of Civil Procedure, of which the interested party was informed prior to the expiry of the limitation period pursuant to Article 70c of the Code of Civil Procedure, the tax liability should not expire upon the lapse of five years. Well, in order to suspend the running of the limitation period of a tax liability, it is important to initiate proceedings for a tax offence in the case and not against a person. Although the Resolution of the Supreme Administrative Court of 24 May 2021, in the case I FPS 1/21 turned out to be quite relevant to the issue taken up, its generality verified its significance. It was noted that one should not derive from it the obligation of automatic and thoughtless removal from legal circulation of all previously existing verdicts of appeal bodies, in which the effects provided for in Article 70 § 6 (1) and Article 70c of the Tax Ordinance were referred to. The judicature justifies it with the need for simultaneous and detailed justification of the circumstances, which caused the initiation of penal fiscal proceedings and suspension of the limitation period of tax liability.[15] It follows from the recitals of the rulings selected for the purpose of the present study that it is the court's task to examine the tax file in detail each time in order to determine whether the circumstances explaining the suspicion of instrumental initiation of fiscal penal proceedings exist in the case under consideration. Indeed, it is only in doubtful cases that a court may actually accuse an authority of failing to provide explanation in the reasons for its decision that the institution of the proceedings in question was not merely apparent.

It has to be stated that one can encounter quite extensive studies concerning the suspension of the course of the limitation period of a tax liability in the literature,[16] while the issue taken up in terms of the Minister of Finance's response to the quoted position of the Ombudsman creates a completely new perspective. The abolition of the condition of suspension of the period of limitation of tax liability in connection

15 The Ruling of the Supreme Administrative Court of 25 May, I FSK 96/22, LEX no. 3348261.

16 *Zarys finansów publicznych i prawa finansowego*, ed. W. Wójtowicz, Warszawa 2008, p. 181; B. Brzeziński, *Glosa do postanowienia NSA z dnia 5 kwietnia 2011 r., I FSK 525/10*, Przegląd Orzecznictwa Podatkowego 2011, vol. 20, no. 6, pp. 517–520; T. Kolanowski, *Zawieszenie biegu terminu przedawnienia zobowiązania podatkowego*, Glosa. Prawo Gospodarcze w Orzeczeniach i Komentarzach 2014, no. 1, pp. 111–127; T. Dudek, *Zawieszenie biegu terminu przedawnienia zobowiązania podatkowego ze względu na tok postępowania karnego skarbowego – artykuł dyskusyjny*, Zeszyty Naukowe Sądownictwa Administracyjnego 2014, no. 1, pp. 58–77; A. Brzozowski, A. Tałasiewicz, *Wszczęcie postępowania karnego skarbowego jako przesłanka zawieszenia biegu terminu przedawnienia zobowiązania podatkowego*, Zeszyty Naukowe Sądownictwa Administracyjnego 2019, no. 5 (86), pp. 91–109.

with the commencement of proceedings for a tax offence or a tax misdemeanor has been announced.[17]

The paper will argue that it is in fact groundless to preserve the premise of suspension of the running of the time limit of the statute of limitations in the construction thereof referred to in Article 70 § 6 (1) of the Tax Ordinance. The aim of the study will also be to assess, against the background of the current legal regulations, the directions of changes to the analysed institution, in particular in the light of the draft of the Tax Ordinance Code,[18] which assumes the repeal of Article 70 § 6 (1) of the Tax Ordinance. Taxpayers should be guaranteed a deadline after which the correctness of their tax settlement will not be negated. In addition, for a long time, the doctrine of tax law has advocated not only systematising statutory definitions within the scope of limitation periods and cases of interruption of the running of the limitation period, but also deleting Article 70 § 6 (1) from the Tax Ordinance Code.[19] The presented subject matter entails the inevitability of analysing the legal issues in the said area in terms of the character of changes as well as of the practical problems involved. In addition, however, over the years the discussed issue has undergone certain transformations, which may cause arbitrariness or impossibility of logically correct, functional and systemically coherent interpretation.

The paper assumes methodological pluralism. The two main research methods used in the work were the dogmatic-legal method and the theoretical-legal one. An auxiliary legal-historical and analytical method was used, which made it possible to present the subject of the research from the point of view of its evolution and thus to obtain a complete picture of the subject under discussion.

1. Limitation of tax liability

Article 70 § 1 of the Tax Ordinance provides that a tax liability is time-barred at the end of five years, counting from the end of the calendar year in which the deadline

17 The Letter of the Minister of Finance of 18 July 2022, https://bip.brpo.gov.pl/sites/default/files/2022-07/Odpowiedz_MF_Ordynacja_Podatkowa_18.07.2022.pdf [access: 26.08.2022], p. 3, cf. also the Explanatory Memorandum to the Government Draft Law – Tax Ordinance, Parliamentary print no. 3517, https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=3517 [access: 12.10.2022], p. 203.

18 Government draft law – Tax Ordinance, draft no. UD409, Parliamentary print no. 3517, https://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?id=CE6B73E53195B2C9C1258417003990D4 [access: 26.08.2022].

19 L. Etel et al., *Nowa Ordynacja podatkowa. Z prac Komisji Kodyfikacyjnej Ogólnego Prawa Podatkowego*, Białystok 2017, p. 254.

for payment of tax expired. Therefore, one has to conclude that after the lapse of a certain period of time, the tax liability, even if unpaid, expires according to Article 59 § 1 (9) of the Tax Ordinance *ex lege* together with interest on arrears. It is unnecessary to issue separate decisions. The tax authority, after the expiry of the limitation period, has no competence to effectively demand payment of the amount due, while the optional payment of the tax after that date generates an overpayment subject to refund to the taxpayer. The essence of a tax liability is that it is concretised as to the amount, as to the time of payment and as to the place of payment. The liability to pay is both concrete and actualised.[20]

When analysing the present issue, one should note that under the general tax law, the statute of limitations exists – as the statute of limitations on tax assessment, the statute of limitations on tax liability, the statute of limitations on the right to determine the tax liability of a third party, and the statute of limitations on the liability of a third party. Depending on the unveiling in which it appears, it can therefore have different effects.

The expiry of a specific tax obligation in the statute of limitations of a tax liability is only a consequence of the wording of Article 59 § 1 item 9 of the Tax Ordinance. Incidentally, it may only be added that the legislator was right to shape this provision in the indicated manner. Indeed if, as in civil law, a time-barred tax liability were to develop into a natural liability, there would be a risk of abuse of the law by the tax administration. It is worth noting that although the creditor – the State Treasury – would be deprived of the possibility to enforce the benefit, such obligation as a natural one would still remain. As a result, complete elimination of the tax liability from legal circulation would become virtually impossible and tax authorities could claim it as unexpired at any time.[21] It should therefore be assumed that if the legislator had wished to shape the statute of limitations for a tax liability along the lines of its counterpart in the civil law, it would have been difficult to formulate normative arguments against such a procedure.

The subject matter in question is widely commented on in the literature. On the one hand, the discussed provision is intended to protect the interests of the state against criminal or fiscal offences but, on the other hand, the complete exclusion of the possibility of limitation raises an objection. However, it turns out that the legislator has not included a regulation, enabling a party subject to tax proceedings to assert its rights by challenging the suspension as of the date of the institution

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20 L. Etel, *Komentarz do art. 70 o.p.*, w: *Ordynacja podatkowa. Komentarz aktualizowany*, ed. L. Etel, 2020 [LEX database], subheading no. 7.

21 A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Warszawa 2008, p. 387.

of criminal proceedings or proceedings for a tax offence or a tax misdemeanour.[22] O. Nieczepa, is right to claim that the specific legal regulation does not solve any problems as regards its application in practice.[23] In particular, the stage of providing information to the taxpayer at the stage of pre-trial proceedings is not clear enough.[24] The moment at which proceedings are initiated against a person plays an important role. In this context, it is worth referring to the stance of the Supreme Court indicating that the issuance of the decision on the presentation of charges, as well as its subsequent announcement and possible questioning of the suspect should take place even within one day, provided that the premises expressed in Article 313 § 1 of the Code of Criminal Procedure do not occur. Taking into account the standpoint of the Supreme Court, the pre-trial proceedings authority, having in view the expiry of the limitation period, should act immediately.[25] As a result, it seems necessary to inform the taxpayer of the presentation of charges, because, as O. Nieczepa states, it is the moment of notifying the taxpayer of the suspension of the running of the limitation period, as from that time the taxpayer has knowledge of the pending penal-fiscal proceedings.[26]

However, the mechanism described above does not change the fact that it can lead to a situation that the taxpayer does not know after what date these liabilities may be enforced. The ambiguity of the regulation in question is updated when the initiated penal-fiscal proceedings are themselves suspended pursuant to Article 114a of the Act of 10 September 1999 – Fiscal Penal Code.[27] The taxpayer is only informed that the statute of limitations does not apply because its course has been suspended. No assumption can be made as to when the taxpayer will become aware of the deadline for the final enforcement of the tax liability. The authorities, during the 5-year limitation period, may initiate and conduct proceedings for a fiscal ('misdemeanour') offence,[28] thereby leading to the suspension of the limitation period for tax liability.[29] When the 5-year limitation period expires, the taxpayer is

22 B. Banaszak, *O konstytucyjności ustawowej*…, pp. 14–16.

23 O. Nieczepa, *Poinformowanie podatnika o wszczęciu postępowania karnoskarbowego jako moment skutecznego zawieszenia biegu terminu przedawnienia zobowiązania podatkowego po upływie 5-letniego terminu przedawnienia*, Glosa. Prawo Gospodarcze w Orzeczeniach i Komentarzach 2015, no. 3, p. 123.

24 T. Dudek, *Zawieszenie postępowania karnego skarbowego ze względu na prejudykat*, Prokuratura i Prawo 2012, no. 11, p. 103.

25 The Supreme Court Ruling of 26 June 2013, V KK 453/12, LEX no. 1341289.

26 O. Nieczepa, *Poinformowanie podatnika*…, p. 125.

27 The Act of 10 September 1999 – Fiscal Penal Code, consolidated text: Journal of Laws of 2023 item 654.

28 T. Grzegorczyk, *Kodeks postępowania karnego*, vol. 1. *Komentarz do art. 1–467*, Warszawa 2014, s. 1038.

29 Cf. G. Dźwigała, *Instrumentalne wszczęcie postępowania karnego skarbowego a zakres kontroli sądowo-administracyjnej*, Przegląd Podatkowy 2021, no. 1, p. 54.

merely informed that the limitation period does not occur, as its course has been suspended due to the commencement of penal-fiscal proceedings.[30]

One may obviously still resort to the catalogue of premises for the suspension of the statute of limitations of a tax liability compiled by M. Guściora for the purposes of the issue under consideration. Therefore, if comparisons are to be resorted to at all, the one that is most relevant is the manner in which information is provided. It should allow the taxpayer himself to determine whether the initiated proceedings for a fiscal offence or a fiscal misdemeanour are linked to a default. It should also be accepted that the action finally taken should lead to the final conclusion of the proceeding for a fiscal offence or fiscal misdemeanour.[31] In this context, one should pay attention to the view of W. Modzelewski, who stated that the limitation period itself is misconstrued. In his view, the erroneous normative construction in question determines the massive scale of criminal proceedings, thus multiplying persons suspected of having committed criminal fiscal offences.[32]

Obviously, all arguments aim at the conclusion that the legislator's response to the indicated problems has been to subordinate the penal fiscal regulations to the institutions of tax law. In this way, it is supposed to be the duty of the administrative court to assess a possible abuse of the law. In turn, the heterogeneous position of the judicature on the said matter generates a real risk of depriving taxpayers of legal protection.[33]

2. The stance of judicature

As has already been pointed out above, the institution of suspension of the running of the limitation period of a tax liability has received quite a lot of attention in court jurisdiction. Considering the challenges associated with it at the moment, it should not come as a surprise that Article 70 § 6 (1) of the Tax Ordinance has aroused particular interest of tax authorities in fiscal penal proceedings, since fiscal issues man-

30 Cf. The Ruling of the Voivodeship Administrative Court of 15 April 2014, III SA/Po 78/14, LEX no. 1465777.

31 M. Guściora, *Skutki wszczęcia postępowania karnego skarbowego będącego przyczyną zawieszenia biegu przedawnienia zobowiązania podatkowego*, Przegląd Podatkowy 2020, no. 10, pp. 50–51.

32 Komisja Kodyfikacyjna Ogólnego Prawa Podatkowego, *Kierunkowe założenia nowej ordynacji podatkowej*, Warszawa 2015, https://mf-arch2.mf.gov.pl/c/document_library/get_file?uuid=c5583761-7069-4816-8f1f-63fb34b9d86b&groupId=764034 [access: 13.10.2022], p. 69.

33 The Ruling of the Voivodeship Administrative Court in Wrocław of 22 July 2019, I SA/Wr 365/19, LEX no. 2725718.

date counteracting the expiry of tax liabilities. The fear of expiry of a tax liability often determines their instrumental behaviour – the commencement of preparatory proceedings for a tax offence or a tax misdemeanour,[34] leading at the same time to the suspension of the statute of limitations of the liability.[35] As I. Lipowicz, the Ombudsman, correctly pointed out, the premise of Article 70 § 6 (1) of the Code of Criminal Procedure has become a 'handy' tool, thanks to which a peculiar 'perpetuum mobile' of never-ending proceedings is created: the criminal and also the administrative ones.[36] Moreover, it is difficult to expect a clear understanding of the analysed institution, since Article 2 of the Constitution of the Republic of Poland itself creates, as it were, a state of uncertainty for a taxpayer, violating the standard of constitutional control under Article 2 of the Constitution of the Republic of Poland.[37] This line of interpretation allows for non-initiation or suspension of the running of the limitation period of a tax liability also in the absence of factual grounds justifying the commencement of criminal proceedings for a fiscal offence or fiscal misdemeanour,[38] without the need to charge the taxpayer with the commission of the indicated forbidden acts.[39] In this manner, the courts assume that a linguistic interpretation is fully sufficient, and they are content to rely on the first, even the intuitive, meaning of a particular normative phrase. In such a case, of course, it is difficult to expect a real analysis of the legal text if other methods of interpretation become unknown.[40] Meanwhile, administrative courts should analyse the hypothesis of a legal norm from all the rules applicable to the whole system of law,[41] and not only from the literal wording of the provisions.[42]

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34 L. Wilk, J. Zagrodnik, *Prawo i proces karny skarbowy*, Warszawa 2019, p. 307.

35 G. Łabuda, *Zawieszenie postępowania karnego skarbowego ze względu na prejudykat*, Prokuratura i Prawo 2011, no. 3, p. 80.

36 The Application of the Ombudsman to the Constitutional Tribunal of 22 October 2014, https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2031/14 [access: 13.10.2022], pp. 3, 8.

37 Cf. B. Banaszak, *O konstytucyjności ustawowej…*, pp. 11–18.

38 Cf. the Ruling of the Supreme Administrative Court of 1 October 2015, II FSK 995/15, LEX no. 1986527; the Ruling of the Supreme Administrative Court of 24 November 2016, I FSK 759/15, LEX no. 2169607; the Ruling of the Supreme Administrative Court of 1 October 2015, II FSK 995/15, LEX no. 1986527; the Ruling of the Supreme Administrative Court of 6 December 2017, I FSK 212/16, LEX no. 2445954; the Order of the Supreme Administrative Court of 8 March 2018, I FSK 657/16, LEX no. 2474887; the Order of the Supreme Administrative Court of 24 May 2018, I FPS 1/18, LEX no. 2492448.

39 H. Gajewska-Kraczkowska, *O prawdziwej funkcji zawieszenia postępowania karnego skarbowego*, Monitor Podatkowy 2012, no. 4, p. 16.

40 *Rzeźbienie państwa prawa. 20 lat później. Ewa Łętowska w rozmowie z Krzysztofem Sobczakiem*, eds. E. Łętowska, K. Sobczak, Warszawa 2012, p. 8.

41 Cf. M. Szubiakowski, *W sprawie ograniczenia przedawnienia zobowiązań podatkowych*, Monitor Podatkowy 2012, no. 4, p. 12.

42 R. Mastalski, *Tworzenie prawa podatkowego a jego stosowanie*, Warszawa 2016, pp. 128–139.

While considering the scope of the institution in question, it is necessary to draw attention to the solutions adopted in the Resolution of the Supreme Administrative Court of 7 judges of the Supreme Administrative Court of 24 May 2021 in the case I FPS 1/21.[43] Drawing on this decision, one may pose the question: what legal issues should be the subject of analysis in order to conclude that the authority acted instrumentally when initiating fiscal penal proceedings?[44] The control of the administrative courts, in a situation in which proceedings for a fiscal offence or fiscal misdemeanour have been initiated, cannot aim at a comprehensive and general verification of the correctness of its initiation from the point of view of the provisions of the Fiscal Penal Code.[45] The mere issuance of a ruling on the initiation of proceedings for a fiscal offence or fiscal misdemeanour results in the effect specified in Article 70 § 6 (1) in connection with Article 70c of the Tax Ordinance, and would precisely lead to the abuse of the title institution, thus undermining the rule of law resulting from Articles 2 and 7 of the Constitution of the Republic of Poland.[46] It follows from a reading of the ruling cited above that the fundamental reason for overruling decisions of the authorities is the issue of the lack of reference to the allegation of instrumental use of the law. At the same time, it has been highlighted that the courts cannot decide on the direction of the ruling or limit themselves in the assessment of a possible abuse of the institution of substantive law. Thus, the difficulty resides in finding out, on the basis of the established facts and evidence, the real reasons for initiating criminal tax proceedings if the material from the tax case does not allow it to be concluded. However, it results in the observation that jurisprudence still approves of the behaviour of an authority that initiates proceedings without actually being interested in the actual conclusion thereof,[47] because the only element of the initiation of criminal tax proceedings is the inevitable passage of time and the risk of the creditor losing the possibility of demanding satisfaction of the liability before the end of tax proceedings, the culmination of which is the

43 The Resolution of 7 judges of the Supreme Administrative Court of 24 May 2021, I FPS 1/21, LEX no. 3178297.

44 D. Strzelec, *Konsekwencje uchwały NSA z 24.05.2021, I FPS 1/21, w orzecznictwie sądów administracyjnych*, Przegląd Podatkowy 2021, no. 12, p. 13.

45 B. Szyprowski, *Uzasadnione podejrzenie popełnienia przestępstwa jako faktyczna przesłanka wszczęcia postępowania przygotowawczego*, Prokuratura i Prawo 2006, no. 3, p. 133.

46 Cf. B. Brzeziński, *O zjawisku nadużycia prawa podatkowego przez administrację podatkową*, Kwartalnik Prawa Podatkowego 2014, no. 1, pp. 9–16.

47 Cf. K. Machalica-Drozdek, A. Drozdek, *Wszczęcie postępowania przygotowawczego w sprawie karnej skarbowej a zawieszenie biegu terminu przedawnienia dochodzenia należnego cła*, Prokuratura i Prawo 2016, no. 4, pp. 129–130.

determination of its amount.[48] Unfortunately, statistics confirm this conclusion. In fact, the report on practical application of Article 70 § 6 (1) of the VAT Act shows, that in 91% of control proceedings, marked with the 'flaw' of instigating criminal tax proceedings – their subject was a tax liability expiring at the end of the year, in which these proceedings were instituted.[49]

Thus, in practice, it is not possible, in the context under discussion, to make such an 'automatic' allegation that there has been an abuse of the suspension of the limitation period which is the subject of the hypothesis of a substantive tax law rule.[50] One should consider the meaning of the situation specified in Article 106 § 3 of the Code of Civil Procedure on the sidelines of the above considerations. It may be relevant for the issue under consideration. If the court, when assessing the ruling relating to Article 70 § 6 (1) of the Tax Ordinance, has doubts as to its justification, then – it could, pursuant to Article 106 § 3 of the Code of Civil Procedure[51] take evidence from the documents of the fiscal penal case file to which the authority refers when explaining the suspension of the running of the limitation period of the tax liability.[52]

3. Amendments to the Tax Ordinance

However, it is impossible to see that adequate protection of the taxpayer could easily be guaranteed by a statutory construction – the abandonment of the regulation contained in the current Article 70 § 6 (1) of the Tax Ordinance. The legislator looks for a justification for such a solution in the forthcoming draft of the Tax Ordinance at least in the principle of speed and simplicity of tax proceedings.[53] The

48 A. Ladziński, J. Waśko, T. Burczyński, W. Waśko, K. Kudlek, *Instrumentalne wszczynanie postępowań karnych skarbowych w trakcie postępowań kontrolnych i podatkowych – analiza praktyki stosowania art. 70 § 6 pkt 1 ordynacji podatkowej. Raport podsumowujący wyniki badania danych uzyskanych w trybie dostępu do informacji publicznej*, Toruń 2019, p. 91.

49 Ibidem, pp. 38–39.

50 Cf. R. Mastalski, *Glosa do wyroku NSA z 30 lipca 2020 r., I FSK 128/20*, Orzecznictwo Sądów Polskich 2021, no. 3, item 143, p. 174.

51 The Act of 30 August 2002 – Law on proceedings before administrative courts, consolidated text: Journal of Laws 2022 item 1457.

52 Cf. J. Waśko, *Instrumentalne wszczęcie postępowania karnego skarbowego – fakt znany sądowi z urzędu i jego konsekwencje*, Przegląd Podatkowy 2021, no. 1, p. 52; M. Jendraszczyk, *Czy wszczęcie postępowania karnoskarbowego zawsze skutkuje zawieszeniem biegu terminu przedawnienia zobowiązania podatkowego?*, Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych 2020, vol. 12, pp. 35–36.

53 Cf. Article 125 of the Tax Ordinance; the Letter from the Minister of Finance of 18 July 2022, p. 1.

Explanatory Memorandum to the draft of the new Tax Ordinance explicitly states that an important issue of the new limitation formula is the repeal of the flawed premise leading to the suspension of the running of the limitation period for tax liabilities in connection with the initiation of fiscal penal proceedings.[54] Practice has shown that Article 70 § 6 (1) of the Tax Ordinance has become a tool for tax authorities serving only de facto to prolong enforcement of tax liabilities and to conduct a considerable number of inspection and tax proceedings. It is worth noting, following M. Zagórski, that the modified content of the provisions in connection with the Decision of the Constitutional Tribunal leads to the conclusion that the enforcement of the disposition of Article 70c of the Tax Ordinance exhausts the condition of notification in Article 70 § 6 (1), which does not at all denote the freedom of notifying the taxpayer of the commencement of penal-fiscal proceedings.[55] There is no doubt that the purpose of the institution in question was to compel the creditor to enforce financial receivables in due time. However, when one proceeds to analyse the current regulation through the prism of the quoted rulings of administrative courts, it becomes apparent that the evident lack of a direct connection with the non-fulfilment of a specific tax obligation results in the suspension of the running of the limitation period of its tax liability.[56] A situation in which legislative ambiguities take place at the expense of entrepreneurs and business entities causes a violation of the stability of social relations guaranteed by the constitutional principle of legal security.[57] Doubts finally arise as to the legal consequences of actions aimed at waiving the principle *in dubio pro tributario*.[58]

Given the above, it may appear that the amendment in question will solve the indicated problems. In a situation in which the law does not provide any other way to achieve the goal – to end the practice of instrumental initiation of penal-fiscal proceedings just before the expiry of the limitation period for tax, such an initiative should be assessed positively. Changes moving in the opposite direction in the

54 The Letter from the Ombudsman…, p. 3.

55 M. Zagórski, *Zawieszenie biegu przedawnienia zobowiązań podatkowych a wszczęcie postępowania w sprawie o przestępstwo karnoskarbowe*, https://isp-modzelewski.pl/serwis/zawieszenie-biegu-przedawnienia-zobowiazan-podatkowych-a-wszczecie-postepowania-w-sprawie-o-przestepstwo-karnoskarbowe/ [access: 4.09.2022].

56 Cf. B. Błaszczak, *Wszczynanie postępowań karnych skarbowych w celu zawieszenia biegu terminu przedawnienia – analiza wybranego orzecznictwa*, Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych 2020, vol. 12, p. 42.

57 Cf. Article 2 of the Constitution of the Republic of Poland.

58 P. Kulik, *Czy każde zawiadomienie organu skarbowego o zawieszeniu terminu przedawnienia zobowiązania podatkowego z powodu wszczęcia postępowania karnoskarbowego skutecznie zawiesza ten termin? Interpretacja art. 70 § 6 pkt 1 i art. 70c ustawy Ordynacja podatkowa w świetle orzecznictwa sądów administracyjnych*, Palestra 2016, no. 7–8, p. 165.

assumption of the proponent himself worsen the situation of taxpayers.[59] However, the assumptions should be real and supported by facts, it is not enough here to make a laconic statement about the elimination of the premise of suspension of the tax liability limitation period in connection with the commencement of proceedings for a tax offence or a tax misdemeanour.

One would rather expect a rational proponent to include precise information concerning at least an analysis of the level of impact of other changes introduced at the same time. Meanwhile, the latest proposals of the Minister of Justice with regard to amendments to the Fiscal Penal Code may have even further increased the lack of clarity and unambiguity of the provisions in force.[60] Serious reservations were aroused by the changes, in particular with regard to the statute of limitations for punishment for fiscal offences and misdemeanours. The withdrawal of the Minister of Justice from the proposed amendments to the Fiscal Penal Code, which could have even further increased the lack of clarity and unambiguity of the provisions in force, should be assessed positively. The project assumed the deletion of § 2 from Article 44 of the Fiscal Penal Code, according to which the punishability of a fiscal offence consisting in the depletion or exposure to depletion of a public law receivable ceases also when the statute of limitations for this receivable has expired. Such reasoning of the proponent was burdened with serious shortcomings. It could have turned out that the modified regulation would have made it possible to hold indebted taxpayers criminally accountable even after the expiry of the statutory limitation period for tax liabilities. The amendment in such a form would not, therefore, have led to the view that in the situation of changes in the Tax Ordinance, after the expiry of the tax liability through the statute of limitations, there would be no possibility of conducting criminal-fiscal proceedings. The work on the bill was eventually abandoned because, as the body responsible for drafting the amendment correctly stated, it would have actually turned out to be pointless. Otherwise, the proponent would simply show a far-reaching inconsistency. On the one hand, there is a desire to counteract the instrumental initiation of criminal fiscal proceedings with the announced amendment to the Tax Ordinance, while on the other hand, a regulation would be implemented depriving once again of certainty as to the scope of liability in the event of the statute of limitations of a tax liability. Although the proponent

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59 M. Szulc, A. Pokojska, *Nowelizacja ordynacji podatkowej: Nowe uprawnienia fiskusa i podatników*, Dziennik Gazeta Prawna 2022, no. 132, https://podatki.gazetaprawna.pl/artykuly/8488963,nowelizacja-ordynacji-podatkowej-zmiany-w-podatkach.html [access: 4.09.2022].

60 The Withdrawn Bill on Amendments to the Act – Fiscal Penal Code and Certain Other Acts, project no. UD357, https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy--kodeks-karny-skarbowy-oraz-niektorych-innych-ustaw [access: 4.09.2022].

of the project admitted that penal fiscal liability should be based on the *ultima ratio* principle of criminal law, the very attempt to introduce a model assuming that penal fiscal liability is incurred despite the statute of limitations, is not conducive to the implementation of the principle of the citizen's trust in the state and the law instituted by it. In addition, according to the project assumptions of the Minister of Finance, the premises suspending the running of the limitation period of a tax liability due to the order for securing the repayment of a potential tax arrears and due to the application of enforcement measures, inter alia, in connection with granting an immediate enforceability order to a non-final decision, are to remain in force.[61] The conclusions drawn after the analysis of the proposed provisions at this stage are sceptical.

Conclusions

Bearing in mind the conclusions drawn from the present study, it should be noted, that the discussed legal regulations allow one to unequivocally state that it is in fact unjustified to maintain the premise of suspension of the course of the statute of limitations in the construction thereof, referred to in Article 70 § 6 (1) of the Tax Ordinance. Undoubtedly, disadvantages resulting from the essence of its functioning cannot be overruled.

Given the already mentioned exemplary nature of the possible forms of the institution in question and the needs of practice, taxpayers remain 'at the mercy' of tax authorities taking advantage of the illegibility of regulations in the discussed scope. A. Brzozowski and A. Tałasiewicz draw attention to doubts about the administrative practice itself accurately. Not only are many of the cases dealt with by the authorities based on a premise which, as it turns out, results in rather vexatious sanctions for the taxpayer, these circumstances are all the more questionable when the authority takes completely different actions in relation to those which it is obliged or entitled to take in dealing with the case.[62] As it seems, genuine protection should be inherent in ensuring the clarity and consistency of the procedure.[63] The specific

61 Cf. A. Pokojska, M. Szulc, *Zmiany w ordynacji podatkowej. Jedne korzystne, inne ryzykowne*, Dziennik Gazeta Prawna 2022, no. 133, p. B2.

62 A. Brzozowski, A. Tałasiewicz, *Wszczęcie postępowania karnego skarbowego*…, p. 107.

63 Cf. A. Nita, *Czynnik czasu w prawie podatkowym. Studium z dziedziny zobowiązań podatkowych*, Gdańsk 2007, p. 270.

looping of the running of the statute of limitations referred to by G. Łabuda[64] places the creditor, i.e. the State Treasury, in a very advantageous position – the suspension of the running of the tax statute of limitations until the completion of the tax case proceedings with the extension of the period of punishment of the tax offence.[65] Naturally, one could reduce the issue to a statement that ignorance of tax law may simply be extremely burdensome for a taxpayer. However, the situation is quite different, all the more so when the Ombudsman's actions go unanswered by the state authorities. The inaction of the Constitutional Court towards the Ombudsman's abstract request cited above as well as the constitutional complaints filed in this case deserves particular disapproval.[66] It leads not only to the conclusion that the current legal status is unacceptable from the point of view of the protection of constitutional rights and freedoms but it makes one question the assumption of the co-participation of the Constitutional Court in the exercise of justice.

Closing the reflections on the title issues, the announced dynamic changes to the Tax Ordinance itself should also be approached with great caution. The best example of this is the attempt to enact a draft of a new Tax Ordinance, prepared by the Codification Committee of the General Tax Law.[67] The draft assumed, among other things, a distinction between the statute of limitations applicable to the right to assess tax and the statute of limitations regarding the right to its collection. The Commission paid particular attention to the guarantee function of the institution of the statute of limitations. It has been pointed out that it is currently weakened due to the existing grounds for suspending the running of the limitation period and abusing the interruption of this period. However, despite five years of work on the new Tax Ordinance, it has not yet been decided to adopt the finished draft.[68]

Although one may argue with the accuracy of the currently proposed solutions, there is no doubt that, *de lege ferenda*, one should rather consider a final elimination of the existing legal regulations pertaining to the premises for suspending the

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64 G. Łabuda, *Art. 44*, in: P. Kardas, G. Łabuda, T. Razowski, *Kodeks karny skarbowy. Komentarz*, 2017 [LEX database].

65 Cf. M. Oleksy, *Postępowanie karnoskarbowe i zawieszenie biegu terminu przedawnienia zobowiązania podatkowego – „trik" fiskusa czy naruszenie podstawowych praw podatnika?*, https://www.oleksy-podatki.pl/2019/12/postepowanie-karnoskarbowe-i.html [access: 4.09.2022].

66 Cf. SK 100/19, SK 50/20, SK 122/20, SK 52/21, SK 4/22.

67 The Act established by the Regulation of the Council of Ministers of 21 October 2014 on the establishment, organization and procedures of the Codification Commission of the General Tax Law, consolidated text: Journal of Laws 2014 item 1471.

68 Ł. Zalewski, *Prof. Etel: Nie widzę możliwości dalszego funkcjonowania obecnej ordynacji podatkowej*, Dziennik Gazeta Prawna 2020, no. 19, https://podatki.gazetaprawna.pl/artykuly/1451016,leonard-etel-ordynacja-podatkowa-zmiany-2020.html [access: 13.10.2022].

running of the limitation period of a tax liability from legal turnover, so that even in the event of a ruling of the Constitutional Tribunal in relation to the problem posed in the Ombudsman's motion, no further changes would have to be made. Indeed, M. Wojtuń is right claiming that the finding of the Constitutional Tribunal rendering Article 70 § 6 (l) of the Code of Civil Procedure inconsistent with Article 2 of the Constitution of the Republic of Poland to the extent that it provides that the running of the limitation period of a tax liability does not commence, and that a commenced period is suspended, with the date of commencement of proceedings in the case and not against the person, will not ensure protection against instrumental use of the said provision. As a result, it will be the duty of administrative courts to carry out such control,[69] and as practice shows, it is impossible to collect all the premises for the suspension of the statute of limitations of a tax liability. Well, the legal predictability is desirable especially from the perspective of the interpretation of the provisions of the fiscal law.

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[69] M. Wojtuń, *Zawieszenie biegu terminu przedawnienia zobowiązania podatkowego na skutek wszczęcia postępowania karnoskarbowego*, Glosa. Prawo Gospodarcze w Orzeczeniach i Komentarzach 2017, no. 2, p. 115.

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Public interest and competition-restricting agreements in the jurisprudential practice of the Bydgoszcz Branch of the Office of Competition and Consumer Protection

Interes publiczny a porozumienia ograniczające konkurencję w praktyce orzeczniczej Delegatury Urzędu Ochrony Konkurencji i Konsumentów w Bydgoszczy

Публичный интерес и ограничивающие конкуренцию соглашения в судебной практике Представительства Управления по защите конкуренции и потребителей в г. Быдгоще

Суспільний інтерес та угоди, що обмежують конкуренцію, у практиці Представництва Управління з питань захисту конкуренції та споживачів у Бидгощі

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Summary: The public interest constitutes a justification for limiting the constitutional principle of freedom of economic activity in the form of prohibiting agreements that restrict competition. It sets the scope of this limitation and identifies behaviours of entrepreneurs that will be considered anti-competitive. However, the public interest is normatively indeterminate, which results in various definitions depending on the adopted doctrinal basis of competition policy. This article presents the understanding of this term as adopted in doctrine and jurisprudence. This serves as a starting point for researching the method of identifying the public interest in the jurisprudential practice of the Branch of the Office of Competition and Consumer Protection in Bydgoszcz. To achieve this goal, decisions concerning agreements restricting competition issued by the President of the Office of Competition and Consumer Protection – Branch of the Office in Bydgoszcz, since the effective date of the Act of 16 February 2007, as well as court judgments resulting from appeals filed in these cases, were analysed. The analysis led to the conclusion that despite formally examining the admissibility of this intervention in each case, the efforts of the President of the Office of Competition and Consumer Protection focus primarily on demonstrating that entrepreneurs enter into competition-restricting agreements, thus violating Article 6 (1) of the Act of 16 February 2007.

Key words: public interest, competition law, competition-restricting agreements

Streszczenie: Interes publiczny stanowi uzasadnienie dla ograniczenia konstytucyjnej zasady wolności działalności gospodarczej w postaci zakazu zawierania porozumień ograniczających konkurencję. Wyznacza zakres tego ograniczenia i wskazuje zachowania przedsiębiorców, które będą uważane za antykonkurencyjne. Interes publiczny jest jednak niedookreślony normatywnie, przez co jest różnie definiowany w zależności m.in. od przyjętych podstaw doktrynalnych polityki konkurencji. Artykuł przedstawia prezentowane w doktrynie i orzecznictwie rozumienie interesu publicznego. Stanowi to punkt wyjścia do przeprowadzenia badań nad sposobem identyfikowania interesu publicznego w praktyce orzeczniczej Delegatury Urzędu Ochrony Konkurencji i Konsumentów w Bydgoszczy. W tym celu przeanalizowano decyzje dotyczące porozumień ograniczających konkurencję wydawane przez Prezesa UOKiK – Delegaturę w Bydgoszczy od czasu wejścia w życie obowiązującej ustawy, a także wyroki sądów, które zapadały w wyniku rozpatrzenia odwołań składanych w tych sprawach. Analiza ta

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pozwoliła na wyciągnięcie wniosku, że mimo formalnego badania dopuszczalności tej interwencji w każdej sprawie, wysiłki Prezesa UOKiK koncentrują się przede wszystkim na wykazaniu zawierania przez przedsiębiorców porozumień ograniczających konkurencję, naruszających przepis art. 6 ust. 1 ustawy z dnia 16 lutego 2007 r.
Słowa kluczowe: interes publiczny, prawo ochrony konkurencji, porozumienia ograniczające konkurencję

Резюме: Публичный интерес является обоснованием для ограничения конституционного принципа свободы хозяйственной деятельности в виде запрета на заключение соглашений, ограничивающих конкуренцию. Он определяет сферу действия данного ограничения и указывает на поведение предпринимателей, которое считается антиконкурентным. Однако публичный интерес не определен нормативно и поэтому определяется по-разному, в том числе и в зависимости от принятой доктринальной основы конкурентной политики. В данной статье представлено понимание публичного интереса, представленное в доктрине и судебной практике. Оно служит отправной точкой для проведения исследования того, как определяется общественный интерес в судебной практике Представительства Управления по защите конкуренции и потребителей в Быдгоще. С этой целью были проанализированы решения по ограничивающим конкуренцию соглашениям, вынесенные Председателем Управления по защите конкуренции и потребителей – Представительством в городе Быдгоще с момента вступления в силу действующего Закона, а также решения судов, вынесенные в результате рассмотрения поданных по этим делам апелляционных обжалований. Данный анализ позволил сделать вывод о том, что, несмотря на формальное рассмотрение вопроса о допустимости данного вмешательства в каждом конкретном случае, усилия Председателя Управления по защите конкуренции и потребителей направлены в первую очередь на подтверждение заключения предпринимателями ограничивающих конкуренцию соглашений, нарушающих положение статьи 6 (1) Закона от 16 февраля 2007 года.
Ключевые слова: публичный интерес, конкурентное право, ограничивающие конкуренцию соглашения

Резюме: Суспільний інтерес є виправданням обмеження конституційного принципу свободи економічної діяльності у формі заборони укладати угоди, що обмежують конкуренцію. Він визначає сферу дії цього обмеження та вказує на поведінку підприємців, яка вважатиметься антиконкурентною. Однак суспільний інтерес є нормативно недостатньо визначеним і тому визначається по-різному, залежно зокрема, від прийнятих доктринальних засад конкурентної політики. У статті представлено розуміння суспільного інтересу в доктрині та практиці. Вона є початковою точкою для проведення дослідження того, як суспільний інтерес визначається в практиці Представництва Управління з питань захисту конкуренції та споживачів у Бидгощі. З цією метою було проаналізовано рішення щодо угод, які обмежують конкуренцію, прийняті Головою Управління з питань захисту конкуренції та споживачів – Бидгощське відділення з моменту набрання чинності чинним Законом, а також рішення судів, які були прийняті за результатами розгляду апеляцій поданих у цих справах. Цей аналіз дозволив зробити висновок, що, незважаючи на формальну перевірку допустимості такого втручання в кожному конкретному випадку, зусилля Голови Управління з питань захисту конкуренції та споживачів (УПЗКС) зосереджуються насамперед на доведенні укладення підприємцями угод, що обмежують конкуренцію, порушуючи положення ч. 1 ст. 6 Закону від 16 лютого 2007 року.
Ключові слова: суспільний інтерес, право захисту конкуренції, угоди, що обмежують конкуренцію

Introduction

The public interest provides a justification for restricting the constitutional principle of freedom of economic activity in the form of a ban on competition-restricting agreements. This concept is vague and normatively undefined, hence it is defined differently depending, among other things, on the accepted doctrinal basis of competition policy. It is largely dependent on the demands of society and its expecta-

tions regarding the rules of the market economy. Consequently, the public interest defined under certain circumstances, along with changes in society and the economic situation, is itself also subject to change. Thus, the general clause of public interest allows to correct its meaning in axiological, political or practical terms.[1]

The heterogeneous and variable nature of this clause, as well as the discrepancies observed in the doctrine as to its understanding, justify the study of the way in which the concept of public interest is interpreted in the rulings of the President of the Office of Competition and Consumer Protection (hereinafter: OCCP) regarding competition-restricting agreements during the effective period of the Competition and Consumer Protection Act of 16 February 2007 (hereinafter: the Act).[2] The research problem thus defined is of momentous practical importance. One of the public interest functions is a jurisdictional one, setting limits on the permissibility of the OCCP President's intervention. The way in which this concept is interpreted will directly affect the possibility of initiating antitrust proceedings and the further evaluation of the actions of entrepreneurs entering into agreements that restrict competition. The study will be conducted on the example of rulings issued by the OCCP Branch in Bydgoszcz. This will allow us to fulfil the purpose of this publication, i.e. to determine what is the jurisprudential practice of the President of the OCCP Branch in Bydgoszcz in cases involving competition-restricting agreements with regard to the interpretation of the concept of public interest against the background of judicial decisions and doctrinal achievements. The goal should also be to determine whether the interpretation of the concept of public interest adopted in the Bydgoszcz Branch reflects the trends in the OCCP President's jurisprudential practice in the rest of the country. Therefore, the OCCP President's decisions issued in other Branches will be examined, and their comparison will make it possible to determine whether the OCCP's practice is uniform in nature, or whether there are noticeable differences in the way it operates, depending on where the decision was issued.

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1 M. Bernatt, A. Jurkowska-Gomułka, T. Skoczny, *Podstawy i zakres publicznoprawnej ochrony konkurencji*, in: *System Prawa Prywatnego*, vol. 15. *Prawo konkurencji*, ed. M. Kępiński, Warszawa 2014, p. 742.

2 Act on competition and consumer protection of 16 February 2007, consolidated text: Journal of Laws [Dziennik Ustaw] 2021 item 275 as amended.

1. Interpretation of the concept of public interest according to the doctrine

The discussion on the concept and nature of public interest has been going on in legal science for a long time.[3] However, there is no consensus on its conceptual scope. Doubts about the feasibility of formulating its definition have led some academics to advocate abandoning the use of this category. The view that the application of the general public interest clause is not useful for the legal order is an isolated one, and representatives of the doctrine have not stopped trying to develop an appropriate definition, which is particularly evident in the doctrine of administrative law in its broadest sense, including administrative business law.[4] In-depth analyses of this concept have resulted in the emergence of numerous concepts in this area. For an overview of positions on the understanding of the concept of public interest, see Artur Żurawik's publication.[5] The author systematised the existing literature, pointing out that four types of concepts have emerged: axiological, linking the public interest to values, praxeological – relating it to goals, concepts linking it to needs, or, finally, mixed concepts.

The concept of public interest in also non-uniform in competition law. The differences in the presented perspectives are due not only to different views regarding its role in this area of law, but also to the adoption of different assumptions and advocacy of one of the concepts indicated above. A convincing view is presented by Konrad Kohutek, who points out that clarifying the axiology of antitrust law is of significant practical importance. In his view, the ultimate value protected by this right is consumer welfare, and focusing on it allows for the consistent application of its regime. In this context, "the public interest is competition as a mechanism that promotes the economic well-being of consumers. The public interest clause allows for a correct understanding of competition as a value that is the subject of antitrust protection." Decisions by the President of the OCCP to intervene in the behaviour of entrepreneurs should depend on whether such behaviour harms the public interest (competition) as such. Introducing additional values into the axiology of antitrust law (which are also intended to be other criteria for the conduct of the

3 The category of public interest is of interest not only to lawyers, but also to political scientists, philosophers, economists and sociologists, see E. Komierzyńska, M. Zdyb, *Klauzula interesu publicznego w działaniach administracji publicznej*, Annales Universitatis Mariae Curie-Skłodowska. Sectio G 2016, vol. 63, no. 2, p. 165.

4 P. Bogdanowicz, *Interes publiczny w prawie energetycznym Unii Europejskiej*, Warszawa 2012, p. 72.

5 A. Żurawik, *Interes publiczny w prawie gospodarczym*, Warszawa 2013 [Legalis database], Chapter 2 § 2.

OCCP President) would typically lead to "inconsistent, unpredictable and, above all, incorrect application or incorrect non-application of the antitrust regime."[6]

The doctrine's considerations on the axiology of competition law are not reflected in the practice of the President of the OCCP.[7] When deciding cases in the field of competition-restricting agreements, he does not advocate any of the views presented in the literature; in fact, he rarely cites them. The separation of legal theory and practice means that in order to determine how the jurisprudential practice of the President of the OCCP – Bydgoszcz Branch is shaped, one should focus primarily on the analysis of the rulings issued.

2. Decisions of the President of the Office of Competition and Consumer Protection – Bydgoszcz Branch in cases of competition-restricting agreements

During the effective period of the Act, the President of the OCCP – Bydgoszcz Branch issued 15 decisions concerning agreements that restrict competition. Nearly half of them (seven) violated the prohibition under Article 6 (1) (1) of the Act, three violated the prohibition under Article 6 (1) (3), two violated the prohibition under Article 6 (1) (6), and three violated the prohibition under Article 6 (1) (7) of the Act.

Of all the violations of Article 6 (1) of the Act found, the largest group (7 cases) are price agreements. The subject of 4 of them was the trading of goods at different market levels, i.e. the agreements were concluded between a manufacturer and distributors.[8] Manufacturers imposed minimum resale prices on their goods, limiting intra-brand competition. This precluded the use of new, cheaper forms of distribution, which ultimately harmed the interests of consumers. The remaining 3 cases involved horizontal agreements that were entered into by competing entities.[9] At the

6 K. Kohutek, *Aksjologia publicznego prawa konkurencji*, in: *Aksjologia publicznego prawa gospodarczego*, ed. A. Powałowski, Warszawa 2022 [Legalis database], point 3. See idem, *Naruszenie interesu publicznego a naruszenie konkurencji (na tle praktyk rynkowych dominantów)*, Państwo i Prawo 2010, no. 7, pp. 45–56.

7 D. Miąsik, T. Skoczny, in: *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. T. Skoczny, Warszawa 2014 [Legalis database], Commentary on Article 1, thesis 70.

8 Decisions of the President of the OCCP of: 31 December 2010, RBG-24/2010; 30 August 2012, RBG-19/2012; 4 December 2012, RBG-30/2012 and 30 December 2013, RBG-42/2013.

9 Decisions of the President of the OCCP of: 16 June 2010, RBG-6/2010; 8 July 2011, RBG-9/2011 and 26 November 2012, RBG-29/2012.

same time, as a result of the mutual exchange of information at informal meetings, competitors were raising the price level of their services. The negative consequences affecting consumers are obvious with such practices.

During the period under review, three decisions were issued in the area under the authority of the Office's Branch in Bydgoszcz, stating violations of the prohibition on agreements involving market sharing. The first of these concerned an agreement in the insurance market. The entrepreneurs were to divide the domestic market for the sale of group accident insurance among themselves. Ultimately, the decision was overturned by a judgment of the Court of Competition and Consumer Protection following an appeal filed by the entrepreneurs, and the judgment of the court of first instance was subsequently upheld by the Court of Appeal in Warsaw.[10] Two other decisions concerned the same entity – a manufacturer and seller of industrial feed for livestock.[11] They concerned unauthorised arrangements between two companies in the same line of business, agreeing not to compete with each other and not to sell products to customers to whom they were supplied by the other party to the agreement. Thus, there was a division of the domestic sales market based on entity criteria. The amount of fines imposed on colluding entrepreneurs was among the highest in 2020 antitrust cases.

Two decisions had a basis in Article 6 (1) (6) of the Act. Both of the identified cases of the restriction of market access concerned the market for funeral services and the prevention of entrepreneurs not covered by the agreement from providing grave digging services and organising burials in cemeteries belonging to Roman Catholic parishes.[12] The activity of the OCCP Branch in Bydgoszcz in this regard was included in an extensive study of the freedom to provide funeral services in cemeteries, conducted since 2000 by the President of the OCCP.[13]

During the period under review, there were also three cases of collusive bidding by entrepreneurs joining tenders organised by public entities.[14] These decisions

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10 Decision of the President of the OCCP of 30 December 2011, RBG-28/2011; Judgment of the Regional Court – Court of Competition and Consumer Protection of 27 March 2015, XVII AmA 82/12 and Judgment of the Court of Appeal in Warsaw of 23 January 2019, VII AGa 1408/18.

11 Decisions of the President of the OCCP of 5 August 2020, RBG-7/2020 and of 28 December 2020, RBG-14/2020.

12 Decisions of the President of the OCCP of 5 December 2011, RBG-21/2011 and of 7 December 2011, RBG-23/2011.

13 P. Adamczewski, *Świadczenie usług cmentarnych i pogrzebowych. Obowiązki zarządcy cmentarza w świetle ustawy o ochronie konkurencji i konsumentów*, Warszawa 2014, https://uokik.gov.pl/publikacje.php?news_page=1&tag=2 [access: 6.06.2022].

14 Decisions of the President of the OCCP of: 21 December 2011, RBG-27/2011; 31 December 2013, RBG-47/2013 and 31 December 2014, RBG-47/2014.

concerned activities involving the agreement of the terms of bids, including in particular the price, in the local markets for the performance of forestry services and the trading of agricultural real estate, as well as in the national market for the provision of road lane, street and car park cleaning and mowing services.

3. Interpretation of the concept of public interest in the decisions of the President of the OCCP – Branch in Bydgoszcz

In order to determine how the concept of public interest was interpreted by the President of the OCCP – Bydgoszcz Branch, the legal justifications of the decisions indicated in the section entitled 'public interest' were examined. Even a brief analysis of them makes it possible to see that the explanations of what constitutes a violation of the public interest by a given practice are based on repeated patterns. The indicated sections of the decision are divided into two parts: a theoretical consideration of the essence of this concept and an examination of whether the premise of antitrust intervention is applicable to the case at hand. Of the 15 decisions issued, 13 were prepared according to a previously adopted template. In terms of the general analysis of the concept of public interest, a total of four models were used.

The decisions of the President of the OCCP – Bydgoszcz Branch clarify the concept of public interest through numerous references to judgments of the Court of Competition and Consumer Protection and the Supreme Court. In this way, the legal justifications for the decisions reflect the trends seen in case law. One issue that the judiciary has often attempted to resolve has been the question of understanding the public interest as a prerequisite for antitrust intervention. A kind of summary of the views in this regard was the Supreme Court's judgment of 5 June 2008, which discussed two opposing lines of jurisprudence.[15] According to the first one, referred to as the quantitative approach, "a violation of the public interest occurs when a «broader circle of market participants» and not just a single entity has been affected by the effects of illegal actions, or when these actions have caused other adverse phenomena in the market."[16] The second line of jurisprudence, on the other hand, "equates the public interest with the infringement of competition or causing (the possibility of causing) adverse effects on the market." The Supreme Court fully shared the position representing the qualitative approach, emphasising that "the

15 Ruling of the Supreme Court of 5 June 2008, III SK 40/07, LEX no. 479320 with case law cited therein.

16 The Court here quotes the Ruling of Supreme Court of 27 August 2003, I CKN 527/01, LEX no. 137525.

existence of a public interest should be assessed through a broader view, taking into account the totality of the negative effects of actions in a particular market."

The largest group of the decisions reviewed, five on price agreements and one on collusive bidding, stressed that the law does not address the protection of individual claims, and that the basis for applying its provisions is to determine whether there has been a violation of the public interest designated by the Act's provisions, not the interest of an individual or group. Reference was also made to a Supreme Court ruling of 27 August 2003, referring to the effects of prohibited activities affecting a wider range of market participants, as well as causing other adverse phenomena. This ruling was identified in the 2008 judgment cited above as representing the first line of jurisprudence, which would fit in with the quantitative approach. However, this approach was not adopted in its pure form. The arguments were supplemented with references to rulings, which are now cited as an example of a qualitative approach. The decisions described further cite, namely, the judgment of the Court of Competition and Consumer Protection of 21 March 2005, in which the protection of the public interest is equated with "the existence and development of competition in all relevant markets," and intended, in the opinion of the Supreme Court, to represent a qualitative approach.[17] Following the distinction between the lines of jurisprudence indicated in the 2008 judgment, it would be reasonable to assume that the Bydgoszcz Branch takes a mixed position and applies both the quantitative and qualitative approach. However, it does not seem to treat the described lines of jurisprudence as contradictory. One must agree with Konrad Kohutek, who points out that there are grounds for even seeing them as similar to each other. Both lines of jurisprudence allow a finding of a violation of the public interest in the event that the practices of entrepreneurs cause other adverse phenomena or effects; it is just that the second line does not emphasize the quantitative criterion.[18] A similar view was expressed by Tadeusz Skoczny, who counts among the rulings demonstrating the quantitative approach only those that directly refer to the number of market participants harmed by practices prohibited by the law, without reference to other criteria for determining the violation of the public interest.[19] Thus, it should be assumed that, in the judgment in question, the Supreme Court insufficiently separated the lines of case law presented, and their common features cause uncertainty about the position taken in the decision being drawn up.

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17 Judgment of Court of Competition and Consumer Protection of 21 March 2005, XVII AmA 16/04.

18 K. Kohutek, in: K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2014, Commentary on Article 1, pp. 58–59.

19 T. Skoczny, in: *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, ed. T. Skoczny, Commentary on Article 1, theses 48–55.

Other decisions issued by the President of the OCCP – Branch in Bydgoszcz do not raise questions of this kind. The elaborate analysis of the concept of public interest presented in them clearly indicates a qualitative approach. Accordingly, "the good protected under the provisions of the law is the public interest in ensuring proper conditions for the functioning of competition and ensuring the protection of the interests of entrepreneurs and consumers as institutional, collective phenomena. The purpose of the law is not to protect the private interest of either the entrepreneur or the consumer."[20] The differences in the ruling practice of the Bydgoszcz Branch are not related to the dates of the decisions. It should be assumed that the President of the OCCP – Bydgoszcz Branch has advocated the qualitative approach since the beginning of the application of the provisions of the Act, but at times his arguments are brief and consist only of quoting a passage from a Supreme Court judgment on "the action of an entrepreneur causing other adverse phenomena in the market' without providing commentary. The 2008 Supreme Court ruling determined the victory of the qualitative approach and the widespread application of public interest interpretations in accordance with the second line of jurisprudence. Subsequently, this position was not questioned, as evidenced by two decisions of the President of the OCCP – Branch in Bydgoszcz issued in 2020, which completely ignored the consideration of the interests or claims of the individual and a broader circle of participants affected by the practice. It was explicitly pointed out that "from the point of view of the admissibility of the application of the Act on Competition and Consumer Protection, the number of entities affected by a restrictive practice is irrelevant, as it is sufficient that the behaviour of the entrepreneur exhausts the characteristics of an anti-competitive practice."

The legal justifications of decisions relating to the interpretation of the concept of public interest do not cite doctrinal views, nor does the President of the OCCP – Bydgoszcz Branch present his own assessment of the issue. Resolutions in this regard are based entirely on case law, with the position presented being in accordance with the views prevailing therein.

4. Public interest as a premise for antitrust intervention in a case

The public interest takes on the form of a general clause referring to extra-legal rules and assessments. This allows the President of the OCCP to make decisions

[20] Decisions of the President of the OCCP of 5 December 2011, RBG-21/2011 and of 7 December 2011, RBG-23/2011.

based on a specific state of fact and with reference to the current normative state. Both in the President's decisions and in the literature, the judgments of the Antitrust Court are repeatedly cited, pointing out that the concept of public interest is not fixed and uniform, and in each case it should be determined and defined in detail.[21] The public interest needs to be continuously defined according to changing violations of antitrust law norms.[22] This view, which is otherwise correct and follows from the assumption that it is impossible and inexpedient to formulate an immutable abstract definition of public interest, does not accord with the jurisprudential practice of the President of the OCCP – Branch in Bydgoszcz. In the detailed sections of the legal justifications of the decisions under review, following the section on general considerations of the essence of the public interest, findings are made on the violation of the public interest in a specific case. It might seem that the need to take into account the specifics of a particular case would make the findings individual in nature. Meanwhile, these parts of justifications are also prepared according to accepted templates. This is because there seems to be one model of justification for each type of competition-restricting agreement or one type of case. One of these models was used in cases of violations of the prohibition on agreements that restrict market access, while another was used in situations where vertical price agreements were made regarding the distribution system for goods and the setting of their resale prices. In addition, identical justifications have been applied to cases similar in subject matter. In cases involving price agreements between entrepreneurs operating in the taxi passenger transport market, as well as agreements restricting access to the funeral services market, the differences between the justifications were found only in the names of the entities involved in the agreement. The reasoning contained in the detailed part of the justifications, which is repeated in the case of subsequent cases and applied in the decisions issued in them, is necessarily also of a general nature. It is pointed out that the type of agreement at issue in this case is one of the grave violations of antitrust law and its effects are detrimental and lead to distortions in the market. The negative consequences of banned practices for other entrepreneurs in the market and for consumers are also described. The use of the same wording, or even whole sections of the justifications of one decision in subsequent decisions, demonstrates that the public interest is not established and defined in detail in every case.

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21 See, among others, Judgment of the Antitrust Court of: 22 May 2002, XVII Ama 53/01; 4 July 2002, XVII Ama 108/00 and 23 October 2002, XVII AmA 133/01.

22 C. Banasiński, *Powstanie, podstawy prawne, zakres i cele prawa antymonopolowego*, in: *Polskie prawo antymonopolowe. Zarys wykładu*, ed. C. Banasiński, Warszawa 2018, p. 41.

In the course of antitrust proceedings, the analysis of a given entrepreneurial practice in terms of the violation of the public interest appears to be purely a formality. Each decision carves out a section of the legal reasoning devoted to this issue, but a closer examination of their content leads to the idea that a violation of one of the competition rules set forth in Article 6 (1) of the Act automatically implies the condition of violation of the public interest. In light of the systemic and linguistic interpretation of Article 1 (1) of the Act, antitrust intervention is permissible upon the combined fulfilment of two conditions: violation of one of the statutory prohibitions and violation of the public interest.[23] If the opposite were adopted, i.e. that failure to comply with statutory norms would be synonymous with a violation of the public interest, the legal regulation of Article 1 (1) of the Act would be pointless.[24] In practice, therefore, the obligation to examine both of these prerequisites is fulfilled by referring to them in the legal justification for the decision, but attention is paid primarily to examining the fulfilment of the first one. The scale of the use of template legal justifications for decisions leads to the conclusion that in the practice of the Bydgoszcz Branch of the OCCP, the public interest performs primarily a jurisdictional function. Assessment of competition-restricting agreements in terms of the violation of the public interest is made only at the stage of deciding whether it is justified to initiate antitrust proceedings. Once it is determined that there are no obstacles to it, the proceedings then move on to examining violations of the prohibition on restrictive agreements. The function of evaluating the public interest[25] is not taken into account and it is assumed that since its application was found at the beginning of the proceedings, it continues and is contained in the decision made.[26]

When analysing the application of the public interest as a premise for antitrust intervention in the jurisprudential practice of the Bydgoszcz Branch of the OCCP, one should take into account not only decisions recognising the behaviour of an entrepreneur as a practice restricting competition, but also otherwise ending the proceedings. Determination in the course of the proceedings of the absence of

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23 K. Kohutek, in: *Ustawa o ochronie*…, Commentary on Article 1, p. 57.

24 P. Korycińska-Rządca, *Ochrona tajemnic strony postępowania antymonopolowego w sprawach praktyk ograniczających konkurencję*, Warszawa 2020 [Legalis database], Chapter I § 3.

25 The evaluative function of the public interest means that it is an instrument for determining the actual scope of the provisions of the Act on Competition and Consumer Protection as an act from the sphere of public law. This allows to define the goals of competition protection and build its axiology, M. Bernatt, A. Jurkowska-Gomułka, T. Skoczny, *Podstawy i zakres*…, pp. 738–743; also R. Blicharz, K. Horubski, M. Pawełczyk, *Prawo konkurencji w systemie publicznego prawa gospodarczego*, in: *System Prawa Administracyjnego*, vol. 8B. *Publiczne prawo gospodarcze*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2018, p. 683.

26 M. Bernatt, A. Jurkowska-Gomułka, T. Skoczny, *Podstawy i zakres*…, pp. 738–739.

a violation of the public interest would be synonymous to the necessity of issuing a decision to discontinue the proceedings on the basis of Article 105 of the Code of Administrative Procedure.[27] Such a case, however, did not occur, since "none of the antitrust proceedings in the field of restrictive practices conducted by the Branch of the OCCP in Bydgoszcz has been discontinued."[28] This confirms the conclusion reached above about treating the premise of a finding of a violation of the public interest as a formality and prejudging the nature of a violation of Article 6 (1) of the Act. In addition, this can be evidenced by the fact that 44 antitrust investigations[29] (including the abuse of a dominant position) were initiated during the effective period of the Act, and the number of decisions made in these cases finding violations of the Act is higher. This means that most or all of the investigations lead to the initiation of antitrust proceedings, each of which is concluded by a decision declaring the practice to be restrictive of competition.

5. Judicial review of the decisions of the President of the OCCP – Bydgoszcz Branch

Decisions issued by the President of the OCCP, concluding the proceedings before him, are administrative in nature. They can be reviewed on appeal before the Court of Competition and Consumer Protection. Entrusting substantive control of the antitrust authority (i.e., a public administration body) to a public court is an expression of judicialisation, but also provides an argument for considering proceedings before the President of the OCCP as hybrid proceedings.[30]

Appeals against the decisions of the President of the Office of Competition and Consumer Protection – Bydgoszcz Branch in cases of competition-restricting agreements were filed in 11 cases (out of 15 antitrust proceedings). So far, verdicts have been reached in eight cases. In two cases, orders have been issued dismissing the appeal, and in one case the trial is still pending. The Court of Competition and Consumer Protection has decided to dismiss the appeals seven times, thereby

27 Code of Administrative Procedure of 14 June 1960, consolidated text: Journal of Laws 2022 item 2000 as amended.

28 Information from the Legal Department of the Office of Competition and Consumer Protection dated 13 December 2022, obtained through access to public information.

29 Ibidem.

30 R.R. Wasilewski, *Postępowanie dowodowe przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów*, Warszawa 2020 [Legalis database], Chapter VI, point 3.

upholding previous decisions. The verdicts were later upheld by the Court of Appeal in Warsaw. This means that the violation of public interest in these cases was not challenged. Finding its absence would be synonymous to failing to meet one of the prerequisites for antitrust intervention and would require revocation of the decision. Only one justification of the verdict included discussion of the public interest.[31] In his appeal, the entrepreneur raised the charge of "issuing the decision against the public interest and the legitimate interest of citizens," and therefore the Court had to address it. In his view, competition should be understood broadly as "the process of market competition among independent entrepreneurs also competing for access to cheaper and better means of production." Enlarging farms, increasing acreage translates into increased opportunities for development and improved product quality, hence the tender for the sale of agricultural property can be a "competitive battlefield of entrepreneurs to acquire such a measure. These opportunities should not be limited by agreements between entrepreneurs involved in collusive bidding that put competitors not involved in the collusion at a disadvantage." The court concluded its analysis by stating that "the violated public interest consisted in ensuring proper conditions for the operation of the land market."

In one case, the Court of Competition and Consumer Protection overturned the decision of the President of the OCCP in its entirety, and this ruling was upheld by the Court of Appeal in Warsaw.[32] However, this did not follow from finding that no public interest was involved. Instead, it was mentioned as a side note to the consideration of the possibility of attributing the status of competitors to entrepreneurs. The court referred to the frequently cited, including in the literature, decision of the Supreme Court of 21 June 2013, according to which the premise of public interest has a corrective function. It allows the court hearing an appeal against a decision to verify the advisability of antitrust intervention in a particular case. It also allows an assessment of the justification of the measures applied, including fines, providing a benchmark for the limits of the OCCP President's discretion in exercising this power.[33]

The analysis of the content of court rulings in antitrust proceedings conducted by the President of the OCCP – Bydgoszcz Branch leads to the conclusion that his assessment of the premise of public interest is correct and does not raise any objections.

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31 Judgment of the Court of Competition and Consumer Protection of 28 May 2015, XVII AmA 21/14.

32 Judgment of the Court of Competition and Consumer Protection of 27 March 2015, XVII AmA 82/12 and Judgments of the Court of Appeal in Warsaw of 6 December 2016, VI Aca 969/15 and of 23 January 2019, VII Aga 1408/18.

33 Decision of Supreme Court of 21 June 2013, III SK 56/12, LEX no. 1341693. See also: E. Stefańska, in: *System Postępowania Cywilnego*, vol. 6. *Postępowania odrębne*, ed. A. Machnikowska, Warszawa 2022, p. 506.

6. The concept of public interest in the jurisprudential practice of other OCCP Branches

Conclusions drawn from the analysis of the rulings of the President of the OCCP Branch in Bydgoszcz need to be verified. For this purpose, 219 decisions issued in other Branches during the effective period of the Act of 16 February 2007 were examined. Most of them, as many as 115, concerned the fixing of prices and the agreement of other conditions for the purchase or sale of goods (price agreements as defined in Article 6 (1) (1) of the Act). 84 decisions were issued in cases of agreement on the terms of bids submitted in tenders (tender collusion under Article 6 (1) (7) of the Act), while the other cases regulated by Article 6 (1) of the Act appeared sporadically in the decisions of the President of the OCCP: there were 9 cases of market sharing agreements, 5 cases of agreements restricting access to the market, and 3 agreements specified in point 2 of Article 6 (1) of the Act.[34]

An analysis of the rulings of the President of the OCCP issued in Branches in the rest of the country confirmed the findings of the study of the practices of the Bydgoszcz Branch. Attention is drawn in particular to the high repetition of legal justifications for decisions in the part related to public interest. The President of the OCCP relies in these cases on case law and cites entire excerpts from judgments of the CCCP, the Courts of Appeal and the Supreme Court.[35] The differences arise only from the selection of rulings. References to the views of representatives of science are rare, namely they appeared in 38 decisions. Also, the detailed part of the justifications, by design devoted to examining the violation of the public interest in a specific case, is not individual. More detailed considerations in this regard can be found in the eight decisions that found violations of Article 6 (1) of the Act (without specifying a point in that paragraph). Since these cases do not match with the catalogue provided by the legislator, the President of the OCCP was obliged to explain how the entrepreneur's behaviour violates the Act. Thus, it is reasonable to conclude that the analysis of a given entrepreneurial practice in terms of violation of the public interest appears to be purely a formality. This phenomenon has been particularly evident in recent years. The examination of the public interest is shorter and more general compared to the justifications for decisions issued in the first years after the

34 The charges in some decisions were based on two or more legal bases.

35 The most frequently cited Judgments are Supreme Court Rulings of: 5 June 2008, III SK 40/07, OSNAPiUS 2009, no. 19–20, item 272; 29 May 2001, I CKN 1217/98, OSNC 2000, no. 1, item 13; 16 October 2008, III SK 2/08, LEX no. 599553; 24 July 2003, I CKN 496/01, Legalis no. 65610 and Judgment of the Court of Competition and Consumer Protection of 27 June 2011, XVII AmA 92/00 and others.

enactment of the 2007 Act. Excerpts from court decisions are still used, but in most cases they are no longer accurately indicated in footnotes.

It can be concluded that the way of interpreting the concept of public interest as applied by the President of the OCCP – Bydgoszcz Branch does not differ from that adopted by other Branches. The jurisprudential practice of the President of the OCCP in this regard is consistent.

Conclusion

The concept of public interest occupies a prominent place in competition law, justifying the OCCP President's authoritative interference in economic relations and setting limits on the behaviour of entrepreneurs. An examination of the rulings of the President of the OCCP Branch in Bydgoszcz made it possible to determine that the interpretation of this concept is not carried out through independently made considerations or references to the rich literature on the subject. The views of the doctrine are not reflected in the decisions issued, which means that there is a separation between practice and theoretical analysis. The concept of public interest, on the other hand, is clarified by numerous references to judgments of the Court of Competition and Consumer Protection and the Supreme Court. Thus, based on case law, it is assumed that the public interest consists in ensuring proper conditions for the functioning of competition and ensuring the protection of the interests of entrepreneurs and consumers as institutional, collective phenomena. At the same time, it is stressed that the public interest should be determined and defined in detail in each case. This contradicts the content of the legal justifications contained in the decisions. Explanations of what constitutes a violation of the public interest by a particular practice are based on repeated patterns, both in the general justification part and in the case-specific part, where a single model of justification seems to apply for each type of restrictive agreement or one type of case. This leads to the conclusion that despite the formal examination of the admissibility of antitrust intervention in each case, the efforts of the President of the OCCP are focused on demonstrating that the entrepreneurs have concluded a competition-restricting agreement in violation of Article 6 (1) of the Act. Assessment of these practices in terms of the violation of public interest is made only at the stage of deciding whether it is justified to initiate antitrust proceedings. This means that public interest serves primarily a jurisdictional function.

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Conflicts of interest and values in the construction process

Konflikty interesów i wartości w procesie budowalnym

Конфликты интересов и ценностей в процессе строительства

Конфлікти інтересів і цінностей в процесі будівництва

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Summary: The law is and should be connected to values which constitute its basis. The reference to values is also significant in Building Law, in which the legislator has regulated the issues of the construction process.

The subject of the article is the analysis of the values and interests underlying the construction process, indicating the possibility of conflicts in this regard, while the aim is to indicate ways to resolve these conflicts and to demonstrate the nature of the provisions of Building Law in this regard.

Based on the analysis of the provisions of Building Law, it should be noted that the catalogue of values subject to protection in the construction process is very wide. However, the will to ensure the safety of constructed and used buildings, and consequently the safety of people and property, shall be considered the most important value. Due to the fact that these values may collide in the construction process, their protection requires public administration authorities to weigh them from the point of view of protecting the interests of an individual and the public interest. The preventive nature of the provisions of Building Law is to aid this.

Unfortunately, the above does not result directly from the provisions of the Act of 7 July 1994 – Building Law, however it may be interpreted from the provisions of the Act, which the legal dogmatic method and the analysis of jurisprudence and literature, which the analysis of the title issue was based on, prove to be helpful with.

Key words: values, building law, construction process, development title, principle of proportionality

Streszczenie: Prawo jest i powinno być związane z wartościami, które są jego podstawą. Odwołanie do wartości jest istotne również w Prawie budowlanym, w którym ustawodawca uregulował zagadnienia procesu budowlanego.

Przedmiotem artykułu jest analiza wartości i interesów leżących u podstaw procesu budowlanego ze wskazaniem możliwości zaistnienia konfliktów w tym zakresie, natomiast celem jest wskazanie sposobów rozwiązania tych konfliktów oraz wykazanie charakteru przepisów Prawa budowlanego w tym obszarze.

Na podstawie analizy przepisów Prawa budowlanego należy stwierdzić, że katalog wartości podlegających ochronie w procesie budowlanym jest bardzo szeroki. Za najważniejszą wartość należy uznać chęć zapewnienia bezpieczeństwa realizowanych i użytkowanych obiektów budowlanych, a w konsekwencji bezpieczeństwo ludzi i mienia. Z uwagi na fakt, iż w procesie budowlanym może dojść do kolizji tych wartości, ich ochrona wymaga ważenia ich przez organy administracji publicznej z punktu widzenia ochrony interesu jednostki i interesu publicznego. Pomóc ma w tym zakresie prewencyjny charakter przepisów Prawa budowlanego.

Powyższe nie wynika niestety wprost z przepisów ustawy z dnia 7 lipca 1994 r. – Prawo budowlane, lecz można to wyinterpretować z przepisów ustawy, w czym pomocna okazuje się metoda dogmatyczno-prawa oraz analiza orzecznictwa i literatury przedmiotu, na których oparte zostały rozważania nad tytułowym zagadnieniem.

Słowa kluczowe: wartości, prawo budowlane, proces budowlany, prawo zabudowy, zasada proporcjonalności

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Резюме: Закон связан и должен быть связан с ценностями, которые лежат в его основе. Ссылка на ценности актуальна и в «Строительном праве», в котором законодатель урегулировал вопросы строительного процесса.

Предметом статьи является анализ ценностей и интересов, лежащих в основе строительного процесса, с указанием возможности возникновения конфликтов в этой связи, а целью – указать пути разрешения этих конфликтов и продемонстрировать характер положений закона «Строительное право» в этой области.

Исходя из анализа положений закона «Строительное право», следует сделать вывод, что перечень ценностей, подлежащих защите в процессе строительства, очень широк. Наиболее важной ценностью следует считать стремление обеспечить безопасность строящихся и эксплуатируемых строительных объектов, а следовательно, безопасность людей и имущества. Поскольку эти ценности могут быть противопоставлены друг другу в процессе строительства, их защита требует от органов публичной администрации взвешивать их с точки зрения защиты интересов личности и общественных интересов. Превентивный характер положений закона «Строительное право» призван оказать помощь в этом отношении.

К сожалению, вышесказанное не следует напрямую из положений закона от 7 июля 1994 года – «Строительное право», но его можно интерпретировать на основе положений Закона, в чем помогает догматико-правовой метод, а также анализ судебной практики и литературы по данному вопросу, на котором базировалось рассмотрение заглавного вопроса.

Ключевые слова: ценности, строительное законодательство, строительный процесс, право застройки, принцип пропорциональности

Резюме: Право є і має бути пов'язане з цінностями, що лежать в його основі. Посилання на цінності є важливим і в законі Будівельне право, в якому законодавець врегулював питання процесу будівництва.

Предметом статті є аналіз цінностей та інтересів, що лежать в основі процесу будівництва, вказуючи на можливість виникнення конфліктів у цій сфері. Метою статті є вказати шляхи вирішення цих конфліктів та продемонструвати характер положень закону Будівельне право в цій сфері.

Виходячи з аналізу положень закону Будівельне право слід констатувати, що каталог цінностей, які підлягають охороні в процесі будівництва, є дуже широкий. Найголовнішою цінністю є прагнення забезпечити безпеку побудованих і експлуатованих будівель, а отже, безпеку людей і майна. Через те, що ці цінності можуть зіткнутися в процесі будівництва, їх захист вимагає від органів державного управління зважувати їх з точки зору захисту інтересів особи та суспільних інтересів. Допомогти в цьому має превентивний характер положень закону Будівельне право.

На жаль, вищезазначене не випливає безпосередньо з положень Закону від 7 липня 1994 р. – Будівельне право, його можна тлумачити з положень Закону, для чого можна використовувати догматико-правовий метод, аналіз судової практики та літератури, на якому ґрунтувалися міркування щодо титульного питання.

Ключові слова: цінності, Будівельне право, процес будівництва, право забудови, принцип пропорційності

Introduction

Values[1] constitute the subject of analysis of axiology[2] which is a branch of philosophy and its subject of interest is the concept of value, its role in human life and

1 'Value' is a feature of what is good in some respect or principles and beliefs that are the basis of ethical norms adopted in a given community, cf. L. Drabik, E. Sobol, *Słownik języka polskiego PWN*, vol. 2. *P–Ż*, Warszawa 2007, p. 448.

2 From Gr. αξιος – worthy, valuable; λογος – science. Axiology is a branch of philosophy, the science of values, the general theory of values. It studies the nature of values as well as sources and mechanisms

the division of values in relation to specific branches of science. The search for and analysis of values is also very important for legal sciences in which values, that constitute the basis of the applicable law, are increasingly sought. The law is closely related to the values that underpin a given legal order which is why it is referred to as the 'axiology of law.'[3]

As rightly emphasised by J. Zimmermann, legal norms should be embedded in values. He defines the axiological justification as a situation "in which it is argued that a given norm should be considered binding since what a given norm prescribes is worthy of approval and what it prohibits – worthy of disapproval."[4] From the axiological point of view, the cited author divides values into three categories: 1) a set of norms or a set of postulates that introduce universal values, lying outside the law, into administrative law; 2) non-external values, i.e. values created by the law or the Constitution of the Republic of Poland; 3) values protected by a specific branch of law, i.e. special values, which the law is created for.[5]

Referring to the third one of the indicated categories of values, it is necessary to consider what are the axiological foundations of building law, which values lie at its source and how is the law supposed to protect them, meeting the requirements of both public and individual interests. Thus, the aim of the article is to analyse the catalogue of values subject to protection in the construction process, regulated by the provisions of Building Law,[6] and to indicate conflicts, that may arise in this

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of value creation in the systematising and postulated aspect; establishes standards and evaluation criteria as well as the hierarchy of values. It studies the ontic status of values, relations with other beings, the social functioning of values in a given historical era, community and culture, J. Zimmermann, *Wprowadzenie*, in: *Wartości w prawie administracyjnym*, ed. J. Zimmermann, Warszawa 2015, p. 11; I. Bogucka, in: *System Prawa Administracyjnego Procesowego*, vol. 1. *Zagadnienia ogólne*, ed. G. Łaszczyca, Warszawa 2017, p. 507.

3 S. Fundowicz, *Aksjologia prawa administracyjnego,* in: *Koncepcja systemu prawa administracyjnego. Zjazd Katedr Prawa Administracyjnego i Postępowania Administracyjnego Zakopane 24–27 września 2006 r.*, ed. J. Zimmermann, Warszawa 2007, pp. 633 ff.; K. Chochowski, *Aksjologia w prawie administracyjnym*, in: *Aksjologia prawa administracyjnego*, vol. 1, ed. J. Zimmermann, Warszawa 2017, pp. 49–50. "The axiology of administrative law" is sometimes spoken of P. Wszołek, *Aksjologia prawa administracyjnego a jego differentia specifica*, in: *Wartości w prawie administracyjnym*, pp. 87–119; I. Niżnik-Dobosz, *Prawo administracyjne jako mechanizm realizacji wartości*, in: *Aksjologia prawa administracyjnego*, vol. 1, pp. 113–124.

4 J. Zimmermann, *Aksjomaty prawa administracyjnego*, Warszawa 2013, p. 74.

5 I repeat after: K. Kokocińska, *Funkcjonalność i dysfunkcjonalność przepisów publicznego prawa gospodarczego z perspektywy kryterium wartości (zagadnienia ogólne)*, in: *Dysfunkcje publicznego prawa gospodarczego*, eds. M. Zdyb, E. Kruk, G. Lubeńczuk, 2018 [Legalis database].

6 Act of 7 July 1994 – Building Law, consolidated text: Journal of Laws 2021 item 2351 with subsequent amendments. The concept of a construction process has not been legally defined. The doctrine distinguishes between the construction process in a narrower sense, which means only the activities related to the design, construction, maintenance and demolition of buildings, to the extent regulated

regard, and ways to solve them. The thesis of the work is the statement that the relationship of interests – of an individual investor and the public interest emerging in the construction process, is not based on the opposite but is complementary. The legal dogmatic method is going to be applied in the work.

1. The concept of value and its types

It is hard to define a value. It was pointed out by W. Tatarkiewicz who wrote that what looks like a definition of a value is rather a replacement of a word with another word that means more or less the same or is a periphrasis.[7] Z. Ziembiński notes that "this word has several meanings and several dozen variants of meaning."[8] For E. Wnuk-Lipiński values ae a polysemic concept and the multiple meanings given to this concept are associated with various research goals and sometimes with a different theoretical perspective within which the category of value is used. He adds that whenever we use this term, we have the impression that we know what we are talking about and we do not feel the need to define it precisely.[9]

In principle it is assumed that value means what is important and valuable for an individual, a given group or the society, what is desirable and associated with positive memories or experiences. Values are treated as a separate kind of being – good in the ideal sense – to the point of attributing the idea of good to some real existence.[10] However, sometimes values are also ranked – from negative, through the zero value, to positive values.[11]

T. Giaro acknowledges that the constitutive features of a value include their longer duration, hence the phrase 'enduring values.'[12] This position could be adopted but only if the catalogue of values was limited to those more valuable from the

by the provisions of the Act of 7 July 1994 – Building Law, together with executive acts to this Act, and in a broader sense additionally including the provisions referring to spatial development in its scope. In the article I refer to the narrow understanding of the "construction process" regulated by the provisions of the Building Law.

7 W. Tatarkiewicz, *O filozofii i sztuce*, Warszawa 1986, p. 70, I repeat after: M. Michalik, *Wartości a potrzeby*, in: *Byt i powinność, czyli status i funkcje wartości*, ed. A.L. Zachariasz, Rzeszów 2005, p. 150.

8 Z. Ziembiński, *Zarys zagadnień etyki*, Poznań–Toruń 1994, p. 27.

9 E. Wnuk-Lipiński, *Socjologia życia publicznego*, Warszawa 2008, p. 180; A. Żurawik, *Interes publiczny w prawie gospodarczym*, Warszawa 2013, p. 106.

10 Z. Ziembiński, *Zarys zagadnień*…, pp. 27–28; A. Żurawik, *Interes publiczny*…, pp. 106–107.

11 M. Pieniążek, *Etyka sytuacyjna prawnika*, Warszawa 2008, pp. 135–148.

12 T. Giaro, *Wartości w języku prawnym i dyskursie prawniczym*, in: *Preambuła Konstytucji Rzeczypospolitej Polskiej*, Warszawa 2009, p. 16.

social point of view. However, if we were to assume that "any object, thing, type of activity, mental construction or states of consciousness may become a value,"[13] then durability would not be a constitutive feature of value in every case and not all values must be constituted by tradition and the community. Some of them may be incidental and individual. However, it should be assumed that the more valuable a value is from the social point of view, the greater its durability and embedding in tradition. Assuming that each value has to meet the feature of durability would narrow their catalogue down which is why it seems that durability cannot constitute a defining feature of values.[14]

In this context, it is worth recalling the word of K. Pałecki, according to whom values are temporal in nature, i.e., they change over time. Therefore, we may talk about contemporary or past or even future values. The duration of an evaluative relationship also makes it possible to talk about transient, 'permanent' or even 'eternally lasting' values, although the belief in the existence of such timeless values, which remain to be values in every situation and everywhere, seems doubtful.[15]

There are also objective and subjective values. Aristotle, among others, emphasised the objectivity of values by acknowledging that values exist regardless of how people assess them, regardless of their tastes or interests. He referred to truth, beauty and justice as examples. In turn, the subjectivist concept was preferred by, for example, Protagoras.[16]

Values may be treated relatively or absolutely which especially refers to moral values. Relativism makes it possible to assume that various equal evaluation criteria, of certain states of affairs as good or bad, are admissible. In turn, absolutism assumes the existence of only one proper criterion for making such judgments.[17] Speaking of values in the context of the law, the following are distinguished: the value of law (e.g., clarity, non-contradiction), values in law (e.g., common good, equality, etc.) and values protected by the law. These values and their content can be decoded through interpretation.[18]

The concept of values-goals, according to which it is assumed that goals regulate human behaviour, give order and meaning to life, help people create and materialise the future and stimulate long-term activities, is also interesting. Sometimes the

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13 K. Pałecki, *Prawoznawstwo. Zarys wykładu. Prawo w porządku społecznym*, Warszawa 2003, p. 78.

14 A. Żurawik, *Interes publiczny*…, p. 107.

15 K. Pałecki, *Prawoznawstwo*…, p. 79.

16 A. Żurawik, *Interes publiczny*…, pp. 107–108.

17 T. Giaro, *Wartości w języku prawnym*…, pp. 14–16; A. Żurawik, *Interes publiczny*…, p. 108.

18 A. Mituś, *Wartości-cele realizowane przez prawo administracyjne*, in: *Aksjologia prawa administracyjnego*, vol. 1, p. 105.

goal is also identified with the main value for a given action.[19] Goals determine the direction of human activities and are of a diverse nature since they concern various spheres of an individual's life.[20] Although, it cannot be assumed that every goal is a value and that every value must be a goal. However, most often values are also goals. Not only are they facilities of desire, but they also constitute the basis for making concrete efforts to achieve, protect or multiply them. They can be characterised as values-goals then. Accepting such assumptions, only those of the values that are also values-goals can be the basis for the rationalisation of norms. However, values that no one intends to achieve remain only to be declared values.[21] On these grounds, it may be assumed that the concept of values-goals is understood as only those values, for the implementation of which appropriate 'values' have been created or are in the process of being created.[22]

2. Catalogue of values and interests protected in Building Law

A strong reference to values can be found in Building Law, where in Article 5 the legislator indicates a very extensive catalogue of values protected by the provisions of this Act during the construction process. Even though the protection of these values does not result directly from the provisions of Building Law, it is primarily in the interest of the investor and in the public interest.

In principle, the construction process is intended to serve the investor who exercises the development title, resulting from Article 4 of Building Law, by means of conducting an investment. This right is a subjective right[23] of a libertarian nature.[24] Freedom of development,[25] being an element of the constitutional right of

19 Z. Załęski, *Psychologia zachowań celowych*, Warszawa 1991, pp. 10–11.

20 T. Kotarbiński, *Traktat o dobrej robocie*, Warszawa 1965, p. 45.

21 K. Pałecki, *Prawoznawstwo*…, pp. 86–87; A. Żurawik, *Wykładnia w prawie gospodarczym*, 2021 [Legalis database].

22 A. Mituś, *Wartości-cele realizowane*…, p. 106.

23 Z. Niewiadomski, T. Asman, *Wolność budowlana jako prawo podmiotowe inwestora*, in: *Księga Jubileuszowa Profesora Stanisława Jędrzejewskiego*, eds. H. Nowicki, W. Szwajdler, Toruń 2009, pp. 559–575.

24 Z. Leoński, *Zasada wolności budowlanej i jej administracyjnoprawne ograniczenia*, in: *Rola materialnego prawa administracyjnego a ochrona praw jednostki*, ed. Z. Leoński, Poznań 1998, p. 139; Z. Leoński, M. Szewczyk, *Zasady prawa budowlanego i zagospodarowania przestrzennego*, Bydgoszcz–Poznań 2002, pp. 49–52.

25 More on the topic of the freedom of construction cf. W. Jakimowicz, *Wolność zabudowy w prawie administracyjnym*, Warszawa 2012.

ownership,[26] may be subject to certain restrictions but they can only be introduced in an act (cf. Article 31 § 3 of the Constitution). As a consequence of the above, the investor's freedom is limited by regulations. This is confirmed by the content of the cited Article 4 of Building Law which guarantees everyone the right to develop land property, if they can prove the right to dispose of the property for construction purposes. The second condition is the compliance of the construction project with the regulations.[27] The restriction of this freedom results primarily from the provisions of the Building Law Act, which introduces administrative regulation of the construction process. It does so through, among others, the obligation to obtain a building permit. However, it should be remembered that any act, introducing restrictions on this process, must be interpreted restrictively.[28]

Restrictions on the freedom of construction and freedom of use of an already completed building facility are intended to protect the values referred to in Article 5 which include, among others, safety of life, property and health,[29] safety of building facilities,[30] ensuring a high technical standard of the construction process and the building facility,[31] ensuring an appropriate standard of living and health of third parties,[32] ensuring architectural and spatial order,[33] ensuring compliance of

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26 T. Bąkowski, *O wolności budowlanej de lege lata i de lege ferenda*, Gdańskie Studia Prawnicze 2015, vol. 33, p. 65; A. Ostrowska, *Rozważania nad istnieniem i istotą wolności zabudowy – głos w dyskusji*, Annales Universitatis Mariae Curie-Skłodowska. Sectio G 2017, vol. 64, no. 1, p. 157.

27 Cf. S. Zwolak, *Zasady prawa budowlanego*, Studia Prawnicze KUL 2016, no. 3, pp. 188–189.

28 M. Masternak-Kubiak, *Znaczenie zasady proporcjonalności w procesie inwestycyjno-budowlanym*, in: *Aktualne wyzwania ochrony wolności i praw jednostki*, eds. M. Jabłoński, S. Jarosz-Żukowska, Wrocław 2014, p. 314.

29 A building facility should be designed and constructed in accordance with the basic requirements referring to, among others: fire safety and safety of use and accessibility of facilities (Article 5 § 1 point 1 letter b and d of the Building Law); occupational health and safety conditions (Article 5 § 1 point 5 of the Building Law); civil protection in accordance with the requirements of civil defence (Article 5 § 1 point 6 of the Building Law); conditions of safety and health protection of persons at the construction site (Article 5 §1 point 10 of the Building Law). Cf. S. Zwolak, *Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 2 lipca 2018 r. (II OSK 3285/17, LEX nr 2523637)*, Studia Iuridica Lublinensia 2019, vol. 28, no. 2, p. 211.

30 Judgment of the Constitutional Tribunal of 22 September 2009, SK 3/08, Legalis no. 169901.

31 A building facility should be designed and constructed in accordance with the principles of technical knowledge (Article 5 § 1 of the Building Law).

32 In accordance with the above, efforts should be made to ensure the supply of water and electricity and heat and fuel as well as the disposal of sewage, rainwater and waste, where necessary (Article 5 § 1 point 2 of the Building Law); occupational health and safety conditions (Article 5 § 1 point 5 of the Building Law) and health and safety of persons at the construction site (Article 5 § 1 point 10 of the Building Law).

33 Judgment of the Constitutional Tribunal of 20 April 2011, Kp 7/09, Legalis no. 316375 and S. Zwolak, *Wartości jako przedmiot ochrony policji budowlanej*, Studia Iuridica Lublinensia 2017, vol. 26, no. 3, p. 137.

the construction project with the local spatial development plan,[34] ensuring access to technology,[35] environmental protection,[36] protection of people with disabilities[37] and protection of monuments.[38]

Taking into account the purpose of the construction process which is the proper implementation and then use of building facilities, the safety of people and property should be considered the most important value protected in this process.[39] It is supposed to refer to building facilities[40] and people at the construction site[41] and in the building facility.[42] The indicated values are protected at every stage of the construction process which is confirmed by the content of Article 5 of Building Law which defines the so-called basic requirements for the preparation and implementation of the investment and the use of the building facility.[43]

The above indicates that the public interest, which is a conceptually open category, should also be taken into account in the construction process. The concept of 'public

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34 Z. Leoński, *Zasada wolności budowlanej i jej administracyjnoprawne ograniczenia*, in: *Kierunki rozwoju prawa administracyjnego. Podstawowe zagadnienia prawa budowlanego i planowania przestrzennego. Dziesiąte Niemiecko-Polskie Kolokwium Prawników Administratywistów, Poznań 8–12 września 1997 roku: referaty i głosy w dyskusji*, ed. H. Bauer, Poznań 1999, p. 359.

35 A building facility should be designed and constructed in a way that ensures access to telecommunications services, in particular within the extent of broad Internet access (Article 5 § 1 point 2a of the Building Law).

36 A building facility should be designed and constructed taking into account the requirements concerning, among others: appropriate energy performance of a building and rationalisation of energy use (Article 5 § 1 point 1 letter f of the Building Law).

37 A building facility should be designed and constructed with the aim of ensuring the necessary conditions for the use of public utility facilities and multifamily housing by people with disabilities, including the elderly (Article 5 § 1 point 4 of the Building Law).

38 A building facility should be designed and constructed in accordance with the requirements referring to, among others: the protection of objects entered into the register of monuments and facilities under conservation protection (Article 5 § 1 point 7 of the Building Law). Cf. K. Zalasińska, *Interes indywidualny a interes publiczny – konflikt wartości w prawnej ochronie zabytków*, Ochrona Zabytków 2008, no. 2, pp. 83–87 and M. Błażewski, *Zasada wolności budowlanej w procesie budowlanym. Studium administracyjnoprawne*, Wrocław 2016, p. 68.

39 D. Sypniewski, *Bezpieczeństwo jako wartość podlegająca ochronie w procesie budowlanym*, in: *Aksjologia prawa administracyjnego*, vol. 2, ed. J. Zimmermann, Warszawa 2017, pp. 595 ff.

40 The safety includes: safety of construction (Article 5 § 1 point 1 letter a and Article 59a § 2 point 3 of the Building Law), fire safety (Article 5 § 1 point 1 letter b and Article 59a § 2 point 3 and Article 71 § 1 point 2 of the Building Law), safety of use (Article 5 § 1 point 1 letter c of the Building Law), flood safety (Article 71 § 1 point 2 of the Building Law). Cf. M. Błażewski, *Ochrona wartości w procesie budowlanym*, in: *Wartości w prawie administracyjnym*, p. 308.

41 The construction process should ensure health safety (Article 5 § 1 point 10, Article 18 § 1, Article 20 § 1 point 1aa and 22 point 3a–3b of the Building Law).

42 The owner or manager of the building facility is obliged to ensure the protection of people's lives in the facility building used (Article 61 point 2 of the Building Law).

43 Cf. Judgment of the Supreme Administrative Court of 12 June 2014, II OSK 89/13, LEX no. 1519434.

interest' as a general clause and an unspecified concept has been analysed many times both in literature[44] and jurisprudence.[45] It was then pointed out that the concept of public interest is a broad and vague concept. It undoubtedly covers the general interest and not individual interests only. It provides the opportunity to pursue the general interest but with respect for individual interests. The public interest is not the sum of individual members of the community, although it is related to it. It also does not reflect the interest of the state and its authorities.[46] It is a conceptual category independent of the type of entity that holds it. Therefore, the premise of the public interest requires respect for the values that are common to the entire society.[47]

In each case, the notion of public interes will be subject to individual evaluation. However, it is worth emphasising that the interpretation by public administration authorities of vague terms, providing room for interpretation, cannot be perceived by them as consent to their unrestricted interpretation. The rules, principles and values of a given branch of law, legal system as well as socially accepted non-legal rules constitute a reference point for determining the content of the concept of this interest in the individual dimension.[48] The control of determining the meaning of the public interest is important because its incorrect interpretation may limit the content of the individual interest.[49]

3. Resolving conflicts of interest and values in the construction process

Due to the conflicting interests in the construction process, their collision is inevitable. Thus, it is necessary to weigh them. Not only does the already indicated

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44 A. Wróbel, *Interes publiczny w postępowaniu administracyjnym*, in: *Administracja publiczna u progu XXI wieku. Prace dedykowane prof. zw. dr. hab. Janowi Szreniawskiemu z okazji Jubileuszu 45-lecia pracy naukowej*, Przemyśl 2000, pp. 701–702; Judgment of the Constitutional Tribunal of 25 February 1999, K 23/98, Legalis no. 43185; A. Żurawik, *Klauzula interesu publicznego w prawie gospodarczym krajowym i unijnym*, Europejski Przegląd Sądowy 2012, no. 12, p. 25; A. Żurawik, *„Interes publiczny", „interes społeczny" i „interes społecznie uzasadniony". Próba dookreślenia pojęć*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 2013, vol. 75, no. 2, pp. 57–70; A. Wilczyńska, *Interes publiczny w prawie stanowionym i orzecznictwie Trybunału Konstytucyjnego*, Przegląd Prawa Handlowego 2009, no. 6, pp. 50–51.

45 Judgment of the Voivodeship Administrative Court in Wrocław of 11 May 2022, IV SA/Wr 15/22, Legalis no. 2694022.

46 M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Warszawa 1986, pp. 35–36.

47 Judgment of the Voivodeship Administrative Court in Olsztyn of 2 June 2022, I SA/Ol 204/22, Legalis no. 2702614.

48 W. Szwajdler, *Ochrona prawna interesu indywidualnego w procesie budowlanym*, Toruń 1993, p. 30.

49 E. Modliński, *Pojęcie interesu publicznego w prawie administracyjnym*, Warszawa 1932, pp. 3–4.

interest of the investor and the public interest meet in this process, but also the interest of third parties which results from their rights to the property adjacent to the property of the investor.[50] Hence, the investor's implementation of the development title to his own real estate is to take into account not only the interest of the investor but also the public interest protected by the law and the interest of third parties which are not directly involved in the implementation of the investment. Their interest is expressed primarily in the need to provide them with the development title to their own real estate. It should be borne in mind that the implementation of the development title may have a negative impact on the possibility of using a real estate belonging to other entities.

Therefore, the construction process is about the protection of the individual and public interest which expresses the values related to the implementation of the construction project.[51] Consequently, the principle of freedom of construction is limited by the public interest[52] which has to be taken into account together with respecting individual interests that may be violated during the implementation of the investment.[53] In a state ruled by law there is a need to protect the interests of each of these groups. However, the regulation of mechanisms for legal protection of these interests is not an easy task[54] because the construction process is a complex set of organisational and legal activities aimed at implementing the land development title by means of the proper construction of a building facility while ensuring the protection of the rights of the property owner and the public interest.[55] The limits of these rights and interests result not only from the provisions of the Act – Building Law but also from the implementing acts to this Act.

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50 W. Szwajdler, *Zniesienie instytucji pozwolenia na budowę a prawo zabudowy nieruchomości gruntowych*, Toruń 2009, pp. 73–74.

51 Z. Leoński, *Zasada wolności budowlanej i jej administracyjnoprawne ograniczenia*, in: *Kierunki rozwoju prawa administracyjnego*…, p. 359; K.A. Wąsowski, *Zakres praw autorskich autora projektu zamierzenia architektoniczno-urbanistycznego*, in: *Prawne aspekty procesu inwestycyjnego*, eds. M. Cherka, F. Elżanowski, K. Wąsowski, Warszawa 2009, p. 234; K. Małysa-Sulińska, *Administracyjnoprawne aspekty inwestycji budowlanych*, Warszawa 2012, p. 26.

52 L. Bar, *Pozwolenie budowlane (jako instrument kształtowania stosunków społecznych)*, Przegląd Ustawodawstwa Gospodarczego 1969, no. 2, p. 54.

53 T. Asman, J. Dessoulavy-Śliwiński, E. Janiszewska-Kuropatwa, K. Kucharski, A. Plucińska-Filipowicz, J. Siegień, *Prawo budowlane. Komentarz*, ed. Z. Niewiadomski, Warszawa 2011, p. 6; S. Zwolak, *Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 13 września 2016 r. (II OSK 3028/14) dotycząca uwzględnienia interesu właściciela obiektu budowlanego oraz wartości prawem chronionych w przypadku zmiany sposobu użytkowania obiektu*, Studia Iuridica Lublinensia 2018, vol. 27, no. 2, p. 181.

54 K. Kucharski, *Ochrona prawna interesu indywidualnego w procesie inwestycyjno-budowlanym dróg publicznych w Polsce. Zagadnienia administracyjnoprawne*, 2020 [Legalis database].

55 W. Piątek, in: *Prawo budowlane. Komentarz*, ed. A. Gliniecki, Warszawa 2012, p. 56.

Of course one cannot assume that the public interest always has to be opposed to the interests of individuals. However, one must be aware that there may be conflicts between these interests.[56]

The best solution to potential conflicts would, of course, be to indicate the priority of a specific interest in legal provisions which would oblige public administration authorities to determine this priority by means of interpretation of the law. However, a situation in which the authority applying the law, without a requirement included in an act, gives priority to one of the interests by means of *a priori* interpretation, especially when the public interest would always be privileged, is not acceptable.[57]

Another way of resolving conflicts in the construction process is the pursuit of public administration authorities to harmonise those interest which do not exist in the relationship of superiority and subordination. As emphasised by the Constitutional Tribunal, 'the public interest' did not take precedence over the interest of an individual. Despite the fact that the implementation of construction investments is a manifestation of the exercise of constitutional freedoms and rights, it remains under the supervision of the state guaranteeing the protection of the public interest and the rights of third parties. Therefore, it is necessary for the authorities, applying the law in the construction process, to weigh these interests each time.[58]

The necessity to take care of the establishment of the right proportions, between the protection of the public interest and the restriction of the private interests of property owners exercising their development title, results from the above. Interference with the right of ownership must be reasonably and appropriately proportionate to the objectives, which certain restrictions are introduced for.[59] However, if it turned out that the scale of interference with the right of ownership was not justified by the public interest or is disproportionate to it, it could be considered that we are dealing with an abuse of public authority.

Proper balancing of private and public interests is a guarantee of proportionality of limiting individual rights in order to implement the public interests.[60] The indicated restrictions may not undermine the development title to one's own real estate. Therefore, it is necessary to maintain the proportion of interference with the freedom of

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56 M. Wyrzykowski, *Pojęcie interesu*…, p. 50.

57 M. Zdyb, *Prawny interes jednostki w sferze materialnego prawa administracyjnego*, Lublin 1991, pp. 240–244.

58 Judgments of the Constitutional Tribunal of 8 October 2007, K 20/07, Legalis no. 87214 and of 26 November 2007, P 24/06, Legalis no. 88880.

59 Judgment of the Supreme Administrative Court of 17 April 2018, II OSK 1410/16, Legalis no. 1772004.

60 Judgment of the Voivodeship Administrative Court in Kraków of 30 June 2021, II SA/Kr 547/21, Legalis no. 2615343.

construction e.g. in terms of formal and legal requirements of the investor, so that its essence is not violated. These requirements are intended to protect the public interest and the interests of third parties defined in the construction process. Additional requirements, besides the need to protect the above-mentioned interest groups, should be considered a manifestation of excessive interference in the freedom of construction.

When determining the rules for implementation of investments, one should strive to appropriately balance conflicting values and constitutional principles. The principle of this weighing of interests result directly from the principle of proportionality expressed in Article 31 § 3 of the Constitution of the Republic of Poland. It results from the above that interference with the sphere of the right to real estate must remain in a reasonable and appropriate proportion to the indicated purposes.[61] At the same time, one should be guided by care for the proper and harmonious coexistence of the members of the community which includes both the protection of the interests of individuals and specific social goods, including public property.[62]

The freedom to implement a construction project is limited mainly by means of legal regulatory measures.[63] The primary measure limiting the principle of the freedom of construction is the obligation to obtain a building permit.[64] Another means of protecting the legal interest is the requirement to notify the intention to carry out construction works. It enables the architectural and construction administration authority to assess whether the construction project complies with the law and whether it does not violate the public interest.[65] The violation of legal provisions protecting the public interest, by means of notifying the intention to carry out construction or construction works, results in the authority's obligation to raise an objection by means of an administrative decision.[66] However, the indicated regulatory measures should not be perceived as diminishing the libertarian nature of the development title. This is only a manifestation of preventive regulation, of the execution of construction works, aimed at determining the compliance of a construction project with the provisions of the law, the public interest and the interests of third parties, by public administration authorities.[67]

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61 Judgment of the Supreme Administrative Court of 4 January 2010, II OSK 1708/09, Legalis no. 222560.

62 See Judgment of the Constitutional Tribunal of 12 January 1999, P 2/98, Legalis no. 43175.

63 Z. Leoński, *Zasada wolności budowlanej i jej administracyjnoprawne ograniczenia*, in: *Kierunki rozwoju prawa administracyjnego*…, p. 359; Judgment of the Voivodeship Administrative Court in Gorzów Wielkopolski of 2 April 2008, II SA/Go 99/08, Legalis no. 157882.

64 Judgment of the Voivodeship Administrative Court in Kraków of 30 April 2008, II SA/Kr 159/08, Legalis no. 161188.

65 Judgment of the Supreme Administrative Court of 27 April 2007, II OSK 688/06, Legalis no. 110428.

66 Judgment of the Supreme Administrative Court of 24 March 2009, II OSK 398/08, Legalis no. 220295.

67 W. Szwajdler, *Ochrona prawna interesu*…, p. 117.

4. Preventive nature of the provisions of Building Law

As stipulated by the legislator, the principle of freedom of construction may only be executed in a manner consistent with legal provisions.[68] In this way it is indicated that the protection of values resulting from the provisions of Building Law is of a preventive nature. The applicable regulations indicate which values are subject to protection and the manner in which it is to be executed as well as the authorities obliged to ensure the protection of these values in the construction process.

The entities responsible for ensuring the protection of the values protected in the construction process are primarily administrative authorities operating in the field of construction, i.e., architectural and construction administrative authorities and construction supervision authorities and participants in the construction process[69] as well as persons responsible for the proper use and maintenance of building facilities, i.e., the owner and the building facility manager.

Preventive protection of fundamental values is ensured at every stage of the construction process. The basic duties in this respect at the investment design stage are performed by the architectural and construction administration authorities which issue building permit decisions and accept the notification of the intention to carry out construction works.[70] Then, the leading role in this respect is played by the construction supervision authorities which supervise the proper implementation of the investment. The indicated authorities are obliged to supervise and control compliance with the provisions of the Act – Building Law.[71]

Other entities that ensure protection of the values regulated by Building Law are the participants of the construction process, i.e., the investor who is responsible for organising the construction process, taking into account the safety and health protection rules contained in the regulations, and persons performing independent technical functions in construction engineering, i.e., persons with appropriate knowledge confirmed by building qualifications.[72] The first person in this regard is

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68 *Prawo budowlane z umowami w działalności inwestycyjnej. Komentarz*, ed. H. Kisilowska, Warszawa 2008, p. 29.

69 According to Article 17 of the Construction Law, the participants in the construction process are: the investor, the investor's supervision inspector, the designer and the construction manager or works manager.

70 J. Smarż, *Pozwolenie na budowę jako wyraz troski o dobro wspólne*, in: *Służąc dobru wspólnemu*, eds. K. Kułak-Krzysiak, J. Parchomiuk, Lublin 2016, pp. 251–266 and J. Smarż, *Pozwolenie na budowę versus „zgłoszenie z projektem" w świetle obowiązujących przepisów*, in: *Nieruchomości – aktualne problemy prawne*, ed. J. Smarż, Radom 2016, pp. 134–147.

71 Article 81 § 1 point 1 of the Building Law.

72 J. Smarż, *Zmiana profesjonalnych uczestników procesu budowlanego w trakcie realizacji inwestycji*, Budownictwo i Prawo 2018, no. 3, pp. 3–5 and eadem, *System nadawania uprawnień budowlanych oraz*

the designer who develops a construction design that meets the basic requirements of Article 5 of Building Law.[73]

The construction and works manager and possibly the investor's supervision inspector, if appointed, ensure compliance with the values protected by the provisions of Building Law at the investment implementation stage. These entities supervise the safety and health protection during construction works.

The last stage of the construction process is the stage of maintaining the building facility during which the owner and manager of the building facility are responsible for preventing the emergence of any threats to the values protected by the provisions of Building Law.[74] The basic method of preventive action of the indicated entities, within the framework of the maintenance of building facilities, is the obligation to carry out periodic inspections of the technical condition of the building facility. The conditions for proper maintenance of a building facility result primarily from Article 61 of Building Law which requires ensuring safe use of the facility, preventing the occurrence of a threat to human life and health, property safety or the environment. The obligation to conduct ongoing periodic inspections and repairs is one of the elements of preventing the emergence of a threat. Implementation of these obligations is subject to control by construction supervision authorities.

The freedom to maintain a building facility is limited by legal provisions which impose appropriate obligations on the owner or the manager. Their implementation is aimed at protecting: the life and health of people, safety of property and the environment, proper technical condition and aesthetic of the building facility.[75] The obligations of these entities result directly from the law or administrative decisions.

Conclusion

The main purpose of the construction process, regulated by the provisions of the Act – Building Law, is the proper implementation of the investment project and then maintaining the building facility in the proper technical and aesthetic condition. This process, as it results from the analysis of the title issue, is subject to

nadzór nad wykonywaniem zawodu inżyniera jako wyraz troski o bezpieczeństwo publiczne, in: *Aksjologia prawa administracyjnego*, vol. 2, pp. 619–629.

73 Article 5 of the Building Law.

74 Articles 61–72a of the Building Law.

75 M. Błażewski, *Zasada wolności użytkowania obiektu budowlanego w procesie jego utrzymania*, Folia Iuridica Universitatis Wratislaviensis 2015, vol. 4, no. 1, p. 320.

significant restrictions resulting from the applicable regulations. They introduce, among others, restrictions on the possibility of undertaking construction works, the obligation to meet the basic requirements during design and construction as well as the maintenance of building facilities and requirements regarding the principles of organising the construction process.

The indicated restrictions have been introduced in order to protect values, the catalogue of which is very wide, although unfortunately it does not result directly from the content of the provisions of Building Law. It can only be interpreted from Article 5 of the Act. The safety of people and property is to be considered the primary value that is to be protected in the construction process.

The analysis of the provisions of Building Law leads to the conclusion that these restrictions are not only in the interest of the investor but also, and perhaps above all, in the public interest. It may seem that we are dealing with a conflict of these interests in this case, however in reality it cannot be assumed that the relationship of these interests is always based on the opposite. The implementation of the public interest brings benefit and ensures security for the investor himself as well. In the event of conflicts arising during the construction process, their resolution is the responsibility of public administration authorities that ensure compliance with the provisions of Building Law. Attention should also be paid to the preventive nature of the provisions of Building Law which are intended to eliminate potential conflicts.

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Commercial operations of municipalities in housing development. On the conflict between self-reliance and serving people and sufficiency of law

Działalność gospodarcza gminy w zakresie budownictwa mieszkaniowego. O konflikcie między samodzielnością i służbie ludziom a legalnością

Хозяйственная деятельность гмины в сфере жилищного строительства. О конфликте между самостоятельностью и служением населению и законностью

Господарська діяльність громади в галузі житлового будівництва. Про конфлікт між незалежністю та служінням людям і законністю

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Summary: This article deals with the relationship between three specific problems. These problems include legal issues related to running a business by municipalities, activities of municipalities in housing construction and municipal housing programmes (MHPs) as a manifestation of the legal and organizational independence of municipalities. In order to obtain reliable results of research in this area, the author decided to analyse the applicable standards and regulations regarding these issues and the views of the doctrine. In both cases, he observed that there are no detailed legal regulations relating to this issue, and thus there is also no in-depth analysis of this problem in the doctrine of legal sciences. All this resulted in the formulation of two types of conclusions. The existing regulations were assessed with the indication of their significant shortcomings. Moreover, conclusions were formulated regarding changes that the legislator should introduce to the Polish legal system to aid municipalities in meeting the housing needs of local communities. This work uses the method of analysing the legal text and, to a limited extent, the dogmatic approach.

Key words: municipality, commercial operations, municipal economy, housing development, legitimacy of operations

Streszczenie: Artykuł jest poświęcony relacjom, jakie zachodzą w ramach trzech problemów szczególnych. Należą do nich: problemy prawne związane z prowadzeniem działalności gospodarczej przez gminy, działanie gmin w zakresie budownictwa mieszkaniowego oraz gminne programy mieszkaniowe jako przejaw samodzielności prawnej i organizacyjnej gmin. Aby otrzymać miarodajne wyniki prac badawczych, Autor przeanalizował obowiązujące normy i przepisy dotyczące tych kwestii oraz poglądy doktryny. W obydwu przypadkach zaobserwowano brak szczegółowych regulacji prawnych odnoszących się do tej problematyki, a co za tym idzie brak pogłębionej analizy tej problematyki w doktrynie nauk prawnych. To doprowadziło do sformułowania dwóch rodzajów wniosków. Oceniono regulacje obowiązujące, wskazując ich istotne mankamenty i braki, a także sformułowano wnioski w zakresie tego, jakie zmiany powinien wprowadzić do polskiego systemu prawnego ustawodawca, aby regulacje te ułatwiały funkcjonowanie gmin w zakresie zaspokajania potrzeb mieszkaniowych wspólnoty samorządowej.

Słowa kluczowe: gmina, działalność gospodarcza, gospodarka komunalna, budownictwo mieszkaniowe, legalność działania

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Резюме: Данная статья посвящена отношениям, возникающим в рамках трех конкретных проблем. К ним относятся: правовые проблемы ведения хозяйственной деятельности гминами, действия гмин в сфере жилищного строительства и муниципальные (гминные) жилищные программы как проявление правовой и организационной самостоятельности гмины. Для получения авторитетных результатов исследовательской работы, автор проанализировал существующие нормы и правила, касающиеся этих вопросов, а также воззрения доктрины. В обоих случаях было отмечено отсутствие детальных правовых норм, касающихся данного вопроса, и, соответственно, отсутствие глубокого анализа данной темы в доктрине юридических наук. Это привело к формулированию двух типов выводов. Была проведена оценка действующих регулирований с указанием их существенных недостатков и недоработок, а также сформулированы выводы о том, какие изменения должен внести законодатель в польскую правовую систему, чтобы эти регулирующие положения способствовали функционированию гмин в удовлетворении жилищных потребностей населения местного сообщества.

Ключевые слова: гмина, хозяйственная деятельность, коммунальное хозяйство, жилищное строительство, законность деятельности

Резюме: Стаття присвячена взаємозв'язкам, що виникають у межах трьох конкретних проблем. До них відносяться: правові проблеми, пов'язані з веденням господарської діяльності громадами, діяльність громад у сфері житлового будівництва та громадські житлові програми як прояв правової та організаційної самостійності громад. Для отримання достовірних результатів дослідження автор проаналізував чинні норми та нормативні акти щодо цих питань, а також доктрину. В обох випадках спостерігалася відсутність детального регулювання цього питання, а отже, відсутність поглибленого аналізу теми в доктрині правових наук. Це призвело до формулювання двох типів висновків. Було проведено оцінку існуючих нормативних актів, вказано на їх суттєві недоліки, а також сформульовано висновки щодо того, які зміни законодавець має внести до польської правової системи, щоб ці нормативні акти сприяли роботі гмін щодо задоволення житлових потреб громадської спільноти самоврядування.

Ключові слова: громада, господарська діяльність, міське господарство, житлове будівництво, законність дії

Introduction

The efficiency of operations of individual entities within the framework of public administration is a combination of several general factors, among which we should indicate the following basic components: explicitly specifying the entity performing operations, clearly describing the task to be completed and the implements to realize said task or transfer of appropriate financial and staff-organizational assets to be used to perform the task.

Among the plenitude of tasks which raise genuine concern, the ones related to satisfying housing needs emerge. The adopted model of operations divides these tasks between the government and the local self-governments. Furthermore, it should be indicated that the realization of such tasks involves various institutional and legal implements.

The aforementioned facts resulted in the ambiguity of the presented model of operations and said model lacking explicit statutory regulations, which would specify how a municipality, being one of the entities indicated by the legislator to satisfy

housing needs, should operate. Moreover, a question emerges of whether we are dealing here with commercial operations of municipalities or public-benefit activities. There are also significant factual issues related to such operations arising from the launch of investments in this area as well as the measures to be taken once residents live in such housing. This article aims to organize the legal issues related to running a business in the context of implementing municipal housing programmes (hereinafter: MHPs). This objective results from the fact that the Polish legislator has not yet fully regulated this issue. Therefore, municipalities must rely on partial regulations, which may lead to unintentional errors in implementing these programmes.

1. Satisfying housing needs as a task of municipalities

In the Polish legal system, a municipality is the basic organizational unit of local self-government. Therefore, in this case, we are dealing with a unit the closest to a citizen and, thus, one that performs all social tasks within the local reach that are not reserved by other branches of local self-government or state administration.[1] The above statement concerns the implementation of the constitutional principle of decentralization.[2]

The aforementioned fact results in the legislator bearing the obligation consisting of clearly specifying what tasks a given unit of local self-government will perform. A relevant list of such taks was stipulated in Article 7 of the Municipal Self-Government Act. The legislator clearly indicated that meeting a community's collective needs lies within a municipality's responsibilities and that these tasks cover, among others, the matters regarding municipal housing development.[3] Realization of these

1 Cf. Article 163 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dziennik Ustaw] 1997 no. 78, item 483 as amended, in relation to Article 6 (1) of the Act of 8 March 1990 on Municipal Self-Government, consolidated text: Journal of Laws 2023 item 40 as amended (hereinafter: MSGA).

2 The decentralization should be understood as "distributing administrative tasks (operations) among various organizations which are legal persons under public law," see S. Fundowicz, *Decentralizacja administracji publicznej w Polsce*, Lublin 2005, p. 28. These organizations are autonomous legal entities (churches and religious organizations, higher education institutions, the central bank), units of local self-government, units of special self-government or other decentralized entities (corporations governed by public law, publicly owned establishments or foundations governed by public law).

3 Cf. Article 7 (1) (7) of the MSGA.

tasks, their scope and the list of relevant implements are included in specific acts of substantive administrative law.

We should primarily refer to human needs in the search for the roots of satisfying housing needs. In reference to human needs and their hierarchy, psychology turns to Maslow's hierarchy of needs. Maslow described human needs by creating a pyramid of needs. This pyramid is founded on physiological needs, including food, shelter, clothes and procreation. Their character influences behaviour to the greatest degree – people work to meet these needs in the first place. For a person who has not satisfied their basic needs, all other needs disappear or are of secondary importance.[4]

Therefore, the need for shelter or housing is a basic need of human beings which determines their actions; only satisfying this basic need enables a person to consider higher needs, i.e. the need for safety, belonging and love, esteem or self-actualization. In our search for the legal sources to meet this need, we will have to explicitly refer to the axiological foundations for formulating the binding standards and legal provisions in this particular manner. Firstly, we should refer to the norms and precepts of the basic law. The Consitution clearly indicates that "Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen."[5]

The quoted rule is general in character. We should primarily notice that the Constitution's take on the issue is a result of the housing problems typical of our country, where such issues are far from being resolved. The social importance of these issues is so significant that they were reflected in the Constitution.[6] The above precept does not establish the right to housing and does not impart upon this right the nature of a legal right.[7] It does not formulate the strategic priorities of state policies, nor does it decide on the manner of implementation of said policies or oblige the state to guarantee housing to every citizen.[8] In this case, we are dealing with

4 A. Maslow, *Motywacja i osobowość*, Warszawa 2009, pp. 63–65.

5 Article 75 (1) of the Constitution of the Republic of Poland. When describing the issue, we must bear in mind that biological needs are necessary for survival, and psychological needs come into play once biological needs are satisfied. Gradation of needs is contractual. Nevertheless, we have to assume that basic needs are pursued until their satisfaction. Only after that will a human being work towards satisfying other needs using their talents and abilities. Meeting these needs is not contradictory. Here, we are dealing with mutual supplementation, which constitutes human development; for more information on the issue, see A. Maslow, *W stronę psychologii istnienia*, Poznań 2004, p. 39.

6 W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2007, p. 71.

7 Judgment of the Constitutional Tribunal of 29 September 2003, K 5/03, LEX no. 80985.

8 Cf. Judgment of the Constitutional Tribunal of 12 January 2000, P 11/98, LEX no. 39282; Judgment of the Constitutional Tribunal of 17 March 2008, K 32/05, LEX no. 358051 or Judgment of the Constitutional Tribunal of 17 December 2008, P 16/08, LEX no. 467442.

a programmatic norm which defines the state goals concerning housing policy; however, no exemplary measures to implement it are indicated. Within the framework of policies aimed to meet the housing needs of citizens, we should, in particular, indicate counteracting homelessness,[9] supporting the development of social housing consisting of erecting social/subsidized housing and adapting the existing buildings for this purpose as well as supporting the actions of citizens aimed at securing own housing.[10] The presented list should be perceived as the minimal obligations of the state (public authorities).[11]

The act of municipalities satisfying housing needs correlates with the obligations concerning "municipal housing development." These needs should be met twofold – through utilizing the existing housing infrastructure and new opportunities in this area through erecting new housing units to satisfy housing needs. Therefore, the measures concerning housing development will be one of the implements of meeting housing needs.

2. Municipal housing programmes as a form of satisfying housing needs

The legislator's statement that meeting housing needs is the task of public authorities in Article 75 (1) of the Constitution resulted in the invoked constitutional norm referring to not only the state and its bodies but to local self-governments.[12] Measures in this field may be implemented at the central or local level directly (e.g. tax credits) or indirectly (e.g. subsidies).[13]

This statement can be not only expanded but also defined more precisely by indicating that in line with Article 75 (1), the entities obliged to take action are not only the legislative bodies but also the bodies applying said law, including courts[14]

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9 Here we should refer to human dignity which can be severely damaged by homelessness as a social phenomenon, see M. Florczak-Wątor, *Obowiązek ochrony beneficjentów prawa do mieszkania jako „innego prawa majątkowego" w rozumieniu art. 64 ust. 1 i 2 Konstytucji RP*, Gdańskie Studia Prawnicze 2018, vol. 40, p. 174.

10 M. Florczak-Wątor, *Art. 75. Zaspokajanie potrzeb mieszkaniowych*, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, 2nd ed., 2021 [LEX database].

11 Judgment of the Supreme Court of 8 September 2020, V CSK 532/18, LEX no. 3051766.

12 W. Sanetra, *Prawo do pracy, polityka zatrudnienia i polityka rynku pracy*, in: *System Prawa Pracy*, vol. 8. *Prawo rynku pracy*, ed. M. Włodarczyk, Warszawa 2018, p. 171.

13 M. Wierzbowski, *Prawo administracyjne*, Warszawa 2009, p. 372.

14 Such entities must operate within the framework laid down by regulations and the material and legal premises for resolving the issues projected in such regulations, e.g. in reference to adjudicating the

and administrative bodies (including local self-government units). These obligations may also be expanded to private entities such as housing cooperatives because they bear special legal status given their role in the realization of tasks indicated in Article 75 (1) and constitute "one of the forms of realization of the task consisting of satisfying housing needs of an individual,"[15] whereby the role of housing cooperatives is instrumental.[16] However, transferring these obligations in full to private persons[17] or realization of these tasks in violation of the existing ownership rights of housing cooperatives is unacceptable.[18]

The forms which can be described as hybrid are a solution which fits in with the implementation of the state policy in the discussed area; in the case of these forms, we are dealing with the participation of the Treasury, the National Real Estate Assets and local self-government units. Historical examples of such cooperation include social housing associations (SHAs), and a current example is social housing initiatives (SHIs).[19]

However, until now, municipal housing programmes were not comprehensively regulated at the statutory level, unlike, for instance, the municipal tasks concerning public roads[20] or the responsibilities regarding the education system.[21] In essence, the legislator provides no comments regarding this aspect. It appears that the causes for this state of affairs lie primarily in the incidentalness of such solutions, where only several municipalities in our country decided to launch such programmes simultaneously with providing other forms of housing support. Secondly, this may be due to the fact that MHPs would become a competition to the already existing programmes of the state administration or within the framework of SHAs (formerly) and SHIs (currently). Nevertheless, while rejecting the assumptions in this area, we may explicitly indicate that the lack of strict statutory standards requires a municipality to operate on the basis of the existing standards and regulations. This, in turn, results in expanding independence and self-governance of a municipality in this

right of the evicted tenant to social housing, see Resolution of the Supreme Court of 19 May 2000, III CZP 4/00, LEX no. 40098.

15 Cf. the aforementioned Judgment of the Constitutional Tribunal of 17 December 2008, P 16/08.

16 L. Garlicki, M. Derlatka, *Art. 75*, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 2, ed. L. Garlicki, M. Zubik, 2nd ed., 2016 [LEX database].

17 Judgment of the Constitutional Tribunal of 10 October 2000, P 8/99, LEX no. 44406.

18 Judgment of the Constitutional Tribunal of 29 May 2001, K 5/01, LEX no. 48040.

19 This entity operates under Article 23–33 of the Act of 26 October 1995 on social forms of housing development, consolidated text: Journal of Laws 2023 item 790 as amended (hereinafter: SFHD Act).

20 Cf. Article 7 (1) (2) of the MSGA in relation to Article 7 of the Act of 21 March 1985 on national road network, consolidated text: Journal of Laws 2023 item 645.

21 Cf. Article 7 (1) (8) of the MSGA in relation to Article 8 (15) and Article 10 (1) of the Education Law Act of 14 December 2016, consolidated text: Journal of Laws 2023 item 900 as amended.

area but, simultaneously, may become a trap leading to acting without a legal basis, i.e. not meeting the legitimacy of operations.

These programmes may be implemented using two models: through the participation of a private entity (a developer) or by a municipality implementing the programme independently using its assets and means. In the first model, it is possible to use the know-how of a private operator who transfers some of the newly constructed residential units to the municipality to satisfy the housing needs of the local community in exchange for granted real estate, for instance.[22] Thus, it appears that the public-private partnership is an appropriate legal form for such operations.[23]

Implementation of MHPs by companies established for this purpose or existing ones[24] and not by the budgetary entities[25] or the municipalities themselves appears to be a proper solution.[26] A municipality transfers the risk related to the implementation of a programme,[27] particularly the financial risk, to a subordinate yet financially self-sufficient entity concerning obligations for which the municipality is liable only up to the value of the transferred assets instead of being liable without limitations as the case would be if a budgetary entity or municipality implemented an MHP directly.

The analysis of MHPs enables us to ascertain that municipalities carry out these programmes as independent operations. The lack of dedicated acts results in municipalities developing these programmes independently. These programmes target the residents of municipalities and persons interested in changing their place of residence and moving to a given municipality. Thus, an attractive form of financing is being introduced under which the deposit payments made by programme participants are used by the entity implementing the programme to cover the financial

22 A situation in which the newly developed residential units (or the residential units transferred by the founding municipality), frequently located in commercially desirable areas, are rented on a commercial basis, and the funds collected in such manner are allotted towards statutory activities, i.e. "housing development, renovation and modernization of facilities destined for satisfying housing needs," is a different example, see U. Legierska, *Działania gminy na rzecz zaspokojenia potrzeb mieszkaniowych jej członków*, in: *Prawne problemy samorządu terytorialnego z perspektywy 25-lecia jego funkcjonowania*, eds. B. Jaworska-Dębska, R. Budzisz, Warszawa 2016, p. 229.

23 The Act of 19 December 2008 on public-private partnership, consolidated text: Journal of Laws 2023 item 30 as amended.

24 Cf. Article 9 (1) of the Municipal Economy Act of 20 December 1996, consolidated text: Journal of Laws 2021 item 679 (hereinafter: MEA).

25 Cf. Article 2 of the MEA.

26 For more information on the forms of engaging in municipal economy, see W. Gonet, *Uwagi o formach prowadzenia gospodarki komunalnej*, Samorząd Terytorialny 2008, no. 7–8, p. 65.

27 It appears that the indicated risk concerns financial, organizational, technical and legal issues.

obligations in this area. These issues should be governed in detail by appropriate regulations for allotting residential units under an MHP. This solution should not be combined with renting premises, which are a part of the housing composition of municipal resources.[28]

3. Engaging in commercial operations concerning municipal housing programmes

In reference to the Constitution, we should indicate that local self-government units carry out public tasks not reserved by other public authorities under relevant acts or legislation.[29] The legislator simultaneously decided that the broadest possible range of activities of these units is tied to the operations of municipalities which perform all public tasks not reserved by other units of local self-government.[30] Under such conditions, we are dealing with a reflection of the principle of subsidiarity expressed in the preamble to the Constitution, stating that public tasks should be performed at the lowest level and their legal and organizational transfer should be effected solely to improve organizational and technical capabilities of their performance.[31] The principle of subsidiarity should lead to the greatest possible reinforcement of the competences of local self-government.

Realization of the statutory tasks of a municipality consistent with the principle of subsidiarity is reflected in the statement that a unit is obliged to engage in commercial operations related to the implementation of the tasks pertaining to meeting the collective needs of its residents.[32] The catalogue of these tasks is indicated in Article 7 (1) of the MSGA, which presents the exemplary list of a municipality's

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28 Supervising authority's Resolution of the Podlasie Governor of 26 October 2020, NK-II.4131.110.2020. BG, LEX no. 3233922.

29 Article 163 of the Constitution of the Republic of Poland.

30 Article 164 (3) of the Constitution of the Republic of Poland.

31 Cf. M. Małecka-Łyszczek, *Zasada subsydiarności jako zasada ogólna prawa administracyjnego*, in: *Jednostka w demokratycznym państwie prawa*, ed. J. Filipek, Bielsko-Biała 2003, p. 368; I. Lipowicz, *Samorząd terytorialny XXI wieku*, Warszawa 2019, p. 141; D. Milczarek, *Subsydiarność – próba balansu*, in: *Subsydiarność*, ed. D. Milczarek, Warszawa 1998, p. 319.

32 A public matter should be understood as "any activity of public authorities (and their bodies), persons performing public functions and self-governments as well as certain activities of other persons and organizational units which are related to implementing public tasks and managing public assets understood as public funds within the meaning of regulations on public funds," see H. Izdebski, *Samorząd terytorialny. Podstawy ustroju i działalności*, Warszawa 2004, p. 209.

responsibilities,[33] including municipal housing development and, thus MHPs. In the case of the indicated area, we should also bear in mind that the operations of a municipality consist of both realizations of public tasks and activities extending beyond said tasks, i.e. commercial operations.[34]

When assessing whether a given type of operation of a municipality consists only of performing public tasks or is a commercial operation, we should individually consider each case. A guide of sorts in this regard is the statement that "if a municipality performs public tasks (public administration tasks) for the benefit of the general populace using legal means of an authoritative nature appropriate for a state authority, the municipality performing said tasks acts as a public authority body and does not engage in commercial operations."[35] Furthermore, under Article 9 (2) of the MSGA, a municipality or other municipal legal person may engage in commercial operations exceeding the scope of public utility tasks only in the cases stipulated in the MSGA. The aforementioned is supplemented by the assertion that the public utility tasks[36] are own tasks of a municipality carried out to continuously satisfy the collective needs of the population on an ongoing basis by rendering commonly available services.

In light of the above facts, it appears that the operations of municipalities concerning local housing programmes do not fall under public-benefit activities but under commercial operations. This is potentially confirmed by an allusion to the MEA, according to which a municipality can engage in commercial operations, e.g. using a limited liability company to carry out MHPs which are in each instance realized by municipal companies, existing or specially established for this purpose in the area of public-benefit activities.[37] The statement that Article 9 (2) of the MSGA stipulates that, in principle, a municipality implements its tasks under commercial operations,[38] provided that its tasks can be an object of commercial and non-commercial activity and the commercial operations of a municipality

33 Ruling of the Voivodeship Administrative Court in Gliwice of 30 March 2020, III SA/Gl 1102/19, LEX no. 3015326.

34 Ruling of the Voivodeship Administrative Court in Gorzów Wielkopolski of 30 October 2019, I SA/Go 589/19, LEX no. 2742557.

35 Ruling of the Voivodeship Administrative Court in Warszawa of 21 April 2021, IV SA/Wa 2661/20, LEX no. 3184738.

36 Article 9 (4) of the MSGA.

37 For more on this form, see G. Kozieł, *Forms of Commercial Companies and Partnerships Designed for Municipal Services Management by the Commune in Polish Law: The Legislation as It Stands (de lege lata) and as It Should Stand (de lege ferenda)*, Lex Localis 2020, vol. 18, no. 4, pp. 675–689.

38 Ruling of the Administrative Court in Szczecin of 26 March 2019, I AGa 215/18, LEX no. 2668198.

cannot exceed realizing public-benefit tasks unless stipulated otherwise elsewhere,[39] reinforces this thesis. We should also bear in mind that "engaging in commercial operations cannot obstruct and hinder public goals and cannot excessively occupy a municipality; the fact that specific public tasks entrusted to a municipality are related to developing and establishing conditions for commercial operations conducted by other entities is also not without significance."[40]

Adopting the assumption that MHPs are commercial operations, we must juxtapose said assumption with the features of commercial operations indicated in Article 3 of the Act of 6 March 2018 – Entrepreneurs Law.[41] These features are the manner of organization, operating to generate income, acting in own interest and continuity.

In the case of the first feature, we can be certain that the condition regarding the manner of organization is met. It is understood as "using particular material components (e.g. real assets or moveable assets) or intangible components (e.g. know-how, reputation, rights to intangible assets) which are functionally and economically combined by a given person into a single arranged system enabling participation in the global economy."[42] However, we must note that the remark that a municipality is not, in principle, a commercial entrepreneur but may be considered an entrepreneur if it engages in commercial operations in a manner described hereinabove[43] does not apply under such circumstances because MHPs are implemented by municipal companies, not directly by municipalities. Therefore, once again, it appears that this issue should be explicitly connected to the invoked article of the Entrepreneurs Law in a separate act to resolve any emerging dubitations.

Another feature of commercial operations is the fact that they are intended to produce economic gain. In this case, the goal of generating profit,[44] even if a given type of operation is not always objectively profitable,[45] is crucial. We should bear in mind that the opposite of a gainful activity is a non-gainful activity, i.e. the

39 Ruling of the Administrative Court in Warszawa of 29 September 2020, I ACa 350/20, LEX no. 3113190.

40 Ruling of the Voivodeship Administrative Court in Olsztyn of 8 September 2011, I SA/Ol 458/11, LEX no. 966077.

41 Consolidated text: Journal of Laws 2023 item 221 as amended (hereinafter: ELaw).

42 A. Kruszewski, *Przepisy ogólne*, in: *Prawo przedsiębiorców. Komentarz*, ed. A. Pietrzak, Warszawa 2019, p. 49.

43 Cf. Ruling of the Court of Appeal in Poznań of 2 February 2022, III AUa 938/20, LEX no. 3330083, in line with the qualities indicated in ELaw.

44 By profit, we mean the profits generated by this activity and not coming from other sources such as social insurance, see Ruling of the Court of Appeal in Lublin of 16 February 2021, III AUa 1116/20, LEX no. 3305900.

45 Ruling of the Court of Appeal in Warszawa of 9 November 2020, III AUa 2020, LEX no. 3115004.

activity whose goal is not generating profit, even if some unintentional profit can be generated when engaging in such activity.[46] In analysing the MHPs in terms of indicated features of commercial operations, we come across a problem. Realizing these programmes is not commercial activity primarily aimed at generating profit. Financial analyses of this issue are not available[47] or are incomplete at the time of realization of municipal housing programmes. However, it must be noted that an MHP is an investment to satisfy the housing needs of residents – it is not a strictly gainful activity. It also appears that this issue should be regulated, provided that the indicated activity will generate profit solely to fund said activity,[48] e.g. creating the opportunity for launching further investments, covering the ongoing expenditures (including salaries of employees) or its other elements. Therefore, this minimal profit should compensate for the ongoing activity, and this type of operation should not burden a municipality or company performing said activity.

The next characteristic of commercial operations is acting in own name. However, this phrasing should not be equated with personal activities because there are no counterindications to using other entities under commercial operations.[49] Therefore, a particular municipality serves as an implementer of a given programme, and a municipal company is a tool to implement a given programme. Also, in this case, the condition indicated as essential for considering certain activities as commercial is fulfilled.

The last indicated feature of commercial operations is their continuity. This aspect also presents certain issues. It must be once again emphasized that the essence of MHPs consists not only of erecting specific buildings and releasing them for use by residents; we are tackling a much more complex and time-consuming process. The following statement seems to sum up the issue adequately: "conducting commercial operations may also consist of performing actions aimed at developing and materializing economic actions forming a specific type of operations such as searching for customers, posting commercials advertising of the operation or

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46 Ruling of the Voivodeship Administrative Court in Poznań of 7 April 2021, I SA/Po 201/21, LEX no. 3176419.

47 The sole components frequently pertain to the contribution in kind to operations of such company, i.e. the real property handed over for investment, costs of loan or financial contributions of programme participants.

48 Cf. Article 24 (2) of SFHD Act, which stipulates that profits generated by SHIs cannot be shared among partners or members and are utilized in full to cover the costs of statutory activities of these entities.

49 A. Powałowski, *Wykonywanie działalności gospodarczej we własnym imieniu*, Gdańskie Studia Prawnicze 2016, vol. 36, p. 360.

settling the related affairs."[50] Therefore, the implementation of an MHP is more expansive: the investment begins with a municipality commissioning a municipal company to implement the programme, i.e. to launch the investment and concludes with the contractual maturity date or transfer of the ownership rights from the municipal company to the programme participant after the period strictly defined in regulations. It appears that owing to such premises, this type of operations/activity becomes rather permanent and stable, not limited to one-time, occasional or sporadic projects,[51] which simply erecting and releasing a building for residential use would be. Furthermore, selecting the form of a commercial partnership or company is correct and proper due to the involvement of capital of a partner or partners and becoming liable only up to the contribution amount.[52]

Under such circumstances, it should be underlined that the ascertainment pertaining to assessing whether we are or are not dealing with commercial operations is a factual ascertainment. Only then should we relate these operations with specific legal qualifications while simultaneously bearing in mind that commercial operations are legally-defined circumstances which must be assessed based on particular factual conditions bearing or not bearing hallmarks of such operations.[53]

It should be underlined that we are considering the complexity of the municipality's status as an entrepreneur. For the purpose of this study, it has been assumed, somewhat directly, that these conditions are met and thus the titular claim regarding a municipality being engaged in commercial operations. These operations should be defined more precisely as the municipality's commercial operations resulting from the activities of a corporation of public law; this statement is deeply rooted in judicial decisions.[54] It should be underscored that in describing the permissible extent of the municipality's commercial operations, we should primarily consider the goal of the municipality's operations resulting from the constitutional order.[55] Realizing certain constitutional objectives specified at the statutory level is impossible without assuming the role of an entrepreneur and, therefore, without engaging in commercial operations.

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50 Ruling of the Court of Appeal in Lublin of 27 January 2021, III AUa 933/19, LEX no. 3126688.

51 Ruling of the Voivodeship Administrative Court in Poznań of 8 April 2021, I SA/Po 229/21, LEX no. 3172268.

52 A. Wojtkowiak, *Spółki prawa handlowego jako przedsiębiorcy wykonujący działalność o charakterze użyteczności publicznej*, Przegląd Prawa Publicznego 2013, no. 1, p. 8.

53 Ruling of the Court of Appeal in Lublin of 21 April 2021, III AUa 15/21, LEX no. 3184339.

54 Cf. Resolution of the Supreme Court of 30 November 1992, III CZP 134/92, LEX no. 3850 or Resolution of the Supreme Court of 9 March 1993, III CZP 156/92, LEX no. 3892.

55 Resolution of the Supreme Court of 14 March 1995, III CZP 6/95, LEX no. 4169.

It appears necessary to designate an impassable border in the indicated area concerning what a municipality can do under applicable legal provisions and what a municipality cannot do due to the binding norms and regulations despite the prohibited operations being similar to the usual activities of municipalities. Thus, it appears that one such type of operation related to housing development in a municipality is the activity of a municipality (and its subordinate units, i.e. municipal companies) in the capacity of a developer. Permissible operations of municipal companies that implement MHPs cannot consist of strictly property development operations, i.e. such entities cannot erect housing units and sell them on the market. Operations of this type, i.e. the activity in the public law field, cannot have hallmarks of commercial operations, which can contribute to disturbing free competition.[56] Whether such operations would disturb and affect free competition or not should be decided case by case. Still, we can indicate without greater doubt that if such types of operations were carried out under the currently existing legal state by a municipal company, certain elements could be distinguished according to which such operations disturb processes of the free market.

Therefore, in light of the above facts, we must once again demand that the issue of operations involving the implementation of municipal housing programmes be addressed in detail in the normative regulatory solutions. The indicated act leaves room for activity in the capacity of a developer; such activity should be regulated precisely, especially in terms of operations which could limit, hinder or obstruct free competition. Furthermore, we should advocate for the profits generated by such operations to be assigned solely towards the activity related to the implementation of MHPs or towards operations in other areas related to satisfying the housing needs of municipality residents.

Conclusions

The presented issues are immensely complex. The limited nature of the study resulting from the editorial requirements prevented us from indicating all specific problems related to this subject. However, it must be emphasized that the operations involving housing development, as exemplified by municipal housing programmes, fits in with the notions of self-reliance of a municipality and commercial operations conducted by this type of entity. This self-reliance is largely due

56 Judgment of the Court of Justice of 29 October 2015, C 174/14, LEX no. 1817703.

to the lack of an appropriate act addressing these issues. Municipalities carrying out the aforementioned tasks operate in a peculiar void that must be dealt with by the municipalities. Lack of a clear framework under which these entities should operate results in municipalities functioning somewhat outside the general norms and legal regulations. This fact, in turn, results in the illegitimacy of operations. Serving people, residents of a given local community, through satisfying housing needs proceeds autonomously, through frequently copying incorrect operational patterns of other municipalities. Therefore, it appears appropriate to advocate for adopting a separate act regulating these issues (as an independent act or within the framework of other regulations). From a psychological point of view, it could serve as a stimulus for more daring operations of Polish municipalities.

The following specific conclusions can be formulated based on this study. Firstly, legal and organizational measures to meet housing needs in the Republic of Poland are ineffective. The tools created for this purpose offer many solutions, but their ad hoc nature and lack of continuity lead to unsatisfactory results. Secondly, although measures at the national level are ineffective and the created instruments do not work, the legislator does not help municipalities in this respect by creating regulations that municipalities could implement. On the one hand, in this case, we see the legal and organizational independence of municipalities. On the other hand, there is a vacuum, the lack of an act dedicated to municipalities. It can even be said that the government administration does not treat local governments as partners who can help implement these tasks but sees them as competition. Thirdly, municipalities, acting without dedicated tools in this area, must create legal and organizational solutions on their own. This, in turn, means that they rarely decide to act in this area, especially since it involves high financial costs. Therefore, it is necessary to clearly indicate the need for a legislative act to fill the existing vacuum.

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The dilemmas of automated decision making in administrative proceedings – comments in the context of § 14 1b of the Administrative Procedure Code

Dylematy automatycznego podejmowania decyzji w postępowaniu administracyjnym – uwagi na tle art. 14 § 1b Kodeksu postępowania administracyjnego

Дилеммы автоматического принятия решений в административном производстве – комментарии к статье 14 § 1b Административного-процессуального кодекса

Дилеми автоматичного прийняття рішень в адміністративному провадженні – уваги з перспективи ст. 14 § 1б Кодексу адміністративного провадження

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Summary: The issue of automated administrative decision making sparks numerous doubts related to the regulations concerning the legal basis for such solution and the issue of ensuring appropriate procedural guarantees for the participating parties. The doctrine lacks consistent assessments regarding interpretation of § 14 1b of the Administrative Procedure Code which projects the possibility of handling cases utilizing an automatically generated missive. Through utilizing the dogmatic method this study engages in the analysis and assessment of this provision in terms of the capacity for automated decision making through utilizing artificial intelligence and its influence on the legal position of an individual. Furthermore, this study presents the postulates concerning regulating algorithmic decision making as a separate mode of jurisdictional proceedings.
Key words: automated decision issuing, algorithmic decision making, automated administrative act

Streszczenie: Problematyka automatycznego podejmowania decyzji administracyjnych wywołuje wiele wątpliwości związanych z regulacją podstaw prawnych takich rozstrzygnięć oraz zapewnieniem odpowiednich gwarancji procesowych stronom. W doktrynie brak jest zgodnych ocen co do interpretacji treści art. 14 § 1b Kodeksu postępowania administracyjnego przewidującego możliwość załatwiania spraw z wykorzystaniem pisma generowanego automatycznie. W opracowaniu, przy zastosowaniu metody dogmatycznej dokonano analizy i oceny tej regulacji pod kątem możliwości wydawania decyzji automatycznie przy użyciu sztucznej inteligencji oraz ich wpływu na pozycję prawną jednostki. Przedstawiono również postulaty dotyczące regulacji trybu algorytmicznego podejmowania decyzji jako odrębnego trybu postępowania jurysdykcyjnego.
Słowa kluczowe: automatyczne wydawanie decyzji, algorytmiczne podejmowanie decyzji, automatyczny akt administracyjny

Резюме: Вопрос автоматического принятия административных решений вызывает много сомнений, связанных с регулированием правовой основы таких решений и предоставлением сторонам адекватных процессуальных гарантий. В доктрине нет единых оценок относительно толкования содержания статьи 14 § 1b Административного-процессуального кодекса, предусматривающей возможность урегулирования дел в форме автоматически генерируемого письма. В исследовании, используя догматический

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метод, проведен анализ и оценка данного нормативного акта с точки зрения возможности вынесения решений в автоматическом режиме с использованием искусственного интеллекта и их влияния на правовое положение физического лица. Также представлены постулаты регулирования порядка принятия алгоритмических решений как отдельного порядка юрисдикционного производства.

Ключевые слова: автоматическое принятие решений, алгоритмическое принятие решений, автоматизированный административный акт

Резюме: Питання автоматичного прийняття адміністративних рішень викликає чимало сумнівів, пов'язаних з врегулюванням правової основи таких рішень та надання відповідних процесуальних гарантій сторонам. У доктрині немає послідовних оцінок щодо тлумачення змісту ст. 14 § 1б Кодексу адміністративного провадження, який передбачає можливість врегулювати питання у формі автоматично сформованого листа. З застосуванням догматичного методу у дослідженні було проаналізовано та оцінено цей нормативний акт з точки зору можливості автоматичного винесення рішень за допомогою штучного інтелекту та їх впливу на правове становище особи. Також були викладені постулати щодо врегулювання алгоритмічного режиму прийняття рішень як окремого способу юрисдикційного провадження.

Ключові слова: автоматичне прийняття рішень, алгоритмічне прийняття рішень, автоматичний адміністративний акт

Introduction

Development of modern information-communication technologies and artificial intelligence is like a digital tornado based on a never-ending spiral of communication.[1] This development paves the way for modernizing operations of administrative bodies through introduction of automation of certain individual actions and procedures into realization of public tasks. This trend also encompasses the issue of algorithmic decision making (*ADM*).[2]

Computerization as such does not oppose the basic expectations towards the administrative procedures. However, applying technology may proceed in a manner which raises doubts regarding the issue whether such actions are consistent with the constitutional guarantees and general provisions of the administrative procedure.[3] Thus appropriate introduction of regulations concerning automated handling of cases into the statutory acts is of major significance.

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1 See: K. Werbach, *Introduction: An Endless Spiral of Connectivity?*, in: *After the Digital Tornado. Networks, Algorithms, Humanity*, ed. K. Werbach, Cambridge 2020, pp. 1 ff.

2 R. Koulu, *Human Control over Automation: EU Policy and AI Ethics*, European Journal of Legal Studies 2020, vol. 12, no. 1, pp. 9 ff.

3 M. Wilbrandt-Gotowicz, *Zasada efektywnej ochrony sądowej na tle zjawisk europeizacji, automatyzacji i pragmatyzacji jurysdykcji administracyjnej*, in: *Kierunki rozwoju jurysdykcji administracyjnej*, eds. M. Kruś, L. Staniszewska, M. Szewczyk, Warszawa 2022; cf. M. Sakowska-Baryła, *Czy używanie sztucznej inteligencji stoi w sprzeczności z podstawowymi oczekiwaniami wobec procedur ochrony*

The goal of this study is to analyze and assess (through utilizing the dogmatic method) the basis for automated handling of administrative cases in the context of Article 14 of the Administrative Procedure Code.[4] The definition and scope of administrative procedure automation, the doubts in interpretation regarding the acceptability of handling cases through automated decision making and the possible consequences of this provision for the procedural rights of an individual as well as the postulates for changes will all be briefly considered in the study.

1. The concept and scope of automation in the administrative procedure

The automation is understood as "utilizing devices which take over certain human cognitive, intellectual and decision-making actions, until now performed by a human being operating an object (e.g. a machine tool, an aeroplane, a bank) or performing creative work (e.g. designing, construction works, learning), for the purpose of gathering and processing information."[5] Contemporarily automation is usually based on using computers and inherently related information-communication techniques, including the techniques utilizing algorithmic data processing. It is a phenomenon common in operations of administrative bodies.

However, the degree of automation of public administration bodies may be related to various displays of these operations. Firstly, we should indicate the factographic systems covering public registers and other public databases which act as sources of appropriately sorted data furnished with search and browse functions which facilitate an administrative body in determining factual state of affairs, the catalogue of involved parties (participants of the proceedings) and their contact details and thus facilitate carrying out jurisdictional proceedings or issuing certificates. Secondly, the work of an official is characterized by the increasing importance of legal information search systems, including databases of legal acts and judicial rulings, which are helpful in determining the legal status of a case. Thirdly, automation largely concerns the communication systems related to electronic delivery of documents (e.g. through using e-PUAP or delivering documents to the electronic delivery address entered into the electronic addresses database) or deliveries made

danych osobowych?, in: *Prawo sztucznej inteligencji i nowych technologii*, eds. B. Fischer, A. Pązik, M. Świerczyński, Warszawa 2021.

4 The Act of 14 June 1960 – the Administrative Procedure Code, consolidated text: Journal of Laws [Dziennik Ustaw] 2023 item 775 as amended.

5 https://encyklopedia.pwn.pl/haslo/automatyzacja;3872577.html [access: 3.01.2023].

to an account within a computerized information system and thus ensures implementation of the principle of active participation of a party in the proceedings or the principle of convincing through utilizing modern communication tools. However, among the Decision Support Systems (*DSS*) we may also count the automated resolution systems based on algorithmic administrative decision making, i.e. issuing a decision which is generated automatically by a computerized information system.[6] The last aspect rises particular doubts regarding adopting a subjective (related to the instrumental role of a machine as a tool utilized by a human and in the same breath a component of the office providing services) or subject (related to effecting legal actions by a machine as a subject of law) theory of utilizing automatic resolution systems.[7]

The displays of automation of a process may be observed in the administrative proceedings' initiation stage (notification); investigation stage (summons); resolution stage (automated decision making) as well as irrespectively of the stage of proceedings (proof of submission, proof of receipt, official acknowledgement of receipt) or outside of a jurisdictional proceedings (certificates).

Therefore utilizing processes of an automated data processing system under administrative procedures is characterized by diversity and its multi-aspect character. These processes may refer to the issues of communication between an administrative body and a party to the proceedings or facilitate determining the factual or legal state of a case as well as aid an individual in obtaining a confirmation of factual or legal state. In the listed fields utilizing automated techniques should guarantee security and certainty of applying the law as well as objectivity and diligence of data processing. However, the auxiliary and secondary character of this aspect of administrative operations' automation as a tool assisting an administrative body in handling cases is certain. The greater dilemmas are evoked by the concept of utilizing automation directly for adopting resolutions in cases, i.e. the so called algorithmic decision making, or issuing decisions through the use of 'artificial intelligence.' Subjecting these processes to 'machine thinking' and bypassing the existing role of a natural person acting as a guardian of an administrative body or a person authorized to make a decision on

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6 Cf. W.R. Wiewiórowski, *Systemy wspomagania decyzji i systemy automatycznego rozstrzygania*, in: G. Wierczyński, W.R. Wiewiórowski, *Informatyka prawnicza*, Warszawa 2016, p. 85.

7 See: G. Sibiga, M. Maciejewski, *Automatyzacja w nakładaniu administracyjnych kar pieniężnych*, in: *Administracyjne kary pieniężne w demokratycznym państwie prawa*, ed. M. Błachucki, Warszawa 2015, pp. 73 ff.; G. Sibiga, W. Wiewiórowski, *Automatyzacja rozstrzygnięć i innych czynności w sprawach indywidualnych załatwianych przez organ administracji*, in: *Informatyzacja postępowania sądowego i administracji publicznej*, ed. J. Gołaczyński, Warszawa 2010, pp. 231 ff; G. Sibiga, *Stosowanie technik informatycznych w postępowaniu administracyjnym ogólnym*, Warszawa 2019, p. 40.

the behalf of an administrative body brings forth a number of dilemmas regarding securing legal rights of an individual, procedural guarantees, wording and construction of an administrative act or administrative power. Verifying whether this is a real problem in the context of the domestic administrative procedural law requires analyzing provisions of the code.

2. New wording of the principle of written form under the Administrative Procedure Code

Article 14 of the Administrative Procedure Code in its wording adopted on 5 October 2021 as a result of the amendment effected through the Act of 18 November 2020 on electronic deliveries[8] is of particular importance for the issues discussed herein. The principle of written form expressed in this provision was modified; previously the principle referred to handling cases in written form or in the form of an electronic document, in the understanding of the Act of 17 February 2005 on the IT development of the bodies performing public tasks,[9] delivered through electronic communication means as two equivalent forms of administrative actions[10]. Consistently with the new wording cases are to be handled and concluded in writing in a paper form or in an electronic form. The amendment to Article 14 of the Administrative Procedure Code was not restricted to the issues which can be considered as directly related to service by electronic means, including the will to put the terminology matrix in order. In the added paragraphs 1b and, in particular, 1c the legislator referred to the issue of utilizing specific techniques related to development of IT technology for handling cases under administrative proceedings. Consistently with Article 14 § 1b of the Administrative Procedure Code: "cases can be handled with the use of automatically generated missives affixed with a qualified electronic seal of an appropriate body of public administration […]". In turn, in light of Article 14 § 1c of the Administrative Procedure Code, cases can be handled through online services made available by public administration bodies following certification of a party to the proceedings or other participant of the proceedings in the manner determined in Article 20a Section 1 or 2 of the IT development act. Analogous regulations were projected in the amended Article 126 § 2 and § 3 of the

8 Consolidated text: Journal of Laws 2023 item 285 as amended.

9 Consolidated text: Journal of Laws 2023 item 57 as amended (hereinafter: the IT development Act).

10 See: M. Jachowicz, M. Kotulski, *Forma dokumentu elektronicznego w działalności administracji publicznej*, Warszawa 2012, p. 88.

Tax Ordinance.[11] The wording and contents of Article 14 § 2 of the Administrative Procedure Code were, in turn, not modified.

Both regulations, § 1b and 1c, despite appearing successively, do not concern the subjectively equivalent "manner of handling cases." Their essence and scope of applying IT techniques are also different. Handling cases through online services primarily pertains to the manner of communication between a body and a participant of proceedings. In this context it may relate to the act of using public e-services consisting of downloading a certificate or submitting an application for initiation of proceedings and, subsequently, downloading the issued decision in an electronic form. This legal basis corresponds to the administrative bodies utilizing IT systems designed for handling particular specific cases (e.g. Tax Portal, e-Tax Office, PUE ZUS) after authorizing a party to or a participant of the proceedings within an IT system in the manner defined in Article 20a Section 1 or Section 2 of the IT development act. In practice, utilizing online services will with the greatest frequency relate to automatic generation of missives (e.g. delivery receipts, certificates) discussed in Article 14 § 1b of the Administrative Procedure Code. However, importantly the phrase "handling cases with use of automatically generated missives," consistently with the grammatical understanding, exceeds using only the specified technique of handling cases and may also cover the form in which cases are handled which in theory could consist of an automated decision. The far-reaching assertion which permits issuing automatically (algorithmically) generated decisions, also known as automated administrative acts,[12] on the basis of Article 14, § 1b of the Administrative Procedure Code merits and requires more expansive analysis. However, I do not perceive legal solutions regarding handling cases through use of automatically generated missives or online services as a deviation from the principle of written form expressed in Article 14 § 1a but instead as the modality of said principle referring to missives in electronic form.[13]

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11 The Act of 29 August 1997 – Tax ordinance, consolidated text: Journal of Laws 2022 item 2651 as amended (hereinafter: Tax ordinance).

12 See: I. Gontarz, *Automatyczny akt administracyjny – postulaty de lege ferenda w zakresie ogólnych ram prawnych*, in: *Skuteczność w prawie administracyjnym*, ed. C. Martysz, 2022 [LEX database].

13 Unlike B. Adamiak according to whom: "The act on service by electronic means (Parliamentary Document No. 239) introduces the admissibility of departure from the general principle of written form realized through preserving missives in paper or electronic form in favour of other, simplified form of creating missives which departs from the requirement of preserving a missive in an electronic form," B. Adamiak, *Kodeks postępowania administracyjnego. Komentarz*, 2021 [Legalis database], Commentary on Article 14, point 10.

3. Handling affairs through utilizing automatically generated missives – interpretation dubitations

The phrase "Cases can be handled through using automatically generated missives" contained in Article 14 § 1b of the Administrative Procedure Code is not clear. The following aspects rise doubts in particular: does the provision covers jurisdictional proceedings or the proceedings concerning issuing certificates?; does the provision refer to handling cases through resolution regarding legal situation of an individual or the actions taken during proceedings?; can an administrative decision generated automatically serve as a missive when handling cases?; can Article 14 § 1 b of the Administrative Procedure Code serve as an independent process basis for issuing this type of resolutions? Wishing to determine the scope for applying this regulation we should in the first place reconstruct legislator's understanding of terms which comprise the adopted norm such as, a) a (administrative) case; b) resolving (and handling) a case; c) the definition of an automatically generated missive or d) using automatically generated missives for resolving (handling) cases.

A) Owing to rooting the analyzed regulation in the Administrative Procedure Code we should relate the term 'case' to the cases handled under administrative proceedings, i.e. 'administrative cases.' The existence of an administrative case (and in consequence, resolving/handling it) is being treated as one of the most important axioms of administrative proceedings which serves as a focus for the essence of the administrative procedure: a singular, unique, individual and specific relation between a fact and the law which always presents an opportunity for substantiation and applying a material legal law norm as a result of carrying out jurisdictional proceedings.[14] The scope of these proceedings is defined by Article 1, point 1 and 2 of the Administrative Procedure Code through combining it with the proceedings carried out before public administration bodies under appropriate cases individually resolved through a decision or handled silently as well as with the proceedings before other state bodies and other entities if such entities are appointed by law or on the grounds of the arrangements concerning handling such cases.

   Accepting the aforementioned wording and understanding of a case in reference to Article 14 §1b of the Administrative Procedure Code would equate with recognizing this provision as referring to jurisdictional proceedings but simultaneously accepting that it does not apply to cases other than those handled under the proceedings specified in Article 1, point 1 and 2 of the Administrative

14 Cf. J. Zimmermann, *Aksjomaty postępowania administracyjnego*, 2017 [LEX database], Chapter III.

Procedure Code. Due to the fact that the justification for the amending act provides the action of issuing certificates as an example of applying the discussed provision the legislator, *in essence*, refers to the broader understanding of the concept of an administrative case. This understanding covers both "a set of factual and legal circumstances under which a state administration body applies an administrative law norm with the goal of establishing a legal situation on the part of the entity (entities) in the form of granting (not granting) the desired authorization or in the form of imposing a specific obligation"[15] as well as the subject of all proceedings before an appropriate administrative body to which provisions of the Administrative Procedure Code apply.[16] Thus among the discussed cases we may count the cases handled under jurisdictional proceedings as well as other proceedings to which provisions of the Administrative Procedure Code apply (e.g. issuing certificates, processing complaints and applications).

B) In the discussed provision resolving cases through utilizing automatically generated missives and not managing and handling cases through such means is being emphasized. Therefore, in contrast to the contents of Article 14 § 1a of the Administrative Procedure Code which concern the principle of written form, utilizing this type of missives should pertain to the final stages of proceedings. Consistently with Article 104 § 1 of the Administrative Procedure Code the basic form of resolving a case is issuing a decision which concludes the case in its entirety or in part in terms of case's essence or a decision which concludes the case in a given instance (e.g. a decision remitting the case). Another legally admissible manner of resolving a case is resolving a case silently or through approved administrative settlement. Under the assumption of the legislator utilizing broader understanding of a term 'case' a case may be also resolved through other means, e.g. by issuing a certificate under the circumstances stipulated in Article 217 of the Administrative Procedure Code.

Applying automatically generated missives solely to the final stages of a case would exclude the possibility of applying these missives during the proceedings if such missives could serve handling and resolving a case. Doing so appears to not be justified in the context of electronic delivery receipts which are automatically generated by a computerized IT system under which a given public e-service is being made available at different stages of the proceedings. The broad understanding of the phrase "resolving cases through using automatically generated

15 W. Dawidowicz, *Zarys procesu administracyjnego*, Warszawa 1989, p. 8.

16 For more on the issue see: A. Wilczyńska, *Sprawa z zakresu administracji publicznej na tle pojęć sprawy administracyjnej i sprawy cywilnej – zagadnienia teoretycznoprawne*, Zeszyty Naukowe Sądownictwa Administracyjnego 2008, no. 5, pp. 83 ff.; T. Kiełkowski, *Sprawa administracyjna*, Kraków 2004.

missives" as a phrase referring to all missives issued under proceedings, i.e. the missives which are to be used in handling and concluding a case and thus resolving a case, is evidenced by the contents of the justification for the draft discussing developing and implementing "the foundation for automatically handling and resolving cases through utilizing a qualified electronic seal of an administrative body" under Article 14 § 1b of the Administrative Procedure Code which would enable "automatically issuing certificates and confirmations of the actions taken within the framework of online services." However, in the light of lack of uniformity of the phrases used between the individual editorial units of Article 14 of the Administrative Procedure Code assuming that the legislator is in this context acting rationally is disputable (§ 1a discusses handling and resolving a case in writing separately).

C) In the analyzed provision the legislator uses the term "automatically generated missives" without defining it. It appears that the term means a particular, qualified form of a missive preserved in an electronic form (consistently with the principle of the written form). Among automatically generated missives I count these electronic documents which are created without direct involvement or with minimal involvement of a human being in the process of generating contents of a given document and which are a result of a computerized IT system downloading and appropriately compiling data, in particular on the basis of the data contained in public resources, registers or submitted by an applicant.[17] The contents of such automatically generated missive are not directly created by a human being but instead created by a computerized IT system through utilizing appropriate data resources, missive templates and algorithms determining type of contents on the basis of the data considered in a given case.

In the light of vagueness of regulations this provision could pertain to all types of missives created by an administrative body over the course of proceedings (jurisdictional proceedings or other proceedings regulated by codices), including decisions. It would mean indirectly introducing into the Polish legal order the so called automated administrative act. As the subject literature indicates "an automated administrative act is nothing else but an administrative act (a decision or a ruling) generated by using or through the process of automated decision making.[18] This process is characterized by a limited involvement of an official whose role consists of verifying correctness of the produced resolution

17 M. Wilbrandt-Gotowicz, in: *Doręczenia elektroniczne. Komentarz*, ed. M. Wilbrandt-Gotowicz, Warszawa 2021, p. 440.

18 The so called ADM – *automated decision making system* or the *algorithmic decision making*.

and in extreme cases is only ritualistic in character and boils down to confirming the resolution by affixing official's signature."[19] However, it is prudent to mention that on the basis of Article 14 § 1b of the Administrative Procedure Code the provisions regarding affixing a signature of a public administration official to a missive do not apply to automatically generated missives. Such missives should instead bear a qualified electronic seal of a body. In turn, under Article 107 § 1, point 8 of the Administrative Procedure Code, one of the obligatory elements of a decision is a signature indicating name, surname and official station of an employee of the administrative body authorized to issue the decision.[20]

Determining whether the legislator intended to introduce automated decision making is difficult. The justification of the draft lacks any direct reference to this issue. In the part referring to the contents of Article 14 § 1b the proposed regulation is justified solely through the need for developing "the foundation for automated handling and resolving of cases through utilizing qualified electronic seal of an administrative body."[21] Therefore the concept of an automatically generated missive was to refer primarily to the missives of non-authoritative character such as certificates and delivery receipts. However, such approach to an automatically generated missive which is to be used by a body to resolve a case does not fit in with the definition of a decision (contained in Article 104 of the Administrative Procedure Code) as an act which concludes and resolves a case when issued by an appropriate body.

D) Further doubts concern establishing the relation between an automatically generated missive and the act of resolving a case. It is so because Article 14 § 1b of the Administrative Procedure Code does not *explicitly* state that the cases can be resolved with an automatically generated missive (similarly to Article 104 of the Administrative Procedure Code 14 § 1b refers to a decision) but "with use of automatically generated missives." Such wording supports the possibility of utilizing automatically generated missives at all stages of proceedings (and not only jurisdictional proceedings). Simultaneously this wording emphasizes the instrumental character of an automatically generated missive as a tool for resolving a case – a fact which would lead to the assertion that these missives are only, due to the manner of their creation (through use of algorithmic systems), a specific form of missives commonly utilized by an administrative body. These

19 I. Gontarz, *Automatyczny akt administracyjny*…

20 In reference to provisions see Article 124 § 1 of the Administrative Procedure Code.

21 The justification for the Act of 18 November 2020 on electronic deliveries, p. 91.

missives can include summons, notifications, protocols, transcripts, certificates but also administrative acts.

In this context a concept emerged in the doctrine indicating that the possibility of resolving a case automatically covers "solely the stage of externalizing the contents of the operations of resolving a decision, a ruling, a certificate."[22] According to authors it would mean that it is possible to issue an administrative decision (an act understood as creating a material or digital document) in the form of an automatically generated missive whereas it would be still impossible to carry out proceedings in an automated manner, without human involvement.[23]

The above opinion is contested. The view that the contents of Article 14 § 1b of the Administrative Procedure Code do not allow for carrying out the entirety of proceedings without human involvement, i.e. in a fully automated manner, is not questionable as a result of the necessity of adhering to the general principles of the proceedings. However, I do not agree with the view that automation as understood under Article 14 § 1b should pertain solely to the externalization stage regarding contents of the resolution. It is so because the issue does not consist of introduction of a new manner of communication (including the communication regarding resolution) effected through and online service as is the case under Article 14 § 1c nor a new manner of resolving cases (which can be effected only in paper or electronic written form, in exceptional circumstances orally or in a different manner indicated in Article 14 § 2 of the Administrative Procedure Code). The essence of resolving a case through utilizing an automatically generated missive consists of creating contents of the resolution through automatic process, i.e. by generating the missive through a computerized IT system. In the case of a decision, which itself is an act of applying law, specifying the legal situation of an individual under resolution proceedings would be a result of algorithmic application of law. Therefore this provision does not pertain solely to externalization of the resolution but also to the manner in which the resolution is reached. Therefore I would express scepticism towards relating the automatically generated character of the decision with approaching the decision solely as a missive utilized to resolve a case and therefore solely as a tool for externalization of the manner in which a case is being handled and resolved instead of treating generating missives automatically as an act of applying law. Doing so would constitute an unjustified departure from

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22 See: B. Adamiak, *Kodeks*…, Commentary on Article 14, point 10; M. Wierzbowski, J. Róg-Dyrda, *Szanse, zagrożenia i bariery prawne związane z wykorzystaniem sztucznej inteligencji w kontekście zasad postępowania administracyjnego*, in: *Administracja w demokratycznym państwie prawa. Księga jubileuszowa Profesora Czesława Martysza*, ed. A. Matan, Warszawa 2022, p. 800.

23 M. Wierzbowski, J. Róg-Dyrda, *Szanse*…, p. 799.

the classical dogma of an administrative act as an act authoritatively shaping legal situation of an individual.

This does not change the fact that adopting an automatically generated resolution would have to be preceded with introduction of the data which describe the factual state of a given case (possibly partially 'downloading' the data from other existing databases) by an official handling a given case and by developing an algorithm for generating missives pertaining to a given type of cases. The first action is principally personal in character – individualistic and appropriate for a given case. The second action would require previously preparing a decision-making model for the specific type of cases, an action which according to myself would relate to the necessity of establishing a legal basis in reference to automatic issuance of an administrative act (instead of issuance of only certificates) in a given type of cases.

The phrase regarding resolving a case not with an automatically generated missive but 'through use of automatically generated missives' supports the subject theory and not the subjective theory regarding utilizing automated resolution systems. Under such approach an automatic system is not being treated as a legal body performing a legal action but as a tool utilized by a human and, at the same time, as a component of the office rendering services for a body and operating on the behalf of the body.[24]

4. Possible consequences of provisions of Article 14 of the Administrative Procedure Code in reference to handling cases through use of automatically generated missives

As a result of performing a grammar interpretation of Article 14 § 1b of the Administrative Procedure Code we may arrive at the conclusion that in theory the range of applications of this provision is extensive. It is so because the language scope covers resolving cases which are, in principle, resolved through issuing decisions. Only the broad understanding of terms 'case' and 'resolving a case' opens this regulation to simplified proceedings, including issuing certificates and the documents produced over the course of proceedings such as e.g. summons, delivery receipts or notifications.

[24] For more on the issue see: G. Sibiga, M. Maciejewski, *Automatyzacja*…, pp. 73 ff; G. Sibiga, W. Wiewiórowski, *Automatyzacja*…, pp. 231 ff.

Ascertaining that the algorithmic decision making was introduced into the Administrative Procedure Code would mean a revolutionary change. It would not be an isolated case in Europe because regulations concerning an automated administrative act are in effect in e.g. Norway, Germany or France.[25] Unsurprisingly, contradictory assessment regarding the scope of application and implications of the introduced regulation appeared in Polish doctrine.[26] It is, however, unquestionable that the legislator did not analyze in depth the potential consequences of covering automated decision making under Article 14 § 1b and, perhaps, these consequences were unintentional.

The Act of 8 June 2022 on altering certain acts with the goal of automating certain cases handled by the National Revenue Administration[27] which operates on the basis of analogous contents of Article 126 of the Tax ordinance fits in with this trend. The provisions of the National Revenue Administration Act of 16 November 2016[28] and the provisions of the ordinance of the Minister of Finances of 6 July 2022 regarding the electronic Tax Office[29] amended by the aforementioned act project that the cases consisting of issuing automatically generated ZAS-DFU and ZAS-DF certificates indicated in Article 306i § 1 of the Tax ordinance are handled through the electronic Tax Office (see: Article 35b § 6 of the National Ravenue Administration Act). Issuing automatically generated missives by the head of the NRA covers only the certificates indicated hereinabove and the official delivery and reception receipts (see: Article 35d § 5 and 35e § 11 of the NRA Act). Thus it does not pertain to automated administrative acts.[30]

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25 See: I. Gontarz, *Automatyczny akt administracyjny*…; F. Geburczyk, *Automated Administrative Decision-Making under the Influence of the GDPR – Early Reflections and Upcoming Challenge*s, Computer Law & Security Review 2021, vol. 41, pp. 10–15; E. Weitzenboeck, *Simplification of Administrative Procedures through Fully Automated Decision-Making: the Case of Norway*, Administrative Sciences 2021, no. 11, pp. 149 ff.

26 See: B. Adamiak, *Kodeks*…, Commentary on Article 14, point 10; M. Wierzbowski, J. Róg-Dyrda, *Szanse*…, pp. 799 ff.; I. Gontarz, *Automatyczny akt administracyjny*…

27 Journal of Laws 2022 item 2707.

28 Journal of Laws 2023 item 615 as amended (hereinafter: NRA Act).

29 Journal of Laws item 1426.

30 See also: the regulation covering the automatically generated notification regarding the threat of disclosure in the Register of Public Liabilities or the written warning issued to a debtor before commencement of debt enforcement which are indicated in Article 15 § 1b and Article 18c § 1a of the act of 17 June 1966 on enforcement proceedings (consolidated text: Journal of Laws 2022 item 479 as amended) or certain data generated automatically in the Register of School and Education Institutions as well as in the Educational Information System discussed in Article 7 Section 1a, Article 35 Section 4, Article 44 Section 4, Article 58 Section 2, Article 78 Section 3 and Article 92 of the Act of 15 April 2011 on the Educational Information System (consolidated text: Journal of Laws 2022 item 2597 as amended).

Despite the results of the grammar interpretation of Article 14 § 1b of the Administrative Procedure Code it is improper due to the far reaching consequences of such interpretation for rights of an individual to ascertain that the legislator covered with this regulation all types of decisions without concern for limiting the scope of cases, types of acts or automation qualification criteria. Such extensive application is not projected in justification of the draft and does not fit in with the existing practice referring the specific provisions from the field of automation of the NRA operations to issuing certificates and delivery receipts. The admissibility of issuing automated administrative acts without existence of specific regulations taking into consideration their automated character would result in a major threat of violating procedural rights stipulated in the provisions of the Constitution and the general provisions of administrative procedure, e.g. the principle of considering public interest and legitimate interest of an applicant, principles of convincing, developing trust in public authorities, legality, two-stage procedures, objective truth or active participation of a party in proceedings. This threat is noticeably exacerbated in reference to the cases which are resolved on the basis of an administrative decision (in its broad understanding).

Therefore, despite the identifiable grammar interpretation of Article 14 § 1b of the Administrative Procedure Code under the assumption of rationality of the legislator, the necessity exists of referring to systemic and purposive interpretation limiting application of this provision in regards to decisions due to lack of broader regulations under the Administrative Procedure Code or specific provisions. Under the decision-making model of applying the law a decision should reflect both the act of determining a factual state as well as legal state of a case, subsumption and the act of determining legal consequences of the determined factual state. Even in the case of human involvement in determining factual and legal state of a case algorithmic decision issuance should meet the procedural guarantees of the involved parties, also in reference to directly shaping contents and justification of a resolution. Possible restrictions in this field should directly result from the act and adhere to the principle of proportionality. Therefore we cannot assume that if a body is appropriate for resolving a given case on the basis of the substantive law provisions said body can resolve this case also through use of a decision generated automatically on the basis of Article 14 § 1b of the Administrative Procedure Code. The manner in which a resolution is generated also should not be arbitrary. Therefore the values rooted in constitutional provisions and general provisions of administrative procedure should restrict bodies from the potential abuse of automatically generated missives through taking into consideration not only the linguistic meaning and interpretation of this provision but also the systemic and purposive interpretation.

The legal norm objectively restricting the possibility of issuing a decision automatically is Article 22 Section 1 of the GDPR.[31] Consistently with its contents each person whose personal details are being processed is entitled to not be submitted to a decision based solely on the automated processing of data, including profiling, which results in legal consequences or significantly influences a person in a different manner. One of the exceptions is the situation where an automated decision is permitted under the law of the European Union or its member state to which controller of the data is bound and which projects appropriate protection measures for rights, freedoms and legitimate interests of a person to which the data pertain. Therefore not only the requirement for a regulation was established in the national and European Union provisions regarding the capacity of appropriate bodies for issuing decisions through automated decision making but also it has been established that these regulations should project appropriate protective measures. The contents of Article 14 § 1b of the Administrative Procedure Code do not meet these requirements. In the light of the current lack of specific provisions limiting application of automatically generated decisions and projecting adequate protective measures Article 14 § 1b of the Administrative Procedure Code cannot serve as a basis for handling and resolving a case under jurisdictional proceedings utilizing automatically generated decisions.

Conclusion

In interpreting Article 14 § 1b of the Administrative Procedure Code we must take into consideration the value of rooting provisions in laws which materialize as the constitutional provisions and general provisions of the administrative procedure. Thus this provision should not be interpreted without taking into consideration its systemic and functional interpretation. Thus Article 14 § 1b of the Administrative Procedure Code should not be perceived as an adequate legal basis for resolving cases through an automatically generated decision. Adopting a different stance would result in significantly weakening procedural guarantees, the risk of violating legal rights and creating a situation in which freedom of administration in algorith-

31 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.05.2016, p. 1.

mically shaping legal standing of an individual in each case would exceed the state legal regulations and the principle of legality.

Utilizing automatically generated missives, including administrative acts, in resolving cases under administrative proceedings may be undeniably beneficial from the point of view of procedural economy, consolidating the uniform case law, bolstering the principles of legal certainty and equality before the law. Therefore it is beneficial that the legislator noticed the opportunity for modernizing administrative operations through automating certain actions but doing so requires more comprehensive reflection and adequate legal framework.

Introduction of the possibility of substituting a human with a computerized IT system in the process of developing contents of a resolution should be preceded with the deliberations concerning redefining classical understanding of an administrative act, the analysis of the dilemmas regarding adopting subject or subjective theory of applying an automated resolution system and, primarily, with the considerations regarding the scope of admissibility of resolving cases with use of automatically generated missives and adequate procedural guarantees for the involved parties. In particular we should analyze in what types of cases (routine, simple) introducing such mechanism would be desirable; can this mechanism cover cases based on a discretionary decision of an administrative body; how the regulation concerning developing computerized IT systems for automated case resolution, including the algorithms for resolving particular types of cases, should be formed; how to ensure adequate level of procedural guarantees (incl. appeal avenues), including the scope within the framework of which possible departures from the standard for general proceedings provisions could be recognized as consistent with the constitutional interpretation of the principle of proportionality?

Furthermore, I advocate for introduction of regulations regarding automated decision making (and resolutions) in administrative proceedings (including a definition of automated administrative proceedings) into the Administrative Procedure Code as a separate type of jurisdictional proceedings with reference to specific provisions and adjusted consistently with the principle of proportionality of procedural guarantees of an individual and the standards for automatically generated decisions and proceedings concluding with making such decisions (e.g. modelled after simplified proceedings). Developing a cohesive model regulation on the codex level would enable opening Polish administrative procedure to the modern IT technologies and simultaneously limiting the threat of dispersing and scattering regulations, at least in reference to the form as crucial for the legal standing of an individual as an administrative act. Through specific provisions a legislator could enable utilizing an automated administrative act in specific types of cases.

The domestic regulations should at the same time meet the requirements of Article 22 of the GDPR concerning appropriate protective measures for individuals. Possibly this should be accompanied by establishing a judicial control over automatically generated administrative acts which would ensure broader scope for hearing of evidence and competences regarding substantive resolution performed by administrative courts. The works on standardization of the Polish law agenda should also take into consideration the solutions from the field of automating administrative procedure implemented in other countries – an issue consciously left aside in this study do to its constraints.

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The axiological foundations of the economic order in the context of the essential values

Aksjologiczne podstawy ładu gospodarczego w kontekście kluczowych wartości

Аксиологические основы экономического порядка в контексте ключевых ценностей

Аксіологічні основи господарського порядку в контексті ключових цінностей

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Summary: This paper concerns the issues covered under the problem of "The axiological foundations of the economic order in the context of the essential values." Undoubtedly development of the market economy and realization of the economic freedom are a crucial reference point for the process of development of said foundations. However, we should bear in mind that in this field the classical concept of the order is an over-simplification. Therefore it is justified to approach this concept in the perspective of the idea of its three-level implementation and identifying the basic values laid at its foundation. My primary goal is to justify the thesis proclaiming that the issue of developing axiological foundations for the economic order should be perceived through the lens of the values which are justified not solely by their positive-legal legitimization (common good, human dignity) but also the values which shape the fundamental values expressed in the constitution of the Republic of Poland and the principles derived from them. In the latter case the issue concerns e.g. the rights, freedoms, values and principles other then the economic freedom (certainty of law, protection of acquired rights, protection of competition, righteousness of will of the legislator and the bodies implementing the law, authority of the state and the law etc.). This, in turn, gives birth to a number of challenges and axiological dilemmas – not only related to economy but to law and ethics as well. Therefore it appears justified to properly identify the basic normative pillars and the values covered under the context of the effective and binding law and the potential threats to the axiological foundations of the public commercial law. Therefore it is relevant to turn our attention to the issues of inflation of law, certainty of normative solutions, protection of acquired rights and fully developing expectations towards the legal security and excessive relativisation of the basic principles which determine the essence of legal order. Developing authority of the state and law as well as developing the ethos of public service are significant for the axiological aspects of the economic order. The paper utilizes the dogmatic method and other auxiliary methods as needed.

Key words: axiological foundations of the economic order, key values, inflation of law, legal security, dis-functionality of legal order

Streszczenie: Artykuł niniejszy jest poświęcony aksjologicznym podstawom ładu gospodarczego w kontekście kluczowych wartości. Nie ulega wątpliwości, że kształtowanie się gospodarki rynkowej oraz realizacja wolności gospodarczej są istotnymi punktami odniesienia w procesie jego budowania. Pamiętać jednak należy, że klasyczna koncepcja ładu w tym zakresie stanowi nadmierne uproszczenie. Stąd też zasadne jest ujmowanie go w perspektywie idei trójpłaszczyznowego jego urzeczywistniania i identyfikacji podstawowych wartości leżących u jego podstaw. Jako cel podstawowy stawiam sobie uzasadnienie tezy, że problem kształtowania aksjologicznych podstaw ładu gospodarczego postrzegać należy przez pryzmat wartości, które nie biorą swojego uzasadnienia li tylko z pozytywno-prawnej legitymacji (dobro wspólne, godność człowieka), ale również tych, których moc kształtują wartości fundamentalne wyartykułowane w Konstytucji RP oraz zasady z nich

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wyprowadzone. W tym ostatnim przypadku rzecz dotyczy m.in. innych niż wolność gospodarcza praw i wolności oraz wartości i zasad (pewność prawa, ochrona praw nabytych, ochrona konkurencji, prawość woli prawodawcy i organów stosujących prawo, autorytet państwa i prawa itd.). Rodzi to szereg wyzwań i aksjologicznych dylematów nie tylko natury ekonomicznej, lecz także prawnej i etycznej. Zasadne w związku z tym staje się dokonanie właściwej identyfikacji podstawowych normatywnych filarów i wartości ujmowanych w kontekście obowiązującego prawa oraz potencjalnych zagrożeń dla aksjologicznych fundamentów publicznego prawa gospodarczego. Istotne jest również zwrócenie uwagi na problem inflacji prawa, pewność rozwiązań normatywnych, ochronę praw nabytych i maksymalnie ukształtowanych ekspektatyw, jak i bezpieczeństwo prawne oraz nadmierną relatywizację podstawowych wartości stanowiących o istocie porządku prawnego. W zakresie aksjologicznych aspektów ładu gospodarczego ważną rolę odgrywa budowanie autorytetu państwa i prawa oraz rozwijanie etosu służby publicznej. W artykule wykorzystano metodę dogmatyczną i posiłkowo także inne metody.

Słowa kluczowe: aksjologiczne podstawy ładu gospodarczego, kluczowe wartości, inflacja prawa, bezpieczeństwo prawne, dysfunkcjonalność ładu prawnego

Резюме: Данная статья посвящена аксиологическим основам экономического порядка в контексте ключевых ценностей. Несомненно, формирование рыночной экономики и реализация экономической свободы являются важными ориентирами в процессе ее построения. Однако следует иметь в виду, что классическая концепция управления в этом отношении является чрезмерным упрощением. Следовательно, правомерно подойти к ней с точки зрения идеи ее трехгранной реализации и выявления базовых ценностей, лежащих в ее основе. Моя основная цель – обосновать тезис о том, что проблема формирования аксиологических основ экономического порядка должна рассматриваться через призму ценностей, которые черпают свое обоснование не только из позитивно-правовой легитимности (общее благо, человеческое достоинство), но и тех, сила которых определяется фундаментальными ценностями, сформулированными в Конституции Республики Польша, и вытекающими из них принципами. В последнем случае речь идет, в частности, о правах и свободах, отличных от экономической свободы, а также о ценностях и принципах (правовая определенность, защита приобретенных прав, защита конкуренции, добросовестность воли законодателя и органов, применяющих закон, авторитет государства и права и т.д.). В связи с этим возникает ряд проблем и аксиологических дилемм не только экономического, но и правового и этического характера. Поэтому правомерным становится правильное определение основных нормативных ориентиров и ценностей, рассматриваемых в контексте действующего права, и потенциальных угроз аксиологическим основам публичного хозяйственного права. Важно также обратить внимание на проблему инфляции права, определенности нормативных решений, защиты приобретенных прав и максимально сформированных экспектаций, а также правовой безопасности и чрезмерной релятивизации базовых ценностей, составляющих суть правового порядка. С точки зрения аксиологических аспектов экономического порядка важную роль играют укрепление авторитета государства и права и развитие этоса государственной службы. В статье используется догматический метод и, дополнительно, другие методы.

Ключевые слова: аксиологические основы экономического порядка, ключевые ценности, инфляция права, правовая безопасность, дисфункциональность правового порядка

Рецензія: Стаття присвячена аксіологічним основам господарського порядку в контексті ключових цінностей. Безперечно, формування ринкової економіки та реалізація економічної свободи є важливими орієнтирами в процесі її побудови. Слід однак пам'ятати, що класична концепція порядку в цьому відношенні є надмірним спрощенням. Тому її доцільно сприймати в ракурсі ідеї його тривимірної реалізації та визначення базових цінностей, що лежать в його основі. Першочерговою метою я ставлю собі обґрунтування тези про те, що проблему формування аксіологічних основ господарського порядку слід сприймати крізь призму цінностей, які не лише виправдовуються позитивно-правовою легітимністю (загальне благо, людська гідність), але також тих, які формуються фундаментальними цінностями, сформульованими в Конституції Республіки Польща, і принципами, що з них випливають. В останньому випадку це стосується крім економічної свободи, прав і свобод, також цінностей і принципів (правової визначеності, захисту набутих прав, захисту конкуренції, справедливості волі законодавця і правоохоронних органів, авторитету держави і права тощо). Це породжує низку викликів і аксіологічних дилем не лише

економічного характеру, а й правового та етичного характеру. Тому стає доцільним належним чином ідентифікувати основні нормативні стовпи та цінності, визнані в контексті чинного права та потенційні загрози аксіологічним основам публічного господарського права. Важливо також звернути увагу на проблему правової інфляції, визначеності нормативних рішень, захисту набутих прав і максимально сформованих очікувань, а також правової безпеки та надмірної релятивізації базових цінностей, що говорять про суть правового порядку. В аксіологічних аспектах господарського порядку важливу роль відіграють розбудова державно-правового авторитету та розвиток етосу публічної служби. У статті використано догматичний метод та інші.

Ключові слова: аксіологічні основи господарського порядку, ключові цінності, інфляція права, правова безпека, дисфункційність правового порядку

Introduction

The issue of commercial operations could be depicted across an excessively wide time frame.[1] However, it seems proper to boil the issue indicated in the title of this paper down to the period during which the market economy and the principle of the economic freedom as its significant displays served as a reference point. Thus it is undeniable that the problem of erecting axiological foundations for implementation of the economic order should be considered in this context. This problem should be perceived through the lens of the values which are justified not solely through the positive-legal legitimization (common good, human dignity) and the values which are based on the principles expressed in the Constitution of the Republic of Poland or its provisions. In the latter case the issue concerns e.g. the rights, freedoms, values and principles other than the economic freedom (certainty of law, protection of acquired rights, protection of competition, righteousness of will of the legislator and the bodies implementing the law, authority of the state and the law etc.).

The basic goal of this paper is justifying the thesis proclaiming that the market economy and the economic freedom are not entities in on themselves and that it is necessary to refer to the key values, common good and human dignity in particular, to develop public order in this field. Despite (rightfully) being expressed in the Constitution of the Republic of Poland these values do not require positive-legal legitimization to materialize. These values are fundamental and universal as confirmed not only within the framework of the social teachings of the catholic church and the person-oriented vision of the public order but also under e.g. judicature of the Constitutional Tribunal. These values were reaffirmed in numerous verdicts of the Constitutional Tribunal. My work related to tackling these issues

1 M. Zdyb, *Zarys historii myśli organizatorskiej*, Lublin 1987.

(1997–2006) was also an inspiration for engaging in more thorough deliberations and drawing more comprehensive conclusions. The values which are carried and effected through provisions of the Constitution or which derive from these provisions are also of major significance. The economic freedom is a specific point of reference for the economic order but it cannot be considered in separation from other legal values. Therefore anchoring these values in the constitution as well as authority of state and law may be important in this context (even if it may not be necessary). It is related to the care for certainty of law, eliminating dysfunctionalities of the legal system as well as various displays of excessive relativism in approaching values. This paper, understandably, primarily utilizes the dogmatic method although a limited need for utilizing other methods existed as well.

1. The modern ideas of the public order in the context of commercial operations. Axiological dilemmas

The views of A. Smith (1723–1790), the author of *An Inquiry into the Nature and Causes of the Wealth of Nations*[2] (and also *The Theory of Moral Sentiments*[3]) and D. Ricardo (1722–1823)[4] are frequently indicated as the starting point for the modern deliberations concerning the essence of economic order and economic freedom under the market economy. Both scholars are considered as the forerunners of the classical school and specific personifications of the liberal vision of the market economy. A. Smith claimed that: "A society may emerge among different people, as well as among different merchants, through its utility, without love and attachments; although no one will have any attachment or feel gratitude towards nobody it may survive through beneficial exchange of simple services consistent with their determined values."[5] As a result: "No provisions related to commerce may increase productivity of a society beyond what the capital is able to activate."[6] Undoubtedly representatives of the classical school and those continuing their work perceived commercial operations' issues primarily in the economic categories assuming that the market is capable of self-regulation. Therefore they minimized or even negated the need for the state and law acting in the capacity of guardians of order and

2 A. Smith, *Badania nad naturą i przyczynami bogactwa narodów*, Warszawa 2007.
3 Idem, *The Theory of Moral Sentiments*, London 1831.
4 D. Ricardo, *Zasady ekonomii politycznej i opodatkowania*, Warszawa 1957.
5 A. Smith, *The Theory*…, p. 135.
6 Idem, *Badania nad naturą*…, p. 54.

security in the area of economic relations. The idea of unprompted order and the corresponding concept of economic freedom as well as the thesis regarding the self--regulation capacity, expressed in the concept of the so called 'invisible hand of the market', along with the convictions regarding exceptional values and virtues of the so called natural, self-creating freedom advocated by A. Smith became the symbols of such approach.

Recognizing A. Smith and D. Ricardo as fathers and precursors of the market economy and economic freedom appears to be a not fully justified oversimplification. The primacy in this matter unquestionably lies with the oldest of the existing Spanish universities, i.e. the University of Salamanca (established in 1208) which was under the protection and great patronage of Isabelle I the Catholic (Isabelle I of Castile) and Ferdinand II the Catholic (Ferdinand II Aragonian). These monikers were imparted upon them by the contemporary pope. During their reign the university grew to the position of one of the most significant universities in the world, also in terms of developing and shaping economic order and its axiological foundations and values referring to the basics of the Latin culture. Following their death, primarily after establishing the order of Jesuits (which contributed greatly to science, also in the field of economic sciences) the university contributed to developing the economic order standards (similarly to the Portuguese University of Coimbra established in 1290). These universities undoubtedly launched the works on developing the foundation for the market economy as early as in the XVI and XVII century. The foundations of these concepts primarily consisted of the views of Francisco de Vitoria from Spain (1486–1546), a lawyer and morality theologian delivering lectures in Sorbonne and Salamanca, D. de Sato (a lawyer, the chancellor of Castile), D. de Cavarrubiasa Leive (the bishop of Segovia) and the most representative of them all, L. de Molina, a Jesuit from Salamancea and the author of *De Justica et Iure* work consisting of five volumes. These scholars, F. de Vitoria and J. de Molina in particular, drew attention to the axiological and legal foundations of the economic order and the moral aspects of engaging in commercial operations. Despite preceding scientific works of A. Smith and D. Ricardo the legal concepts developed by the professors from Salamanca and Coimbra are not well known. It is so because they got ahead of the age of factual development of the market economy.[7]

Therefore the views of the so called classicists of the market economy became the reference point for numerous liberal concepts of XIX, XX and even XXI century. They supplemented and, at times, expanded the classic concepts of A. Smith and

[7] M. Zdyb, *Komentarz do art. 2*, in: M. Zdyb, G. Lubeńczuk, A. Wołoszyn-Cichocka, *Prawo przedsiębiorców. Komentarz*, Warszawa 2019, p. 86.

D. Ricardo. The multitude and these concepts and their diverse character forces us to merely indicate them. We may indicate, if only, J.S. Mill who in his work titled *On Freedom* adopts the premise that freedom begins with becoming aware of it but simultaneously turns readers' attention to the importance of spontaneous acts and the concept of utility, in its praxeological understanding, and emphasizes that the utility is "the last instance in all ethical dilemmas."[8] In this field it is even more difficult to accept the views of J. Bentham who advocates for the idea of relativism not only in the field economy but morality and ethics as well.[9] We could say that reflecting on the universal axiological foundations and basic values is of no greater importance for operations of the economic freedom because such values did not become systemic values. Such reasoning may lead us to the conclusion that they are not values at all but instead components of the game of interests. Therefore morality, integrity, justice, truth, falsehood etc. do not exists because behaviours and results of commercial operations are decided by a game of, as depicted in Anotnioni's film, invisible football. Thus the excessive individualism became a peculiar problem. According to J. Bentham only an individual matters: "A society is a fictional organism […] it is a sum of interests of individuals who form it."[10] Such approach to commercial operations can be accused of: single-dimensionality, faith in economy's capacity for self-regulation, fetishization of artificial systems of values.

Begining with the XIX century and even as early as in the XVIII century the market economy and the economic freedom became the desginata in shaping the modern models of the economic order. The extreme approach to this phenomenon was rooted in the views of classic scholars and, later, in the views of J.S. Mill and J. Bentham,[11] P. van Parijs,[12] K. Popper, J. Eccles[13] and various others expressed similar views. The singular (economic) understanding of the economic order and standards of the market economy, as well as excessive and gullible faith in the self-developing market instruments being adequate for unobstructed and unprompted realization of moral values as well as the faith that under such circumstances actions of the legislator will not be required became excessively primitive and perverse as indicated on the global scale by the great crises from the threshold of XIX and XX centuries as well as the crises of the 20s and 30s of the XX century.

8 J.S. Mill, *O wolności*, Warszawa 1959.

9 J. Bentham, *Utylitaryzm*, Warszawa 1959, pp. 29 ff.

10 Idem, *A Fragment on Government and on Introduction to the Principles of Morals and Legislation*, Oxford 1960, pp. 126–127.

11 Idem, *Utylitaryzm*…

12 P. van Parijs, *Evolutionary Explanation in the Social Science. An Emerging Paradigm*, New Jersey 1981.

13 K. Popper, J. Eccles, *The Self and Its Brain*, New York 1977.

Thus the critical approach of not only the exceptional scholars from the fields of law, philosophy of law and economy, who perceived the economic order ideas and considered the related problems in the categories of axiology and the three-level approach (economy, law and moral-ethics) – i.e. in the context of the qualitative categories reflected in specific values, appears to be crucial, also when the foundations of such understanding consist of the quantitative approach, as in the case of e.g. games theory.

The games theory (not to be confused with the market game as understood under the classicist approach) assumed that, in principle, under the market economy conditions zero-sum games emerge relatively rarely, whereas the situations when scope of risk is extensive, numerous entrepreneurs participate in the games and the games itself are, for economic reasons, games of conflict are of key importance. Under such circumstances the environment in which commercial operations are carried out, various utility functions of specific actions which cannot be boiled down to quantitative categories (moral values, aesthetic sensations, moral satisfaction) and the obligation to adhere to the principle of rationality are of major importance. An entrepreneur behaves rationally when the decisions which are being made are beneficial to him.

For an entrepreneur who engages in various commercial operations and at the same time has an opportunity to compensate for losses through the effects of other types of activity/operations it may be favourable to engage in economic activities which will not yield profits at a specific time, e.g. in selling services and goods at a price lower than the manufacturing and realization costs. Rendering services and selling goods at a price lower then manufacturing costs when other entrepreneurs do not have such opportunity may lead to business failure of the latter. Such state of affairs may result in eliminating competitors and, later, increasing prices of goods and services with the goal of compensating for previous losses. Such circumstances forced legislators to implement appropriate legal regulations concerning: counteracting unfair competition; counteracting unfair market practices, establishing regulations concerning dumping practices and offences against economic exchange and trade. The goal was to develop the so called "commercial integrity." Thus we may say that under such approach the necessity of adhering to moral norms and the appropriate legal provisions which eliminate or should eliminate pathological behaviours become prerequisites for proper functioning of the economy. It is related to the necessity of introducing legal standards shaping the basic principles of an integrous market game and righteousness of will. This issue is of particular importance for the so called "non-zero sum conflict market games" where: a) a loss of one entrepreneur does not necessary result in win of the other entrepreneur and therefore the win of one entrepreneur

does not necessary result in the loss of the other; b) owing to entrepreneurs coordinating their actions it is possible to produce results more beneficial than the level of security. In all cases not only the spontaneously developed economic rules of conduct are of importance but also the legal norms, moral standards, adherence to the principles of integrity and rationality of actions.

In the context of the legal-economic order and related strictness the state-individual relation is not (should not be) a game of conflict (in the traditional understanding) because the state, bearing in mind human dignity and resulting rights as well as common good, is (or at least should be) interested in well-being of every entrepreneur (citizen) who acts with respect for the law.

In the commercial operations aspect the games theory indicates numerous examples of conflict situations where participants, e.g. the state – an entrepreneur – a citizen or an entrepreneur – other entrepreneurs, hoping that other participants will act with integrity and rationally, attempt to 'outsmart' each other hoping that the other party will adhere to the universal principles and rules of conduct and thus an opening will emerge – if they will act unfairly – for acquiring benefits and profits greater than the benefits and profits obtained as a consequence of adhering to the standards and principles of a market game. Under such circumstances the additional 'benefits' or profits (in the economic understanding) will be secured by the party violating the law and acting unfairly. Such state of affairs is perfectly demonstrated by such games as 'the prisoner dilemma', 'the game of chicken' or 'the marriage problem.' These games indicate that, by nature, we should behave morally, rationally and adhere to the legal and economic principles as well as the fundamental values which lay at the foundation of the public order and establish the sense of security and trust between an entrepreneur and other entities and in the case of the entrepreneur – state relation build authority of the state, trust of state authorities in entrepreneurs and citizens and vice versa. In case of a market game fraudulent and dishonest behaviours and actions frequently contributed to economic crises or loss of trust in the state and state institutions e.g. the central bank or persons of public trust (e.g. commercial banks). Frequently it pertained to the Central Bank (the State) – commercial banks – a citizen (acting as a credit recipient) relation. The state, or rather the National Bank of Poland which embodies the state authority, being obliged to care for the value of currency and through utilizing appropriate instruments, including interest rates, may protect the foundation of the monetary order which is of major significance for establishing the economic order and legal security. Article 227 Section 1 of the Constitution of the Republic of Poland explicitly indicates that the National Bank of Poland guards the value of money and bears the related responsibility. Inefficiency of actions of e.g. the National Bank of Poland

and its bodies as well as appropriate state authorities, when their actions serve only instrumental goals and contribute to inflation and rising prices, is not only a violation of law but may also be immoral and to the detriment of the authority of the state and persons of public trust. The thesis imported from the USA proclaiming that it does not pay to be unfair and dishonest applies not only to citizens but to the state and persons of public trust as well.

Thus it should be claimed that developing all economic relations on the foundation of basic values and the premise that it does not pay to act without integrity, not only the economic but the moral and legal integrity as well, is important for public order in terms of economic relations. We should also bear in mind that freedom is not something assigned but rather something which is being developed and everyone takes responsibility for exercising his freedom. Under such premises the foundations of the USA public order were developed following the great economic crisis which developed on the turning point between the 20s and the 30s of the XX century.

In summary, we must ascertain that in relation to the above an entrepreneur should be aware that integrity and righteousness of will, respecting the fundamental values of law and adhering to properly legitimized law are values crucial for developing the economic order. Such state of affairs is universal in character and pertains also to the actions taken by state authorities. Under such circumstances the state should act not only as an administrator of a certain empire but also as a medium for rationality, righteousness of will and justice. Through integrous and just actions and through respecting common good and human dignity the trust of citizens (entrepreneurs) in the state and its bodies as well as the authority of law is being developed. Each dishonest and unfair action gives birth to mistrust, sense of wrong and deteriorates trust in the other party. Under such circumstances the perfidiousness and perversity in approach to values, excessive relativism, glorification and absolutization of artificial systems of values and axiological nihilism are particularly dangerous.[14]

2. The basic pillars and values of the public order within the framework of economic activity

Undoubtedly following the 'prenatal' period related to the classicist school of the market economy theory it has been observed, also in the liberal circles, that at a certain level of

14 M. Zdyb, *Komentarz*…, pp. 93–94.

economic development the agency of the idea of spontaneous order not only decreases but also gives birth to a number of detrimental phenomena. The extremely liberal and individualistic approach to commercial operations required significant and thorough verification. Such approach was accused of: 1) normative and ethical nihilism, 2) axiological relativism, 3) excessive utilitarianism, 4) uncontrolled concentration of capital as well as, 5) not perceiving the importance of the fundamental values such as human dignity and common good – this in turn led to stratification of society which is conducive to pauperization of the general populace in favour of the few. Excessive concentration of the capital led to factual weakening of economic freedom and competition – values crucial for the market economy. Thus a problem emerged – how to eliminate circumstances under which the rules of the market game were being determined not by the market itself but by the few strongest players who through holding the economic power determined the basic principles of the game without considering the principles of integrity or even the normatively developed standards.

Therefore the need for intervention emerged, e.g. in the field of unfair competition, unfair market practices and moral and legal relativization of the rules of conduct. Appropriate legal regulations and entities holding appropriate causative power and legal implements adequate for enforcing the standards of the so called "commercial integrity," i.e. conducting economic activity consistently with moral principles, and capable for shaping the space for crucial values of the public order, common good and human dignity in particular, had to emerge at the foundation of such process. This problem could be in particular observed in the conservative concepts of the economic order which did not question the role of the market as one of the regulators of the economic order but indicated the need for modifying its role consistently with the fundamental values. The attention to this issue has been drawn by e.g. the German ordo-liberals with W. Röpke at the forefront. As he wrote: "[…] It is true that at a certain age we have to go through all stages of madness. We became aware of the excesses of capitalism – the colossus, and then we were carried away by the collectivism in which many sought salvation. People take note of the common qualities of these phenomena and currently should be fed up with their role as a well-oiled cog in the social, political and economic machine. People wish to become people in the most true and simplest understanding, they wish to be themselves, to belong to their family and greater community, they sense with an irresistible force that the modern society sentences them to living the life discordant with the human nature."[15]

[15] W. Röpke, *Powrót do niepowtarzalności*, Znak 1990, no. 10–11, p. 71 (translated on the basis of W. Röpke, *Civitas humana. Grundfragen der Gesellschafts- und Wirtschaftsreform*, Erlenbach-Zürich 1946).

Also other representatives of this trend noticed that the excessive utilitarianism, individualism and relativism, i.e. not observing the basic values or even holding them in contempt, also the contempt transferred to other aspects of the public order, are a major obstacle for developing economic order.[16]

The need for modifying liberalism towards conservatism was expressed in the postulate advocating for axiologization of the economic freedom, reinforcing position of the state through providing it with the capacity for protecting the very essence of freedom and, where applicable and necessary, the capacity for shaping wise and rational restrictive mechanisms and combining this type of freedom with the responsibility for executing it, eliminating all pathological behaviours and displays of unfair competition, artificial weakening of the value of currency etc. This type of activity in the fields of law, economics and morality served as the foundation for the idea of the three-level materialization of law in the process of developing foundations for public order. These and other views laid at the foundation of the German economic miracle symbolized by the reign of chancellor K. Adenauer.

The issues demonstrated herein-above were presented even more explicitly and blankly in the views of Michael Novak (born 1933), an American conservative political philosopher. In the part of his work I frequently invoke titled "Beyond economics, beyond politics" he wrote: "The statue of Liberty gifted to the United States of America by France more than a hundred years ago is a symbol of true freedom; a woman – not a warrior – in one hand she holds a torch of enlightenment guarding against the darkness, in the other the book of laws. This dame, undeniably stern, disciplined and with expression of focus, is a proper symbol of freedom; a pornographic shop in Manhattan lit up with neon lights most certainly is not. If the symbols of moral decadence were to become the symbols of liberal societies the freedom would go extinct within a single generation. You don't have to be a puritan – within the liberal vision there is place to spare for carnality and pleasure – to notice that the freedom is primarily a quality of spirit, intellect, the world based on the wisdom of law."[17] Thus Pope John Paul II in his encyclic *Centesimus annus* adopts that pure economism isolated from laws and morality as well as common good and human dignity in its approach to the market economy is a form of materialism which differs from the Marxist materialism solely in the quantitative categories. However, Pope John Paul II adopts that "if we were to understand capitalism as an economic system which recognizes the principal and positive role of an enterprise, the market, private property and the related responsibility for means

16 A. Rüstow, *Das Versagen des Wirtschaftsliberalismus*, München 1950, p. 52.

17 M. Novak, *Poza ekonomią, poza polityką*, Znak 1994, no. 6, pp. 94–95.

of production as well as free human initiative in the area of economy the capitalist model would be worthy of proposing to all nations."[18]

Bearing in mind the above it must be adopted that the market economy and economic freedom are values established on the level of the Constitution of the Republic of Poland (and they derive from it) and therefore they are entitled to appropriate protection and the possibility of limiting them to the extent determined by the Constitution and axiologically eligible. We should also take in to consideration that such restrictions can be imposed only through a major legal act and when justified through major public interest (e.g. threat to life, health, public order, public morality, environment protection, in consideration of other laws, rights and freedoms etc.). These restrictions cannot violate the essence of freedom including, obviously, taking the freedom away (see: Article 22 and 31 Section 3 of the Constitution of the Republic of Poland). Such state of affairs means that market operations, competition and the economic freedom are not entities in on themselves. They should be perceived in the context of the most crucial values of public order i.e. common good and human dignity. Existence and essence of these values is not dependant on the appropriate acts of the positive legislator although the legislator may form the normative foundations for their execution. Therefore these values are the key pillars of every legal order (also in the economic order).

Due to the contemporary complexity of the modern economic relations establishing any type of order in the philosophical, legal or economic understanding must not lead to chaos and a crisis devastating the economy and, as a result, encroaching upon other areas of functioning of the state and other communities and, at the same time, corrupting the principle of a state governed by the rule of law. This is why contemporarily it is impossible to shape the economic order without referring to common good[19] and, in consequence, the principles of justice and subsidiarity. Therefore the commercial law not only may but also should be perceived as one of the reference points for the search for its axiological perspective. The law is meaningless or means little if it is not aimed at the supra-systemic values

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18 Jan Paweł II, *Encyklika Centesimus annus*, Wrocław 1991, p. 128.

19 Ibidem, passim; J. Majka, *Etyka społeczna i polityczna*, Warszawa 1993, p. 243; M. Zdyb, *Dobro wspólne w perspektywie art. 1 Konstytucji RP*, in: *Trybunał Konstytucyjny. Księga XV-lecia*, Warszawa 2001, pp. 190–205; idem, *Drogi i bezdroża państwa prawnego*, in: *Konstytucja. Ustrój, system finansowy państwa. Księga pamiątkowa ku czci prof. Natalii Gajl*, eds. T. Dębowska-Romanowska, A. Jankiewicz, Warszawa 1999, pp. 197–235, as well as: idem, *Służba publiczna*, in: *Prawość i Godność. Księga pamiątkowa w 70. rocznicę urodzin Profesora Wojciecha Łączkowskiego*, eds. A. Gomułowicz, S. Fundowicz, F. Rymarz, Lublin 2003, pp. 349–377; see also the Judgment of the Constitutional Tribunal of 25 February 1999, K 23/98, OTK 1999, no. 2, item 25.

(positive-legal values).[20] The provisions of positive law undeniably constitute a significant and crucial but not the sole point of reference in the attempts at identifying the legal norms referred to the specific factual states. System-wide and fundamental values which are the foundation for public order (and the legal order) of the state are significant for developing such provisions. They cannot contradict the axiological core of the legal order.[21] Therefore I fully share the view of A. Kaufmann who claims that "a positivist who sees only acts and shuts himself of from other supra-act aspects of law is for this very reason […] powerless in the face of each form of corruption of law effected by a political force."[22] Thus it is necessary to refer to two fundamental values, i.e. common good and human dignity.

It should be adopted that the common good is not only an expression of the expectations of individuals but also an obligation to accept the supra-individual values. We should agree with J. Krucina who claims that the common good is a specific emanation of the natural order which is a symbol of unity of individuals and the society forming a community. It is being determined by: "1) humans – because a human is primarily a person within a community, works towards becoming a part of a community, grows within it and wishes to participate in it by giving and taking; 2) therefore humans cannot be separated from each other and must remain together […]; 3) the relations connecting people are not of any kind and indifferent but instead are aimed at some unifying factor; this mutual relation grows on the foundation of inherent and imparted goods, values and goals which give people the strength to come together and become a common good of a society […]; 4) in caring for common good people discover a part of themselves within its values, a personal individual good."[23] Thus it is undeniable that determining common good is related to the necessity of taking into consideration other values which supplement this concept, even if it serves as their foundation. It is related to the necessity of breaking down its contents into its most basic components. These components are ultimately responsible for expressing the essence of this concept. Therefore the common good should always be analyzed in the context of the democratic state governed by the rule of law, the principle of social justice, respecting human dignity and the rights which are based on the common good because these values are the specific emanation of the common good.

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20 Such as e.g. M.A. Krąpiec, *By ocalić suwerenność*, Toruń 1997, p. 8.

21 F. Longchamps, *Z problemów poznania prawa*, Wrocław 1968, pp. 32–33.

22 A. Kaufmann, *Rechtsphilosophie, Rechtstheorie, Rechtsdogmatik*, in: *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart*, eds. A. Kaufmann, W. Hassemer, Heidelberg 1989, p. 17.

23 I. Krucina, *Wokół wartości najwyższych*, Wrocław 1996, pp. 14–15.

The fact that the common good is not a fully defined and clear concept does not mean that the bodies exercising the law enjoy discretionary powers which impart upon them the freedom of interpretation. Such body enjoys not as much the power and freedom of specifying it as it sees fit but rather the obligation to develop the optimal extent of power in consideration of the fundamental values. Rooting common good within the framework of a specific normative structure of positive law not always provides a proper foundation for determining its contents in this field without referring to the supra-systemic values which do not require positive-legal legitimization and which specify this law. We should bear in mind that understanding of these values is influenced by tradition, legal culture, goals of the legislator who contributed to introducing these laws/provisions into the legal order or even by the specific metaphysical conditions and references. Thus it is an oversimplification to assume the existence of specific opposition, particularly against the concepts of common good and human dignity, in advance although elements of disharmony may emerge. However, in principle, these concepts supplement each other and constitute the two key pillars of public order, also in the area of economic relations.

Undeniably in the context of the economic order, just like in the case of other areas of law, human dignity is a basic value and this fact is reflected in both the doctrine[24] and verdicts of the Constitutional Tribunal.[25] Human dignity demonstrates our humanity and essences regardless of the area in which we operate. It concerns all personal incarnations and circumstances. Those who in the time of contempt, in the inhuman land 'reigned over' by the fascist and Bolshevik tormentors attempted to deprive people of their wealth, houses, families, friends and life were unable to deprive people of human dignity.

The economic life, the past and the contemporary, is not entirely free from the contempt aimed against the weak, from the conviction that human trafficking can

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24 J. Bucińska, *Godność człowieka jako podstawowa wartość porządku prawnego*, Prawo – Administracja – Kościół 2001, no. 2–3, pp. 31 ff.; K. Complak, *Uwagi o godności człowieka oraz jej ochrona w świetle nowej Konstytucji*, Przegląd Sądowy 1998, no. 5, p. 44; F.J. Mazurek, *Godność osoby ludzkiej podstawą praw człowieka*, Lublin 2001; M. Jabłoński, *Pojęcie i ochrona godności człowieka w orzecznictwie organów władzy sądowniczej w Polsce*, in: *Godność człowieka jako kategoria prawna*, ed. K. Complak, Wrocław 2001, pp. 304 ff.; L. Urbanek, *Pojęcie godności człowieka w Konstytucji RP z 1997 r. a problem definicji*, Prawa Człowieka 2000, no. 7, p. 67; M. Zdyb, *Godność człowieka w świetle art. 39 Konstytucji Rzeczypospolitej Polskiej*, in: *Normatywny wymiar godności człowieka*, eds. W. Lis, A. Balicki, Lublin 2012, pp. 41–73.

25 The Judgment of the Constitutional Tribunal of 25 November 1997, K 26/97, OTK 1997, no. 5–6, item 64; the Judgment of the Constitutional Tribunal of 12 January 1999, P 2/98, OTK 1999, no. 1, item 2, p. 221; the Judgment of the Constitutional Tribunal of 15 November 2000, P 12/99, OTK 2000, no. 7, item 260; the Judgment of the Constitutional Tribunal of 7 January 2004, K 14/03, OTK 2004, no. 1A, item 1; the Judgment of the Constitutional Tribunal of 7 March 2007, K 28/05, OTK 2007, no. 3, item 29 etc.

be a source of profits, that a fellow man can be treated as an object, or that we are demonstrating our own strength when we deprive someone of life in order to secure profit. We may demonstrate our, at times imaginary, superiority over a fellow human but dignity cannot be deprived of its value nor can it be stolen, processed into profitable material goods. In numerous legal acts of the highest rank, international agreements, constitutions etc. we come across references to dignity. However, we must bear in mind that dignity is secured not through the will of domestic or international legislators but because it is of character reaching beyond the positive-legal qualities. The United Nations Charter, international conventions and agreements, Article 30 of the Constitutions of the Republic of Poland do not establish but only confirm the existence of inherent and indefeasible human dignity.

'Human dignity' as D. Dudek rightfully notes in this context "with its major significance and implications is not a legal institution developed by law and strictly regulated […]. It is a primal phenomenon independent of law and related to existence of a man, possible to reconstruct in the form of a definition rather philosophical (anthropological and ethical) or philosophical-legal in character then strictly dogmatic-legal."[26] Under such circumstances we should adopt that human dignity is inviolable and that it deserves appropriate respect within the framework of the practices of all state bodies.

We should agree with F.J. Mazurek (Professor of The John Paul II Catholic University of Lublin) that in the context of the reference to a man "neither economy nor ideology or the state" are a measure of public and private actions. "In the core of the structure lies human dignity. The law inscribed in the Constitution cannot be treated as binding solely because it was established by the will of the state rulers. The constitution does not negate the powers of the state authority regarding establishing laws, their importance and binding force but always acts within the confines of the primary principle of human dignity."[27] Human dignity is a justification and source of not only the economic freedom but also other rights and freedoms. Thus we cannot label the state in which freedom will lead to excessive restrictions or annihilation of other laws and freedoms (e.g. the right to live, the right to heath protection, the property right etc.) as exercising freedom. The human dignity contains the categorical imperative which in this matter symbolizes the essence of the natural public order.

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26 *Zasady ustroju III Rzeczypospolitej Polskiej*, ed. D. Dudek, Warszawa 2009, pp. 43–44.

27 F.J. Mazurek, *Godność osoby ludzkiej*…, pp. 157–158.

3. The basic (selected) axiological issues in the context of the dissonance of the economic order

3.1. General remarks

The development of legal order in the area of the commercial law and also other areas of reference should be undeniably connected to the attempts at eliminating the dissonance between values which are the primary designata of the axiological order. There are numerous related dilemmas. Therefore it is justifiable to draw attention to these dilemmas which may give birth to various displays of values' corruption regardless of the appropriate approach to such axiological and fundamental values as common good and human dignity. Thus we should primarily indicate the following problems: the inflation of law, the uncertainty of law, the damage to the authority of the state and law, liberation from the specific ethos of public service, relativization of the values significant to the legal order. It is crucial to draw attention to them at least cursorily.

3.2. Inflation of law

The problem of inflation of law is undeniably a major challenge, not only in the context of the axiological perspective of legal and economic order but also in the context of destruction of positive law and unacceptable relativization and nihilization of the values to which specific regulations refer. Inflation in the axiological sphere may lead to the conflict of values and, frequently, to the legal system and individual regulations becoming 'liberated' from these values. Frequently as a consequence of the inflation of law common good and human dignity are artificially put in opposition and instrumentalized. It pertains also to the values, rights and freedoms empowered by human dignity and these rights, values and freedoms should be put into primal and independent categories which are only confirmed by the positive law because in on themselves they possess primal legitimization.

Undeniably at the foundation of inflation of law, independently of the qualities indicated above, are:[28]

[28] See also: M. Zdyb, *Dylematy ładu prawnego w kontekście inflacji i niektórych innych niedoskonałości prawa administracyjnego*, in: *Prawo administracyjne dziś i jutro*, eds. J. Jagielski, M. Wierzbowski, Warszawa 2018, pp. 425–441.

- liberating the commercial law from values; it leads to instrumentalization of values and glorification of artificial systems of values. All instances of relativization of values may lead to axiological and moral anarchy and lawlessness. S. Wyszyński strongly emphasized that: "Without restoring the moral order […] Poland will remain stuck in the mire of crises."[29] The contempt for values may give birth to the sense of lawlessness (the issue of so called 'statutory lawlessness'), disturbing the basic solutions and regulations as well as lack of sense of legal security;
- lack of systemic solutions between specific legal regulations;
- inconsistency of legal solutions within the framework of the commercial law;
- lack o systemic understanding of law (e.g. in the field of the financial market);
- excessive number of legal regulations; as A. Zoll rightfully emphasized "the law has lost its function of motivating entities to engage in behaviour prescribed under legal norms due to the excessive number of regulations, their inconsistency, ambiguity and instability."[30] In the peculiar jungle of legal regulations not only the citizens but also, in a certain sense, lawyers become lost. Law should be written for citizens, in a manner which ensures that recipients of law are capable of not only familiarizing themselves with its contents without help of experts but are also capable of understanding it;
- excessive number of amendments (there are instances of major changes being effected in an act at the vacatio legis stage);
- insufficient protection of the acquired rights; consistently with the case-law of the Constitutional Tribunal protection of acquired rights "prohibits arbitrarily abolishing or restricting legal rights of an individual or other private entities available under legal transactions"[31];
- lack of adequate protection of the fully developed expectations;
- legal traps burdened with the risk of unintentional threat to citizens (e.g. in the area of tax law);
- excessive amount of legal regulations issued in the form of circular letters, guidelines, interpretations and instructions which encroaches upon the commonly effective law;
- inconsistencies in definitions;
- separating competences and responsibility related to realization of law etc.

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29 S. Wyszyński, *Prymas Tysiąclecia (Z przemówienia w uroczystość Matki Bożej Gromnicznej w Gnieźnie w dniu 2 lutego 1978 r.)*, Paryż 1982, p. 144.

30 A. Zoll, *Główne grzechy w funkcjonowaniu państwa prawa*, a paper delivered during "Czy Polska jest państwem prawnym?" conference, Warszawa, 15.10.2004.

31 The Judgment of the Constitutional Tribunal of 5 December 2013, K 27/13, OTK 2013, no. 9A, item 134.

The issue of inflation of law points towards the quality of law not being evidenced by the number of normative acts but their quality and, in a certain sense, their permanence and legal security the law guarantees.

3.3. Uncertainty of law

The certainty of law is undoubtedly of crucial importance for development of legal orders, permanence of legal order, proper development of the legal relations between key values and establishing the legal system on a solid foundation.[32] The certainty of law cannot be guaranteed solely by the democratic foundations of its development formulated under the quantitative categories; even more importantly certainty of law should be guaranteed by the democracy formulated under the qualitative categories, i.e. in the perspective of axiological foundation. Owing to the laws of the Decalogue and the values stemming from the Old and the New Testament being inscribed deeply into our consciences and despite the passage of ages not only the Catholics treat these vales as immovable stronghold of earthly public and personal order. For the faithful these laws and values are legitimized by the fact that they were imparted by the God, a perfect entity, whereas for others (nonbelievers or people of a different creed) these laws and values can simply constitute the quintessence of humanity. How important properly formulated and worded regulations (legal provisions) are for certainty of positive law is demonstrated by the certainty of the Roman law and Napoleonic codifications.

It is undeniable that the certainty of the positive law bolsters the righteousness of will of legislators and the bodies applying laws; it also induces the law-makers to reason in the pro-state and pro-citizen categories and not through the lens of the interests of various groups. The constant changes in law related to shifting political powers are dangerous for certainty of law. Everyone to whom law refers expects that the adopted legal solutions will establish a sense of permanence of these solutions and will enable recipients of law to plan their activity and impart upon them the sense of normative security. It is of particular importance in the area of economic relations. Uncertainty of law may induce the uncertainty regarding the future and reluctance towards the solutions the permanence of which is questionable and does not engender trust in the state and the law.

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[32] See also: M. Zdyb, *Pewność prawa (Legal Certainty)*, TEKA Komisji Prawniczej PAN – Oddział w Lublinie 2018, vol. 11, no. 1, pp. 421–443.

The dis-functionality of material and procedural law in regards to competences and structure of the bodies exercising the law as well as the dysfunctional attempts at overhauling dysfunctional regulation are not conducive to certainty of law. It pertains to e.g.: functioning of the financial market, rationing of commercial operations, the banking law, public procurement law, excess of bureaucratic obstacles, adopting hastily drafted laws and flimsy character of legal solutions.

The certainty of law is undeniably an axiological guarantee of legal security and the value conducive to developing trust in the state and the law. Its importance has been noticed by the Constitutional Tribunal which drew it from the normative preamble and expanded it with the comprehensive analysis of certain constitutional provisions contained within the articles of the Constitution (e.g. in Article 2 – the principle of a democratic state governed by the rule of law). On the level of acts referring to commercial operations we should draw attention to the act of 6 March 2018 – the Entrepreneurs Law[33] where the certainty of law has been emphasized in act's preamble and Article 11. The issue of certainty of law indicated in the preamble refers to both adoption and application of law. In turn, Article 11 refers to applying the law.[34] However, we should bear in mind that simply formulating the law under an act consistently with the aforementioned principle is not decisive for ensuring certainty of law. The practice of implementing this principle will be crucial in this matter.

3.4. Insufficient care for authority of the state and law as well as the public service ethos

The issue of establishing the authority of law in the field of commercial operations has been discussed above. Here we should indicate that the key to doing so undeniably consist of clear axiological foundations and values which should be carried by the positive law and state bodies with the goal of ensuring that we may state that the law is the art of everything good, just, rational and prudent but also moral and ethical. It also concerns the authority of the ruling power.

Bearing the above facts in mind it appears legitimate to invoke two meaningful quotes. In this context F. Koneczny rightfully noted that: "The state does not exist beyond ethics nor does it stands above ethics. The so called strong rule is justified and good as long as it remains just […] Lack of ethics in the state led […] to characteristic perception of politics as the art of grabbing power […]. If the state does not behave

33 Journal of Laws [Dziennik Ustaw] 2018 item 646.

34 Consistently with Article 2 of the Act: "without a justified reason a body does not depart from the determined and consolidated practice of resolving cases of the same factual and legal state."

ethically in regards to the citizens how citizens can behave ethically towards the state? […] The bizarre conviction that the law is enough of a connection between the state and the society does not belong to any part of the Latin civilization. Legal formulas supplanting conscience, formulas destined to be toys of authorities – a clear example of the Byzantine malady. […] The state does not […] hold the power to engage in unethical acts, i.e. the evil does not become moral and allowable because the state engages in evil acts or through being committed on the behalf of or by the state […]. There is no power under the sun which could order its subjects to act against the Decalogue."[35]

D. Hollenbach further adds that "the government has a moral role to play: to protect human rights and ensure basic justice for all members of the community. The society [as in 'the state' – M.Z.] understood as a whole, as a conglomeration of diverse planes and aspects, bears the responsibility for jointly developing common good."[36]

The authority of public authorities does not stem solely from the requirements developed under legal provisions and the expectations based on their contents nor from the formal qualifications or specific personal relations. Undoubtedly it is not enough. Such authority is being developed through the sense of service. This is why restoring the ethos of public service appears to be so important contemporarily. Under no circumstances public service can be associated with servility, a spot in the hierarchy of power and perceiving the power through the lens of means required to obtain it. Public officials exercising power on various planes and levels of hierarchy should be characterized by the righteousness of will, just character of their actions and thinking in categories of the state and a citizen. Recently, as evidenced by the crisis which started in 2007, the countries with seemingly vast democratic traditions went through state institutions' crisis and legal crisis and, as a result, contributed to exacerbating the economic crisis. The words of the Primate of the Millennium delivered during the launch of academic year at the Catholic University of Lublin in 1979 remain topical to this day: "Do not think that a nation can achieve its goals with the help of blank people who do not see the essence of public service and perceive it solely as servility."

3.5. Excessive relativization of understanding of normative values

We can with full certainty claim that following the tragic experience of two World Wars and various totalitarian regimes the modern international conventions and

35 F. Koneczny, *Rozwój moralności*, Lublin 1938, pp. 212–219.

36 Quoting M. Novak, *Splot dwóch tradycji*, Znak 1990, no. 10–11, p. 11.

agreements as well as domestic constitutions and law in civilized states have been saturated with the values significant from the point of view of legal order and security. Undoubtedly despite the passage of time the United Nations Charter signed on the 16 October 1945 in Washington and the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in Paris remain crucial documents[37] which are certainly some of UN's greatest achievements. The majority of the phrases were reflected in constitutions of individual countries but was not always interpreted in the spirit of the aforementioned documents; this fact resulted in specific relativization of constitutions on the level of other domestic laws and agreements. Without establishing these laws on clear axiological foundations glamourous slogans and values may become a subject of unacceptable and intolerable relativization. They become as useful to a drunkard as a streetlight – not as a source of light but as a place to prop himself up against. The issue of moral perversity in approach to values was emphasized by e.g. J. Nagórny,[38] J. Onimus,[39] A.M. Krąpiec,[40] G. Radbruch[41] as well as the author of this paper.[42]

The theory of axiological neutrality of law frequently advocated for today, the 'moral situationism,' fetishization of the artificial systems of values, the single-minded approach to economic reality lead to relativization of the values of law and towards the assumption that everything is relative. It is undeniable that the axiological dilemmas and the possible conflict of values in the area of commercial law are not sparked by the essence of the economic freedom, as it is unquestionable, but instead by the understanding of the economic freedom in the context of diverse conditions.

Conclusion

In summary, it must be ascertained that the economic freedom is not something granted but rather something that has to be developed. Thus it should be understood not as an arbitrarily assigned privilege but as a task to be fulfilled, encum-

37 https://www.unesco.pl/fileadmin/user_upload/pdf/Powszechna Deklaracja Praw Czlowieka.pdf [access: 7.07.2023].

38 J. Nagórny, *Wychowanie do wartości moralnych. Perspektywa chrześcijańska*, Lublin 1993, p. 14.

39 J. Onimus, *Próby odpowiedzi*, Warszawa 1972, pp. 9–12.

40 M.A. Krąpiec, *Człowiek i prawo naturalne*, Lublin 1975, p. 38.

41 G. Radbruch, *Die Natur der Sache als juristische Denkform*, Darmstadt 1960, p. 42.

42 Journal of Laws 1947 no. 23, item 91. M. Zdyb, *Drogi i bezdroża*…, pp. 197–235.

bered with related responsibilities and the obligation to manage it appropriately. It cannot relate to state nihilism and liberating the economic order from morality and the so called 'commercial integrity.'

The state nihilism and moral relativism are not a part of human nature. "Fidelity, loyalty, courage, integrity, entrepreneurship, creative spirit, kindness, compassion and other regular virtues are still alive" as M. Novak wrote.[43] However, they are frequently overlooked or their contents are filled with normative mush, particularly in the field of application of law.

The deliberations contained within this paper were directed, similarly to my numerous other publications, by the personal vision of public order which assumes that in this context not only the literal wording of legal provisions is important but also – as I emphasized on numerous occasions – the law being an art of choosing what is good, right, just, prudent, rational and wise. Thus the thesis was born proclaiming that to establish legal order in the area of economic relations it is not sufficient to adopt a certain number of laws because to play its role the laws have to be founded on clear axiological foundations which embody the essential values. Common good (Article 1 of the Constitution of the Republic of Poland) and human dignity (Article 30) perceived not in opposition but in mutual relation are of primary importance under these circumstances. They exist regardless of being legitimized by law or positive reception. Every legislator must bear these values in mind, also when considering rights and freedoms (including the economic freedom) stemming from human dignity. They are undoubtedly supplemented with various systemic values resulting from the social principle of the market economy, the need for protecting other rights and freedoms, the idea of social justice etc. In conclusion, it would be prudent to claim that the axiological foundations of the legal-economic order are, as per this paper, threatened by such phenomena as: normative and ethical nihilism, axiological relativism, uncontrolled concentration of capital, uncertainty in the field of developing and applying law as well as inflation of law, not caring appropriately for developing and maintaining authority of the state and law etc.

Translated by Monika Zielińska

[43] M. Zdyb, *Drogi i bezdroża*…, p. 106.

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Materiały i glosy /
Materials and commentaries

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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).

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Gloss to the Judgment of the Court of Justice of 17 November 2022, C-224/20

Glosa do wyroku Trybunału Sprawiedliwości z dnia 17 listopada 2022 r., C-224/20

Научный комментарий к решению Европейского суда от 17 ноября 2022 г., C-224/20

Глосарій до рішення Суду Європейського Союзу від 17 листопада 2022 року, C-224/20

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Summary: The commented judgment concerns the admissibility of repackaging medicinal products in parallel trade. It was issued in connection with new EU regulations aimed at counteracting the counterfeiting of such products. The Court examined how the regulations in question affect the scope of rights enjoyed by the owners of trademarks affixed to products, as well as the rights of entrepreneurs engaged in parallel trade.

Key words: free movement of goods, intellectual property, exhaustion of the rights conferred by a trademark, parallel import of medicinal products

Streszczenie: Glosowane orzeczenie dotyczy problematyki dopuszczalności przepakowywania produktów leczniczych w ramach handlu równoległego. Zostało ono wydane w związku z nowymi regulacjami prawa unijnego, które mają przeciwdziałać fałszowaniu tego rodzaju produktów. Trybunał ocenił, jak przedmiotowe regulacje wpływają na zakres uprawnień właścicieli znaków towarowych, którymi są opatrzone produkty, oraz na uprawnienia przedsiębiorców zajmujących się handlem równoległym.

Słowa kluczowe: swobodny przepływ towarów, własność intelektualna, wyczerpanie prawa do znaku towarowego, handel równoległy produktami leczniczymi

Резюме: Комментируемое решение касается вопроса о допустимости переупаковки лекарственных препаратов в рамках параллельной торговли. Оно было вынесено в связи с новыми нормами законодательства ЕС, направленными на противодействие фальсификации таких препаратов. Суд проанализировал, как рассматриваемые нормы влияют на объем прав владельцев товарных знаков, которыми маркируется продукция, и на права участников параллельной торговли.

Ключевые слова: свободное перемещение товаров, интеллектуальная собственность, истечение срока действия права на товарный знак, параллельная торговля лекарственными препаратами

Резюме: Рішення, що розглядається, стосується питання допустимості перепакування лікарських засобів у паралельній торгівлі. Воно було винесене у зв'язку з новими правовими нормами ЄС, спрямованими на протидію фальсифікації такої продукції. Суд оцінив, як ці норми впливають на обсяг прав власників товарних знаків, якими маркується продукція, і на права права підприємців, які займаються паралельною торгівлею.

Ключові слова: вільний рух товарів, інтелектуальна власність, вичерпання права до товарного знаку, паралельна торгівля лікарськими засобами

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Theses of the Judgment

1. Article 9 (2) and Article 15 of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, and Article 10 (2) and Article 15 of Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, read in conjunction with Articles 34 and 36 TFEU,

must be interpreted as meaning that the proprietor of a trade mark is entitled to oppose the marketing, by a parallel importer, of a medicinal product repackaged in new outer packaging to which that trade mark is affixed where the replacement of the anti-tampering device of the original outer packaging, carried out in accordance with Article 47a (1) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, as amended by Directive 2012/26/EU of the European Parliament and of the Council of 25 October 2012, would leave visible or tangible traces of that original outer packaging having been opened, provided that:

there is no doubt that those traces of opening are attributable to the repackaging of that medicinal product by that parallel importer and

those traces do not cause, on the market of the Member State of importation or on a substantial part of it, such strong resistance from a significant proportion of consumers to the medicinal products repackaged in that way that it would constitute a barrier to effective access to that market.

2. Directive 2001/83, as amended by Directive 2012/26, and Commission Delegated Regulation (EU) 2016/161 of 2 October 2015 supplementing Directive 2001/83,

must be interpreted as precluding a Member State from requiring that medicinal products imported in parallel must, in principle, be repackaged in new packaging and that recourse may be had to relabelling and to the affixing of new safety features to the original outer packaging of those medicinal products only on application and in exceptional circumstances, such as, inter alia, a risk of disruption to the supply of the medicinal product concerned.

3. Article 9 (2) and Article 15 of Regulation 2017/1001 and Article 10 (2) and Article 15 of Directive 2015/2436, read in conjunction with Articles 34 and 36 TFEU,

must be interpreted as meaning that a Member State rule which requires that medicinal products imported in parallel must, in principle, be repackaged in new packaging and that recourse may be had to relabelling and to the affixing of new safety features to the original outer packaging of those medicinal products only on application and in exceptional circumstances does not impede the exercise by

a trade mark proprietor of his or her right to oppose the marketing by a parallel importer of a medicinal product repackaged in new outer packaging to which that mark is affixed.

4. Article 9 (2) and Article 15 (2) of Regulation 2017/1001 and Article 10 (2) and Article 15 (2) of Directive 2015/2436, read in conjunction with Articles 34 and 36 TFEU,

must be interpreted as meaning that the first of the five conditions set out in paragraph 79 of the judgment of 11 July 1996, Bristol-Myers Squibb and Others (C-427/93, C-429/93 and C-436/93, ECLI:EU:C:1996:282) – according to which the proprietor of a trade mark may legitimately oppose the further marketing in a Member State of a medicinal product bearing that mark and imported from another Member State, where the importer of that medicinal product has repackaged that product and reaffixed that trade mark to the packaging and where such repackaging of that medicinal product in new outer packaging is not objectively necessary for the purposes of its being marketed in the Member State of importation – must be satisfied where the trade mark which appeared on the original outer packaging of the medicinal product concerned has been replaced by a different product name on the new outer packaging of that medicinal product, provided that the immediate packaging of that product bears that trade mark and/or that new outer packaging refers to that mark.

5. Article 9 (2) and Article 15 (2) of Regulation 2017/1001 and Article 10 (2) and Article 15 (2) of Directive 2015/2436

must be interpreted as meaning that the proprietor of a trade mark may oppose the marketing in a Member State by a parallel importer of a medicinal product imported from another Member State which that importer has repackaged in new outer packaging to which he or she has reaffixed the trade mark of the proprietor specific to that product, but not the other trademarks and/or other distinctive signs which appeared on the original outer packaging of that medicinal product, where the presentation of that new outer packaging is in fact liable to damage the reputation of the trade mark or where that presentation does not enable normally informed and reasonably attentive consumers, or enables them only with difficulty, to ascertain whether that medicinal product originates from the proprietor of the trade mark or an undertaking economically linked to him or her or, on the contrary, originates from a third party, thus adversely affecting the function of indicating the origin of the mark.

Introduction

Medicinal products are a special type of commodity. The costs of their development and marketing borne by their manufacturers are enormous. What is more, their production entails the risk that they will not bring the desired returns for manufacturers**.** Furthermore, public authorities in different countries control their prices in different ways. Finally, their specificity stems also from the fact that the use of medicinal products directly affects human health and life. As was correctly observed by M. Szpunar, Advocate General, "the need for a return on investment, on the one hand, and the regulatory constraints on prices, on the other hand, lead manufacturers of medicinal products to set widely differing prices for the same product, even in highly interconnected markets, as is the case in the Member States of the European Union. The indicated situation, in turn, results in the profitability of the practice of purchasing medicinal products on markets with low prices and reselling them on markets with higher prices."[1] It is referred to as parallel import (parallel trade). Defining the said form of trading as parallel import results from the fact that it takes place parallel to the manufacturers' distribution channels, while involving the same medicinal products registered in the country of destination.[2] This is why entities that are independent of manufacturers take advantage of the practice described above, which is opposed by manufacturers. Trademark rights constitute the weapon that the latter can use to fight back. The entity that holds the right of registration (right of protection) of a trademark may, in fact, oppose the use of that trademark, including for the marketing of the product in question, by a third party. At the same time, manufacturers of medicinal products take various measures to prevent parallel imports.[3]

One of the risks associated with parallel trade, even if not linked thereto in an inextricable way, is the risk of introducing falsified medicinal products on the market. In particular, there may be a danger of their repackaging, which is often necessary to place such products on the market in Member States other than the one in

1 The opinion of Advocate General M. Szpunar presented on 13 January 2022, C-147/20, C-204/20 and C-224/20, ECLI:EU:C:2022:28.

2 M. Królikowska-Olczak, *Import równoległy produktów leczniczych a zasada swobodnego przepływu towarów*, Studia Prawno-Ekonomiczne 2016, vol. 100, pp. 35–36.

3 R. Skubisz, *Wyczerpanie prawa ochronnego na znak towarowy*, in: *System Prawa Prywatnego*, vol. 14B. *Prawo własności przemysłowej*, ed. R. Skubisz, 2nd ed., Warszawa 2017 [Legalis database], no. 85. As for parallel import see also T. Sieniow, *Rozkład ciężaru dowodu w sprawach importu równoległego*, Europejski Przegląd Sądowy 2006, no. 7, p. 19.

which they were sold originally.[4] Another example of interference with the original packaging on which the trademark has been affixed is placing an additional label that covers the original packaging, applied by the authorized trademark holder, in whole or in part.[5] The EU legislator has introduced mechanisms to verify the authenticity of medicinal products to counteract the said risks.[6] Directive 2011/62 (Falsified Medicines Directive, FMD)[7] thus inserted into Article 54 of Directive 2001/83 the point (o) pursuant to which the outer packaging or, where there is no outer packaging, the immediate packaging of medicinal products other than radiopharmaceuticals referred to in Article 54a (1) of that directive must be equipped with safety features enabling wholesale distributors and persons authorised or entitled to supply medicinal products to the public to verify the authenticity of the medicinal product concerned, to identify individual packs and to verify whether the outer packaging of that medicinal product has been tampered with. Pursuant to Article 54a (2) of Directive 2001/83, Delegated Regulation 2016/161[8] establishes the detailed rules for those safety features. Recital 1 of that delegated regulation identifies two types of safety features, namely (i) a unique identifier and (ii) an anti-tampering device. An anti-tampering device is defined in Article 3 (2) of that delegated regulation as the safety feature allowing the verification of whether the packaging of a medicinal product has been tampered with.

On the said background, the Court of Justice of the European Union rendered a series of judgments on the interpretation of the rules on falsified medicinal products. The main judgment, that takes into account the complexity and multiplicity of

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4 The opinion of Advocate General M. Szpunar presented on 13 January 2022, cases C-147/20, C-204/20 and C-224/20, ECLI:EU:C:2022:28, Section 10. Simultaneously, on the same day, the Court rendered in particular judgments in the cases C-147/20 and C-204/20. Due to the vastness of the subject matter, these are only hinted at.

5 K. Szczepanowska-Kozłowska, *Import równoległy produktów leczniczych oznaczonych znakiem towarowym*, Przegląd Prawa Handlowego 2007, no. 12, p. 12.

6 See *inter alia* Articles 54, 54 (a), 57, 59, 60 of Directive 2001/83; Articles 3 (2), 10, 16 (1), 24, 25, 30 of Delegated Regulation 2016/161.

7 The Falsified Medicines Directive was published on 1 July 2011, and applies since 2 January 2013.

8 This regulation details the characteristics of the safety features, as well as how medicine authenticity should be verified and by whom. It has been in force since 9 February 2019. The EU system aims to facilitate the verification of the authenticity of medicinal products directly with the manufacturers at any stage of the distribution chain and at any point within the internal market of the European Union, until the medicinal product is delivered to patients. The provisions stipulate that once the medicine is delivered, usually to the patient, the unique identifier will be withdrawn from the database system, so that no other package with the same unique identifier can be 'positively verified,' cf. I. Kalinowska-Maksim, *Fałszowanie produktów leczniczych. Zagadnienia prawne i kryminologiczn*e, Warszawa 2020, p. 49.

issues involved, is the said case C-224/20.[9] On the basis of the relevant statement of the Advocate General, the fundamental legal issue addressed in these cases involves the consideration of whether the requirements in question, intended to counteract the falsification of medicinal products, change the status quo with respect to the rights of parallel traders of medicinal products as well as the rights of their manufacturers as proprietors of the trademarks under which the said products are marketed.[10]

The commented judgment is also relevant to the Polish pharmaceutical market, where the share of parallel traders is significant. The aim of the present gloss is to examine the extent to which the aforementioned FMD regulation [Falsified Medicines Directive] affects the issue of parallel trade and entrepreneurs' entitlements.

1. De facto and de jure situation

The commented judgment has been rendered on the request made in the context of seven sets of proceedings between (i) manufacturers of medicinal products – proprietors of trademarks under which the medicinal products they produce are sold, and (ii) parallel importers of pharmaceutical products, concerning the importation into Denmark of medicinal products placed on the market in other Member States by those manufacturers. Once they are placed on the market in Denmark, those medicinal products are repackaged in new outer packaging. Parallel importers purchase medicinal products in EU countries offering lower prices and sell them in EU countries where the prices are higher. To do this, the parallel traders must change the directions for use and the drug packages in each case to be in the language of the country of destination. In some of the disputes in the main proceedings, the trademarks of those manufacturers are affixed to the new outer packaging, whereas, in other disputes, these trademarks are replaced by new product names. In the latter case, the new outer packaging indicates that the medicinal product it contains corresponds to the medicinal product marketed by the proprietor under his or her trademark and that the blister packs inside that new outer packaging bear that mark. The new package leaflet accompanying the medicinal product in question also indicates that the product corresponds to that sold by the proprietor under his or her trademark. The companies which manufacture the original medicinal prod-

9 Judgments on similar legal issues were passed in the cases of C-253/20 and C-254/20.

10 The opinion of Advocate General M. Szpunar presented on 13 January 2022 item 11.

ucts claim that, in circumstances such as those covered by the disputes in the main proceedings, trademark law confers on them the right to oppose the repackaging of the medicinal products in question in the new outer packaging. The companies that import medicinal products into Denmark contend that repackaging is necessary and therefore lawful.

Given the above-mentioned circumstances, the Landgericht Hamburg (Hamburg Regional Court) addressed the Court with questions that could be summarised as follows: (1) Do the new rules counteracting the falsification of medicinal products introduced by the FMD and Delegated Regulation 2016/161 oblige parallel traders to give preference to the repackaging of parallel imported medicinal products into new packaging over the use of original packaging with new labels affixed to it? (2) Do, and if so, to what extent, the new rules in question alter the scope of the right of proprietors of trademarks related to medicinal products to counteract the repackaging of parallel traded medicinal products into new packaging vis-à-vis the legal situation resulting from the present case-law of the Court of Justice? (3) Are the Member States' authorities entitled to lay down stricter rules concerning the manner in which parallel traded medicinal products are repackaged and, if so, what are the consequences thereof for the rights of the manufacturers of these medicinal products? 4) To what extent does the proprietor of a trademark relating to a parallel traded medicinal product have the right to counteract the repackaging of the medicinal product in question where the parallel trader does not reproduce, or only partially reproduces the trademarks used by the owner in respect of the said medicinal product.[11]

Parallel traders argue that, due to the new regulations of Directive 2011/62 and Delegated Regulation 2016/161, repackaging into new packaging is now the rule, and resealing of the original packaging is only allowed as an exception. In contrast, trademark owners of medicinal products maintained that the new legislation did not fundamentally change the existing rules. According to these entrepreneurs, both the re-use of the original packaging and repackaging into new packaging are in principle permissible, and the regulations for medicinal products do not provide for the priority of one or the other method.[12]

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11 The opinion of Advocate General M. Szpunar presented on 13 January 2022, Section 52. For the formulation of the questions at issue, see Section 42 of the judgment under review C-224/20, ECLI:EU:C:2022:893.

12 The opinion of Advocate General M. Szpunar presented on 13 January 2022, Section 57. According to Article 47a (1) of Directive 2001/83: The safety features referred to in point (o) of Article 54 shall not be removed or covered, either fully or partially, unless the following conditions are fulfilled:

2. Comments

The view that dominates in the literature is that the judgment in Bristol Myers Squibb, BMS, is of fundamental importance for the repackaging of medicinal products.[13] This judgment included five conditions to be fulfilled by an entity repackaging a medicinal product to be able to invoke exhaustion of the trademark right against the proprietor.[14] They are called BMS conditions.[15] Other judgments of the Court of Justice of the European Union [CJEU] also addressed the problem of legal issues related to the exhaustion of the right to register a mark. The literature points out that even the judgment in Boehringer Ingelheim and Others C-348/04 case[16] seemed to rule out further discussion on the premises of admissibility of repackaging.[17] Furthermore, it was pointed out in the doctrine that the CJEU rulings showed that "only a change in the condition of the goods that adversely affects the consumer's perception of the product can threaten trademark infringement. If the change is not perceptible by the consumer or is neutral to his/her perception, it should not

(a) The manufacturing authorisation holder verifies, prior to partly or fully removing or covering those safety features, that the medicinal product concerned is authentic and that it has not been tampered with;

(b) The manufacturing authorisation holder complies with point (o) of Article 54 by replacing those safety features with safety features which are equivalent as regards the possibility to verify the authenticity, identification and to provide evidence of tampering of the medicinal product. Such replacement shall be conducted without opening the immediate packaging as defined in point 23 of Article 1. Safety features shall be considered equivalent if they: (i) comply with the requirements set out in the delegated acts adopted pursuant to Article 54a (2); and (ii) are equally effective in enabling the verification of authenticity and identification of medicinal products and in providing evidence of tampering with medicinal products;

(c) the replacement of the safety features is conducted in accordance with applicable good manufacturing practice for medicinal products; and

(d) the replacement of the safety features is subject to supervision by the competent authority.

13 Judgment of the Court of 11 July 1996, Bristol-Myers Squibb and Others, C-427/93, C-429/93 and C-436/93, ECLI:EU:C:1996:282.

14 E. Traple, *Import równoległy a wyczerpanie prawa z patentu i prawa ochronnego na znak towarowy*, in: *Prawo farmaceutyczne*, eds. E. Traple, M. Krekora, M. Świerczyński, Warszawa 2020, p. 661.

15 R. Skubisz, in: *System Prawa Prywatnego*, vol. 14B, p. 1085.

16 Judgment of Court of 26 April 2007, Boehringer Ingelheim and Others, C-348/04, ECLI:EU:C:2007:249.

17 Read more widely on the topic: K. Szczepanowska-Kozłowska, *Ewolucja koncepcji wyczerpania prawa ochronnego na znak towarowy w orzecznictwie Trybunału Sprawiedliwości*, Glosa 2014, no. 1, pp. 65–68. To learn more about the evolution of the CJEU's views on repackaging, see also: W. Olszewski, *Ewolucja zasad przepakowania produktu leczniczego w ramach importu równoległego. Glosa do wyroku Trybunału Sprawiedliwości z 28.07.2011 r. w sprawach połączonych: C-400/09 i C-207/10 „Orifarm i inni"*, Europejski Przegląd Sądowy 2015, no. 1, pp. 46–48.

create a premise for the trademark holder to use his/her rights."[18] Tampering with the packaging of a medicinal product may take various forms.[19] In parallel imports of medicinal products, the rule is to tamper with the packaging in which the product was originally placed on the market by the right holder, and this is due to the need to comply with standards arising from legislation in force in the importing country, not yet standardised in the Member States.[20]

As far as more recent rulings are concerned, it is also important to recall the judgment of the Court in the C-642/16, Junek Europ-Vertrieb case.[21] It concerned parallel imports of medical products and tampering with the outer packaging, consisting of affixing a small information sticker that did not cover or contain the trademark. The Court ruled that this form of tampering with packaging is not repackaging within the meaning of the earlier case law developed in relation to medicines and does not require compliance with the requirements set out in the earlier judgments, including, in particular, the notification of the trademark proprietor.[22]

Then, usually parallel traders typically had to add labels to the existing packaging (relabelling) and could only introduce replacement packaging (reboxing) where that was necessary, for instance due to different pack sizes or "such strong resistance from a significant proportion of consumers to relabelled pharmaceutical products that there must be held to be a hindrance to effective market access."[23]

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18 M. Kondrat, *Przepakowanie leków w imporcie równoległym*, in: *100 lat ochrony własności przemysłowej w Polsce. Księga jubileuszowa Urzędu Patentowego Rzeczypospolitej Polskiej*, ed. A. Adamczak, Warszawa 2018, p. 471.

19 In the practice of marketing medicinal products, it is becoming increasingly common for importers to place their own trademarks on the packaging alongside the manufacturer's trademark, which is seen as an attempt to promote the parallel importer or to highlight the name of the medicinal product from the country of destination, if this name is different from the name of the product used in the country from which the product is exported. This is known as co-branding. There is also the practice of removing the trademark that is used in the country of origin of the medicinal product from the packaging and replacing it with the trademark from the country of destination. This in turn is called re-branding. A third method is to remove the trademark from the packaging and replace it with a trademark from the country of origin (de-branding). R. Stankiewicz, *Reguły importu równoległego ustalone w orzecznictwie unijnym*, in: *Instytucje rynku farmaceutycznego*, ed. R. Stankiewicz, Warszawa 2016, p. 335. Also in this matter see J. Chlebny, *Dopuszczalność usuwania cudzego znaku towarowego na gruncie prawa znaków towarowych (część 1)*, Przegląd Prawa Handlowego 2020, no. 1, p. 39.

20 R. Skubisz, *Import równoległy produktów leczniczych. Glosa do wyroku ETS z 26.04.2007 r. (C-348/04)*, Europejski Przegląd Sądowy 2007, no. 7, p. 48.

21 Judgment of the Court of 17 May 2018, Junek Europ-Vertrieb, C-642/16, ECLI:EU:C:2018:322.

22 Read more widely on the topic: M. Kondrat, in: *Prawo własności przemysłowej. Komentarz*, ed. M. Kondrat, Warszawa 2021 [LEX database], Commentary on Article 155.

23 Judgment of 23 April 2002, Merck, Sharp & Dohme v. Paranova, C-443/99, ECLI:EU:C:2002:245, § 31.

The first thesis of the commented judgment of the Court concerns the interpretation of Article 9 (2) and Article 15 of Regulation (EU) 2017/1001 and Article 10 (2) and Article 15 of Directive (EU) 2015/2436,[24] read in conjunction with Articles 34 and 36 TFEU. The Court indicated that these provisions must be interpreted as meaning that the proprietor of a trademark is entitled to oppose the marketing, by a parallel importer, of a medicinal product repackaged in new outer packaging to which that trademark is affixed where the replacement of the anti-tampering device of the original outer packaging, carried out in accordance with Article 47a (1) of Directive 2001/83/EC, would leave visible or tangible traces of that original outer packaging having been opened, provided that: (I) there is no doubt that those traces of opening are attributable to the repackaging of that medicinal product by that parallel importer and (ii) those traces do not cause, on the market of the Member State of importation or on a substantial part of it, such strong resistance from a significant proportion of consumers to the medicinal products repackaged in that way that it would constitute a barrier to effective access to that market. In reaching its decision in this regard, the Court referred to its previous judgments that formulated the conditions under which a trademark holder is entitled to counteract the repackaging of a product, including the BMS judgment.[25] First, the Court indicated that repackaging into new packaging must be regarded as objectively necessary where the anti-tampering device with which the outer packaging of the medicinal product concerned is equipped cannot objectively be replaced by an equivalent device, within the meaning of Article 47a (1) (b) of Directive 2001/83, however, the presence of traces of opening is, in itself, insufficient to support the inference that the condition of equivalence has not been satisfied. On the other hand, according to the Court, a parallel importer cannot rely on a general presumption of consumer resistance to relabelled medicinal products whose anti-tampering devices have been replaced. Then, the possible existence of such resistance and its extent must be assessed *in concreto*, taking into account, in particular, the circumstances prevailing in the Member State of importation at the time at which the medicinal product

[24] The transposition of the rule expressed in the provision of Article 15 of Directive 2015/2436 is the provision of Article 155 of the Act of 30 June 2000 – Industrial Property Law. The provision of the Directive constitutes, in turn, a normative sanctioning of the concept of exhaustion developed earlier in the jurisprudence of the CJ against the background of Articles 34 and 36 of the Treaty on the Functioning of the European Union (ex Articles 28 and 30 of the Treaty Establishing the European Community) relating to the free movement of goods within the internal market. Cf. more widely: M. Bohaczewski, in: K. Osajda, *Komentarze Prawa Przemysłowego*, vol. 8B. *Prawo własności przemysłowej. Komentarz*, ed. Ł. Żelechowski, 2nd ed., Warszawa 2022 [Legalis database], Commentary on Article 155.

[25] C-224/20, § 52–57.

concerned was marketed, and of the fact that traces of opening are visible or, on the contrary, can be detected only after a thorough verification by wholesalers or persons authorised or entitled to supply medicinal products to the public pursuant to their verification obligations under Articles 10, 24 and 30 of Delegated Regulation 2016/161. The Court in this case resisted the automatic presumption that recipients of medicinal products would refrain from purchasing relabelled medicinal products whose anti-tampering devices have been replaced. The circumstances of a particular case must be examined on a case-by-case basis by the national court.

Also, the Court clearly indicated that provisions of the Directive 2001/83 and Delegated Regulation 2016/161 preclude a Member State from requiring that medicinal products imported in parallel trade must, in principle, be repackaged in new packaging and that recourse may be had to relabelling and to the affixing of new safety features to the original outer packaging of those medicinal products only on application and in exceptional circumstances, such as, inter alia, a risk of disruption to the supply of the medicinal product concerned. Such finding of the Court has been issued as a reaction to the actions of the Danish Medicines Agency. This Agency considered that it is a general rule that parallel importers must repackage the products in new packaging according to the new rules of the regulation. According to this Agency, that also follows from the purpose of the new rules of the regulation, including the requirement for an anti-tampering device to be designed in such a way that any opening of, or tampering with, the package can be identified. Parallel importers who opened the packaging of medicinal products and broke the anti-tampering device for the purpose of placing a Danish package leaflet etc. in the packaging must therefore, in accordance with the new rules of the regulation, repackage the products in new packaging and attach a new unique identifier and anti-tampering device on the packaging, as well as upload information etc. Such interpretation provided by this Agency has been questioned by the Court. The Court has pointed out, inter alia, that a systemic interpretation of Article 47a of Directive 2001/83, read in the light of the objectives of that directive and of Directive 2011/62, that this article brings about exhaustive harmonisation as regards the conditions under which safety features may be replaced. Then, the Member States cannot create further conditions, as it can impede the marketing of medicinal products. As has been highlighted by the Advocate General, pursuant to the provision of Article 47a (1) (d) of Directive 2001/83, the substitution of the safeguards referred to in Article 54 (o) of that Directive is subject to supervision by a competent authority. It is obvious that the competent authority of the Member State may issue guidelines informing on the conditions and modalities thereof under the said supervision. However, the indicated guidelines may not amend the existing provisions of EU

law. In its judgment concerning the matter, the Court adopted the interpretation developed by the Advocate General. The interpretation in question seems to be correct and based on both the wording and the purpose of the relevant provisions. It will furthermore provide a clear guideline for action with regard to the EU's national regulatory authorities in terms of establishing regulation modelled on the one submitted by the Danish regulatory authority in the case in question.

In the commented judgment, the Court also addressed the scope of the trademark proprietor's right relating to a medicinal product engaged in parallel trade. The Court has analysed the case, where the trademark which appears on the original outer packaging of a medicinal product is replaced by a different product name on the new outer packaging of that medicinal product, the parallel importer uses in the course of trade a sign identical with that mark, within the meaning of Article 9 (2) (a) of Regulation 2017/1001 and Article 10 (2) (a) of Directive 2015/2436, in relation to the imported medicinal products which he or she wishes to place on the market of a Member State. The Court emphasised that the repackaging of those medicinal products in new outer packaging is liable to affect the functions of the trademark and, therefore, the proprietor may have a legitimate interest in opposing it. The Court stressed that that new outer packaging or label must not be defective, of poor quality, or untidy.[26] Moreover, a repackaged pharmaceutical product could be presented inappropriately and, therefore, damage the trademark's reputation in particular where the packaging or label, while not being defective, of poor quality or untidy, is such as to affect the trademark's value by detracting from the image of reliability and quality attaching to such a product and the confidence it is capable of inspiring in the public concerned.[27] The Court remarked that, according to the that rule, a presentation of a product which does not enable normally informed and reasonably attentive consumers, or enables them only with difficulty, to ascertain whether the product originates from the proprietor of the trademark or an undertaking economically linked to him or her or, on the contrary, originates from a third party, adversely affects the function of indicating the origin of the mark.[28] The labelling on the packaging may include the name of the parallel trader's company. In such a situation, consumers, who may not be aware of the existence of parallel trade, may even think that this manufacturer is a parallel trader. This is why reaffixing the proprietor's trademark specific to a medicinal product to the new outer packaging of that product, without reproducing on that packaging the other

26 See Judgment of the Court of 26 April 2007, Boehringer Ingelheim and Others, § 40 and 43.

27 Ibidem.

28 Judgment of the Court of 8 July 2010, Portakabin, C-558/08, ECLI:EU:C:2010:416, § 34.

trademarks and/or the other distinctive signs which appeared on the original packaging of that medicinal product, adversely affects the function of indicating the origin of the mark. The Court's jurisprudence to date has indicated that a trademark holder may counteract the repackaging of products if this is likely to damage the reputation of the trademark placed on that product. What is new is the highlighting that – as far as the repackaging of medicinal products is concerned – the key functions of a trademark include, particularly, the essential function of indicating the product's origin. However, these functions are not limited to the essential function of the mark, which is to guarantee to consumers the origin of the product or service, but they also cover the other functions of the mark, such as, in particular, that of guaranteeing the quality of the product or service, or those of communication, investment or advertising.[29]

Conclusions

The reasons that countries or regions allow or prevent parallel importing are not exclusively a matter of legal rules. Rather, there are economic considerations that determine and shape the legal rules.[30] The issues that are the subject of the judgment are related to the functions of trademarks. In the course of the evolution of trademark law, there has been a shift away from the close connection of a trademark with an enterprise towards the distinctive function of the mark.[31] K. Szczepanowska-Kozłowska indicates that a trademark is a symbol of a product.[32] The importance of this function is also recalled in the commented judgment. This means that the repackaging of medicinal products in new outer packaging is liable to affect the functions of the trademark and, therefore, the proprietor may have a legitimate interest in opposing it. Indeed, it appears that the Court has accepted the approach taken by the manufacturers of original medicinal products. It should be remembered that they invest heavily in the development and implementation

29 See Judgment of the Court of 25 July 2018, Mitsubishi Shoji Kaisha and Mitsubishi Caterpillar Forklift Europe, C-129/17, ECLI:EU:C:2018:594, § 34 and the case-law cited.

30 S. Frankel, *The Dynamic and Unsettled Evolution of Parallel Importing*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej 2017, no. 3, p. 29.

31 See further: Ł. Żelechowski, *Funkcje znaku towarowego a naruszenie prawa ochronnego na znak towarowy (cz. I)*, Przegląd Prawa Handlowego 2015, no. 5, pp. 5–6; R. Skubisz, *Znaki towarowe – ewolucja przedmiotu ochrony prawnej*, Przegląd Prawa Handlowego 2008, no. 12, p. 17.

32 K. Szczepanowska-Kozłowska, *Wyczerpanie praw własności przemysłowej. Patent i prawo ochronne na znak towarowy*, Warszawa 2003, p. 69.

of new medicinal products. It is also the matter of public interest to protect the interests of these manufacturers because it can encourage them to invest in creating new products.

Also, the Court agreed with the Advocate General that a parallel importer cannot rely on a general presumption of consumer resistance to relabelled medicinal products whose anti-tampering devices have been replaced. I also agree with this statement. Although the requirements of the Medicines Directive and the FMD mean that the parallel importers of pharmaceutical products will have to open the original outer packaging of the products, which may leave visible traces of the packaging being opened, this does not automatically mean that an equivalent anti-tampering device cannot be applied by the parallel importer. Also, if it was objectively possible to relabel the product, rather than repackage it, and still be compliant with the Medicines Directive and the FMD, then the proprietor would be entitled to enforce their rights against the repackaging. Then, the importers of pharmaceutical products wouldn't be able to treat the provisions of the FMD as an automatic right to repackage. They will need to provide specific reasons why it is necessary to repackage the product, and why they could not simply replace the security features of the packaging with new security features of equivalent effect.

The crucial thing is to balance, on the one hand, the basic function of the trademark and, on the other hand, maintain effective access to the market of the importing Member State. However, the arguments regarding the effectiveness of the fight against the counterfeiting of medicinal products, which provided the basis for adopting new regulations of the FMD, cannot be regarded as a sufficient argument to limit the rights of holders. Taking the above-mentioned into account, even if complying with the directives will leave visible traces that the packaging had been opened, this does not necessarily mean that the importers' access to the market will be hindered.

The judgment under review is largely based on previous case law of the Court. It is not out of the ordinary. With that in mind, the view has so far been advanced in the doctrine that the Court has focused excessively on the problem of ensuring maximum facilitation of the free movement of goods. This has weakened the trademark protection.[33] This time, the Court tended to favour the arguments of the original medicine manufacturers.

It should be stressed that, despite the efforts made at EU level to harmonise the safety features for medicinal products as much as possible, the question whether

[33] M. Roszak, *Handel równoległy produktami leczniczymi w prawie unijnym. Granice swobody przepływu towarów na rynku farmaceutycznym*, Warszawa 2014, p. 210.

traces left by the original safety seal can provoke a strong reaction from consumers. It also should be emphasised that, according to the Court, any national legislation imposing full repackaging cannot curtail a trademark owner's rights. It is also an important indication for Polish lawmakers. Besides, the commented judgment will be also important in respect to the application of Article 155 of Act of 30 June 2000 – Industrial Property Law.[34]

The commented judgment still leaves the assessment in this matter for the national courts. It means a certain degree of uncertainty for parallel traders. As a result, regardless of whether there are anti-tampering device traces, parallel importers still need to prove in a concrete manner that it is objectively necessary to rebox before being allowed to do so. The fact that the opening of the original packaging and the replacing of the original anti-tampered device leaves visible or tangible traces does not amount to objective necessity to re-box the product. Although we can probably expect further judgments of the Court making the rules set out by this judgment more specific, the commented judgment is a sensible interpretation of the provisions of the directives, which protects the rights of manufacturers of original products, without unduly restricting the principle of free movement of goods.

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[34] Consolidated text: Journal of Laws [Dziennik Ustaw] 2023 item 1170.

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Conflict between freedom of expression and freedom of religion. The ECHR case of Rabczewska v. Poland, 8257/13. An approving commentary

Konflikt między wolnością słowa a wolnością religijną. Sprawa Rabczewska v. Polska, skarga nr 8257/13. Glosa aprobująca

Конфликт между свободой слова и свободой вероисповедания. Дело Рабчевска против Польши, жалоба № 8257/13. Одобрительный научный комментарий

Конфлікт між свободою слова та релігійною свободою. Справа Рабчевська проти Польщі, заява № 8257/13. Схвалюючий коментар

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Summary: The ECHR statement that the domestic courts did not assess whether the applicant's statements had been capable of arousing legitimate indignation or whether they were of a nature to incite to hatred or otherwise disturb religious peace and tolerance in Poland is of key importance considering the judgment under review. ECHR rightly ruled that a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements in question do not incite to hatred or religious intolerance. In the absence of a legal definition, it is difficult to assess the social harmfulness of an act. The Court has recognised the issue that has existed for years in Polish criminal law – that the protection of religious feelings is ineffective and inadequate to the degree of the insulting nature of the criminal act. Poland violated Article 10 of the Convention, as the national courts failed to make a fair assessment of the social harmfulness of the act.

Key words: blasphemy, religious feelings, freedom of speech, religious freedom, freedom of expression

Streszczenie: Ocena dokonana przez ETPC, w myśl której sądy krajowe nie oceniły, czy wypowiedzi skarżącej mogły wzbudzić uzasadnione oburzenie lub czy miały one charakter podżegania do nienawiści albo w inny sposób zakłócania pokoju i tolerancji religijnej w Polsce, ma kluczowe znaczenie w kontekście glosowanego wyroku. ETPC słusznie orzekł, że grupa religijna musi tolerować zaprzeczanie przez innych jej przekonaniom religijnym, a nawet propagowanie przez innych doktryn wrogich ich wierze, o ile kwestionowane wypowiedzi nie nawołują do nienawiści lub nietolerancji religijnej. Wobec braku definicji prawnej trudno ocenić społeczną szkodliwość czynu. Trybunał stwierdził, że ochrona uczuć religijnych jest nieskuteczna i nieadekwatna do stopnia zniewagi czynu zabronionego, tym samym uznał istniejący od lat w polskim prawie karnym problem ze stopniowaniem społecznej szkodliwości czynu. Polska naruszyła art. 10 Konwencji, gdyż sądy krajowe nie dokonały rzetelnej oceny społecznej szkodliwości czynu.

Słowa kluczowe: bluźnierstwo, uczucia religijne, wolność słowa, wolność religijna

Резюме: Оценка Европейским судом по правам человека (ЕСПЧ) того, что национальные суды не оценили, могли ли высказывания заявителя вызвать обоснованное негодование, носили ли они характер подстрекательства к ненависти или иным образом нарушали мир и религиозную толерантность в Польше, имеет решающее значение в контексте рассматриваемого постановления. ЕСПЧ справедливо постановил, что религиозная группа должна терпимо относиться к отрицанию другими лицами ее религиозных

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убеждений и даже к распространению другими лицами доктрин, враждебных ее вере, если оспариваемые высказывания не возбуждают ненависть или религиозную нетолерантность. В силу отсутствия юридического определения, трудно оценить общественную опасность деяния. Суд пришел к выводу, что защита религиозных чувств неэффективна и неадекватна степени оскорбления запрещенного деяния, тем самым признав существующую в течение многих лет в польском уголовном праве проблему с градацией общественной опасности деяния. Польша нарушила статью 10 Конвенции, поскольку национальные суды не смогли дать справедливую оценку общественной опасности деяния.

Ключевые слова: богохульство, религиозные чувства, свобода слова, свобода вероисповедания

Резюме: Оцінка ЄСПЛ, згідно якої національні суди не оцінили, чи могли заяви заявника викликати обґрунтоване обурення або чи мали вони характер підбурювання до ненависті чи іншим чином порушували мир і релігійну терпимість у Польщі, має вирішальне значення в контексті рішення, що переглядається. ЄСПЛ справедливо постановив, що релігійна група повинна терпимо ставитися до заперечення іншими її релігійних переконань і навіть до поширення іншими доктрин, ворожих їхній вірі, якщо оскаржувані висловлювання не розпалюють релігійну ненависть або брак толерантності. За відсутності легального визначення важко оцінити суспільну шкоду діяння. Суд визнав, що захист релігійних почуттів є неефективним і неадекватним ступеню правопорушення забороненого діяння, тим самим визнавши проблему, яка роками існувала в польському кримінальному праві з градацією суспільної шкідливості діяння. Польща порушила статтю 10 Конвенції, оскільки національні суди не дали справедливої оцінки суспільної шкідливості діяння.

Ключові слова: богохульство, релігійні почуття, свобода слова, релігійна свобода

The Court reiterates that a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite to hatred or religious intolerance (§ 57).

In particular, the domestic courts did not assess whether the applicant's statements had been capable of arousing justified indignation or whether they were of a nature to incite to hatred or otherwise disturb religious peace and tolerance in Poland (§ 60).

Introduction

This gloss is of an approving nature and will analyse the judgment of the European Court of Human Rights (hereinafter: the Court) of 15 September 2022 (case of Rabczewska v. Poland, application no. 257/13).[1] The following part of the judgment under review will answer the question of whether the judgment implies the need to decriminalise the offence of insulting religious feelings.

[1] https://hudoc.echr.coe.int/fre#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%228257/13%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-219102%22]} [access: 10.07.2023].

1. Circumstances of the case

It was clear from the factual findings of the first-instance (Regional Court for Warsaw--Mokotów) and second-instance court (District Court in Warsaw that the defendant (Dorota Rabczewska), through her public utterance, referred in a demeaning and insulting manner to objects of religious reverence – the figures considered to be the authors of the Holy Scriptures, and indirectly also to the content of the Book. By her unambiguously insulting statement concerning the authors of Scripture, the defendant also indirectly insulted the Book itself (in an immaterial sense), which is an object of the highest reverence not only in the Christian religions, but – as far as the Old Testament is concerned – also in Judaism. The defendant, through her controversial words, intended to hurt the religious feelings of others. The District Court held that the characterisation of biblical content as the fruit of the drug- and alcohol-induced state its creators were in – which is indisputably evident from the content of the interview – could not be regarded as an appropriate and acceptable criticism of the object of religious reverence, a presentation of one's own views, or a joke. The defendant committed this act with direct intent; she was fully aware of her criminal activity. Despite assurances that she did not intend to offend anyone, the defendant believes that such a context and manner of expression is within the scope of freedom of speech, it is an expression of her sincerity and she will act similarly in the future. As a mitigating circumstance, the Court considered the defendant's prior clean criminal record, the fact that she had reconciled with the victim, and that she had expressed remorse. An appeal against the above ruling was lodged by the defendant's attorney. In considering the above appeal, the District Court had no doubt that the defendant's conduct was of an offensive, taunting nature and fulfilled all the elements of an offence under Article 196 of the Criminal Code. The Regional Court only changed the date on which the criminal act was committed, establishing that the offence against religious feelings occurred on 24 July 2009.

Dorota Rabczewska by virtue of the rulings by the District Court in Warsaw of 16 January 2012 (III K 416/10) and by the Regional Court in Warsaw of 18 June 2012 (X Ka 496/12), was legally found guilty of committing the offence charged in the indictment under Article 196 of the Criminal Code, i.e. that in an interview with the online edition of Dziennik.pl she publicly insulted the religious feelings of Ryszard N. and Stanisław K. by insulting the object of religious worship in the persons of the authors of the Holy Bible. The defendant was fined a total of PLN 5000 (€ 1000).

Dorota Rabczewska then filed a constitutional complaint requesting that the Constitutional Court declare Article 196 of the Criminal Code as unconstitutional as it prevents the free expression of views on objects of religious worship; it restricts

this right in a disproportionate manner; it does not protect persons who do not profess a religion; and it does not meet the requirements of the specificity of law. The representatives of the Prosecutor General and the Sejm (Lower Chamber of the Parliament) moved to consider the provision of Article 196 of the Criminal Code as compliant with the Constitution.[2]

The Constitutional Tribunal, in its judgment of 6 October 2015 (SK 54/13), stated that Article 196 of the Criminal Code, in so far as it criminalises insulting the religious feelings of others by publicly insulting an object of religious worship, punishable by a fine: is consistent with Article 42 item 1 in connection with Article 2 of the Constitution of the Republic of Poland; it is not incompatible with Article 53 item 1 in connection with Article 54 item 1 of the Constitution; it is in line with Article 54 item 1 in connection with Article 31 item 3 of the Constitution.[3] Consequently, Dorota Rabczewska (hereinafter: the applicant) lodged an application with the Court, registered under no. 8257/13. Polish doctrine notes the fact that the Constitutional Tribunal's judgment is compliant with current European standards.[4]

2. The enjoyment of freedom of speech

In the case in question, the Tribunal rightly noted that the context of the applicant's statements was not aimed at provoking religious hatred or intolerance. The domestic courts found that the words uttered by the applicant were offensive and caused an outrage among religious believers. From the perspective of protecting

[2] In the constitutional complaint, Dorota Rabczewska indicated the following constitutional review patterns: Article 53 Section 1 of the Constitution in connection with Article 54 Section 1 of the Constitution to the extent that it interferes with the freedom of conscience of people who do not profess religion by preventing them from freely expressing their views on objects of religious worship; Article 54 Section 1 of the Constitution in connection with Article 31 Section 3 of the Constitution in connection with Article 2 of the Constitution to the extent that it restricts the freedom of expression in a disproportionate way, significantly exceeding the scope necessary in a democratic state ruled by law, violating the essence of this freedom; Article 25 Section 2 of the Constitution in connection with Article 32 Section 1 of the Constitution to the extent that it protects believers against offending their religious feelings, but it does not protect people who do not profess religion and their worldview and philosophical beliefs are violated by other people; Article 42 Section 1 of the Constitution in connection with Article 2 of the Constitution to the extent that it does not meet the requirements of specificity and certainty of criminal law provisions.

[3] OTK ZU 2015, no. 9A, item 142; Journal of Laws [Dziennik Ustaw] of 2015 item 1632.

[4] M. Skwarzyński, *Orzeczenie TK w sprawie sygn. akt SK 54/13 w przedmiocie przestępstwa obrazy uczuć religijnych w świetle standardów strasburskich*, Przegląd Prawa Wyznaniowego 2016, vol. 8, pp. 115–128.

freedom of expression, it is the purpose of the utterance and its nature that is most significant, not just the specific statements, even if they are offensive. The Tribunal analysed the applicant's words in terms of their actual impact on Polish society. The Tribunal considered the type of rights infringed upon and the consequences of the singer's words.

Religious feelings are protected by Polish law. The offence under Article 196 of the Criminal Code is compliant with the Polish Constitution. However, all this does not mean that freedom of speech cannot be violated. The applicant did not use hate speech nor did she incite or even suggest that people should abandon their faith or attack believers. Her words were shocking and controversial, but simultaneously did not carry a message of religious intolerance. It is one thing to incite to hatred or religious intolerance and another to express extremely foolish views that cannot be perceived by others as an attack on religion. This subtle difference was noted by the Tribunal, while assessing the rank of the singer's words in the context of her right to freedom of speech. It is difficult to view the applicant's statement as intended to provoke a doctrinal dispute or undermine core truths of the faith. The style and nature of the applicant's speech would seem to support considering it as a typical exercise of free speech not subject to punishment.

The applicant did not intend to provoke any public debate on religious issues, nor did she wish to undermine religious doctrine. Instead, it was apparent from the context of her statements that she was driven by emotions and aimed at gaining popularity. This, of course, does not release her from responsibility for her words. The context of her statement clearly indicates that the purpose of her interview was not religious in nature. The controversial issues in the interview were incidental. The applicant has never taken part in public debates concerning religion, the role of faith in human life, etc. The few words uttered in the interview cannot obscure the fact of the interview's true intention. The Tribunal conducted a fair evaluation of the applicant's statements and found that her words did not provoke a religious fight nor were they directed at religious believers in order to provoke hatred. In fact, the interview was intended to promote herself and her artistic work rather than provoking a religious fight.

Certainly, the Tribunal has drawn attention to the existing issue in Polish law of classifying statements insulting religious feelings as hate speech. Public expression of one's negative or critical views concerning the object of religious reverence are outside the scope of the criminalisation under Article 196 of the Criminal Code, provided that it does not take the form of or contain objectively insulting content. It is accepted in doctrine that public criticism of a particular religious community, its functioning or the views it proclaims, including questioning the existence of the

object of their worship, shall not be considered an insult to religious feelings, provided that the criticism is not insulting by its nature.[5]

Freedom of expression, referred to in Article 54 Section 1 of the Constitution, enjoys full liberty with regard to behaviour that does not fulfil the elements of the offence of insulting religious feelings (Article 196 of the Criminal Code), even when we are dealing with criticism or a negative opinion, which, however, does not take the form of insult, and also when culpable guilt cannot be attributed to the perpetrator. Offence to religious feelings is a subjective category dependent on the recipient's individual sensibility. The Court rightly noted that the applicant's statement did not include "actions containing elements of violence, or elements susceptible of stirring up or justifying violence, hatred or intolerance of believers." This raises the question of when and what actions should be considered iconoclastic. The Court triggered discussions concerning the interplay between hate speech and speech offending religious feelings. The Court found that the applicant's state of mind and lack of unequivocal intent to offend the religious feelings of others and, most importantly, the fact that her public words had provoked a reaction from only two people in the country should be seen as a violation of freedom of speech.[6]

One should not lose sight of the need for the Polish courts to apply a proportionality test. The crux of the matter comes down to the question of whether offending the religious feelings of two people in the entire country is sufficient to consider the application of criminal sanctions as necessary. The circumstances of this case show that the lack of objective criteria as to when an action is an inadmissible critique, negative opinion, insult, or disparagement is of great importance here. It cannot be that the criminal law system uses Article 196 of the Criminal Code to criminalise the absurdity, stupidity and infantile behaviour of the perpetrator. Freedom of speech in the context of a democratic and pluralist state also means the freedom to express one's ignorance without inhibitions. A democratic society is entitled to protection against the insults to its values, in this case fundamental (religious) values, but this protection must relate to situations in which religious freedom is genuinely

5 S. Hypś, in: *Kodeks karny. Komentarz*, eds. A. Grześkowiak, K. Wiak, Warszawa 2015, p. 977.

6 See § 63: "[…] the Court observes that the applicant was convicted in criminal proceedings originating from a bill of indictment lodged by a public prosecutor upon a complaint by two individuals. The criminal proceedings were thus continued even after the applicant had reached a friendly settlement with one of the complainants. The applicant was sentenced to a fine equivalent to 1,160 euros, fifty times the minimum. The Court cannot, therefore, conclude that the criminal sanction imposed on the applicant was insignificant."

threatened. An insult therefore consists of behaviour which constitutes, in the light of customary and cultural norms, an expression of contempt.[7]

In practice, freedom of expression will be jeopardised whenever national courts inadequately justify the application of a criminal sanction against a person who has offended the religious feelings of others. The very fact that legislative attempts have been made to change the content of Article 196 of the Criminal Code demonstrates the need for deeper reflection on the criminal law protection of religious feelings.[8] Any doubt in a criminal trial must be interpreted in favour of the defendant (*in dubio mitius*), including those concerning attempts at legislative amendment of the offence under Article 196 of the Criminal Code.[9] The national courts were not up to the task.

3. The subjectivity of religious feelings

The Constitutional Tribunal, in its judgment of 6 October 2015, stated that the object of protection, referred to in Article 196 of the Criminal Code, is the right to protection of religious feelings, arising from the freedom of religion guaranteed by Article 53 of the Polish Constitution.[10] In Poland, the scope of protection under Article 196 of the Criminal Code provides comprehensive protection of religious feelings, adequate to the constitutional rank of this value. In practice, the construction of the offence under Article 196 of the Criminal Code focuses only on the legal

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7 See more: N. Kłączyńska, in: *Kodeks karny. Część szczególna. Komentarz*, ed. J. Giezek, Warszawa 2014, p. 510.

8 See more in: J. Strzelecki, *Kryminalizacja obrazy uczuć religijnych – analiza krytyczna*, in: *Nauki penalne wobec szybkich przemian socjokulturowych. Księga jubileuszowa Profesora Mariana Filara*, vol. 1, eds. A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Leciak, Toruń 2012, pp. 488–489.

9 Two draft amendments to the Criminal Code concerning the crime of offending religious feelings were submitted to the Lower Chamber of the Parliament. The solutions proposed in the draft of 24 January 2012 (Paper no. 240) aimed at removing the provision of Article 196 of the Criminal Code and, consequently, to decriminalise offences against religious feelings, and the draft of 20 April 2012 (Paper no. 383) assumed the modification of the features of this type of offence, combined with the reduction of the statutory threat and the introduction of a private prosecution procedure. The draft of 11 April 2022 provided for the introduction of two offences into the Criminal Code – publicly insulting or mocking a church or other religious association with a regulated legal situation, its dogmas or rituals, as well as publicly insulting an object of religious worship or a place intended for the public performance of religious rites.

10 Judgment of the Constitutional Tribunal of 6 October 2015, SK 54/13, OTK 2015, no. 9A, item 142.

protection of believers.[11] There should be no doubt that religious feelings are inseparably linked precisely to a person's faith – not to other aspects of their emotional life and inner convictions.[12] In contrast, the protection under this provision does not extend to the feelings of non-religious people arising from their non-religious affiliation.[13]

Polish courts have not sufficiently taken into account the type and nature of the rights infringed upon, the extent of the damage caused or threatened, the manner and circumstances in which the act was committed, as well as the motivation of the perpetrator, the type of precautionary rules violated and the degree of their violation. The literature rightly notes that Article 115 § 2 of the Criminal Code does not formally define the essence of social harmfulness, but merely indicates which elements are to be taken into account in its assessment.[14]

Criminal law doctrine indicates various criteria that can be used to assess the degree of social harm. However, the examples of negligible social harm provided in the literature indicate that the assessment of behaviour is often extra-legal in nature.[15] The negligible nature of this type of offence is also evident from a comparison of the number of convictions for an offence under Article 196 of the Criminal Code in relation to the overall scale of offences and represents between 0,000002 and 0,000032% (average 0,000017%) of criminal cases per year (2005–2011). In these few cases, the courts have most often imposed a custodial sentence with probation.[16]

It is truly difficult to conclude that the social harmfulness of the act is greater than negligible in a situation where the justice system is involved in prosecuting the offence of insulting religious feelings after two people have filed a complaint. One of the elements to be examined by the court when analysing social harm is the extent of the harm caused. The lack of clear guidance on how to grade social harm in itself violates Article 10 of the convention, because, after all, it can be a tool to restrict freedom of expression. There is a lack of research on how the victim's own

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11 See W. Wróbel, in: *Kodeks karny. Część szczególna*, vol. 2, ed. A. Zoll, Kraków 2006, p. 643; in diferrent manner M. Filar, M. Berent, in: *Kodeks karny. Komentarz*, ed. M. Filar, Warszawa 2016, p. 1204.

12 See Z. Gądzik, *Przestępstwa przeciwko wolności sumienia i wyznania*. *Efektywne Prawo*, 2021, https://efektywne-prawo.org.pl/wp-content/uploads/2021/12/Z.-Gadzik-przestepstwa-wobec-wolnosci-sumienia-i-wyznania4.pdf [access: 10.07.2023].

13 Z. Migros, *Z problematyki przestępstw przeciwko wolności sumienia i wyznania*, Zeszyty Naukowe ASW 1978, no. 22, p. 100.

14 R. Zawłocki, *Pojęcie i funkcje społecznej szkodliwości czynu w prawie karnym*, Warszawa 2007, pp. 156–157.

15 Ibidem, pp. 219–268, 290; W. Janyga, *Przestępstwo obrazy uczuć religijnych w polskim prawie karnym w świetle współczesnego pojmowania wolności sumienia i wyznania*, Warszawa 2010, p. 277.

16 M. Poniatowski, *Analiza art. 196 Kodeksu karnego z perspektywy 15 lat jego obowiązywania*, Roczniki Nauk Prawnych 2013, vol. 23, no. 3, pp. 30–50.

subjective belief arising from a sense of offence to their religious feelings is investigated in practice. The average member of a religious group is therefore taken as a model.[17] This is an imperfect criterion.[18]

An important issue of the judgment under review is the recognition that the social harmfulness of an act is gradable and that assessment of its degree falls to the court. In order to speak of an offence, the social harm must be greater than negligible (*nullum crimen sine damno sociali magis quam minimo*, as expressed in Article 1 § 2 of the Criminal Code). The 1997 Polish Criminal Code adopted a comprehensive concept, all the while without defining the concept of social harm. The condition for any discontinuation of proceedings is to prove that the degree of social harm was negligible under Article 17 § 1 point 3 of the Code of Criminal Procedure. The impact of the degree of social harm is relevant not only in the case of the institution of conditional suspension of proceedings, but also when ruling on the application of a penal measure instead of a penalty (Articles 53 § 1, 59, 66 of the Criminal Code).

4. The lack of need to decriminalise the offence of insulting religious feelings in Polish criminal law

Answering the main question posed in this gloss, it must be stated that the Rabczewska v. Poland ruling does not imply the necessity to decriminalise the offence of insulting religious feelings. The breach of the Convention standard in this case should be seen as a necessity to make the essential legislative changes, given the considerations mentioned in this gloss.

Above all, the shaping of criminal liability without considering the criteria for assessing the degree of social harm caused by the act deprived the applicant of the right to form her own opinions. Each of the grounds of social harm is characterised by its legal significance, and therefore the omission of any of them and the arbitrary assessment of any of them must result in a breach of the Convention standard. In the case of Rabczewska v Poland, the Tribunal recognised this issue by stating that "the examined under examination did not amount to an improper or abusive attack

17 R. Krajewski, *Ochrona wolności sumienia i wyznania w świetle Kodeksu karnego z 1997 r.*, Przegląd Sądowy 2008, no. 3, p. 72; E. Kruczoń, *Przestępstwo obrazy uczuć religijnych*, Prokuratura i Prawo 2011, no. 2, p. 44.

18 M. Poniatowski, *Analiza art. 196*…, pp. 30, 36, 57.

on an object of religious veneration likely to incite religious intolerance or violating the spirit of tolerance, which is one of the bases of a democratic society" (§ 64).

The complexity of understanding and interpreting elements of the offence of insulting religious feelings leads to the conclusion that the applicant's conduct was reprehensible and insulting, but did not merit a criminal law response from the State. The Tribunal concludes that "in the instant case the domestic courts failed to comprehensively assess the wider context of the applicant's statements and carefully balance her right to freedom of expression with the rights of others to have their religious feelings protected and religious peace preserved in the society" (§ 64).

Drawing on the well-known distinction between justification and excuse (exculpation) for the purposes of criminal law, it is worth noting that a justified action is not criminal, whereas an excused defendant has committed a criminal act but is not subject to punishment. In view of the complex circumstances of the entire incident, it must be considered that the applicant's conduct did not substantially violate social mores. In particular, the fact that the applicant was judged as for a criminal act despite her state of mind and her lack of clear intent to offend the religious feelings of others and, most importantly, the fact that her public words caused a reaction from only two people in the country should be seen as a violation of freedom of expression.

Constitutional Tribunal Judge Andrzej Wróbel stated that "In a democratic state governed by the rule of law, belonging to a European culture marked by, among others, values such as tolerance and pluralism of worldviews, the protection of the religious feelings of others against being offended by insulting and public and intentional behaviour towards an object of religious worship need not lead to the threat of imprisonment, in particular for up to 2 years."

In the Author's opinion, the arguments presented by the Court should provide guidance to the Polish State in adapting the current provision of Article 196 of the Criminal Code to balance two constitutional rights. After all, the mere threat of a custodial sentence, irrespective of sentencing practice, can also be seen as an excessively harsh measure. At this point, it should be pointed out that the causal conduct described in Article 196 of the Criminal Code, in order to be socially harmful, must aim to influence society in such a way as to cause social danger. The issue in terms of the correct application of Article 196 of the Criminal Code is to grasp the moment from which it can be said that the act in question was socially harmful to a degree greater than negligible.

In finding a violation of Article 10 of the Convention, the Court in fact recognised the problem associated with the assessment of the social harmfulness of an act in Polish criminal law. In Rabczewska's case, the Polish government failed to show that the applicant's behaviour had a domino effect and depreciated religious

values to such an extent that state intervention would be required. First of all, Poland violated Article 10 of the Convention, as the national courts failed to make a fair assessment of the social harmfulness of the act.

According to Thomaso Virgili, one of the main problematic aspects is the subjectivity of religious feelings: "Along with 'justified indignation', 'religious feelings' is a vague phrase that is hard to define and inevitably linked to the ethos and sensibility of the individual or of that (allegedly) prevalent in the group. Who should speak for all believers? 'Religious peace' is yet another indefinite concept, as the ECtHR has not anchored it to the more objective criterion of public order. And if it did so, as the concurring opinion proposes, it would de facto create an incentive for organised groups to react violently against expression they do not like, for the louder the unrest, the more solid the legal grounds for censorship."[19]

Conclusions

It must be stated that the Court's judgment does not imply the necessity to decriminalise the offence under Article 196 of the Criminal Code. Violation of Article 10 of the Convention in this case should trigger a discussion on the due protection of freedom of expression by introducing objective criteria for the gradation of the social harmfulness of the act of offending religious feelings and perhaps also its fundamental revision.

The judgment is also an important point of reference for Christians in Poland to become more resolutely involved in defending the values close to them by using the available legal tools to this end, otherwise national courts will not be able to establish the social harmfulness of the act.

In practice, the Court has recognised the issue that has existed for years in Polish criminal law – that the protection of religious feelings is ineffective and inadequate to the degree of the insulting nature of the criminal act. On the one hand, the Court's judgment should represent a watershed moment in terms of modifying the content of the elements of this offence and, on the other hand, national courts must implement a system that would objectively assess the gradation of the social harmfulness of iconoclastic acts.

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19 T. Virgili, *Rabczewska v. Poland and Blasphemy before the ECtHR: A Neverending Story of Inconsistency*, Strasbourg Observers, 2022, https://strasbourgobservers.com/2022/10/21/rabczewska-v-poland-and-blasphemy-before-the-ecthr-a-neverending-story-of-inconsistency/ [access: 10.07.2023].

A significant problem noticed by the ECHR in the Rabczewska v Poland case is the lack of gradation of the act's social harmfulness. Not all behaviour (even socially negative and offensive) should result in criminal liability. If the criminal law system were designed to punish stupidity and all its manifestations, it would lead to absurdity. In practice, the criminal sanction is intended to have an educative dimension and is the ultimate response of the state to a citizen's behaviour. In Rabczewska's case, her punishment had the opposite effect to that intended, lending credibility to her frivolous statement, which can objectively be considered ridiculous. According to the Supreme Court, "the assessment of the degree of social harmfulness of a specific conduct should be an overall assessment, taking into account the circumstances listed in Article 115 § 2 of the Criminal Code, and not the sum or derivative of partial assessments;" therefore, national courts must "assess the harmfulness of an act comprehensively, and not in terms of its individual factors."[20]

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[20] Judgment of the Supreme Court of 27 July 2021, III KK 346/20, LEX no. 3305210.

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Materiały źródłowe / Source materials

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Memorandum o porozumieniu między Ministerstwem Spraw Zagranicznych Rzeczypospolitej Polskiej a Ministerstwem Spraw Zagranicznych i Współpracy Międzynarodowej Republiki Rwandy o konsultacjach politycznych, podpisane w Warszawie dnia 11 maja 2021 r.[1]

Memorandum of Understanding between the Ministry of Foreign Affairs of the Republic of Poland and the Ministry of Foreign Affairs and International Cooperation of the Republic of Rwanda on Political Consultations, signed in Warsaw on 11 May 2021

Меморандум о взаимопонимании между Министерством иностранных дел Республики Польша и Министерством иностранных дел и международного сотрудничества Республики Руанда о политических консультациях, подписанный в Варшаве 11 мая 2021 года

Меморандум про домовленість між Міністерством закордонних справ Республіки Польща та Міністерством закордонних справ і міжнародного співробітництва Республіки Руанда про політичні консультації, підписаний у Варшаві 11 травня 2021 року

tłum. z j. ang. **ŁUKASZ RUPNIAK**
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Ministerstwo Spraw Zagranicznych Rzeczypospolitej Polskiej oraz Ministerstwo Spraw Zagranicznych i Współpracy Międzynarodowej Republiki Rwandy (dalej łącznie zwane „Uczestnikami" oraz indywidualnie „Uczestnikiem");

potwierdzając dwustronne konsultacje, a także wymianę opinii na różnych poziomach w kwestiach będących przedmiotem wspólnego zainteresowania;

pragnąc wzmocnić i promować wzajemne porozumienie i współpracę między dwoma państwami oraz

przestrzegając zasady wzajemnego poszanowania suwerenności, niepodległości oraz nieingerencji w sprawy wewnętrzne,

osiągnęły następujące porozumienie:

[1] Niniejsze memorandum nie stanowi umowy międzynarodowej i nie zostało ogłoszone w dzienniku urzędowym. Tekst w języku angielskim jest dostępny w Internetowej Bazie Traktatowej Ministerstwa Spraw Zagranicznych Rzeczypospolitej Polskiej (https://traktaty.msz.gov.pl).

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Artykuł 1
Cele

Celem niniejszego Memorandum o porozumieniu (zwanego dalej „MoP") jest stworzenie mechanizmu dwustronnych konsultacji politycznych.

Artykuł 2
Spotkania konsultacyjne

Uczestnicy będą odbywać regularne spotkania konsultacyjne urzędników wyższego szczebla w celu omówienia różnych sposobów współpracy na rzecz rozwoju stosunków dwustronnych, a także wymiany opinii i współpracy w kwestiach międzynarodowych będących przedmiotem wspólnego zainteresowania.

1. Uczestnicy mogą powołać komitet w celu omówienia konkretnego obszaru będącego przedmiotem wspólnego zainteresowania.
2. Spotkania konsultacyjne mogą odbywać się raz na dwa lata albo częściej, jeśli wystąpi taka potrzeba.
3. Uczestnicy wspólnie uzgodnią w drodze dyplomatycznej poziom reprezentacji, termin, miejsce i porządek spotkań konsultacyjnych.

Artykuł 3
Wymiana informacji o wzajemnych stosunkach

Uczestnicy będą zachęcać, ilekroć uznają to za potrzebne, do konsultacji i wymiany informacji o wzajemnych stosunkach i kwestiach ogólnoświatowych będących przedmiotem wspólnego zainteresowania ich urzędników wysokiej rangi.

Uczestnicy będą zachęcać do kontaktów między instytucjami obu państw, w szczególności między naukowcami specjalizującymi się w dziedzinie stosunków międzynarodowych i polityki zagranicznej.

Artykuł 4
Zasady współpracy

Uczestnicy powinni zachęcać do dwustronnych kontaktów i wymiany informacji między ich odpowiednimi stałymi misjami przy Organizacji Narodów Zjednoczo-

nych, jak również między ich przedstawicielstwami dyplomatycznymi w państwach trzecich.

Artykuł 5
Koszty działań

Każdy Uczestnik zapewni fundusze na działania i projekty, które inicjuje i które będą realizowane w jego jurysdykcji. Wydatki będą ponoszone przez Uczestników w miarę dostępności funduszy.

Artykuł 6
Status prawny

Uczestnicy potwierdzają, że niniejsze MoP stanowi niewiążące porozumienie. Każdy Uczestnik zgadza się, że niniejsze MoP nie skutkuje powstaniem zobowiązań prawnych dla żadnego Uczestnika. Uczestnicy zamierzają w dobrej wierze dołożyć wszelkich starań we wzajemnej współpracy w celu osiągnięcia celów niniejszego MoP.

Niniejsze MoP nie stanowi traktatu w rozumieniu prawa międzynarodowego publicznego.

Artykuł 7
Poufność

Żaden Uczestnik nie będzie ujawniał trzeciemu uczestnikowi żadnych przekazanych mu poufnych informacji, bez uprzedniej pisemnej zgody drugiego Uczestnika, z wyjątkiem udostępnionych w domenie publicznej lub w celu wykonania przepisu prawa. Niniejsze postanowienie pozostanie skuteczne po wygaśnięciu lub wypowiedzeniu niniejszego MoP.

Artykuł 8
Zmiana

Niniejsze MoP może być zmienione za obopólną pisemną zgodą Uczestników.

Artykuł 9
Obowiązywanie i wypowiedzenie

Niniejsze MoP pozostanie skuteczne przez czas nieokreślony, o ile żaden Uczestnik nie wypowie go z sześciomiesięcznym wypowiedzeniem.

W przypadku wypowiedzenia niniejszego MoP, Uczestnicy będą w dobrej wierze koordynować zakończenie wszelkich prowadzonych działań.

Artykuł 10a
Skuteczność

Niniejsze MoP stanie się skuteczne z chwilą podpisania.

Podpisano w dwóch egzemplarzach w Warszawie dnia 11 maja 2021 r., w języku angielskim.

Recenzje i artykuły recenzyjne / Reviews and review articles

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Małgorzata Ganczar, Alicja Sytek, *Computerisation of Public Administration. Effectiveness of Regulations*, Wydawnictwo CeDeWu, Warsaw 2021, pp. 298

Małgorzata Ganczar, Alicja Sytek, *Informatyzacja administracji publicznej. Skuteczność regulacji*, Wydawnictwo CeDeWu, Warszawa 2021, ss. 298

Малгожата Ганчар, Алиция Сытек, *Информатизация публичной администрации. Эффективность регулирования*, Wydawnictwo CeDeWu, Варшава 2021, 298 стр.

Малгожата Ганчар, Аліція Ситек, *Комп'ютеризація державного управління. Ефективність правових норм*, Wydawnictwo CeDeWu, Варшава 2021, стор. 298

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The subject of this peer review is a monographic study titled *Informatyzacja administracji publicznej. Skuteczność regulacji* (*Informatization of Public Administration. Effectiveness of Regulations*) written by Małgorzata Gonczar and Alicja Sytek. The research assumption adopted by the authors is based on assessment of the law effective and binding in the field of informatization and computerization of public administration in the context of adequacy of said law in regards to the changes occurring in the administration resulting from establishing and development of an information society. The subject of these deliberations also consists of the assessment in the context of the practice of applying legal solutions; this fact is undoubtedly a major merit of the monograph. It is so because the existing subject literature regarding the law pertaining to the new technologies in the public administration is primarily dominated by descriptive works referring to the issue of informatization of administration which do not include an assessment as comprehensive as the assessment presented herein and due to the fact that such works are out of date while the technical progress and its influence on the tasks of administration and the manner in which said tasks are realized requires ongoing and increasingly topical presentation.

Thus we should draw our attention to the fact that the authors touched upon the issues concerning a very current and interesting subject the value of which was significantly influenced by the challenges related to remote work in the age of the COVID-19 pandemic. And although the very process of informatization of the operations of public bodies was initiated in Poland along with adopting the first legal

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regulations regarding this issue, i.e. at the time of adopting the act of 17 February 2005 on the IT development of the bodies performing public tasks,[1] the very progress of this process was not without hindrances emerging as a result of various factors such as lack of proper training for administrative staff.

Putting the discussed issue not only into the context of the law pertaining to administration but also approaching the issue from the perspective of a common citizen acting as a subject of administrative procedures, a subject which wishes to utilize electronic administration services or is forced by effective law to use such services, is also worthy of emphasizing. This issue gives birth to the challenge of securing assets of a citizen, personal details in particular. It also sparks development of additional requirements referring to proper administration of the data procured by an office. An attempt at assessing these regulations made by the authors is an interesting approach.

The specific contents of the monograph present interesting deliberations referring to the issue of an information society and public administration operating in the age of widespread and common Internet. The first part of the monograph is devoted to this very issue. The authors engage in their deliberations in the thematic and chronological order. The authors begin with familiarizing readers with basic concepts such as the concept of an information society and its origins, indicate the achievements of the countries which were first to tackle the issue in an ordered fashion and coped with the results of transforming from an industry-based society into an information-based society. In demonstrating the origins and meaning of the term "Information Society" the authors did not limit themselves to demonstrating only the current solutions but also demonstrated how the concept developed until the current understanding of the notion of an information society was reached. This part of the monograph also provides readers with the knowledge regarding the preparations conducted by the European Union in the field of software which are aimed at adapting the process of development to the new challenges resulting from the technical and technological progress. And thus the authors discussed the framework documents referring to functioning of a society under the conditions of the so called global information and the role of the state in this filed, particularly in the context of ensuring security and cohesion. The authors verified the intentionality and effectiveness of the assumptions adopted across the years by confronting their adequacy in reference to the Polish information society. The notion of information society services adopted in the directives of the EU and comparison of the scope of this notion with the solutions adopted by the Polish legislator, i.e. in the

[1] Consolidated text: Journal of Laws [Dziennik Ustaw] 2023 item 57.

regulations regarding rendering electronic services, described in this part of the monograph present an added value. It is significant due to the fact that the services of an information society are an object of operations of the public administration in the age of its informatization.

In the subsequent part of the monograph – the Electronic Public Administration – the authors present the issues related to application of new technologies by public administration discussed against the backdrop of the e-government and the e-governance concepts which are frequently, as indicated by the authors, and incorrectly equated in common speech. An e-government is such mode of operations of a public administration and local self-government under which modern communication technologies are utilized for contacting addressees of public services, including citizens and entrepreneurs acting as subjects of the governance, and for maintaining contacts with other administrative entities. Under the deliberations concerning the issue of e-government the authors present the expert opinions regarding the conditions and prerequisites required for factual spread and universalization of this phenomenon in the Polish public administration because the essence of this phenomenon consists of not only computerization of public administration. As underscored by the authors this essence also consist of transforming the functions of state governance and rendering public services in a manner which will ensure meeting the commonly accepted e-administration standards.

Therefore, according to the authors, simply providing citizens with common access to the public information in electronic format is not enough. A paradigm shift in regards to the state governance is required. It is hard to argue with such statement and it is also difficult to counter the arguments presented by the authors in this part of the monograph. Even more so due to the fact that the authors justify their statement in detail yet clearly. An additional merit of this part of the monograph is the deliberations concerning the obstacles for development of the Polish e-administration which authors have identified as well as the results of the development of electronic administration, in particular in the area of human activity, e.g. in regards to the risks emerging as a result of electronic election procedures. The authors correctly emphasize that the state and its administration bear particular responsibilities, particularly in regards to data protection, resulting from the fact that the administration is undergoing transformation towards its electronic form. The authors demonstrate interesting issues of development and operations of e-administration but also consider the normative aspect. Herein a detailed analysis of the effective and binding regulations was presented. The authors analyze the basic regulations, i.e. the act on the IT development of the bodies performing public tasks, along with the origins of the solutions adapted therein; furthermore,

the authors analyze the process of implementation of the regulations and indicate sources of individual problems regarding applying these regulations in practice. It is prudent to emphasize the diligence of the reasoning contained in this part of the monograph. The authors draw attention of the reader to the clarity of the terms utilized by the legislator and their uniform scope under the act and the ordinance; simultaneously the authors indicate the shortcomings in the field of basic terms, e.g. an electronic document, which present a major problem for applying said provisions. As emphasized herein, the authors do not limit themselves solely to presenting the subjective-objective scope of the statutory regulations but analyze the executive regulations in detail.

Another issue closely related to operations of an electronic administration is informatization of administrative proceedings. Also in regards to this issue the authors perform a thorough analysis of the legal conditions ensuring availability of electronic citizen services. The authors demonstrate these amendments to the provisions of the Code of Administrative Procedure the introduction of which was related to implementation of the principle of promptness and simplicity of the administrative procedure. Against this backdrop the authors present the issue of electronic documents and the regulations referring to the electronic signature – a fact which is a mark of thoroughness of Authors' deliberations.

The subsequent part of the monograph demonstrates the electronic administration services. The authors begin with presenting the evolution in the field of rendering services by public administration; during this presentation attention is primarily drawn to the transformations in the field of the services offered to the citizens on a macro-scale but also to the changes in regards to the forms of realizing services. This part also contains a theoretical foundation for the deliberations as well as presentation of the doctrine. The authors present the issues of transformations in the field of the form in which the services related to transferring information are rendered and do not limit themselves to providing a reference to the basic regulations but instead confront said regulations with other solutions, e.g. the solutions in the field of the Telecommunications Law. This part of the monograph discusses the legal solutions which are of significance to development of e-administration; these solutions were selected consistently with the criterion concerning their inclusion into the legal system. The authors begin presentation of the services in question with discussing the Electronic Platform of Public Administration Services, e-PUAP, developed in 2008 which after numerous transformations continues to operate until this day. Also in this case the origins and transformations in the operations of this platform were presented; additionally, the authors did not limit themselves to describing the legal grounds and scope of the regulations but verified

their suitability and, importantly, identified the hindrances in proper functioning of the regulations emerging despite removing the legal obstacles. Another service significant from the point of view of an information society and e-administration which was distinguished is an electronic inbox. It is a publicly available mean of electronic communication which is utilized for submitting documents to a public body. It is, as emphasized by the authors, the first and the simplest administrative e-service, common use of which significantly accelerates reaching public institutions in regards to the matters pertaining to citizens and entrepreneurs. The subsequent part of the monograph presents in detail other platforms providing citizens with e-services: the Central Register of Vehicles and the Central Registry and Information about Business Activity Having. Next the authors present in detail the previously indicated issues pertaining to an electronic document, the service of certification/authentication, the electronic management of official documentation as well as the related electronic archive; lastly the authors indicate the currently operating electronic registers.

In the fourth part of the monograph the authors focus on the issue of the access to the information held by the administration. It is an issue of a crucial importance for execution of the right to access to public information, particularly in a government state governed through the rule of law. Thus this part presents the relations with the idea of democracy, freedom of expression and the principle of transparency of public life and activities of authorities as well as the influence the aforementioned issues exert upon improving the trust of citizens in the state an the bodies operating in state's name. The authors also drew attention to the issue of equality in access to information, particularly in the age of the digital exclusion issues and state's obligation to counteract these phenomena indicated on the EU level. This part of the monograph presents the regulations of the act on access to public information. The authors supplement their own deliberations with opinions presented in the subject literature. The public information, its qualities and importance in the relations between the administration and citizens are analyzed in detail. The domestic legal solutions pertaining to access to public information were presented in the context of the international law and extensive body of issued judicial decisions. This part discusses in detail the issues of the origins of the right to access to information in Polish law, its constitutional basis, the subjective and objective scope of the statutory regulations, practical implementation of the right to access to public information, the Public Information Bulletin as a tool used by administration and the central repository for sharing information.

In the last part of the monograph titled: "Restrictions in access to public information" the authors present the issues related to protection of the undisclosed

information and other statutory protected information, the right to protection of personal details and the issue of business confidentiality as the categories of data and information subjected to special protection and the resulting restrictions regarding access to such data and information. The provisions of individual acts pertaining to these issues were analyzed by the authors in the context of protection of rights of individual categories of entities and in the context of the obligations borne by controllers of such data. The authors supplemented their deliberations with presentation of the doctrine and assessment of the solutions adopted in Poland.

Conclusions

The monograph constitutes a complex study of a significant cognitive value, important from the point of view of legal solutions regarding informatization utilized by the obliged administrative entities as well as the citizens-addressees of the actions of the administration (clients, recipients of services) and members of an information society.

The division of contents and their arrangement are characterized by logical consistency whereas the deliberations are conducted in a clear manner. The language used by the authors is fully coherent and comprehensible despite the subject of the individual deliberations consisting of the legal regulations from the field between technology and legal knowledge. Technical and specialist expressions and terms used by the authors were explained to the reader in an approachable and understandable manner, a fact which increases value of the monograph.

The assessed monograph is characterized by a clearly stated research goal. The authors undertook to describe the issue of adequacy of the current legal solutions and to assess said solutions in the context of their effectiveness. The research problem consists of the regulations in the field of informatization of public administration. In the assessed monograph the authors analyze legal solutions pertaining to implementation of the process of informatization of public administration and analyze the effectiveness of the solutions adopted in this field until now.

The approach to the detailed contents adopted by the authors as well as the manner in which contents are arranged point towards a high substantive level of the deliberations and comprehensiveness of the monograph. These qualities are further emphasized through a multitude of references to the correctly selected and expansive subject literature. This fact is also underlined by the invoked judiciary decisions. It is so because we should bear in mind that the manner of organization

and operations of an electronic administration cannot be analyzed in isolation from the classical legal law institutions which do not transform along with the changes resulting from the technological progress of the surrounding world.

The conclusions formulated by the authors correspond to the research premises adopted in the introduction. According to the reviewer the thesis adopted by the authors was fully implemented. The monograph constitutes an important contribution to development of the administrative law science, particularly due to the lack of complex and topical studies of this type which would clearly and comprehensively depict the issue of an information society and electronic administration. And despite the fact that the matter for deliberations is exceptionally extensive the authors selected the contents in a well-balanced manner. The manner in which individual issues are presented points towards competence of the authors. The assessments performed by the authors on an ongoing basis undoubtedly present a major added value. These assessments are not without consideration and the manner in which they are formulated indicates comprehension of the subject matter and tact. This verification of the specific issues and presented problems in the context of adequacy and feasibility under dynamically changing external conditions enables the reader to understand the entirety of the complex conditions for administering in the age of the Internet society but also to develop own view on the bulk of the legal solutions adopted in this field and to assess their usefulness from the point of view of an individual. The authors do not shy away from the criticism expressed on the basis of a thorough analysis of the presented issue and thus increase the cognitive merits of the monograph and this fact, in turn, contributes to the positive assessment and recommendation of the monograph.

Translated by Monika Zielińska

Sprawozdania / Reports

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11th Scientific Seminar of the Department of Civil Procedure of the John Paul II Catholic University of Lublin, Vienna, 24 June 2023

11 Seminarium Naukowe Katedry Postępowania Cywilnego KUL, Wiedeń, 24 czerwca 2023 r.

XI Научный семинар Кафедры гражданского процесса Люблинского католического университета Иоанна Павла II, Вена, 24 июня 2023 г.

11-й науковий семінар Кафедри цивільного процесу Люблінського католицького університету Відень, 24 червня 2023 р.

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On 24 June 2023, the 11th Scientific Seminar of doctors and doctoral students of the Department of Civil Procedure of the John Paul II Catholic University of Lublin (KUL) took place at the University of Vienna. This event, which constitutes part of our tradition of annual scientific seminars organised as part of the activities of the KUL Department of Civil Procedure, was for the first time a scientific undertaking, planned and implemented abroad, in cooperation with the largest and oldest university of the German-speaking countries. The objective of this scientific meeting was to present the participants' observations on current legal issues related to the application of the provisions of civil procedural law and to conduct discussions, the background of which were the presented speeches. What gave the seminar its practical value was the participation of people who, apart from developing their scientific interests, deal with the application of law in practice on a daily basis as part of their work and professions, i.e. court referendaries, barristers and solicitors. The seminar was chaired by Prof. Joanna Misztal-Konecka – Head of the KUL Department of Civil Procedure, who also inaugurated it.

The seminar, divided into two sessions, was attended by eight speakers. Each of the sessions was concluded with a discussion on the theses of the speeches presented during them. The first paper, entitled "Doręczenia w procedurze cywilnej po nowelizacji" ["Service in civil procedure after the amendment"] was delivered by Dr. Paulina Woś. The subject of the presentation was a comparison of the procedure of service of correspondence by the court on a natural person conducting business activity against the background of the provisions in force on the basis of the 2019 amendment to the Code of Civil Procedure and the envisaged changes with regard to service that the legislator introduced on the basis of the wording of

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the provisions of the Act of 9 March 2023 amending the Act – the Code of Civil Procedure and certain other acts.

Next, the floor was taken by Dr. Paweł Wrzaszcz, whose paper was entitled "Skutki dla istniejących służebności gruntowych podziału i połączenia się nieruchomości w jednej księdze wieczystej – rozważania na tle uchwały Sądu Najwyższego z dnia 13 stycznia 2022 r. (sygn. akt III CZP 14/22)" ["Effects on the existing easements of the division and merger of real estate in one land and mortgage register – considerations against the background of the resolution of the Supreme Court of 13 January 2022 (reference number III CZP 14/22)"]. The presentation concerned the conditions under which the property was divided and then merged with another property, or the merger of the property with another property in the land and mortgage register into which the property was entered. The speaker presented the thesis that decisions regarding the possibility for the land and mortgage register court to initiate ex officio proceedings for the transfer of easement to joint encumberment should be justified in the context of a different understanding of the concept of 'real estate' in the provisions of the Civil Code, in relation to what is considered real estate within the meaning of the land and mortgage register.

The third paper entitled "Dopuszczalność orzekania o wynagrodzeniu pełnomocnika ustanowionego z urzędu w razie śmierci w toku postępowania strony przez niego reprezentowanej" ["The admissibility of ruling on the remuneration of a proxy appointed ex officio in the event of death of the party represented by them in the course of the proceedings"] was delivered by Katarzyna Woch, M.A. The author pointed out that the Code of Civil Procedure does not contain specific regulations regarding the demand for ex officio remuneration of a proxy in the event of death of the party represented by them during the proceedings, which does not mean, however, that this remuneration should be granted and paid from the State Treasury automatically upon submitting the relevant application. The speaker concluded by claiming that the decision on the application for legal fees granted to a party ex officio should not take place earlier than in the decision terminating the proceedings in that instance.

The next and last speech in the first session, entitled "Ocena polskich rozwiązań w zakresie implementacji dyrektywy Parlamentu Europejskiego i Rady (UE) 2019/2121 z dnia 27 listopada 2019 r. zmieniającej dyrektywę (UE) 2017/1132 w odniesieniu do transgranicznego przekształcania, łączenia i podziału spółek" ["Assessment of Polish solutions in the field of implementation of 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"], was delivered by Dr. Emil Kowalik, participating in the meeting

by means of distance communication. The subject of the author's considerations was the analysis of the impact of the indicated implementation on the conduct of companies' activities on the EU internal market, by striving to introduce a uniform legal framework for cross-border conversions and divisions, changes regarding cross-border mergers, as well as implementation of digital tools, such as, for example, the system of interconnection of registers.

The second session began with a speech by Anna Haciuk, M.A., entitled "Postępowanie zabezpieczające w świetle nowelizacji K.p.c. z 9 marca 2023 r." ["Proceedings to secure claims in the light of the amendment to the Code of Civil Procedure of 9 March 2023"]. The author discussed issues related to the change in the provisions regarding the appeal against the injunction decision and regarding the securing of claims in matters related to intellectual property law, including issues connected with the likelihood of annulment of the exclusive right in other pending proceedings and the impact of this circumstance on the court's assessment regarding the substantiation of the application for injunction, related to the change in the formal conditions of the application for injunction, related to the change in the deadline by which the application for injunction should be submitted and related to the introduction of the obligation to hear the person obliged to make a decision on the application for injunction in matters of broadly understood intellectual property.

The next paper, entitled "O wymogu wyodrębniania oświadczeń, twierdzeń oraz wniosków w pismach procesowych w postępowaniu cywilnym" ["On the requirement to separate statements, assertions and applications in pleadings in civil proceedings"], was presented by Dominika Wójcik, M.A. The speaker presented the requirements that resulted from the introduction, by the Act of 9 March 2023 amending the Act – Code of Civil Procedure and certain other acts, of Article 1281 of the Code of Civil Procedure, as well as the effects of failure to comply with the first sentence of the aforementioned provision imposing on professional attorneys the obligation to clearly separate statements, assertions and applications, including applications for evidence, in their pleadings. The presentation ended with an assessment of the new legal regulation, also made against the background of the hitherto existing legal solutions regarding the omission of evidence by the court.

The last of the papers presented in the second session of the scientific seminar was delivered by Katarzyna Kajmowicz, M.A., who addressed the issue of the "Essence of 'novelty' within the meaning of art. 381 of the Code of Civil Procedure". The author began her paper by defining the concept of 'novelty' and analysing the concept of "new facts and evidence" within the meaning of this provision. The conclusions of the presentation boiled down to presenting the thesis that the scope of

the concept of "new facts and evidence" may vary. Firstly, this concept may include such facts and evidence that are new in relation to the procedural material collected by the court of first instance. Secondly, only those facts and evidence which were not included in the procedural material of the court of first instance fall within the scope of the new facts and evidence, since they could not have been relied on during the proceedings before that court.

After a discussion of the papers presented during the second session of the scientific seminar, the chairwoman of the seminar, Prof. Dr. habil. Joanna Misztal-Konecka, took the floor, answering the question "What impact will the finding that the death of the party occurred before a decision was issued by the court of first instance have on the course of the appellate proceedings, if it was only made during them?". The answer to this question was preceded by an analysis of the validity of the three decisions that can be taken by the appellate court in the presented procedural situation. These are, first, returning the case to the court of first instance in order to suspend the proceedings and determine the heirs, and then to quash the judgment on its own, second, suspending the proceedings before the court of first instance and then returning the case to the court of first instance in order to determine the heirs and quashing the appealed judgment on its own, and, third, suspending the proceedings, determining the heirs of the deceased party, initiating the proceedings and quashing the judgment and referring the case to the court of first instance. Stating the correctness of the last of the presented possibilities, Prof. Dr. habil. Joanna Misztal-Konecka explained that the court of first instance is not competent to quash the decision ending the case in this instance, due to the loss of competence to decide on the case and the binding nature of the content of the decision issued in that instance. Therefore, the choice of one of the appeals court's procedural decisions is determined by the scope of the courts' competence.

The speech of Prof. Dr. habil. Joanna Misztal-Konecka was followed by a summary and conclusion of the scientific seminar. Once again, the 11th Scientific Seminar of the KUL Department of Civil Procedure was a great opportunity for its participants to share their observations – not only on the theoretical approach to the provisions of civil procedural law, but above all on the application of these provisions in practice. The participants of the described event agreed that the formula of organising seminars in cooperation with foreign universities would not only support the tradition of annual scientific meetings organised as part of the operation of the KUL Department of Civil Procedure, but would also provide an opportunity to acquire experience related to the opportunity to learn about the functioning of universities of the same level of education, located outside the country in which the *alma mater* bringing together the seminar participants operates.

Z życia Wydziału /
Faculty activities

STUDIA PRAWNICZE KUL
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DIARIUSZ
Kalendarium ważniejszych wydarzeń naukowych z udziałem pracowników Wydziału Prawa, Prawa Kanonicznego i Administracji KUL styczeń – marzec 2023 r.

DIARY
Calendar of major scientific events with the participation of academic staff of the Faculty of Law, Canon Law and Administration of the John Paul II Catholic University of Lublin
January – March 2023

КАЛЕНДАРЬ МЕРОПРИЯТИЙ
Главные научные события с участием сотрудников Факультета права, канонического права и администрации Люблинского католического университета Иоанна Павла II
январь – март 2023 года

ЖУРНАЛ ПОДІЙ
Календар головних наукових заходів за участю співробітників факультету Права, Канонічного Права та Адміністрації Люблінського католицького університету
січень – березень 2023 р.

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Styczeń

23 stycznia 2023 r. – odbyła się publiczna obrona rozprawy doktorskiej ks. mgr. **Radosława Wnuka** pt. *Kompetencje biskupa diecezjalnego dotyczące wyższego seminarium duchownego w Polsce*. Promotor: ks. prof. dr hab. Mirosław Sitarz.

31 stycznia 2023 r. – dr hab. **Anna Tunia**, prof. KUL, podczas Ogólnopolskiej Konferencji Naukowej *XVII Dzień Ochrony Danych Osobowych* nt. *Przyszłość ochrony danych osobowych w świetle rozwoju technologii*, zorganizowanej przez Prezesa Urzędu Ochrony Danych Osobowych oraz Uniwersytet Warmińsko-Mazurski w Olsztynie – Filia w Ełku, wygłosiła referat pt. *Ochrona danych osobowych uczestników postępowania w sprawach o wykroczenia*.

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Luty

20 lutego 2023 r. – odbyła się publiczna obrona rozprawy doktorskiej mgr **Irminy Stodulskiej** pt. *Magia w ustawodawstwie rzymskich cesarzy chrześcijańskich*. Promotor: ks. prof. dr hab. Antoni Dębiński.

21 lutego 2023 r. – odbyła się publiczna obrona rozprawy doktorskiej mgr **Ilony Resztak** pt. *Samorząd województwa jako forma decentralizacji administracji publicznej*. Promotor: ks. dr hab. Sławomir Fundowicz.

28 lutego 2023 r. – odbyła się publiczna obrona rozprawy doktorskiej mgr **Sylwii Dąbrowskiej** pt. *Przewodniczący rady gminy*. Promotor: ks. dr hab. Sławomir Fundowicz.

Marzec

3 marca 2023 r. – ks. prof. dr hab. **Piotr Stanisz**, podczas Ogólnopolskiej Konferencji Naukowej nt. *Relacje państwo – Kościół, jakich potrzebuje dziś Polska. Ile autonomii, ile współpracy?*, zorganizowanej przez Instytut Nauk o Polityce i Administracji UKSW oraz Katolicką Agencję Informacyjną, wygłosił referat pt. *Między radykalną separacją a religią państwową. Polski model relacji państwo – Kościół na tle rozwiązań europejskich*.

8 marca 2023 r. – ks. dr **Paweł Lewandowski**, podczas Międzynarodowej Konferencji Naukowej nt. *Women in the Church and religious societies*, zorganizowanej przez Institute for Legal Aspects of Religious Freedom, Faculty of Law, Trnava University in Trnava; Jean Monnet Project – Strengthening and Promoting EU Studies Across India (SAPHIRE) oraz Jawaharlal Nehru University, wygłosił referat pt. *The position of women in the social teaching of John Paul II*.

9 marca 2023 r. – dr hab. **Dominik Tyrawa**, podczas I Ogólnopolskiej Konferencji Naukowej nt. *Kształtowanie Bezpiecznej Przestrzeni i Cyberprzestrzeni w interdyscyplinarnym dyskursie naukowym współdziałania ze służbą więzienną*, zorganizowanej przez Wydział Administracji i Bezpieczeństwa Narodowego Akademii im. Jakuba z Paradyża w Gorzowie Wielkopolskim oraz Szkołę Wyższą Wymiaru Sprawiedliwości w Warszawie, wygłosił referat pt. *Krajowy system cyberbezpieczeństwa w świetle nauki prawa administracyjnego. Uwagi wybrane*.

11 marca 2023 r. – dr **Aneta Maria Abramowicz**, podczas Ogólnopolskiej Konferencji Naukowej nt. *Duszpasterstwo Służb Mundurowych w Polsce. Aspekt organizacyjno-prawny*, zorganizowanej przez Wydział Nauk Społecznych KUL wraz z Ka-

tedrą Teorii Społecznych i Socjologii Rodziny i Katedrą Praw Człowieka i Pracy Socjalnej oraz Wydział Prawa, Prawa Kanonicznego i Administracji KUL wraz z Katedrą Prawa Wyznaniowego we współpracy z Radą Wydziałowego Samorządu Studentów WNS KUL, wygłosiła referat pt. *Podstawy normatywne duszpasterstwa w służbach mundurowych w Polsce*.

13 marca 2023 r. – odbyła się publiczna obrona rozprawy doktorskiej mgr **Małgorzaty Sztolf** pt. *Zbrodnia ludobójstwa w międzynarodowym i polskim prawie karnym*. Promotor: dr hab. Krzysztof Wiak, prof. KUL. Odbyła się ponadto publiczna obrona rozprawy doktorskiej mgr **Pauliny Brejdak** pt. *Opodatkowanie przychodów osób fizycznych z tytułu nieodpłatnych świadczeń*. Promotor: prof. dr hab. Paweł Smoleń.

20 marca 2023 r. – odbyła się publiczna obrona rozprawy doktorskiej mgr. **Piotra Krzyżanowskiego** pt. *Podstawy ustroju państwa w ujęciu Ignacego Czumy*. Promotor: dr hab. Jadwiga Potrzeszcz, prof. KUL.

23 marca 2023 r. – dr **Katarzyna Miaskowska-Daszkiewicz**, podczas Ogólnopolskiej Konferencji Naukowej pn. *Ochrona zdrowia psychicznego – prawne wyzwania XXI w.*, zorganizowanej przez Wydział Prawa i Administracji Uniwersytetu Warszawskiego, wygłosiła referat pt. *Dostępność produktów leczniczych zawierających środki odurzające lub substancje psychotropowe*.

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Bibliografia pracowników naukowych Wydziału Prawa, Prawa Kanonicznego i Administracji Katolickiego Uniwersytetu Lubelskiego Jana Pawła II za rok 2018

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Бібліографія наукових працівників Факультету Права, Канонічного Права та Адміністрації Люблінського католицького університету імені Івана Павла II за 2018 р.

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Przyjęto następującą klasyfikację: I. Opracowania książkowe; II. Artykuły i studia; III. Hasła encyklopedyczne; IV. Glosy; V. Recenzje i noty; VI. Sprawozdania; VII. Inne.

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