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GOVERNMENTAL INFLUENCE ON CRYPTO ASSETS IN FINANCE: A CASE STUDY OF GERMAN REGULATORY INITIATIVES

Abstract

We review the case study of Germany with its regulatory initiatives regarding the possible governmental influence on crypto assets in finance. In doing so, we conclude that regulation shows adequate tendencies to foster innovation and adaption of digital assets such as crypto securities or currencies. This can mainly be referred to as creating a legal framework in favor of consumer protection, thereby reducing operational and reputational risks for financial companies which seek to engage in the digital assets business.

KEYWORDS

regulation, crypto assets, digital assets, finance, innovation

SŁOWA KLUCZOWE

regulacja, kryptowaluty, aktywa cyfrowe, finanse, innowacje

1. INTRODUCTION

Crypto assets, also referred to as cryptocurrencies or digital securities, are a type of digital asset that use cryptography to secure and verify transactions and to control the creation of new units. They are based on the distributed ledger technology, thereby using blockchains with decentralized characteristics. Decentralization implies that there is no control by any central authority through operations on a peer-to-peer network. Crypto assets are typically created through a process called mining, in which powerful computers perform complex calculations to validate transactions on the network and generate new units of the currency. Some popular examples of crypto assets include Bitcoin (BTC), Ethereum (ETH), Litecoin (LTC), and Ripple (XRP).[1]

Crypto assets are often used as a means of exchange, like traditional currencies, but they can also be used for other purposes such as investments, store of value, and speculative trading. Their value is determined by supply and demand and can be highly volatile due to various factors such as market sentiment, regulatory changes, and technological advancements. Due to its novelty and the complex technology, the financial services industry is currently researching opportunities for new products and services. The future of crypto assets is still uncertain due to the literature base or expert opinions, but there are several factors that suggest that they may have a significant role to play in the financial system in the coming years.[2]

Firstly, crypto assets offer several advantages over traditional forms of assets, such as their decentralized nature, fast transaction times, low fees, and potential for greater privacy and security. These benefits have already attracted a large and growing user base, including individual investors, merchants, and institutional players. Secondly, the underlying blockchain technology that powers many digital assets has potential applications beyond just financial transactions, such as

[1] R. Houben, A. Snyers, *Crypto-assets. Key developments, regulatory concerns and responses*, Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies. PE 648.779, 2020, p. 13; H. Stix, *Ownership and purchase intention of crypto-assets: Survey results*, Empirica, 48 (1), 2021, pp. 65-99; D. F. Ahelegbey, P. Giudici, F. Mojtahedi, *Tail risk measurement in Crypto-Asset Markets*, International Review of Financial Analysis, 2021, p. 73.

[2] M. T. Chimienti, U. Kochanska, A. Pinna, *Understanding the crypto-asset phenomenon, its risks and measurement issues*, Economic Bulletin Articles, 2019, p. 5.

in supply chain management, voting systems, and decentralized social networks. This has led to a growing interest and investment in blockchain technology by both public and private sector entities.[3]

However, there are also manifold challenges and risks that may affect the future of crypto assets, such as regulatory uncertainty, the potential for market manipulation, and the risk of fraud and theft. Additionally, the volatility of crypto assets and their susceptibility to speculative bubbles have raised concerns about their long-term stability and utility as a store of value. As of now, the possible chances of crypto assets depend on a range of factors and uncertainties, and their future success will depend on how effectively regulatory measures can address existing challenges.[4]

Regulation in crypto refers to the set of rules and guidelines that govern the use, trade, and issuance of cryptocurrencies and other crypto assets. As crypto assets continue to gain mainstream adoption, governments and regulatory bodies around the world are increasingly taking an interest in regulating the crypto industry to protect consumers, prevent illegal activities such as money laundering and fraud, as well as ensure market stability.[5]

Regulations can take many forms, including licensing requirements for crypto businesses, anti-money laundering and counter-terrorism financing (AML/CTF) measures, consumer protection rules, and taxation policies. Some countries have taken a more permissive approach to crypto regulation, while others have imposed strict rules and even banned certain activities related to crypto assets. General regulation in crypto is a complex and evolving area and can vary greatly from country to country. As the industry continues to grow and mature, it is likely that we will see more comprehensive and consistent regulations emerge to address the unique challenges posed by crypto assets.[6]

In this article, we review the regulatory impact on crypto for the German market, thereby stating the several significant national regulations and elaborating

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[3] J. G. Dumas, S. Jimenez-Garcès, F. Șoiman, *Blockchain technology and crypto-assets market analysis: vulnerabilities and risk assessment*, 12th International Conference on Complexity, Informatics and Cybernetics, Vol. 1, 2021, pp. 30-37.

[4] J. G. Dumas, S. Jimenez-Garcès, F. Șoiman, *Blockchain technology and crypto-assets market analysis: vulnerabilities and risk assessment*, 12th International Conference on Complexity, Informatics and Cybernetics, Vol. 1, 2021, pp. 30-37; D. A. Zetzsche, F. Annunziata, D. W. Arner, R. P. Buckley, *The Markets in Crypto-Assets regulation (MiCA) and the EU digital finance strategy*, Capital Markets Law Journal, 16(2), 2021, pp. 203-225; A. Ferreira, P. Sandner, *Eu search for regulatory answers to crypto assets and their place in the financial markets' infrastructure*, Computer Law & Security Review, Vol. 43, 2021, No. 105632.

[5] A. Ferreira, P. Sandner, *Eu search for regulatory answers to crypto assets and their place in the financial markets' infrastructure*, Computer Law & Security Review, Vol. 43, 2021, No.105632.

[6] A. Ferreira, P. Sandner, *Eu search for regulatory answers to crypto assets and their place in the financial markets' infrastructure*, Computer Law & Security Review, Vol. 43, 2021, No. 105632; S. S. Huang, *Crypto assets regulation in the UK: an assessment of the regulatory effectiveness and consistency*, Journal of Financial Regulation and Compliance, 29(3), 2021, pp. 336-351.

specifically on the German Securities Act. Finally, a conclusion on the governmental influence as well as an outlook on the crypto adoption will be provided for the German market.

2. LITERATURE REVIEW ON CRYPTO REGULATION

A literature review is a critical and systematic analysis of the existing literature (books, articles, dissertations, conference proceedings, etc.) on a specific research topic or question. It involves identifying, evaluating, and synthesizing the relevant literature to provide a comprehensive understanding of the topic and to identify gaps, inconsistencies, and areas for further research. The identified sources are then screened and evaluated based on their relevance, quality, and validity. Once the relevant literature has been identified, the next step is to critically analyze and synthesize the information. This involves identifying common themes, patterns, and trends across the literature and assessing the strengths as well as weaknesses of the studies and arguments presented. The final product of a literature review is a comprehensive and well-organized summary of the existing knowledge on the research topic, which can serve as a foundation for further research and as a valuable resource for researchers and practitioners in the field.

In doing so, it can be stated that crypto regulation is still a novelty in the current literature debate. This becomes evident when searching on well-known platforms with keywords such as 'crypto regulation' or 'regulating digital assets'. Most publications focus on international markets other than Germany (e.g., the United States) and will be briefly presented as a summary below.

Bonaparte and Bernile (2023) analyze the prospect of cryptocurrency regulation and how it affects cryptocurrency prices, volatility, and trading, thereby using the Google Trend technique in order to create the Crypto Regulation Sentiment Index (CRSX). The CRSX shall reflect the investors' attitude towards crypto regulation. Their analysis encompasses over 75% of the crypto market's daily activity and they conclude that the CRSX has no statistically significant long-term impact on cryptocurrency prices. Moreover, according to the authors, the effects of CSRX on crypto markets largely depend on the coin's key blockchain characteristics.[7]

Griffith and Clancey-Shang (2023) examine the effects of the 2021 Chinese cryptocurrency ban on several aspects of crypto market quality, namely prices, volatility, and liquidity. The study is of high relevance to assessing the potential impact of governmental influence on crypto adoption, in this case, on cryp-

[7] Y. Bonaparte, G. Bernile, *A new 'Wall Street Darling?' effects of regulation sentiment in cryptocurrency markets*, Finance Research Letters, Vol. 52, 2023, No. 103376.

tocurrencies. The authors find that average crypto prices plunge and liquidity deteriorates, while volatility spikes in response to the announcement of the ban. Moreover, the volatility surge is short-lived, while the fall in crypto values and liquidity persist. According to the authors' research findings, the results are robust across dollar trading volume sorts and remain significant after considering the interconnectedness between the market quality measures in the vector autoregressive framework.[8]

Copestake et al. (2022) constructed daily databases of crypto bans as well as policy statements with regard to the central bank digital currencies (CBDCs) to estimate their effect on crypto trading volumes for an unbalanced panel of 116 countries from November 2016 to December 2021. CBDCs can be regarded as part of digital assets due to the use of DLT. However, based on centralistic aspects of the design of CBDCs, it is currently experiencing a constructive debate on its possible success. The authors find that trading volume falls by up to 55% in the week after the announcement of a ban and by up to 25% after a CBDC-supportive speech by senior central bank officials. For the strictest bans, this reduction persists over the subsequent quarter, driven by a reduction in trading by institutional investors. The results suggest that crypto market participants pay significant attention to government policy on digital assets. The research compares several jurisdictions to draw conclusions. In Germany or Europe, the European Central Bank (ECB) is currently investigating a possible introduction of its digital euro as its very own form of a retail or wholesale CBDC. However, there is no final decision yet which academics could utilize in their current research works.[9]

In contrast to the previous research works, *Ungson and Soorapanth* (2022) examine blockchain technology in ASEAN (Association of Southeast Asian Nations). They discuss the preconditions for blockchain adoption, thereby enabling factors relating to regulatory policies and illustrative cases depicting new blockchain solutions or improvements over current practices. Based on these narratives, the authors present a six-step roadmap, which delineates the need for regulatory clarity, the balance between public versus private policies, and pathways for securing competitive strategies and organizational advantages. Their research underlines the necessity and relevance of regulation for the Asian crypto market.[10]

One research focusing on the German regulation is conducted by Winnowicz *et al.* (2022). The research aim of their work was to review current regulatory guidelines for cryptocurrencies in the European area. In doing so, measures were highlighted that identify the illegal use of the new currency. One of the

[8] T. Griffith, D. Clancey-Shang, *Cryptocurrency regulation and market quality*, Journal of International Financial Markets, Institutions and Money, Vol. 84, 2023, No. 101744.

[9] A. Copestake, D. Furceri, P. Gonzalez-Dominguez, *Crypto market responses to digital asset policies*, Economics Letters, Vol. 222, 2023, No. 110949.

[10] G. R. Ungson, S. Soorapanth, *The ASEAN blockchain roadmap*, Asia and the Global Economy, Vol. 2(3), 2022, No. 100047.

findings is that the regulations for the interoperability of cryptocurrencies with regulated financial companies must be questioned to derive further insights into the influence on the Bitcoin price. The results show that individual countries such as Germany, Switzerland, and Liechtenstein are more advanced in terms of the regulatory system for cryptocurrencies. If the European countries do not act as a joint entity with the EU financial authorities on the world market, then other countries might take the lead and shape regulatory measures in the future. The authors underline the necessity of regulation by governments to strengthen the possible adoption of crypto and enable consumer or customer protection. However, the study is focused on cryptocurrencies and does not regard digital assets as a whole new asset class.[11]

As an interim conclusion, the literature review shows the following three key findings:

- Overall low number of publications tackling regulatory aspects of crypto (compared to other established academic disciplines).
- The majority of publications refer to international markets such as the United States or Asian countries.
- There is a consensus that research on regulation must continue with the further development of crypto and new regulatory measures.

The excerpt of journal publications with the focus on crypto regulation proves that the current literature debate is concentrated on international markets other than Germany. However, there are market-specific publications by the German/European government as well as by several national crypto companies, which are operating in Germany and which will be presented in the following section.

2.1. EUROPEAN REGULATORY INITIATIVES

In this section, the European regulation is presented to provide an overview of the regulatory landscape which affects Germany as a competitive crypto market in the global context.

Regulation of markets in crypto assets (MiCA)

MiCA (or MiCAR) stands for Markets in Crypto-Assets Regulation. It is a regulatory framework proposed by the European Commission for regulating crypto assets and related activities in the European Union. The framework aims to establish a harmonized and comprehensive set of rules for crypto assets, including cryptocurrencies, security tokens, and utility tokens, as well as the entities that deal with them, such as exchanges, custodians, and wallet providers. MiCA

[11] K. Winnowicz, C-D. Au, D. Stein, *Crypto Regulation within the European Union (1 July 2021)*, https://ssrn.com/abstract=4194771 or http://dx.doi.org/10.2139/ssrn.4194771 (accessed: 18 April 2023).

proposes several requirements for crypto asset service providers, such as obtaining authorization from national regulatory authorities, implementing measures to prevent money laundering and terrorist financing, as well as ensuring consumer protection through disclosure requirements and transparency obligations. The proposal also includes a framework for regulating stablecoins, which are cryptocurrencies that are designed to maintain a stable value relative to another asset or currency. Stablecoins have gained popularity in recent years but have raised concerns about their potential impact on financial stability and the effectiveness of monetary policy. MiCA is still in the proposal stage and has not yet been adopted by the European Union. However, if adopted, it could have a significant impact on the crypto asset industry in the EU and on the regulatory landscape for crypto assets globally.[12]

We assess that the possible impact of MiCA is to create fair conditions for competition within the EU, thereby protecting the interests of customers. Governmental interference can help to create trust and liability in dealing with the new asset class of cryptos. Regarding old-established finance companies, the regulation paves the way to enter the new digital market while reducing legal and reputational risks.

DLT Pilot Regime

This regulatory initiative provides a temporary regulatory sandbox for market infrastructures based on DLT. The DLT Pilot Regime intends to identify further potential for the financial services industry. In doing so, regulatory obstacles for competition as well as innovation are to be lowered, considering the associated risks. Moreover, the idea behind this is to offer specific conditions for obtaining a license which would grant the right to operate a DLT market infrastructure. Therefore, the regulation shows a clear definition of possible financial instruments which are tradable in this 'new digital world'. Thus, the regulators intend to create a temporary 'regulatory sandbox' for the trading and settlement processes. The DLT Pilot Regime with its supervisory framework is mainly suitable for, e.g., investment firms, market operators, and central securities depositories (CSD). These companies may apply for a corresponding license to operate multilateral trading systems and securities settlement systems based on DLT.[13]

The following operations require a license under the DLT Pilot Regime:

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[12] European Council, *Digital finance: agreement reached on European crypto-assets regulation (MiCA),* https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/digital-finance-agreement-reached-on-european-crypto-assets-regulation-mica/ (accessed: 4 April 2023).

[13] Deloitte, *Das DLT Pilot Regime*, https://www2.deloitte.com/de/de/pages/audit/articles/dlt-pilot-regime.html (accessed: 6 April 2023); EUR-Lex, *Vorschlag für eine VERORDNUNG DES EUROPÄISCHEN PARLAMENTS UND DES RATES über eine Pilotregelung für auf der Distributed-Ledger-Technologie basierende Marktinfrastrukturen*, https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX%3A52020PC0594 (accessed: 7 April 2023).

- **Multilateral Trading Facility (DLT MTF)**

DLT MTF stands for 'multilateral trading system' according to Section 2 (6) BörsG, which only allows trading in DLT financial instruments and is operated by a market operator or an investment firm. DLT MTF is subject to the requirements that apply to a multilateral trading facility in accordance with Regulation (EU) No. 600/2014 and Directive 2014/65/EU.

- **Securities Settlement System (DLT SS)**

DLT SS is a securities settlement system that allows for the recording and safekeeping of DLT financial instruments and is operated by a central securities depository. A DLT SS is subject to the requirements of Article 2, Paragraph 1, No. 1 of Regulation (EU) No. 909/2014, which apply to a securities settlement system. The requirements in terms of Article 2a of Directive 98/26/EC are that the system ensures the execution of payment and transfer orders, and is not operated by a central counterparty.

- **Multilateral Trading Facility and Securities Settlement Facility (DLT TSS)**

DLT TSS is a multilateral trading facility and a securities settlement system that combines the services provided by a DLT MTF and a DLT SS and is operated by a market operator or investment firm and a CSD.

Overall, we regard the endeavors of the DLT Pilot Regime as a vital opportunity for all market participants to get acquainted with the new technology and its possible implications on existing business operations or financial services. This also specifically implies lessons for governments and regulators to ensure the next iterations of regulations for the finance industry based on DLT.

Digital Finance Forum

Another governmental approach which does not serve as a regulatory initiative is the active communication under the slogan 'Shaping the Future of Finance' with players and experts from the financial services industry. The German government jointly defined a 'roadmap of the Digital Finance Forum, [which] is an important impetus for national and European projects in the digital financial market'.[14] The idea behind this format is to find common grounds and interests to foster innovation within the German market, which benefits both the Government

[14] Federal Ministry of Justice, *Für einen innovativen Finanzstandort Deutschland: Digital Finance Forum beim BMF stellt Roadmap vor* https://www.bundesfinanzministerium.de/Content/DE/Pressemitteilungen/Finanzpolitik/2023/03/2023-03-21-digital-finance-forum-stellt-roadmap-vor.html (accessed: 10 April 2023).

and the financial industry. In the published roadmap, the following important measures are stated (listed in excerpts):[15]

- Analysis of regulatory hurdles for Euro-Stablecoins or creation of a regulatory framework for tokenized euro payment solutions
- Recognizing blockchain as a key technology and considering it accordingly in relevant legislative projects
- Supervisory openness to novelty business models

We conclude that this initiative may provide the foundation for adequate regulatory actions in the future. By interacting with the finance industry, valuable insights may be taken directly from the source, thereby hitting the 'right nerve' to foster innovation and research in the field of crypto assets. In addition, it implies a strong signal to customers who are considering cryptos as a possible investment alternative. Interest rates are still low in comparison to historical data and may not be sufficient to ensure real capital preservation.

2.2. CHANCES AND CHALLENGES OF REGULATING ISSUANCE OF DIGITAL SECURITIES IN GERMANY

One specific German regulation, which is regarded as a global novelty in crypto regulation, is the Electronic Securities Act. The draft law was presented in July 2021 and intends to modernize the German securities law with its associated supervisory law. The main content in this draft was the introduction of the new law on electronic securities (also known as 'eWpG'). With the establishment of digital securities, one of the central building blocks of the federal government's blockchain strategy and the joint key issue of the BMF and the BMJV on electronic securities is being implemented.[16]

The eWpG is required due to the outdated German laws, which stand in contradiction to the possible digitization of securities. When reviewing the current legal situation, financial instruments that are considered securities under civil law must be securitized by utilizing a physical document. The physical document serves as a sort of proof of property transfer and ensures the protection of potential buyers. To ensure the marketability of securities and a legally secure

[15] Federal Ministry of Justice, *Für einen innovativen Finanzstandort Deutschland: Digital Finance Forum beim BMF stellt Roadmap vor*, https://www.bundesfinanzministerium.de/Content/DE/Pressemitteilungen/Finanzpolitik/2023/03/2023-03-21-digital-finance-forum-stellt-roadmap-vor.html (accessed: 10 April 2023).

[16] Federal Ministry of Justice, *Gesetz zur Einführung von elektronischen Wertpapieren*, https://www.bmj.de/EN/Home/home_node.html;jsessionid=254BF64E5E82587532EE0A3384ED7263.2_cid289 (accessed: 10 April 2023).

acquisition at the same time, a suitable replacement for the physical document is required, e.g., by an entry in a register based on DLT.[17]

According to the current eWpG implementation, issuers can now choose between a traditional or digital process for issuing new securities. The Electronic Securities Act offers the digitization of bearer bonds, which encompasses securities such as bonds of all types or certificates. When choosing the digital path, there is the requirement to approach a crypto registrar, which is a company with a license granted by the BaFin to manage a DLT-based register (*Kryptowertpapierregister*). This register entry substitutes the requirement for a physical document and ultimately enables an end-to-end digital issuance process.

One well-known use case is constituted by the issuance of a digital Siemens bond on the blockchain. 'Siemens is one of the first companies in Germany to issue a digital bond, in accordance with Germany's Electronic Securities Act (*Gesetz über elektronische Wertpapiere*, eWpG). Worth 60 million, it has a maturity of one year and is underpinned by a public blockchain'.[18] The example of Siemens demonstrates the ongoing digitization of the traditional securities business. It also serves as a role model for non-finance companies which may research blockchain technology for their own purposes and benefits.

We review the German Electronic Securities Act as a fundamental blueprint which could possibly be adopted on a global scale. It provides legal certainty as well as protection for all the parties involved, thereby reducing the corresponding costs of issuance. Moreover, reduced costs can attract new companies because they can afford to enter the capital markets for financing purposes. The act in its current state does not include the digitization of stocks, but it is expected to be included due to the communication and plans within the Digital Finance Forum.

3. CONCLUSION AND OUTLOOK

In summary, Germany as a case study shows manifold regulatory endeavors with different objectives to approach the complexity as well as the disruptive force of blockchain technology. Although still in its infancy, we review the regulations that refer to the technology as a vital starting point to find common ground with the fast-growing crypto community. By showing the case of Siemens, we chose a suitable example to demonstrate the effectiveness of governmental inter-

[17] Federal Ministry of Justice, *Gesetz zur Einführung von elektronischen Wertpapieren*, https://www.bmj.de/EN/Home/home_node.html;jsessionid=254BF64E5E82587532EE0A3384ED7263.2_cid289 (accessed: 10 April 2023).

[18] Siemens, *Siemens issues first digital bond on blockchain*, https://press.siemens.com/global/en/pressrelease/siemens-issues-first-digital-bond-blockchain (accessed: 10 April 2023).

ference in which adequate regulation can foster innovation and pave the way for the new digital world.

We expect the regulatory endeavors to continue and adapt based on new research and insights gathered by the global academic debate as well as by the implementation of regulations. In doing so, the ongoing adoption of crypto assets may gradually rise, thereby challenging the traditional financial world. It remains to be seen to what extent the markets will accept DLT-based operations and processes or, in other words, how much of the traditional world will be successfully disrupted. However, the exemplary regulatory measures presented in this paper demonstrate the influence of governmental interference, thereby continuing the gradual establishment of the new class of crypto assets in traditional finance.

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FOOTBALL SUPER LEAGUE AND THE VALUES OF EUROPEAN SPORT. CRITICAL ANALYSIS OF THE OPINION OF THE ADVOCATE GENERAL IN CASE C-333/21

Abstract

The article presents author's own opinion on case C-333/21 which concerns the controversial project of organizing a football Super League (ESL). The aim of this initiative is to develop a commercial organizational formula for football competition, which at the same time would be independent of the structures of FIFA and UEFA. For the above reasons, the resolution of the dispute before the Court of Justice of the European Union has a significant impact on the answer to the question about the future of the organizational structure of European football. In this case, the EU competition law and the determination of a catalog of values are of fundamental importance that could possibly justify compliance of the restrictions applied by FIFA and UEFA in relation to ESL organizers with Articles 101 and 102 TFUE.

KEYWORDS

European Super League Company, sports law, antitrust law, values in sport, European model of sport

SŁOWA KLUCZOWE

European Super League Company, prawo sportowe, prawo antymonopolowe, wartości w sporcie, europejski model sportu

1. INTRODUCTION

European Super League (ESL)[1] is a project of commercial, cyclical football competitions whose participants were to be the leading European football clubs. Among the founders were twelve organizations, including: Real Madrid, FC Barcelona, Juventus Turin, AC Milan, Manchester United, and Arsenal London. According to the accepted assumptions, the ESL competitions were to be partially closed (assuming the permanent participation of the founding organizations, 15 places) while allowing the annual participation of five additional clubs, based on the adopted qualifying mechanism. As part of the presented format of the new football competition, the following elements, among others, were announced: the highest quality of the games offered and increasing financial inflows for European football, which were supposed to grow together with the growth of the company's revenues.

It needs to be emphasized that the above concept of creating new football competitions, independent of FIFA and UEFA structures, raises questions related to the very existence of the organizational structure of modern football and has encountered intense criticism from representatives of public authorities, football circles, and fans.

Firstly, the international football federations, i.e., FIFA and UEFA,[2] expressed their unanimous negative opinion about the idea of establishing a new competition formula. In the first place, both organizations saw the ESL project as a rival one for their own tournaments, especially the Champions League. The organizations also threatened that in the event of the launch of the said competitions, they would impose sanctions on both clubs and players who would take part in

[1] The project of the football Super League is run by the European Super League Company, S. L., and it was announced on 18 April 2021.

[2] Following the announcement of the creation of the Super League, on 21 January 2021, FIFA and UEFA issued a joint statement in which they expressed their refusal to recognize this new entity and warned that any player or club participating in these new competitions would be excluded from the competitions organized by FIFA and its confederations. In a further communication dated 18 April 2021, UEFA and other national federations supported this statement, recalling the possibility of disciplinary measures.

the new project.[3] The authorities of the most important national football leagues, including the English Premier League, Italian Serie A, and Spanish La Liga[4] also spoke critically about the Super League. It is also worth noting that the project in question was not accepted by many other major football clubs, e.g., Bayern Munich, Paris Saint Germain, or Borussia Dortmund, which rejected proposals to join the organization.[5]

The reaction of the fans of the club teams that were involved in the ESL should also be considered as extremely important. There was no doubt about the very negative attitude of these circles in relation to the idea of creating an alternative formula of football competition. It seems that the opinions expressed by the fans had the greatest impact on the decision of most football organizations to withdraw from the project. As a result, a few days after its announcement, English clubs (Arsenal, Manchester United, Manchester City, Tottenham, Chelsea, and Liverpool), Italian clubs (Inter Milan and AC Milan), and a Spanish club (Atletico Madrid) withdrew from the ESL. As a result of the above actions, only 3 football clubs remained among the founding organizations (Real Madrid, FC Barcelona, Juventus Turin) and the very idea of creating the Super League was suspended.

In this situation, the three above-mentioned entities, led by the President of Real Madrid – Florentino Perez, decided to refer the case to the commercial court in Madrid, which then formulated a number of questions for a preliminary ruling to the CJEU regarding the application of Articles 101 and 102 TFUE to the activities of FIFA and UEFA football federations and the admissibility of applying sanctions by these structures against participants of the football Super League.

The purpose of this article is to present the author's own opinion on the case before the CJEU and at the same time to answer the question whether the treaty provisions do not prevent football federations from introducing certain restrictions that are aimed at limiting or even preventing the implementation of the ESL project.

2. BACKGROUND TO THE DISPUTE AND PRELIMINARY QUESTIONS FROM THE SPANISH COMMERCIAL COURT

As already noted, the impetus for initiating the proceedings before the CJEU was a claim filed by the European Super League Company with the commercial

[3] M. Auzbiter, *Superliga nie odpuszcza i pozywa UEFA i FIFA do TSUE,* (in:) www.rp.pl/prawo-dla-ciebie, 22 June 2022, (accessed: 24 February 2023).

[4] S. Stone, *European Super League: Uefa and Premier League condemn 12 major clubs signing up to breakaway plans,* (in:) www.bbc.com/sport, 18 April 2021 (accessed: 24 February 2023).

[5] Bayern, *PSG reject Super League in favor of Champions League*, (in:) www.espn.co.uk/footbal, 20 April 2021 (accessed: 24 February 2023).

court in Madrid[6] against the Union of European Football Associations (UEFA) and the Fédération Internationale de Football Association (FIFA). The claim included, in particular, a motion to declare that by opposing the creation of the European Super League, the defendant violates the competition law and abuses its dominant position on the market for organizing international football club competitions in Europe and on the market for the sale of rights related to these competitions. The plaintiff also requested interim measures to enable the organization and development of the European Super League.

Following a claim filed by the ESL, the Spanish court decided to refer to the Court of Justice of the European Union, pursuant to Article 267 TFEU, six questions for a preliminary ruling, which in general concerned the interpretation of Articles 101, 102, 45, 49, 56 and 63 TFEU.[7] The referring court pointed out that FIFA and UEFA had a 100% market share in the organization of international football competitions, which meant that those organizations had a monopoly in that area of activity. It was also noted that FIFA and UEFA adopted rules applicable to football competitions and granted themselves the power to impose sanctions or disciplinary measures, which constitute an insurmountable obstacle to the entry of new competitors into the European market for international club football competitions and to the sale of rights related to those competitions.[8]

Among the most important issues raised in the questions referred for a preliminary ruling by the commercial court in Madrid, it is worth mentioning, among others:

- question on the interpretation of Article 102 TFUE in such a way that it prohibits the abuse of a dominant position consisting in the fact that FIFA and UEFA establish, among others, in their statutes that prior approval from FIFA and UEFA is required for the creation by a third party of new pan-European club competitions, such as the Super League,
- question on the interpretation of Article 101 TFUE in such a way that it prohibits FIFA and UEFA from requiring in their statutes prior consent of these entities to organize international competitions in Europe,
- question on the interpretation of Articles 101 and 102 TFUE in such a way that they prohibit FIFA, UEFA, their member federations, or national leagues from threatening to impose sanctions on clubs participating in the Super League.

[6] The claim was accepted for consideration on 19 April 2021 by Juzgado de lo Mercantil n° 17 de Madrid.

[7] R. Bujalski, *Superliga Europejska: UEFA. Do przerwy 0 : 1. Omówienie opinii rzecznika generalnego TSUE z dnia 15 grudnia 2022 r., C-333/21 (European Super League Company)*, LEX/el. 2022.

[8] Case C-333/21, request for a preliminary ruling available on the website www.curia.europa.eu.

3. ANALYSIS OF THE ASSUMPTIONS PRESENTED IN THE OPINION OF THE ADVOCATE GENERAL IN CASE C-333/21

A few months after the initiation of the proceedings before the Court of Justice (case C-333/21), the Opinion of the Advocate General, Athanasios Rantos,[9] was presented in this case. It is worth noting that already in the introduction to the Opinion, the Advocate General emphasized that this particular request for a preliminary ruling raised questions about the very essence of the existence of the organizational structure of modern football and its future would depend on the opinion of the Court of Justice on this matter. With reference to the above observation of the Advocate General, it should be noted that the conclusions contained in the Opinion leave a certain deficiency because they are quite conservative and may be accompanied by controversies.

With the above in mind, first of all, the content of the proposals for the answers to the questions for a preliminary ruling expressed by the Advocate General in the Opinion of 15 December 2022 should be quoted.

Firstly, in point V.1) of the Opinion, the Advocate General proposed that in the expected judgment, Tribunal should express the position according to which Articles 101 and 102 TFUE must be interpreted in such a way as not to preclude the FIFA and UEFA regulations, which provide that the creation of new pan-European club football competitions is subject to a system of prior authorization since, taking into consideration the characteristics of the competitions envisaged, the restrictive effects resulting from that system appear to be inherent and proportionate to the legitimate objectives pursued by UEFA and FIFA, which are related to the specific nature of sport.

Secondly, in point V.2), an interpretation of Articles 101 and 102 TFUE was suggested, in so far as they do not prohibit FIFA, UEFA, their member federations, or their national leagues from threatening to impose sanctions on clubs affiliated to those federations if those clubs participate in a project to create a new pan-European club football competition, which could jeopardize the legitimate purposes pursued by the said federations, of which those clubs are members. However, the exclusion sanctions targeted at players, who are not involved in any way in the contested project, are disproportionate, in particular, with regard to their exclusion from national teams.

Thirdly, in point V.3) of the Opinion, it was noted that Articles 101 and 102 TFUE must be interpreted as not precluding Articles 67 and 68 of the FIFA statutes to the extent that the restrictions relating to the exclusive sale of rights connected with competitions organized by FIFA and UEFA appear to be intrinsically related to and proportionate to the pursuit of legitimate objectives associated with

[9] Opinion of the Advocate General of 25 December 2022 in case C-333/21, www.curia.europa.eu.

the specific nature of sport. Furthermore, it is for the referring court to ascertain to what extent the articles in question may benefit from the exemption provided for in Article 101 sec. 3 TFUE or whether there is an objective justification for this behavior within the meaning of Article 102 TFUE.

Fourth, it is proposed in point V.4) that Articles 45, 49, 56, and 63 TFUE should be interpreted as not precluding the statutory provisions of FIFA and UEFA, which provide that the creation of new pan-European club football competitions is subject to a system of prior authorization in so far as that requirement is appropriate and necessary for that purpose, taking into account the specific characteristics of the planned competitions.

Moving on to the analysis of the problems presented in the Opinion of the Advocate General, one should first agree with the initial findings made therein. First of all, it should be noted that the observations of the Advocate General concerning the specific nature of sport included in EU law do not raise any doubts. In this regard, the Opinion drew attention to the role of Article 165 TFUE, which emphasizes the social importance of sport and indicates that Union actions should aim at developing a European dimension of sport, by promoting fairness and accessibility in sports competition and cooperation between entities responsible for sport, as well as by protecting the physical and mental integrity of athletes. In Recital 29 of the Opinion, it is also noted that the content of Article 165 TFUE crystallized a number of conclusions on the role and function of European sport, which have been shaped since the 1990s, following the judgments issued by the CJEU, including, in particular, the judgment in the Bosman case.[10]

The Advocate General also rightly emphasized the importance of the so-called European Sports Model, the goals of which include popularization of open sports competitions based on a transparent system of relegation and promotion, as well as a system of financial solidarity that allows for the redistribution and reinvestment of the income generated by elite events and activities at lower levels of sport (Recital 30 of the Opinion).

At the same time, there are no fundamental doubts regarding the observation that the above model of sport adopted in most sports competitions in Europe is based on the activities of sports federations, whose tasks include, among others, ensuring compliance with and uniform application of the rules governing individual sports disciplines. At the same time, it is quite obvious that the most important features of the European model of sport include its pyramidal structure, inside of which sports federations at the national and international level have a monopoly within their geographical jurisdiction (cf. Recital 31 of the Opinion).

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[10] Judgment of the CJEU of 15 December 1995, C 415/93; J.C. Drolet, *Extra Time: Are the New FIFA Transfer Rules Doomed?,* (in:) S. Gardiner, R. Parrish, R.C. Siekmann (ed.), *EU, Sport, Law and Policy. Regulation, Re-regulation and Representation, TMC Asser Press The Hague 2009*, p. 167.

What is important, in the opinion of 15 December 2022, it was also noted that modern sport is a significant area of economic activity. Consequently, the purpose of the introduction of Article 165 TFUE was to emphasize the specific social nature of that economic activity, which may justify different treatment in certain respects (Recital 34 of the Opinion). At the same time, the Advocate General stated that perceiving the sphere of sport as a platform for commercial activity means that Article 165 TFUE cannot be interpreted in isolation, contrary to the requirements of Articles 101 and 102 TFUE (which also apply in the field of sport).

As a consequence of the above findings, the Advocate General then pointed out that the 'separatist movements' observed in Europe and the sometimes offered 'alternative models' of organizing sports competitions in Europe,[11] while challenging the monopoly of some European sports federations, usually base their arguments on competition law (see Recital 36 and 37 of the Opinion). As indicated in Recital 37 of the Opinion of the Advocate General, the most common arguments in such cases include, among others, the dual role of sports federations as a regulator and economic operator, the monopolistic structure of certain markets for the organization of sports competitions, and the sale of related rights, as well as the refusal of these federations to allow independent competitions to be organized and, consequently, to allow new competitors to enter the markets concerned.

Looking at the questions referred for a preliminary ruling in case C-333/21, it can easily be concluded that the claim brought by the European Super League Company in the present case is based on similar arguments.

In this state of affairs, it should be stated that the key issue for the correct resolution of the dispute that occurred in the above case is balancing the relationship between the economic essence of modern sports services and those specific characteristics of sport protected in Article 165 TFEU. There are no fundamental doubts that sport, to the extent in which it constitutes an economic activity, is subject to EU law, including, in particular, the provisions of the TFEU regarding EU economic law. On the other hand, as indicated in Recital 42 of the Opinion, while the specific features of sport cannot be invoked to exclude sporting activities from the scope of the EU and FEU Treaties, then the references to those features and to the social and educational function of sport that are included in Article 165 TFEU may be relevant, in particular, for the possible objective justification of restrictions of competition or fundamental treaty freedoms.

For this reason, the position expressed by the Advocate General in Recital 49, according to which sports federations may, under certain conditions, refuse market access to third parties, which does not constitute an infringement of Articles 101 and 102 TFEU, provided that such a refusal is justified by legitimate

[11] Case C-124/21 P, concerning the International Skating Union (ISU), provides the best example in this regard.

objectives and the measures taken by those federations are proportionate to those objectives, must be regarded as appropriate. At the same time, however, it should be strongly emphasized that this wording cannot automatically mean that specific actions taken by FIFA and UEFA regarding the Super League will always benefit from the above exception.

In this state of affairs, although I share the observations of the Advocate General presented above as to the shape of the organizational structure of sport in Europe and its axiological background, I would also like to propose a look at the concept presented in the Opinion of 15 December 2022 from a different perspective.

The comments made by the Advocate General in Recitals 85 and 86 of the Opinion are of key importance for further considerations. In these comments it was pointed out that in order to justify the admissibility of specific restrictions that could be imposed on the organizers of the European Super League the ancillary restraints doctrine would be useful. In the literature, the concept of ancillary restrictions is understood as any alleged restriction of competition that is directly related to the main non-restrictive agreement, and, at the same time, necessary for the effective implementation of the objectives of this agreement.[12] The concept of ancillary restrictions is applied primarily in cases involving concentration of enterprises, however, it can also be applied to restrictions of competition accompanying other types of agreements.

Importantly, following the case law of the CJEU, the above doctrine was extended to include restrictions that were deemed necessary in relation to the public interest. Judgment C-309/99 Wouters played a key role in this regard.[13] It was also the basis for the judgment in case C-519/04 Meca – Medina/Majcen,[14] which is the only case, so far, in the field of sport in which the concept of ancillary restrictions was applied. In the Wouters judgment, the Court of Justice presented, among others, an opinion that the treaty provisions do not preclude the regulations of the Dutch bar association prohibiting cooperation between advocates and chartered accountants because that regulation could reasonably be considered necessary for the proper practice of the profession of the advocate under the rules under which it operates in a given member state. In its judgment in the Meca – Medina/Majcen case, the Court of Justice noted that anti-doping rules (even if they were considered to restrict the freedom of activity of the appellant athletes) did not constitute a restriction of competition because their introduction was jus-

[12] A. Jurkowska–Gomułka, G. Materna, D. Miąsik, (in:) K. Kowalik – Bańczyk, M. Szwarc–Kuczer, A. Wróbel, *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz, Vol. II, (Articles 90 – 222),* Warszawa 2012, commentary on Article 101.

[13] Judgment of the CJEU of 19 February 2002, C-309/99; K. Kohutek, *Gloss to the judgment of the CJEU of 12 December 2013*, C-327/13, LEX/el. 2016.

[14] Judgment of the CJEU of 18 July 2006, C-519/04; B. Rischka-Słowik, *Konstytucja sportu Unii Europejskiej*, Warszawa 2014, p. 398.

tified by a legitimate aim. At the same time, it is a restriction inextricably linked to the organization and proper course of sports competitions.

In my opinion, in the light of the above-mentioned judgments, the arguments adopted by the Advocate General in the Opinion on case C-333/21 are inaccurate.

First of all, as regards cases C-309/99 and C-519/04, I consider that the objectives, which would possibly enable the use of the ancillary restrictions concept in the ESL case, are incomparable. As already pointed out, in judgment C-309/99 Wouters, the CJEU referred to the problem of proper performance of the profession of public trust. At the same time, there is no doubt that ensuring the above attribute of a specific professional activity is in the public interest. In Recitals 100 and 102, the CJEU emphasized, among others, that the 'proper' performance of the profession of an advocate should be based on the obligation to defend a client in the conditions of complete independence and in his sole interest, avoidance of conflicts of interest, and strict observance of professional secrecy. As a consequence, the restrictions imposed by professional corporations serve independence from public authorities, other enterprises, and third parties, and the guarantee that the actions taken in the case are conditioned solely and exclusively by the client's interest. The provisions of the Polish legal order also leave no doubts, where already in Article 17 of the Constitution of the Republic of Poland, the legislator decided that the proper performance of a profession of public trust lies in the public interest which should be supervised by professional self-governments.[15]

Against this background, the opinion of the Advocate General in relation to Article 165 TFEU arouses controversy. In my opinion, in Article 165 TFEU it is not about protecting the 'European Sports Model' but about protecting the values accompanying the phenomenon of sport in general. I consider it somewhat of an overinterpretation of the Advocate General's statement that 'most of the objectives invoked by UEFA and FIFA stem from the 'European Sports Model' and are therefore expressly covered by primary EU law and, in particular, Article 165 TFEU'.[16] One cannot agree with the view that the EU's objective is to protect or even somehow maintain a specific organizational structure in a given sport. Even more specifically, the term 'dimension of sport' used in the TFEU cannot be equated with the word 'model' or 'organizational model'. Following this line of considerations, it should be noted that among the values accompanying sport, listed in Article 165 TFEU, there are objectives of a universal (and not only related to a certain organizational structure) character. For example, it is about the fairness of competition, accessibility, and the physical and mental integrity of participants. Based on the above point of view, a fundamental difference can be seen

[15] More: M. Tabernacka, *Zakres wykonywania zadań publicznych przez organy samorządów zawodowych*, Wrocław 2007; M. Biliński, *Podstawy aksjologiczne regulacji wykonywania tzw. zawodu zaufania publicznego*, (in:) A. Powałowski (ed.), *Aksjologia publicznego prawa gospodarczego*, Warszawa 2022, pp. 169-181.

[16] Recital 93 of the Opinion.

between the objectives that formed the basis of the judgment in Meca – Medina/Majcen and the objectives proposed in the Advocate General's Opinion in the present case. Because anti-doping regulations uphold values that are universal for sport and are clearly related to the need to ensure fairness, equal opportunities, and uncertainty of the result. The objectives of the restrictions introduced by FIFA and UEFA, referred to in the Opinion of the Advocate General, are, in turn, mostly related to the functioning of a specific organizational format. The conclusion that only one organizational model, i.e., the structure managed by FIFA and UEFA based on the European model of sport, is capable of fulfilling the universal values of sport referred to in Article 165 TFEU, should be considered unjustified.

Secondly, taking into account the above arguments, it seems that the objectives referred to in the Opinion of the Advocate General, which would justify the use of the concept of ancillary restrictions, do not meet the requirements of necessity and proportionality. They are not necessary because the possible creation of a football Super League will not deprive FIFA and UEFA of the possibility to pursue the goals of sport referred to in Article 165 TFEU. In this state of affairs, the restrictions imposed by sports federations are not proportionate to the restrictions imposed on the freedom to engage in economic activity. Of course, one cannot lose sight of the relevant arguments of the Advocate General regarding the phenomenon of the so-called 'free riding' and 'dual membership' allowing to describe the real intentions of the Super League organizers.[17] In my opinion, however, they are aimed primarily at the commercial interests of modern football (cf. below).

Thirdly, one cannot agree with the catalog of goals proposed by the Advocate General justifying the FIFA and UEFA restrictions, due to the fact that these are essentially commercial goals. In Recital 88 of the Opinion, it is explicitly stated (with which, of course, one has to agree) that in some cases it is permissible to balance the 'non-commercial' objectives with the restriction of competition and to state that the former outweigh the latter, as a result of which there is no violation of Article 101 sec. 1 TFEU. However, analyzing the Opinion allows us to conclude that sports competition based on the key value for sport, which is the openness of competition and the uncertainty of the result, in the Opinion is perceived interchangeably with market competition and the economic interest of specific market participants. For example, Recital 102 of the Opinion states that 'such a competition would inevitably have a negative impact on the national championships by reducing the appeal of those competitions'. Recital 103 of the Opinion states that 'competition with the characteristics of the ESL could have a negative impact on the principle of equal opportunities, which is one component of the fairness of competitions. Thanks to their guaranteed participation in the ESL, certain clubs could book significant additional revenue whilst continuing,

[17] Recital 106 of the Opinion of the Advocate General.

at the same time, to participate in national competitions in which they would fight against other clubs that would be unable to generate revenue on a comparable scale'. Finally, Recital 105 explicitly mentions 'the effect of undermining the appeal and the profitability of UEFA's competitions (in particular the Champions League) and of thus reducing the revenue from them'. In my view, the arguments presented in the Opinion, which are based on the forecast of commercial losses of football market participants, cannot be considered legitimate.

In the context of the present case, the Advocate General's comments on the admissibility of undertaking by an enterprise (or association of enterprises such as UEFA) attempts to protect its own economic interests, in particular, in relation to an 'opportunistic' project which could significantly weaken it, must be regarded as relevant (Recital 108 to the Opinion). In particular, the intention of the ESL organizers to remain simultaneously within the structures of FIFA and UEFA and to derive appropriate benefits from this (the so-called 'dual membership'). The Advocate General noted on this occasion that ESL's founding clubs appear to want to enjoy the rights and benefits of UEFA membership, on the one hand, but they do not want to be bound by UEFA's rules and obligations, on the other hand. I cannot agree with the above statement. In my opinion, there are no non-exclusive organizational obstacles which would prevent certain sports clubs from participating simultaneously in two organizational structures of sport and at the same time from complying with those principles and obligations arising from membership in FIFA and UEFA which coincide with universal sport values. Moreover, it can be assumed that this type of activity is, in fact, primarily an economic risk for clubs undertaking the effort (organizational, personnel, financial) to expand their activities so significantly. Of course, if the Advocate General's forecast should come true, one must agree with the observation in Recital 108 of the Opinion that the Court of Justice has already considered appropriate the provisions of the statute of the cooperative union which limit the possibility of its members (including through sanctions of exclusion) to join other forms of competitive cooperation.[18] It should be noted, however, that that judgment clearly states that the relevant statutory provisions prohibiting its members from participating in other forms of organized cooperation are not covered by the treaty prohibitions insofar as they are limited to what is necessary to ensure the proper functioning and maintenance of the contractual power towards producers. In my opinion, in view of the arguments set out above, the restrictions on the organization of the Super League do not meet the above requirement.

The same conclusion should be reached with regard to the proposed answer to the first question referred for a preliminary ruling, concerning the possible abuse by FIFA and UEFA of Article 102 TFEU. It should be noted that the Advocate

[18] Judgment of the ECJ of 15 December 1994 in the case of Dansk Landbrugs Grovvareselskab AmbA (DLG), C-250/92.

General's Opinion indicates that the analysis conducted on the application of the case law on ancillary restrictions will be of fundamental importance for answering the above question. Consequently, the answer to the second question referred for a preliminary ruling can be applied simultaneously to the examination of the measures in the present case in the light of Article 102 TFEU (see Recital 131 of the Opinion).

In this state of affairs, based on the arguments presented above, it seems that the actions taken by FIFA and UEFA in order to protect their own commercial interests do not meet the proportionality requirement and are not objectively justified.

4. CONCLUSION

Considering the above, one cannot agree with the proposals of the Advocate General, which were expressed in point V of the Opinion, in case C-333/21. In my opinion, there are fundamental doubts in the above dispute as to whether there are grounds for limiting the freedom to create new competition systems in the field of European football. In this state of affairs, blocking access to the market and introducing certain restrictions may be perceived as violation of Articles 101 and 102 TFUE. Consequently, the answers to the three key questions referred for a preliminary ruling by the economic court of Madrid in case C-333/21 should head in the opposite direction, i.e., affirmative direction.

Firstly, Articles 101 and 102 TFEU should be interpreted as precluding the FIFA and UEFA rules, which provide that the creation of new pan-European club football competitions is subject to a system of prior authorization (questions 1 and 2).

Secondly, Articles 101 and 102 TFEU prohibit FIFA, UEFA, their member federations, or their national leagues from imposing sanctions on clubs affiliated to those federations if those clubs participate in the project to create a new pan-European club football competition (question 3).

It should also be pointed out that, regardless of the motives of the Super League organizers and the fears caused by the possible launch of new football competitions, I think that an attempt to establish a new formula for football competition should be resolved at the level of market competition. The more so that in the present case the market has already acted, indicating that the traditional model of football games is not in a lost position. This is about the reaction of the fans, whose outrage led to the withdrawal of most of the Super League founders from the project. From another perspective, this behavior can be seen as a reaction of an enterprise to the opinion taken by consumers in relation to the service offered by this enterprise.

I consider the attempts to justify the market struggle with the need to protect universal sports values to be an extremely dangerous phenomenon for contemporary sport. In my opinion, they cannot be used to camouflage the real (based on market play) purpose of restrictions on the freedom of economic activity introduced by sports federations.

This article was prepared and submitted for publication before the ruling of the Court of Justice in case C-333/21. Regardless of the content of the expected ruling, the author of the submitted study hopes to start an in-depth discussion on the current state of the organizational structure of professional sport in Europe, its ability to implement the universal values of sport, and the challenges it will face in the future.

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PUBLIC INTEREST IN THE ENFORCEABILITY OF LABOUR LAW WITH AN ACCENT ON THE REMUNERATION OF DEPENDENT WORK

Abstract

The presented article focuses on the protection of employees' income, one of the many public interests the state pursues. Legislation creates several levels of employee income protection, from which the public interest of the state in this area of regulation can be induced. The article describes the substantive and procedural instruments of employee protection and compares specific forms of regulation in different legal systems. Based on these findings, appropriate *de lege ferenda* changes to regulation are presented, proposed, and argued. Finally, the article draws attention to the close connection between the world of work, labour regulation, financial (tax) law and economics, and hopes to instigate discussions between experts across the different legal sectors.

KEYWORDS

public interest, enforceability of employees' subjective rights, instruments assisting in compliance with remuneration rules, Labour Law

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interes publiczny, możliwość egzekwowania praw podmiotowych pracowników, instrumenty wspomagające przestrzeganie zasad wynagradzania, Prawo pracy

1. INTRODUCTION

The state pursues many public interests important for the functioning of society, the protection of key common goods[1] and the improvement of the quality of life of its citizens. The remuneration of employees for dependent work[2] can be found among the common goods (public goods[3]) important to society as a whole that it seeks to achieve. Legislation creates several levels of income protection for employees, from which the public interest of the state in this area of legal regulation can be deduced. We can name the instruments of substantive protection, both public and private law, and the instruments of procedural law. This article introduces the individual instruments in more detail, classifies them clearly, and compares their specific forms, thus comparing Czech and Polish legislation. On the basis of the findings, the appropriate (successful) existing instruments helping employees to effectively assert their subjective rights related to remuneration are highlighted and their usefulness (effectiveness) is justified. Appropriate changes to the relevant *de lege ferenda* regulation are also proposed and argued. General ideas worth following are named.

It should be pointed out at the outset that non-compliance with the rules on the remuneration of employees has significant consequences not only in the world of work itself but also in the sphere of finance. Non-compliance with the Labour Code's standards on the remuneration of employees has a legitimate impact on tax collection. Even worse is the situation with the concealment of the basic employment relationship, where a civil (commercial) relationship is simulated *vis-à-vis*

[1] F. Schoch, *§ 49 Widerruf eines rechtmäßigen Verwaltungsaktes*. Marginal no. 118–120, (in:) F. Schoch, J-P. Schneider (ed.), *Verwaltungsrecht VwVfG.,* C.H. Beck, 2022, 3rd edition, p. 3700.

[2] In particular, the public interest in achieving a minimum level of income for the performance of dependent work, which is embodied in the institution of the minimum wage.

[3] K. A. Pape, *WHG § 15 Gehobene Erlaubnis*. Marginal no. 8, (in:) R. von Landmann, G. Rohmer (ed.), *Umweltrecht Werkstand*, C.H. Beck, 2022. 99th edition, p. 12 000.

the public authorities, while at the same time, the employment relationship is dissimulated. However, this article will not discuss illegal employment any further and will focus on the violations of the rules on remuneration of employees where the subjects of the basic employment relationship do not disguise the dependent performance of work.

Moreover, work is closely linked to the economy as employees are the key factor of production for entrepreneurs and the economy as a whole. Demotivated, illegally remunerated employees may decide to stop doing dependent work, may choose not to work, and may choose to run a business or do work under the guise of what in Czech is called *švarcsystém* (meaning doing dependent work covertly). All of these changes then affect the production and consumption of goods and services. The world of work, labour regulation, is thus unquestionably closely intertwined with the world of finance, economics, and financial (tax) law. If the public interest is discussed in the context of finance and economics, the discussion should not be conducted without the topic of labour regulation. It is with this aim, among others, that this article has been written.

2. DEFINITION OF BASIC TERMS

2.1. PUBLIC INTEREST

Talking about the public interest in compliance with the remuneration rules, we refer to the previously established meanings of the mentioned term. However, the public interest can generally be understood in at least two senses. Firstly, as an indicator determining the direction of policy and, secondly, as a concept with legal content. In the literature, the public interest is thus understood[4] in the first sense as a non-private interest, an interest of society at large,[5] precisely undefined and undefinable. This does not mean, of course, that the public interest cannot be consistent with the private interest of a particular individual. Simply put, the literature points out that the public interest in this sense is one of the material sources of law.[6]

In the second sense of the word, we can also operate with it in the context of dealing with legal norms since it is a legal corrective affecting the creation, inter-

[4] K. Weber, *Öffentliches Interesse,* (in:) K. Weber (ed.), *Rechtswörterbuch,* C.H. Beck, 2022, 24th revised edition.

[5] G-M. Knopp, J. Müller, *WHG § 17 Zulassung vorzeitigen Beginns*. Marginal no. 52, 53, (in:) F. Sieder, H. Zeitler, H. Dahme, G-M. Knopp (ed.), *Wasserhaushaltsgesetz, Abwasserabgabengesetz: WHG*, C.H. Beck, 2022, 57th edition, p. 4600.

[6] K. Eliáš, *Veřejný zájem (Malá glosa k velkému tématu)*, Ad Notam, 1998, Vol. 5, p. 103.

pretation, and application of objective law.[7] Eliáš[8] adds to this normative understanding of the commented concept that the public interest 'represents part of the substance of a certain legal norm. As such (in this sense), it represents a problem of interpretation of an individual legal rule'.[9]

The legal concept of 'public interest' (in its second meaning) is thus treated directly by positive law itself. For example, the Czech Civil Code (hereinafter referred to as 'the Civil Code') mentions it in connection with the protection of a person's image and privacy or in connection with the exceptions to this protection (see Section 88(2) of the Civil Code[10]), and it also mentions it in connection with the appointment of a guardian for a person by a court, which is to take place if it is necessary to defend a person's interests or if the (just mentioned) public interest requires it (see Section 465 of the Civil Code[11]). Furthermore, the occurrence of the term in positive law can be referred to, e.g., Section 1032 (public interest and necessary way), Section 1037, Section 1038 (public interest and limitation of the right of ownership) of the Civil Code. In the context of relative property rights, the term of public interest is used in Civil Code, for example, in the case of donation (Section 2064), lease (Section 2288), and health care (Section 2650).

In the following part of the text, the public interest will be treated in its first meaning, i.e., as an indicator for policy making, for the creation of legal norms.

It may be noted that the public interest in labour relations is specified by the principles of labour law. Thus, we can speak of the public interest in the safety and health of employees at work, in a working environment free from discriminatory practices, in (fair) remuneration,[12] in the stability of employment relations (manifestations of the principle of legal protection of the employee's position), which also protects the interest in maintaining the desired level of employment and economic growth. In all the various aspects, the public interest in respecting human rights, that is respect for the right to human dignity, can be discerned. The principles thus specify the public interest, setting out partial, yet general, objectives for the legislator's work.

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[7] A. Gerloch, *Veřejný zájem*, (in:) D. Hendrych (ed.), *Právnický slovník*, Praha 2009. On the difference between the legal-sociological concept of public interest and the normative concept, see K. Eliáš, *Veřejný zájem (Malá glosa k velkému tématu)*, *Ibid*.

[8] Karel Eliáš is a Czech lawyer, commercialist and the main author of the new Civil Code.

[9] K. Eliáš, *Veřejný zájem (Malá glosa k velkému tématu), Ibid*. Eliáš refers to J. Hoetzel, Československé správní právo. Část všeobecná, Praha 1937, p. 29.

[10] 'Consent is also not required when a likeness, a document of a personal nature or a sound or visual recording is taken or used by law for an official purpose or when someone makes a public appearance on a matter of public interest'.

[11] See L. Ptáček, *Komentář k § 465*, (in:) F. Melzer, P. Tégl (ed.), *Občanský zákoník – velký komentář*, Svazek III. § 419 – 654, Praha 2014, p. 136.

[12] Which is the focus of this article.

2.2. ENFORCEABILITY (REALISATION) OF EMPLOYEES' SUBJECTIVE RIGHTS

In addition to the aforementioned values, such as fair remuneration of employees, it is possible to point out another public interest in the world of work. It consists in the realisation of the rights of the subjects of law, in the enforceability of labour law,[13] especially in the enforceability of the rights of the weaker party to the contract – employees, including the interest in the observance (implementation) of the rules relating to the remuneration of employees for the work they do. In particular, these rules are to be respected by the employer since an employee essentially goes to work to earn an income. There is thus a heightened public interest in compliance with the legal rules in this area of employment regulation.

Legal norms are to be implemented, they are not to remain only in legal texts. On the basis of this premise, the legislator should take care to create new instruments or improve existing ones. Otherwise, the law loses its purpose, which is the effective regulation of relations in society. Therefore, the following and central part of the article focuses – first in general and later in particular – on the instruments, across legal frameworks, through which the legislator seeks to strengthen the implementation of employees' rights in the area of their remuneration by the employer.

3. INSTRUMENTS ASSISTING IN COMPLIANCE WITH REMUNERATION RULES – IN GENERAL

In general, instruments to assist in compliance with labour regulation (i.e., including regulation around employee remuneration) can be divided into three categories.

– Firstly, the **instruments of public labour law**,[14] which include inspection bodies that monitor whether effective legal regulation is being observed between the subjects of the underlying employment relationship. This also includes norms formulating offences and containing penalties for breaches of labour law, which act as a deterrent to the subject of the basic employment relationship, regardless of whether the liability is administrative or

[13] See M. Blažek, *Posílená realizace práv zaměstnanců jako nová idea soukromého pracovního práva*, Brno 2023.

[14] By which we mean substantive instruments. In order to be able to structure the topic more specifically, we distinguish these instruments from procedural instruments, although these also fall under the area of public law.

criminal.[15] There are also other rights linked to the existence of an inspection body, such as the right to lodge a complaint with that body to initiate an inspection. The legal regulation of employers' insolvency and the state's assistance to employees should not be overlooked.

– The following are the **instruments of private labour law** which refer to employers. At a general level, we can talk about instruments that are reflected in the individual relationship between an employee and an employer, such as the possibility to claim interest for late payment[16] or the possibility to terminate the employment relationship[17] immediately if the employer delays the payment of remuneration. Reference may also be

[15] From the Czech decision-making practice, we can point, for example, to the judgment of the Supreme Administrative Court of 25 July 2022, Case No. 6 Ads 138/2022, in which the Supreme Administrative Court considered a case where the Regional Labour Inspectorate, by its decision, found the applicant guilty of committing an offence under Section 26(1)(c) of Act No. 251/2005 Coll., on Labour Inspection, which he committed by failing to provide his employees with part of the wages for the work they had done by the end of the month following the completion of their work, in breach of Section 141(1) of Act No. 262/2006 Coll., the Labour Code. The regional inspectorate fined the applicant CZK 50,000 for the offence. Reference may also be made to the judgment of the Supreme Administrative Court of 15 June 2021, Case No. 2 Ads 370/2019, in which the Supreme Administrative Court considered a case where the employer had committed an administrative offence by failing to provide 23 employees with wage compensation. Authors' note: the decision can be found on the website www.nssoud.cz.

[16] See, e.g., the judgment of the Supreme Court of 15 January 2015, Case No. 21 Cdo 403/2014, in which the Supreme Court – among other things – addressed the question of 'under what conditions and when the employer is in default of the employee's right to wages (salary) if the employee failed to appear at the specified time and place for payment and if the employer failed to send the wages (salary) to the employee at his/her own expense and risk on the next working day at the latest'.

[17] On this subject, cf., e.g., the Supreme Court judgment of 14 March 2002, Case No. 21 Cdo 515/2001, in which the Court of Appeal held that the failure to pay part of the wages is also a reason for immediate termination of employment; the Supreme Court judgment of 26 April 2002, Case No. 21 Cdo 1151/2001, in which it was stated that 'The grounds for immediate termination of employment ... is given even if the employer had satisfied the employee's claim for wages or wage compensation before the immediate termination was served if the employer paid the wages or wage compensation due to the employee only after 15 days had elapsed after the wages or wage compensation were due and that the subsequent satisfaction of the employee's claim for wages or wage compensation after 15 days had elapsed may be taken into account only in the context of assessing whether the employee's conduct constituted an abuse of law'. On this topic, see also, e.g., the Supreme Court judgment of 31 October 2019, Case No. 21 Cdo 1815/2018, in which the Supreme Court addressed the question of 'whether an employee who proceeded to the immediate termination of the employment relationship on the grounds of non-payment of wages pursuant to the provisions of Section 56(1)(b) of the Labour Code abused his rights within the meaning of Section 8 of the Civil Code if he did so in a situation where he himself violated the employee's obligations arising from the employment relationship or the Supreme Court judgment of 16 December 2013, Case No. 21 Cdo 298/2013, the Supreme Court judgment of 12 October 2010, Case No. 21 Cdo 2242/2009, or the Constitutional Court judgment of 16 June 2015, Case No. II ÚS 3399/14. Authors' note: the decisions can be found on the websites www.nsoud.cz and www.usoud.cz.

made in this category to the employer's obligation to provide information on remuneration rules, whether through an individual contract, a collective agreement or otherwise. It is also necessary to draw attention to the educational activities of the private entities around the employee. By this we mean, in particular, trade unions, which can help employees to navigate through employment law.

– Last but not least, we can point to **the instruments of procedural law**. These include, in the first place, the employee's right to bring an action before the courts to claim wages (or wage compensation). This ability to assert one's rights before a judicial authority implicitly includes the power to influence the employer not to infringe the pay rules. The powers of trade unions can also be pointed out in this context – here, it is the possibility of representing employees in civil court proceedings.

Employers cannot be forced to never break employment law, and similarly, employees cannot be forced to sue their employers every time they break the law. However, in view of the public interest in ensuring that employees receive fair remuneration for their work, the legislator should continuously evaluate these instruments to see whether they help to realise the rights of employees, including in the area of income protection. The instruments should prompt the employer to violate the legal norms to the lowest extent possible and, in turn, they should influence the employees not to be afraid to defend their rights before a judicial authority or to be aware of their rights at all. Instruments to facilitate the path to justice tend to be of a procedural nature, modifying the general procedural rules in a situation where one of the parties to the dispute is the employee, the weaker party in terms of substantive law. In the following part of the text, attention will be paid to specific Czech and Polish instruments which pursue the above-mentioned public interest.

Of course, the instruments can also be structured using other criteria. It is advisable to think about the instruments in the sense of whether they are actually capable of protecting the employee's income (replacing the lost income that is not paid by the employer) – see, e.g., the regulation of employee protection in the event of employer insolvency or whether they only have a preventive, punitive effect on the employer, but the employee is not directly able to replace the income (fines, interest for late payment).

4. INSTRUMENTS ASSISTING WITH COMPLIANCE WITH REMUNERATION RULES – IN PARTICULAR

4.1. CZECH REPUBLIC

4.1.1. PUBLIC LAW INSTRUMENTS

Czech legal regulation in this sub-area is contained in the **Labour Inspection Act**,[18] which, among other things, regulates the rights and obligations of subjects during the inspection and the period of sanctions for violation of the established obligations. A person commits offences by failing to ensure equal treatment of all employees in terms of their remuneration for work, for which a fine of up to CZK 1,000,000 may be imposed.[19] The right of an employee to be paid the minimum wage, the right to be paid for work generally within a specified period of time and the right to compensatory time off for work on public holidays, etc., are also protected.[20]

Furthermore, the adopted regulation which is based on the guidelines of the European Union,[21] contained in the **Act on the Protection of Employees in the Event of Insolvency of their Employer**,[22] is also crucial. Here, too, the public interest of the state in protecting the income of employees is clearly visible since it provides employees with the right to satisfaction of the outstanding wage claims not paid to them by their insolvent employer.[23] It is not only the wages themselves that are protected here but also other wage claims, such as severance pay.[24] Thanks to the commented regulation, an employee can contact any regional branch of the Labour Office. The latter informs the public about employers whose employees can claim their wage entitlements through its official board. The Ministry of

[18] Act No. 215/2005 Coll., on Labour Inspection. Available, e.g., at: https://www.zakonyprolidi.cz/cs/2005-251.

[19] Section 11 of the Labour Inspection Act. In addition to the aforementioned Section 11, which defines the obligation towards natural persons, there is also Section 24 of the same Act, which regulates the same obligation towards legal persons and natural persons engaged in business.

[20] Section 13 of the Labour Inspection Act. In relation to legal persons and natural persons engaged in business, see Section 26 of the same Act.

[21] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.

[22] Act No. 118/2000 Coll., the Act on the Protection of Employees in the Event of Insolvency of their Employer and on Amendments to Certain Acts (hereinafter referred to as the Employee Protection Act). Available, e.g., at: https://www.zakonyprolidi.cz/cs/2000-118#f2020692.

[23] See Section 1a of the Employee Protection Act.

[24] For the definition of other terms, see Section 3 of the Employee Protection Act.

Labour and Social Affairs also informs about them on its website.[25] Simply put, the Labour Office then satisfies the rights of employees (within the limits defined by law) to benefits that the employer has failed to fulfil due to its insolvency.[26]

4.1.2. PRIVATE LAW INSTRUMENTS

In view of the regulation in Section 141(1) of the Labour Code, an employee may claim **interest for late payment**[27] from the employer if the employer fails to pay the wages no later than the month following the month in which the employee performed the work for which the right to wages arose. Such an employer is in default and the employee, in the position of an unsatisfied creditor, may claim interest on the default in accordance with the provision in the Civil Code applicable subsidiarily. It is thus a sanction which also has a preventive effect on the employer and it is supposed to prompt him to pay the benefits on time. However, interest on late payment does not directly have the potential to protect the employee's income.

If the employer fails to pay the employee's wages within 15 days after the due date (see the previous paragraph), the employee may **immediately terminate the employment relationship** with the employer in writing pursuant to Section 56(1)(b) of the Labour Code.[28]

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[25] Section 4 of the Employee Protection Act.

[26] Pursuant to Section 3(a) of the Employee Protection Act, an insolvent employer is defined as such an employer if it has failed to satisfy outstanding wage claims of its employees on the day following the day on which a moratorium was declared against it prior to the commencement of insolvency proceedings, or on the day on which an insolvency petition was filed against it with a competent court in the Czech Republic, or, in the case of a multinational employer, also on the day on which it was declared insolvent by a competent authority in another Member State of the European Union.

[27] See, e.g., the judgment of the Supreme Court of 15 January 2015, Case No. 21 Cdo 403/2014, in which the Supreme Court – among other things – addressed the question 'under what conditions and when is the employer in default of the employee's right to wages (salary) if the employee failed to appear at the specified time and place for payment and if the employer failed to send the wages (salary) to the employee at his/her own expense and risk on the next working day at the latest'.

[28] On this topic, see, e.g., the Supreme Court judgment of 12 October 2010, Case No. 21 Cdo 2242/2009, the Supreme Court judgment of 14 March 2002, Case No. 21 Cdo 515/2001, in which the Court of Appeal concluded that the failure to pay part of the wages is also a reason for immediate termination of employment; the Supreme Court judgment of 26 April 2002, Case No. 21 Cdo 1151/2001, in which it was stated that 'The grounds for immediate termination of employment ... is given even if the employer had satisfied the employee's claim for wages or wage compensation before the immediate termination was served if the employer paid the wages or wage compensation due to the employee only after 15 days had elapsed after the wages or wage compensation were due and that the subsequent satisfaction of the employee's claim for wages or wage compensation after 15 days had elapsed may be taken into account only in the context of assessing whether the employee's conduct constituted an abuse of law'. On this topic, cf. also, e.g., the Supreme Court judgment of 31 October 2019, Case No. 21 Cdo 1815/2018, in which the Supreme Court addressed the question of 'whether an employee who proceeded to the immediate termination of the em-

In this context, it is also possible to point out the employer's obligations to inform employees or employees' representatives about sub-topics related to employee remuneration. In particular, attention may be drawn to the employer's obligation under Section 279(a) of the Labour Code to inform the employer about its **economic and financial situation** and its likely development. All employers who employ more than 10 employees have this obligation.[29]

Workers' representatives have already been mentioned. In particular, the work of the **trade unions**, which can be a kind of first legal advice for employees, cannot be ignored in the context of income protection.

The employee's right to receive his wages in legal tender (see Section 142(1) of the Labour Code), i.e., banknotes and coins issued by the Czech National Bank (Section 16 of Act No. 6/1993 Coll., the Act of the Czech National Council on the Czech National Bank), and his right to be paid during **working hours** and at the **workplace** also constitute income protection. However, in the name of the contractual freedom of the parties, the parties may agree on other conditions for the payment of remuneration.

The employee's income is also protected under Czech law by the rule which states that **wage deductions** (among other things) may be made only on the basis of the law (Section 145 *et seq.* of the Labour Code) that an employee **cannot exempt the employer** from the obligation to provide him with wages (Section 346c of the Labour Code), which cannot be derogated from, and that the employer can only demand 'reimbursement of amounts wrongly paid' to the employee if the employee knew or must have assumed from the circumstances that the amounts were incorrectly determined or paid in error, within 3 years from the date of payment (§ 331 of the Labour Code). The possibility of **claiming compensation for damage** cannot be overlooked if the conditions under which the employee is entitled to claim compensation are met (attributability of the damage, causal link, breach of duty, damage suffered, etc.).

4.1.3. PROCEDURAL INSTRUMENTS

A trade union can help an employee to a larger extent than just providing 'mere' legal advice. According to Czech legislation in force, it can assist the employee in **asserting his or her rights** before a civil court (see Section 26 of the Code of Civil Procedure), e.g., in proceedings initiated by an action for per-

ployment relationship on the grounds of non-payment of wages pursuant to Section 56(1)(b) of the Labour Code abused his rights within the meaning of Section 8 of the Civil Code if he did so in a situation where he himself violated the employee's obligations arising from the employment relationship', or the Supreme Court judgment of 16 December 2013, Case No. 21 Cdo 298/2013, the Supreme Court judgment of 12 October 2010, Case No. 21 Cdo 2242/2009, or the Constitutional Court judgment of 16 June 2015, Case No. II ÚS 3399/14. Authors' note: the decision can be found on the websites www.nsoud.cz and www.usoud.cz.

[29] Section 279(2) of the Labour Code.

formance, claiming the amount of wages owed, including the aforementioned accessories, i.e., default interest, or in proceedings addressing discrimination, initiated by an anti-discrimination action. The trade union may also avail itself of its assistance in **insolvency proceedings** and in **incidental disputes** (Section 20(2) of the Insolvency Act). For the sake of comprehensiveness, it may be noted that the trade union is also entitled to participate in the **meeting of creditors** and **the meeting of the creditors' committee** (See Section 47(2) and Section 67 of the Insolvency Act).

The procedural law instrument that can quickly help the employee to protect his income or to deal with the loss of income is the instrument contained in Article 76 of the Code of Civil Procedure. Under this provision, the court may order an **interim measure** requiring the employer to provide at least part of the remuneration.

4.2. POLAND

4.2.1. POLAND – IN GENERAL

Similarly to Czech legislation, Polish legislation is not concentrated in one legal regulation, but the regulation can be found in both private *(Kodeks pracy)* and public law regulations. After the analysis of the regulation, we present here only an overview of the most important instruments that can protect the employees' income or at least prompt the employer to fulfil its remuneration obligations in a timely manner.

4.2.2. PUBLIC LAW INSTRUMENTS

Polish legislation also relies on the control of employers through **inspection bodies**. The employee has the possibility to turn to them in the case of non-fulfilment of obligations by the employer (either in full or in case of delayed fulfilment of obligations) and the labour inspectorate can issue an order on the basis of which the employer is obliged to pay the unpaid wages to the employee. These orders are characterised by their immediate enforceability.[30]

[30] M. Stachowska, 1) *Niewypłacone wynagrodzenie za pracę, czyli jak odzyskać należną wypłatę*. 4 April 2023, https://poradnikpracownika.pl/-niewyplacone-wynagrodzenie-za-prace-czyli-jak-odzyskac-nalezna-wyplate#:~:text=Jednym%20z%20podstawowych%20obowi-%C4%85zk%C3%B3w%20pracodawcy,jest%20wykroczeniem%20przeciwko%20prawom%20pracownika (accessed: 18 April 2023); 2) *Uchybienia w zakresie wypłaty wynagrodzeń – skutki prawne*. 21 November 2022, https://poradnikprzedsiebiorcy.pl/-uchybienia-w-zakresie-wyplaty-wynagrodzen-skutki-prawne (accessed: 18 April 2023). For unpaid wages, the Polish Labour Inspectorate can fine employers between PLN 1,000 and PLN 30,000. See also: A. Walczyńska, *Niewypłacenie pensji w terminie – konsekwencje prawne*. 24 July 2022, https://poradnikpracownika.pl/-niewyplacenie-pensji-w-terminie-konsekwencje-prawne (accessed: 18 April 2023). Art.11 point 7 of the Act of 13 April 2007 on the National Labour Inspectorate – If the employer fails to

What is specific about the Polish regulation is that, in contrast to the Czech regulation, employers are also subject to **criminal sanctions** for the breach of remuneration obligations. According to the norms of the Criminal Code, an employer may be subject not only to a fine but also to imprisonment if the employer does so intentionally and consistently.[31] The issue is regulated in Section 218 *et seq.* of the Criminal Code *(Kodeks karny)*. There are also other offences against the rights of persons engaged in gainful employment.[32]

Polish legislation also regulates the situation when an employer becomes insolvent, i.e., when he no longer has sufficient funds to cover his costs. Here, employees are protected through the Guaranteed Employee Benefits Fund *(Fundusz Gwarantowanych Świadczeń Pracowniczych)* and, similarly to the Czech regulation, the possibility of drawing on it for employees is limited (claims can be made for unpaid wages but also for other claims, such as 'reimbursement' of holidays).[33]

4.2.3. PRIVATE LAW INSTRUMENTS

In contrast to Czech legislation, Polish legislation requires that **the remuneration for work should be included in the employment contract**. However, doctrine and case law are divided on the plain wording of the text of the law. The latter emphasise that remuneration cannot be included among the obligatory elements and that even in the absence of this element the contract is valid.[34] The remuneration may be agreed upon in other sources, such as a collective agreement, or set out, for example, in an internal regulation. If the amount of the employee's remuneration is completely absent and cannot be ascertained, the remuneration is based on the normal wage, appropriate for the type, quality, and quantity of work performed. If, on the other hand, the contract expressly provides that the work is to be performed without remuneration that would be an invalid act.[35] It can be

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pay the wages, the labour inspectorate can order the employer to pay the wages. *Uchybienia w zakresie wypłaty wynagrodzeń – skutki prawne*. 21 November 2022. https://poradnikprzedsiebiorcy.pl/-uchybienia-w-zakresie-wyplaty-wynagrodzen-skutki-prawne (accessed: 18 April 2023).

[31] I. Stefaniak, *Nieprawidłowa wypłata wynagrodzenia – sankcje*. 18August 2014, https://ksiegowosc.infor.pl/zus-kadry/wynagrodzenia/697091,Nieprawidlowa-wyplata-wynagrodzenia-sankcje.html (accessed: 18 April 2023).

[32] For more information see e.g., A. Grześkowiak (ed.), *Kodeks karny: komentarz*, Warszawa 2021; or R.A. Stefański (ed.), *Kodeks karny: komentarz*, Warszawa 2020.

[33] M. Stachowska, *Niewypłacone wynagrodzenie za pracę, czyli jak odzyskać należną wypłatę*. 4 April 2023, https://poradnikpracownika.pl/-niewyplacone-wynagrodzenie-za-prace-czyli-jak-odzyskac-nalezna-wyplate#:~:text=Jednym%20z%20podstawowych%20obowi%C4%85zk%C3%B3w%20pracodawcy,jest%20wykroczeniem%20przeciwko%20prawom%20pracownika (accessed: 18 April 2023).

[34] M. Tomaszewska, *Artykuł 29*, (in:) K.W. Baran (ed.), *Kodeks pracy: komentarz: projekty nowelizacji Kodeksu pracy z komentarzem*. *Vol. I, Art. 1-93*, Warszawa 2022, p. 361.

[35] M. Tomaszewska, *Artykuł 29*, (in:) K.W. Baran (ed.), *Kodeks pracy: komentarz: projekty nowelizacji Kodeksu pracy z komentarzem*. *Vol. I, Art. 1-93*, Warszawa 2022, p. 361.

stated here that Polish law corresponds to Czech law, since even in the Czech legal environment, a statement about the unpaid performance of dependent work would lead to the (absolute) nullity of the contract, since such an arrangement would not only be contrary to the regulation but also to the basic principles of labour relations and therefore to public policy.

The employer is obliged to **inform** the employee in writing, no later than 7 days from the date of conclusion of the employment contract, about the frequency of payment of wages and, unless otherwise stated (through an internal regulation), also about the place, date and time of payment (date of payment) of wages.[36] Polish legislation also reflects the provisions of Directive 91/533/EEC. The obligation to inform is not surprisingly applicable here not only to relationships established by an employment contract but also by appointment.[37]

Failure to comply with the rules of remuneration laid down by the law, internal normative acts or by contract, including the rules on the due date of payment of wages, is punishable by the employer's obligation to pay the employee **interest for late payment**. According to Article 94(5) of *Kodeks pracy*, the employer is obliged to pay the employee's wages duly and on time,[38] according to a predetermined deadline. The fact that the employee may also claim damages does not affect the right to claim interest for late payment. At the same time, the employee may claim interest for late payment even if the employee has not suffered any damage.[39]

As already indicated, similarly to the Czech regulation, failure to pay wages properly and on time may lead to consequences in the form of the employee's right to **compensation**, which may occur, for example, in connection with the inability to pay the rent to the employer or to another creditor.[40]

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[36] See: Art. 104 § 1 point 5 of the Labour Code. M. Stachowska, *Niewypłacone wynagrodzenie za pracę, czyli jak odzyskać należną wypłatę*. 4 April 2023, https://poradnikpracownika.pl/-niewyplacone-wynagrodzenie-za-prace-czyli-jak-odzyskac-nalezna-wyplate#:~:text=-Jednym%20z%20podstawowych%20obowi%C4%85zk%C3%B3w%20pracodawcy,jest%20wykroczeniem%20przeciwko%20prawom%20pracownika (accessed: 18 April 2023). See also: A. Walczyńska, *Niewypłacenie pensji w terminie – konsekwencje prawne*. 24 July 2022, https://poradnikpracownika.pl/-niewyplacenie-pensji-w-terminie-konsekwencje-prawne (accessed: 18 April 2023).

[37] M. Tomaszewska, *Artykuł 29*, (in:) K.W. Baran (ed.), *Kodeks pracy: komentarz: projekty nowelizacji Kodeksu pracy z komentarzem. Tom I, Art. 1-93*, Warszawa 2022, p. 362.

[38] M. Stachowska, *Ibid*; A.Walczyńska, *Ibid*.

[39] *Uchybienia w zakresie wypłaty wynagrodzeń – skutki prawne*. 21 November 2022, https://poradnikprzedsiebiorcy.pl/-uchybienia-w-zakresie-wyplaty-wynagrodzen-skutki-prawne (accessed: 18 April 2023).

[40] Default is the failure to perform an obligation in time or immediately after the request for performance, unless a time limit has been set for which the debtor is liable (Section 476 of the Civil Code). It therefore does not apply to situations where the delay is caused by circumstances for which the employer is not liable, such as a fire at a cash desk in the workplace, failure of the banking system, failure of postal clerks. In the case of an employee who is in arrears in receiving

If the employer pays the employee more than the employee is entitled to, the employer has the right to claim back the amounts paid. At a general level, the standard states that a person who has received a monetary benefit without legal justification is obliged to return the benefit. If the employee does not agree to repay the overpayment and does not hand it over, the employer has the option of going to court to claim back the sums paid. Similarly to Czech legislation, there is a rule which states that the employee is not obliged to repay the amounts received if he believes that he is entitled to them and has already spent the amount of the overpayment.[41]

In the context of the institution of termination of employment without notice period, it may be noted that the employment relationship is terminated without notice, but the employer is entitled to the remuneration corresponding to the length of the notice period. The employee is obliged to state the reason for such termination. The employee may deliver it to the employer even during the expiry of the notice period which was started by a notice given earlier.[42] The doctrine, following the example of case law, points out that an employee may terminate the employment relationship without a notice, *inter alia*, in a situation where the employer breaches fundamental obligations in the employment relationship. These mainly involve the obligations contained in the employment regulations which additionally violate existing legal principles. Such obligations include obligations relating to remuneration, e.g., failure to implement a previously agreed salary adjustment.[43] They can also include failure to pay wages in general, unless it is a partial payment not representing a high-value amount, delay in the payment of wages, and payment of wages to the wrong bank account, etc.[44]

Thus, the employer should not forget about this possible instrument when it violates one of its elementary obligations in the field of remuneration. For example, late payment of wages can also mean the loss of an employee whom the employer must pay during the notice period. In addition, the employer incurs

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wages owed, the employer may discharge the debt by depositing the amount of wages with the court. See, i.e., I. Stefaniak, *Ibid*.

[41] It is rare that an employee continues to be enriched at the time of claiming the benefit and does not use the surplus to cover the cost of living. The salary is primarily a maintenance payment and is most often distributed on a pay-as-you-go basis. It is the employer who calculates its amount and is liable for any miscalculation. The employee may assume that the relevant payroll and personnel departments have correctly calculated the amount of remuneration due to him and thus may not take into account the possibility of overvaluation and any obligation to repay the amount of unjust enrichment. The employee bears the burden of proof of the loss or consumption of surplus so that he is no longer enriched. The employer bears the burden of proving that the employee is obliged to repay the overpayment, i.e., the employer must prove that the employee knew that he or she was not entitled to the overpayment. *Ibid*.

[42] K.W. Baran, *Artykuł 55,* (in:) K.W. Baran (ed.), *Kodeks pracy: komentarz: projekty nowelizacji Kodeksu pracy z komentarzem. Vol. I, Art. 1-93*, Warszawa 2022, p. 744.

[43] *Ibid*., p. 747.

[44] *Ibid*., p. 750.

further increased (financial) costs in finding a new employee to take the place of the employee who was no longer satisfied with the employer (because of the delay in the payment of wages).

4.2.4. PROCEDURAL INSTRUMENTS

As far as procedural tools are concerned, the employee may apply to the court to exercise his/her right, and in contrast to the general regulation of civil procedure, the **fee obligation** is regulated in favour of the employee as a specific party to the proceedings.[45] Polish law, similarly to Czech civil procedure, modifies the general rules in relation to the employee. In this context, one may also point out the possibility – if the statutory conditions are met – for the court to hear the case expeditiously, without ordering a hearing.[46] Here, too, the employee may be assisted in exercising his/her rights by the trade union, which may represent him/her in the proceedings.[47]

5. CONCLUSION

A well-drafted **employment contract** with the employer protects the employee's income at the basic level. Here, it is advisable to specify the employee's specific rights to wages and other individual wage benefits beyond the law, unless this is done, for example, in general to several employees of the employer, through an **internal regulation** or a concluded and effective **collective agreement**.[48]

Employees can also protect their income in a preventive way by **actively informing** themselves about the employer's payment situation in advance, finding out about the employer's history (its market position), researching the situation in the industry, the number of competitors of the employer, etc. For this

[45] M. Stachowska, *Ibid*.; A. Walczyńska, *Ibid*.

[46] N. Zięba, *Co powinien zrobić pracownika, gdy pracodawca nie wypłaca wynagrodzenia?* 16 May 2017, https://kadry.infor.pl/kodeks-pracy/spory-ze-stosunku-pracy/756729,Co-powinien-zrobic-pracownik-gdy-pracodawca-nie-wyplaca-wynagrodzenia.html#:~:text=Z%20punktu%20widzenia,wniosku%20w%20pozwie (accessed: 18 April 2023).

[47] Not only the representation of an employee before an employment tribunal., See the following article: J. Tęczka, *Postępowanie przed sądem pracy - ogólna charakterystyka*. 25 July 2022, https://poradnikpracownika.pl/-postepowanie-przed-sadem-pracy-ogolna-charakterystyka (accessed: 18 April 2023).

[48] Pursuant to Section 37(1) of the Labour Code, if the employment contract does not contain information on the rights and obligations arising from the employment relationship – including, *inter alia*, information on wages and the method of remuneration, the due date of wages, the date of payment of wages, the place and method of payment of wages or salary, the employer is obliged to inform the employee in writing of such information no later than one month after the employment relationship has been established.

purpose, **public registers,** such as the commercial and insolvency registers, can be used. The employee can also enquire about the employer's general **financial situation**, its future plans, and intended investments. Employees can also **diversify their income** by not relying (in the current climate where the media inform us daily about various crises) on a single income from a single employer. Whether as individuals or even as a family, they will not rely on a single income from a single employer. The loss of income will then not have such an impact on the employee's financial situation.

However, these tools are more important on the preventive side of the matter. Still, the regulation also offers tools that act in the case of situations where employees do not receive payment for their work.

For this reason, after defining the necessary terms and drawing attention to the broader context of the topic, this article focuses its attention, in particular, on the tools that help employees to obtain remuneration for the performance of dependent work in cases where employers violate the legal norms of the Labour Code and do not pay their employees remuneration for their work. The structure of various instruments that can facilitate the employee's path to remuneration across the legal system is shown and the Polish and Czech instruments are presented.

On the basis of the analysis of relevant Czech and Polish legislation (of a substantive and procedural nature, public and private law), it was found that the **adoption of criminal liability** of employers for breaches of regulations concerning the remuneration of employees seems to be an appropriate *de lege ferenda* inspiration for the Czech regulation. Both legal regulations contain less invasive instruments that have a punitive effect on employers (the possibility to demand interest for late payment, immediate termination of the employment relationship, demanding compensation for damages). However, as is well known, the threat of criminal liability can **compel compliance** more effectively. Of course, the facts of a possible criminal offence should be regulated in the Czech environment so that only truly (intensely) illegal (and primarily intentional) conduct of the employer is punished.

However, in addition to the adoption of the instrument of force, the state power should not give up on educating responsible individuals with respect for the rule of law. As already mentioned, the common leitmotif of future changes should be a greater fulfilment of the public interest in terms of greater realisation of employees' rights in the area of legal regulation of remuneration.

Furthermore, the competences of the labour inspection bodies would not necessarily be developed as such a modification would automatically be associated with an increase in the costs for the budget of such a branch of power, i.e., the state budget. A much more financially advantageous option would be to support trade unions, which could provide more (better) assistance to employees in exercising their rights. There would be no increase in governance costs.

In conclusion, legal scholarship must not neglect this topic, since the transparent (in the sense of not obscuring the basic employment relationship), timely and complete receipt of remuneration for the performance of dependent work has an impact not only on the life of the individual and his or her immediate family but also ultimately on society as a whole because (as already mentioned) the issue is related to the question of public finances and the economy as a whole. Inadequate income (unpaid expected income) can push workers into a poor living (economic) situation to the extreme of committing criminal activities in order to secure money as a source of livelihood. It is therefore in the public interest that the legislator should not stop monitoring the topic discussed in the article and continuously evaluate the effective legislation, both in terms of its effectiveness measured by the degree of realisation of employees' rights and from an economic (fiscal) perspective, i.e., the criterion of whether the funds issued by the Treasury for the existing instruments (in particular funding for inspection bodies overseeing compliance with legislation) satisfactorily correspond to the results achieved, or whether it is not appropriate to look for other, more effective and ideally less costly legal instruments, as already mentioned.

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PUBLIC INTEREST AS A DETERMINANT OF STATE INFLUENCE ON THE FINANCIAL MARKET IN THE EUROPEAN UNION

Abstract

The article discusses the issue of the influence of public interest on the regulation of the financial market. The basic challenges for regulators associated with the dynamic development of this market are presented. A new regulatory paradigm aimed at introducing and implementing values necessary for the proper functioning of the financial market is discussed. The need to protect non-professional participants of this market is emphasized in particular. A new approach to the consumer model is taken into account where the rational consumer has become more susceptible to emotions and irrational behaviors. The special role of financial market stability is highlighted, which has become a kind of public good that is subject to special protection. The way in which public interest materializes in financial market regulations, not only in statutory law but also in soft law norms, is also discussed.

KEYWORDS

financial market, consumer protection, FinTech, behavioral economy, financial stability, financial education

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rynek finansowy, ochrona konsumentów, FinTech, ekonomia behawioralna, stabilność finansowa, edukacja finansowa

1. INTRODUCTION

The financialization of life increasingly affects the functioning of individuals and entities. It is important to take into account public interest, especially the core values that are necessary to maintain the stability of the financial market. The dynamic development of the financial market, associated with technological progress and the emergence of new, innovative financial institutions offering a wide range of innovative financial services in the borderless cyberspace of the globalizing world, creates new challenges for regulators. The aim of the article is to indicate the values that must be taken into account when creating proper regulations and the type of norms that would most effectively introduce them into the legal system. These norms should ensure freedom of competition and freedom to conduct business but also take into account public interest manifested in maintaining the greatest value, which is the stability of the financial market.

2. BASIC VALUES OF THE FINANCIAL MARKET

In general terms, the financial market is the place where, based on money and financial instruments, contracts for the purchase and sale of various forms of capital are made. It plays a key role in the economy by enabling the mobilization of capital, its allocation, monetary turnover, capital valuation, and risk management. Financial markets are becoming increasingly complex due to interconnectedness, globalization, significant and dynamic technological development, and the provision of new services by innovative institutions in the Financial Technology (FinTech) sector.[1]

With a few exceptions, local financial markets are exposed to internal stressors arising from the characteristics of a given market, as well as difficult to predict and manage external risks that 'infect' structurally and institutionally related markets. The dynamic development of technology has had a huge impact on finan-

[1] D.W. Arner, J. Barberis, R.P. Buckley, *The evolution of FinTech: A new postcrisis paradigm?,* Georgetown Journal of International Law, Vol. 47, 2016, p. 1271.

cial markets. The possibility of almost cost-free global communication across the entire globe has marked the emergence of cyberspace, which is an important area of activity for financial institutions. It allows the provision of an expanded range of services without territorial boundaries, resulting in a significant reduction in costs.

The financial market is an element of the broader social system exerting significant influence on its functioning, co-determining the values within it, and satisfying social needs. For its proper functioning, it is necessary to adhere to a catalog of values without which the market could not exist and which it embodies. The very basis of financial markets, namely money, is grounded in socially accepted values, particularly trust (as 'fiduciary money' means 'faith-based money'). Trust is based on a unique social bond between members of a community. It plays a crucial role in ensuring the security and stability of market participants. These values may seem as abstract and detached-from-reality postulates that do not quite fit the financial market, which is largely based on information, knowledge, and often complex mathematical analysis. However, these values are the foundation and the *sine qua non* for the proper functioning of the financial market and its realization of the functions and tasks assigned to it. The financial market's functioning should be based on values that reflect the content of the public interest, highlighting the importance of their implementation by the legislator. Thus, it is necessary to view these markets in a broader axiological dimension.[2] Legal regulations of the financial market are primarily public in nature, containing the legislature's sovereign determinations on the rules for establishing, organizing, managing, financing, and protecting institutions operating within this market. Public interest creates the possibility of transferring to the law the instruments of expediency through which the state can affect the financial market's functioning. Thus, the state's actions in the area of legal regulations are taken in the public interest through the protection of the fundamental values of the financial market. At the same time, the dynamically changing financial market environment requires regulatory adaptations, which present new challenges for regulators.

The values that operate throughout the single financial market of the European Union are primarily aimed at ensuring its proper functioning, stability, security, transparency, and market confidence, as well as protecting the interests of its participants, providing reliable information on its functioning and achieving the objectives set out in the laws regulating its various sectors. The European System of Financial Supervision (ESFS) has been designated to oversee compliance with these values in the financial market. Its main objective is to ensure consistent implementation of financial sector regulations in a way that preserves financial stability, increases the level of convergence of supervisory practices among

[2] T. Nieborak T., *Rynek finansowym jako dobro wspólne*, Poznań 2016, p. 167.

national financial supervisors, enhances confidence in the financial system as a whole, and provides adequate protection for consumers of financial services. The ESFS consists of the European Systemic Risk Board, the European Supervisory Authorities,[3] the Joint Committee, and the supervisory authorities in each member state.[4]

The values indicated above are interdependent, intertwined, and complementary to each other. However, it should be noted that the stability of financial markets is a fundamental value and its importance for the economic situation of countries is so momentous that it has rightly been recognized as one of the public goods which is subject to far-reaching protection. The stability of the financial system acquired significant, even primary importance during the global crisis of 2007. It became necessary not only to identify its sources and take *ad hoc* measures to estimate losses but also, and primarily, to define programs for creating conditions for implementing strategic long-term projects. In place of the belief in the rationality of financial markets and the conviction that there is no need to intervene in the financial system, which is efficient and safe thanks to private risk management at the level of individual institutions subject to micro-prudential supervision, a new consensus has emerged. According to the new paradigm, the market is unstable, pro-cyclical, and prone to herd behavior. For the new consensus, the macro-prudential perspective and the protection of consumer rights and interests are essential.[5]

When analyzing financial market stability from a macroeconomic perspective, special attention should be paid to issues related to monetary policy, prudential supervision, ownership supervision, as well as legal and technological safeguards. Monetary policy, whose main purpose is to influence the money supply and regulate its circulation to ensure monetary equilibrium and maintain monetary stability, is carried out by central banks. It affects the money market and its proper implementation is necessary to ensure an adequate level of stability in this market, as well as in other markets related to it. The prerequisites for effective prudential supervision of financial market participants include autonomy to prevent influence from other entities, adequate norms and standards for implementation, and data for decision-making. Sound corporate governance is very important, as its effectiveness is necessary to maintain the stability of the entire financial system.[6] Nowadays, it is not enough to simply know who the share-

[3] European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA) and European Securities and Markets Authority (ESMA).

[4] Financial Supervision Commission (KNF) in Poland, obliged to protect the above values in Article 2 of the Financial Market Supervision Act (Journal of Laws of the Republic of Poland: Journal of Laws 2022, item 660).

[5] P. Błaszczyk, S. Zwierzchlewski, *Stabilność finansowa jako dobro publiczne*, Zeszyty Naukowe Uniwersytetu Ekonomicznego w Poznaniu, Vol. 139, 2010, pp. 7-25.

[6] P. O. Mülbert, *Corporate Governance of Banks after the Financial Crisis - Theory, Evidence, Reforms,* ECGI – Law Working Paper No. 130, 2009, pp. 1-23.

holders of a financial institution are; it is also important to know who controls the shareholders and the degree of concentration of their control, how ownership rights are enforced against the entity, as well as who influences its strategy and how. It is also necessary to guarantee the security of transactions performed in the capital markets.

3. CONSUMER PROTECTION ON THE FINANCIAL MARKET

Although the 2007 crisis had many systemic sources, one of the most significant was the inadequate protection of consumers in relation to the provision of excessively risky credit, such as sub-prime credit.[7] This prompted a paradigm shift towards regulation and supervision, emphasizing the need for regulatory and supervisory intervention in the financial market. It was recognized that the complex nature of financial services and the interconnectedness of market participants create risks that cannot be assessed by even the best-informed consumers. This has led to the expansion of regulations protecting not only consumers but also non-professional participants in the financial market more broadly,[8] as well as the creation of a system of institutional protection for these groups.[9] The architecture of security and protection of consumer interests in the financial services market has become one of the most important areas of social welfare.

The assumptions of behavioral economics that challenge the rationality of consumer choices are increasingly being taken into account. The subprime mortgage experience has provided three important insights into the consequences of consumer behavior for the economy as a whole. First, poor financial decision-making is a surprisingly common phenomenon. Second, such problems can go unnoticed for a long time before a crisis occurs. Third, the systemic effects and costs of maintaining stability can be significant, as evidenced by financial market turmoil and subsequent interventions. While modern consumers are becoming increasingly open to innovation and education, they may not always be well-informed about their rights and the scope of financial institutions. In fact, consumers often make decisions based on cognitive errors and heuristics, which can lead to wrong choices.

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[7] G. Dell'Ariccia, D. Igan, L. Laeven, *Credit Booms and Lending Standards: Evidence from the Subprime Mortgage Market*, European Banking Center Discussion Paper No. 2009-14S, CentER Discussion Paper Series No. 2009-46S, pp. 26-27.

[8] L. Haim, *Rethinking Consumer Protection Policy in Financial Markets (6 November 2015),* Journal of Law and Commerce, Vol. 32, 2013, p. 23.

[9] D. Cyman, *Zarys systemu instytucjonalnej ochrony praw konsumentów na rynku finansowym*, Gdańskie Studia Prawnicze, 2017, Vol. 38, p. 325.

One of the earliest concepts of bounded consumer rationality was the theory developed by Herbert Simon, who won the Nobel Prize in Economics in 1978. Simon believed that the expected utility theory was not applicable to everyday conditions as people usually lack the necessary cognitive abilities to make decisions based on the axioms of the expected utility theory. Moreover, people do not have all the information they need about the situation they find themselves in nor do they have a fixed set of preferences.[10] People change their minds about what is worthwhile and what they want to achieve, even at the expense of logical consistency or violation of the principle of transitivity of preferences. When making decisions, people cannot assess the probability and utility of all alternative scenarios due to limited cognitive abilities. They also do not take into account all relevant issues and their decisions may not be consistent and can vary depending on the moment or context in which they are made.

In the 1970s, the research conducted by psychologists A. Tversky and D. Kahneman challenged the assumption of rationality in consumer behavior.[11] Their experiments and observations showed that consumer decisions are often more emotional than rational. They proposed an alternative model to the traditional *homo economicus* model to describe how people perceive events under uncertainty. According to their model, people often make decisions based on heuristics, which leads to numerous and systematic mistakes. The process of assessing value and forecasting changes in financial markets is particularly prone to errors and distortions.[12]

Consumer protection is critical for maintaining confidence in the financial market and this trust is based on three pillars. The first pillar is technological security which aims to protect transactions by imposing strict requirements for physical safeguards, such as replacing magnetic strips with microchips and encrypting data sent electronically. The second pillar is consumer protection which aims to grant consumers certain rights and develop appropriate procedures for asserting them. The third pillar is tort protection which guarantees the norms of both general and individual prevention against the unlawful use of electronic payment instruments.

[10] H.A Simon, *Rational Choice and the Structure of the Environment*, 'Psychological Review' 1956, Vol. 3, No. 2, pp. 129-138.

[11] D. Kahneman, A. Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 'Econometrica', XLVII, 1979, pp. 263–291.

[12] D. Kahneman, *Thinking fast and slow*, Farrar, Straus and Giroux, 2011.

4. THE LAW OF THE FINANCIAL MARKET AND THE REALIZATION OF PUBLIC INTEREST IN ITS CREATION AND ENFORCEMENT

In the formation of trust, both the legislator and state institutions play an important role. When creating laws that regulate the operation of the financial market based on trust, the legislator must minimize elements detrimental to it, including excessive risk. Trust is also influenced by normative stability, which affects existential security and creates generalized trust, transparency of social organizations, permanence of social order, subordination of power to the rules of law, consistent implementation of powers, and enforcement of obligations by independent institutions that protect threatened powers (such as courts) and enforce the implementation of certain obligations (for example, supervisory authorities).[13]

When analyzing the influence of the state on the financial market through the introduction of legal regulations, it is necessary to take into account their special nature, which distinguishes financial market law from other branches of law. In financial market law, elements of public and private, national, EU and international, substantive, systemic, and procedural law intermingle. It contains legal regulations related to the influence of the state on the organization and operation of financial institutions to ensure the proper functioning and security of the financial market. This law is formed by legal norms regulating, among other things, the designation of entities authorized to perform financial services in the financial market, the conditions for undertaking activities by financial institutions, supervision of the market, as well as the principles of conducting activities.[14]

The doctrine distinguishes between the concepts of financial market law, which has a public-law character, and financial services law, which includes private-law regulations.[15] However, such a division is not always clear and the influence of public law regulations on the provision of services is increasingly apparent, including the supervision of their provision. Effective and efficient regulations require research in other areas, particularly in the fields of economics, psychology, and sociology. A system based on safeguarding legal interests and related values, including the protection of consumer rights in financial services (which includes support for financial education and awareness), should be established while ensuring the unfettered operation of the financial market.

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[13] T. Nieborak, *Tworzenie i stosowanie prawa rynku finansowego a proces ekonomizacji prawa*, Poznań 2016, p. 115.

[14] A. Jurkowska-Zeidler, M. Olszak (ed.), *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, Warszawa 2016.

[15] D. Wojtczak, *Usługi bankowe w regulacjach Unii Europejskiej*, Warszawa 2012, p. 15; W. Srokosz, *Pojęcie usług finansowych w regulacjach prawnych Unii Europejskiej*, Prawo Bankowe 2000, Vol. 9, pp. 79–81.

The degree of regulatory interference in the financial market's operation is crucial. The fundamental value of this market is the freedom to conduct business in it and any restrictions should be justified by the protection of other values. Thus, the principle of proportionality of this interference,[16] which sets the limits of state interventionism, is crucial. It relates to the adequacy, necessity, and proportionality of regulation. It boils down to whether the regulation is necessary, whether it achieves its intended goals, and whether its effects remain proportional to the burdens or restrictions it imposes. To answer these questions, it is necessary to develop an appropriate model of the participants in this market, particularly taking into account their actual behavior (and thus considering the behavioral approach to the non-professional financial market participant).[17] It is also important to adopt an appropriate set of values and assess their relevance to the functioning of not only the financial market but the entire social system in which this market operates.

In the pre-crisis financial markets of 2007, the regulatory paradigm known as the Washington Consensus was dominant. This paradigm was characterized by an unwavering belief in economic liberalism and the rationality of financial markets. It was believed that financial markets were fundamentally efficient, although subject to short-term turbulence, and that their proper functioning required only full access to market information by all participants. The role of regulation was limited to ensuring the smooth operation of market mechanisms based on a free-market economy, with the main role assigned to internal market discipline. However, the 2007 crisis challenged this consensus, proving that even the largest and most innovative financial institutions were vulnerable to risks.

The new consensus, known as the Basel Consensus, assumes that financial markets are fundamentally unstable. This instability is increased by the excessive complexity of financial systems and the introduction of financial innovations that create additional risks. Therefore, state intervention is necessary to ban certain business models, restrict the sale of certain financial services, and regulate not only individual financial institutions but also the entire financial market. Public authorities must assess and review the internal corporate governance and risk management of financial institutions. Additionally, the internal crisis management structures utilized by supervised institutions must also be subject to supervisory scrutiny.[18]

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[16] S. Karasiewicz, L. Kurkliński, W. Szpringer, *Zasada proporcjonalności. Przełom w ocenie regulacji*, Warszawa 2014, p. 39.

[17] A.F. Lefevre, M. Chapman, *Behavioural economics and financial consumer protection*, OECD Working Papers on Finance, Insurance and Private Pensions No. 42, OECD 2017.

[18] J. Monkiewicz, M. Monkiewicz, *Ochrona konsumentów w nowym paradygmacie regulacyjno-nadzorczym rynków finansowych,* (in:) J. Monkiewicz, M. Orlicki (ed.), *Ochrona konsumentów na rynku ubezpieczeniowym w Polsce. Współczesne wyzwania*, Warszawa 2015, pp. 13-14.

Questioning the rationality of consumer choices has led to a shift from the regulator's passive role in the consumer market to an active one, with interventions addressing both market behavior and the structure of the market itself. This shift also places more responsibility on financial institutions to consider the choices made by consumers. The idea of the rational consumer has been replaced by the idea of the rational regulator and financial market participants who prioritize fair play.

Soft law norms are playing an increasingly important role in modern financial market regulation.[19] They serve to promote a consistent and uniform understanding of European Union financial market law and compliance with it. These regulations deviate significantly from traditional soft law, exhibiting features that are much stronger and more binding on addressees. This is particularly evident in the recommendations of supervisory authorities issued to financial institutions.[20] The effectiveness of soft law is largely ensured by normative instruments that enforce certain actions and sanction the failure of supervised entities to carry out the intentions of their creators. As a result, they are, in fact, a new form of acts of public authority. The legislator, unable to ascribe a directly binding character to them, seeks to force the addressees of this law to comply with certain legal effects relevant to the objectives of the regulations they create.

In addition to direct regulation, promoting financial education and improving the financial skills of financial market participants are important aspects of pursuing the public interest in the financial market. OECD has made significant contributions to this area by conducting international surveys of citizens' financial skills and forms of financial education.[21] Based on the results of these studies, representatives of OECD member governments have developed recommendations on principles and good practices in financial education and financial awareness.[22] These recommendations emphasize the role of financial institutions in providing objective information about the services they offer, as well as the responsibility of employers in providing employees with information about retirement savings opportunities and methods.

Financial education is also crucial for the proper functioning of the European Union's financial market. In 1975, the European Commission put forward the

[19] A. Nadolska, *Soft law w regulacji rynku finansowego w Polsce: rekomendacje, wytyczne i lista ostrzeżeń publicznych KNF*, Warszawa 2021.

[20] M. Federowicz, *Nadzór nad ryzykiem finansowym Unii Europejskiej*, Warszawa 2013, pp. 162-163; Z. Ofiarski, *Rola soft law w regulacji rynku finansowego na przykładzie rekomendacji i wytycznych Komisji Nadzoru* Finansowego, (in:) A. Jurkowska Zeidler, M. Olszak (ed.), *Prawo Rynku Finansowego*, Warszawa 2016, p. 137.

[21] Improving Financial Literacy. Analysis Of Issues And Policies, OECD 2005.

[22] Recommendation on Principles and Good Practices for Financial Education and Awareness, OECD 2005.

right to education as one of the five fundamental consumer rights.[23] According to Article 165 TFEU,[24] the European Union shall contribute to the development of quality education by encouraging cooperation between the Member States and, if necessary, by supporting and supplementing their activities. This applies fully to financial education, which is recognized as important for enabling European citizens to make informed decisions about the acquisition of financial services and to understand the basics of private finance, thereby ensuring that the single market can directly bring benefit to them.

5. CONCLUSIONS

The financial market law has undergone significant changes since the crisis of 2007. The previous assumption of the self-regulating stability of the market, which led to significant liberalization and deregulation, turned out to be incorrect. It has become clear that the financial market is not stable and does not automatically return to the state of equilibrium in the event of disturbances. Intervention by regulators and state institutions is necessary to maintain the stability. The financial market plays an extremely important role in the functioning of society and, therefore, all regulations should take into account the public interest. It is reflected in the identification and consideration of basic values that are necessary for the proper functioning of the financial market. Beside the stability of the financial market, which can be considered a public good, other essential values, like safety and trust in the financial market and consumer protection have to be introduced to financial market law. The dynamically changing financial market, innovative financial institutions and services make it difficult for statutory law to keep up with the changes on the market. Therefore, the role of more flexible soft law norms is particularly important.

The implementation of effective solutions to ensure the realization of the public interest in the financial market requires an increase in institutional protection, particularly, in terms of safeguarding non-professional market participants. This can be achieved by expanding supervisory powers, not only over financial institutions but also over services provided in the market. Active intervention by state institutions promotes market safety, provides consumer protection, and introduces supervision over the stability of individual institutions, as well as the financial services market as a whole, ultimately increasing stability and reducing systemic risks. Self-regulation of the market is also increasingly important,

[23] Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C 92, 25 April 1975, p. 1–1.

[24] Treaty on the Functioning of the European Union (consolidated version), [2012] OJ C 326/47.

involving the creation of norms by market participants, as well as norms targeted at financial institutions created by supervisory authorities.

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PUBLIC INTEREST AS A FEATURE OF PUBLIC FINANCE INSPECTION

Abstract

This article deals with the selected attributes of public interest within the realization of public finance inspection. It is based on the hypothesis that inspection can be considered legitimate and legal only if it is properly justified by the protection of a specific public interest. From the interpretation perspective, the resolution of conflict, even a potential one, either with a private interest or possibly with another public interest, is essential. The article also points out that interest of the public in inspection outputs is a kind of protected public interest as well.

KEYWORDS

public interest, inspection, public finance, management of public funds, public administration, Supreme Audit Office

SŁOWA KLUCZOWE

interes publiczny, kontrola, finanse publiczne, gospodarowanie środkami publicznymi, administracja publiczna, Najwyższa Izba Kontroli

1. INTRODUCTION

There is no doubt that inspection represents an integral part of the proper management of public funds. It is no different in the case of private funds management. However, inspection means a significant intervention in the area of inspected persons. Depending on the subject and focus of the inspection, in the case of public finance, it can be public administration bodies, as well as private entities, i.e., legal entities and individuals, for example those holding the role of a subsidy recipient. This article is based on the hypothesis that inspection can be considered legitimate and legal only if it is properly justified by the protection of a specific public interest. In general, it is an interest in the protection of public funds which are entrusted to the inspected persons on the basis of various legal acts and under various conditions. The true essence of entrusted public funds, which justifies the public interest in their protection, is the fact that they are the result of the allocation function of the tax system, i.e., they represent a mass of funds that were drawn from taxpayers specifically in the public interest. At the same time, the variety of public interests pursued by the allocation is increasing. It is a result of the global development of the economy in recent years. In general, state and public administration, including territorial self-governing units, is increasingly taking on the role of a provider of public goods and services, which are financed through public funds. This phenomenon, of course, also brings greater pressure on the proper management of public funds and, therefore, a demand for a higher level of responsibility and the associated increased interest from the public. In this context, the aim of this article is to point out selected aspects that are related to the public interest and its protection within the public finance inspection.

2. THEORETICAL BASIS

Based on Hendrych,[1] Kotáb,[2] and Mrkývka,[3] for the purposes of this article, the public finance inspection can be defined as an assessment of whether a certain activity or a certain state corresponds to legal regulations, or an assessment of whether the obligations set out on the basis of these legal regulations are met to ensure the protection of public finance. The protection of public finance repre-

[1] D. Hendrych, *Správní věda: teorie veřejné správy*, Praha 2014, p. 190; D. Hendrych, *Správní právo: obecná část*, Praha 2009, p. 299.

[2] P. Kotáb, *Chapter V. State inspection and financial control*, (in:) M. Bakeš, *Finanční právo*, Praha 2012, p. 51.

[3] P. Mrkývka, *Determinace a diverzifikace finančního práva*, Brno 2012, pp. 62–63.

sents the public interest. Public interest is a vague legal term that must always be interpreted with regard to the circumstances of the given case as is assumed by the relevant legal regulations that serve its protection. Even though it is a vague legal term, in essence, it is a specific interest that is protected. In this context, Vedral[4] points out that public administrative bodies do not create public interest within their activities. Public interest results directly from the relevant legislation. The Constitutional Court states that a public administrative body finds the public interest in the course of administrative proceedings, which must necessarily be reflected in the justification of its decision. The justification must include, in particular, the reason why the public interest prevailed over the private interest.[5] This interpretation corresponds to the general principle of the public interest protection, which is defined in the provisions of Section 2, paragraph 4 of the Code of Administrative Procedure.[6] However, it cannot be assumed that the public interest would be constructed *a priori* by the legal regulation. Rather, the legal regulation defines the relevant public interest but not always explicitly, and, in particular, creates the prerequisites for its successful protection, or provides specific instruments for this purpose. The definition of public interest, which is contained in Black's legal dictionary, also corresponds to this: '*1. The general welfare of the public that warrants recognition and protection. 2. Something in which the public as a whole has a stake; especially an interest that justifies governmental regulation'*.[7] According to Skulová,[8] public interest determines the content of public administration as it represents the purpose to be achieved through the activity of a public administrative body. In addition, public interest is also a legitimate reason for limiting the private interest of the persons concerned. It follows from the nature of the matter that public administrative authorities or courts only deal with a question of public interest in the event of its conflict with another interest, even if the existence of other interests is not a *sine qua non* condition.

3. CONFLICT OF PUBLIC INTERESTS

In practice, not only private interest can be in conflict with public interest but also several public interests can be in conflict mutually. The Supreme Administrative Court formulated instructions for resolving this conflict: *'In the case*

[4] J. Vedral, *Kontrolní řád: komentář*, Praha 2015, p. 206; J. Vedral, *Správní řád: komentář*, Praha 2012, p. 100.

[5] Decision of Constitutional Court of 28 June 2005, Pl. ÚS 24/04.

[6] Act No.500/2004 Coll., Code of Administrative Procedure, as amended.

[7] B. A. Garner (ed.), *Black's law dictionary*, St. Paul 2004.

[8] S. Skulová, *The principle of compliance with the public interest*, (in:) A. Kliková (ed.), *Správní řád*, Praha 2016, p. 48.

of weighing two public interests that are in conflict, analogically to the case of a conflict of fundamental rights, the administrative authority must first properly determine and individualize both public interests that are involved, and then compare the importance of the two public interests in conflict with the fact that interference with either of the two protected public interests must not outweigh the positives in its negative consequences. In dealing with a conflict of public interests, the maximum of both conflicting interests should be preserved, while the core and periphery of the conflicting public interest should be identified, and of the two public interests that are involved, at least their core should be preserved'.[9] An example of two public interests that are in conflict in connection with the public finance inspection is public procurement. The public interest pursued by the Public Procurement Act[10] is the protection of economic competition, which is reflected in the individual provisions of the Public Procurement Act and, in particular, in the principles that are postulated in Section 6: equal treatment, non-discrimination, and transparency. In the case where a public contract is financed from public resources, the contracting authority has, in addition to these obligations, the obligation to comply with the 3E principle, i.e., economy, efficiency, effectiveness. This principle is defined in the provisions of Section 2, letters m), n) and o) of the Financial Control Act[11] and it represents the public interest in the protection of public finance. In an effort to protect public finance to the greatest extent, there may be situations where principles protecting economic competition are partially or completely suppressed. This is especially the case when, in accordance with the principle of efficiency, specific detailed requirements are defined for the purchased goods, delivery or service. In particular, this refers to qualitative parameters, which may lead to the restriction or even the exclusion of economic competition. It is obvious that if specific quality requirements are set, which is required by the 3E principle, the number of potential suppliers is automatically reduced. This can lead to a potential threat to economic competition. Taking into account the nature of both public interests as well as the fact that these are public interests that go beyond national legislation and are based on the European Union legislation,[12] it is necessary to follow the procedure

[9] Judgement of the Supreme Administrative Court of 10 May 2013, 6 As 65/2012-161, No. 2879/2013 Coll. NSS.

[10] Act No. 134/2016 Coll., on Public Procurement, as amended.

[11] Act No. 320/2001 Coll., on Financial Control in Public Administration and amending certain acts (Act on Financial Control), as amended.

[12] In particular, the Regulation (EU, Euratom) 2018/1046 of the European Parliament and the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No. 1296/2013, (EU) No. 1301/2013, (EU) No. 1303/2013, (EU) No. 1304/2013, (EU) No. 1309/2013, (EU) No. 1316/2013, (EU) No. 223/2014, (EU) No. 283/2014, and Decision No. 541/2014/EU and repealing Regulation (EU, Euratom) No. 966/2012, as amended and Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended.

defined by the Supreme Administrative Court,[13] as none of the principles can be excluded from the application. The final solution must be, just as in the case of an administrative decision, properly justified and recorded within the audit trail to perform a preliminary financial control.[14]

4. INTEREST OF THE PUBLIC IN INSPECTION OUTPUTS

Leaving aside the fact that the public interest is implied in the essence of inspection, it also appears explicitly in the legal system in connection with the regulation of the public finance inspection. It can be assumed that in these cases, the legislator was guided by an effort to emphasize its meaning or by the need to provide a proper and explicit justification. The Constitution of the Czech Republic[15] does not regulate public finance primarily, with the exception of a marginal reference to the budget and property of territorial self-governing units[16] and further in the provision of Article 97, paragraph 1 of the Constitution of the Czech Republic, which generally regulates the competence of the Supreme Audit Office to perform audits on the management of state property and the implementation of the state budget. From the point of view of the protection of the public interest, the constitutional definition of the authority of the Supreme Audit Office can be considered essential.

The Supreme Audit Office, as it is formed in modern legal states, represents an important control mechanism that enables the public, both directly and indirectly through elected representatives, to participate in the inspection of the use of public funds. The public can participate directly based on the provisions of Section 30, paragraph 1 of the Act on the Supreme Audit Office,[17] according to which all approved audit reports shall be published in the Office Bulletin which is accessible on its website.[18] The same provision also regulates indirect control, which is carried out through elected representatives. The approved audit reports are sent to both chambers of parliament as well as to the government. Especially in the case of the government, it is expected that, based on the results of the audit

[13] Judgement of the Supreme Administrative Court of 10 May 2013, 6 As 65/2012-161, No. 2879/2013 Coll. NSS.

[14] For details see D. Czudek, *Commentary on Section 4*, (in:) J. Czudek Kranecová, D. Czudek, T. Koucká Höfferová, A. Vuongová, *Komentář k zákonu o finanční kontrole ve veřejné správě*, Plzeň 2021.

[15] Constitutional Act No. 1/1993 Coll, The Constitution of the Czech Republic, as amended.

[16] Article 101, paragraph 3 of Constitutional Act No. 1/1993 Coll, The Constitution of the Czech Republic.

[17] Act No. 166/1993 Coll. on Supreme Audit Office, as amended.

[18] Supreme Audit Office: www.nku.cz

which are contained in the reports, it will take appropriate measures, both to eliminate the identified deficiencies and to strengthen the management and control mechanisms to increase the protection of the entrusted public funds. However, it is not excluded that both chambers of the parliament will deal with the audit reports in more detail. It can even be considered that this is assumed with regard to the wording of Section 30, paragraph 2 of the Act on the Supreme Audit Office, according to which both chambers of the parliament and their bodies (commissions and committees), as well as the government, have access not only to the published audit reports but also to their sources, especially the audit protocols in accordance with the provisions of Section 25 of the Act on the Supreme Audit Office. The audit protocol, unlike the audit report, is provided only to an exhaustively determined circle of authorized authorities. In addition to the aforementioned two chambers of the parliament, their bodies and the government, the audit protocol is of course forwarded to the auditee and, eventually, to law enforcement authorities in accordance with the provisions of Section 8, paragraph 1 of the Code of the Criminal Procedure,[19] and to the tax administration bodies in accordance with provisions of Section 58 of the Code of Tax Procedure.[20] The audit protocol is, therefore, inaccessible not only to the public but also to other bodies that have inspection authority over the auditees and for whom the conclusions of the Supreme Control Office can be crucial, especially from the point of view of inspection planning. In this case, for example, it is the Ministry of Finance according to the provisions of Section 7 of the Act on Financial Control.[21] The Ministry of Finance has extensive inspection competences, in particular, towards public administration bodies but also towards recipients of public financial support or providers of public financial support, whose inspection competence is based on the provisions of Section 8 *et seq.* of the Financial Control Act. It is not completely clear how lawmakers were driven to adopt such a restrictive legislation, especially in view of the fact that inspection bodies have the authority to request audit protocols from auditees, based on the provisions of Section 8, letter c) of the Code of Inspection Procedure.[22] In this case, the inspection authority is bound by the object and scope of the inspection. However, theoretically, according to the provision of Section 3, paragraph 1 of the Code of Inspection Procedure, inspection bodies have the authority to request all audit protocols from auditees, but only if they will serve to decide whether to initiate an inspection. The auditee is not obliged to comply with the request in this case. Public access to audit protocols of the Supreme Audit Office is excluded, as they are covered by one of the few exceptions according to the provision of Section 11, paragraph 4, letter

[19] Act No. 141/1961 Coll., Code of Criminal Procedure, as amended.

[20] Act No. 280/2009 Coll., Code of Tax Procedure, as amended.

[21] Act No. 320/2001 Coll. on Financial Control in Public Administration and amending certain acts (Act on Financial Control), as amended.

[22] Act No. 255/2012 Coll. on Inspection (Code of Inspection Procedure), as amended.

d) of the Act on Free Access to Information.[23] In contrast to the access of control authorities to audit protocols, this prohibition applies to all authorities who have this information and protocols, not only to the Supreme Audit Office as such.[24] On the one hand, lawmakers formed a control mechanism, whose primary aim is, on the one hand, to protect the public interest in the sense of the protection of public funds and, on the other hand, it fundamentally limits public access to its outcome. The motivation of lawmakers is not entirely clear, especially in view of the fact protocols, representing an output of inspection bodies, which are accessible to the public either based on the aforementioned Act on Free Access to Information or are directly published in full as part of the preparation and discussion of the accounts of territorial self-governing units. In essence, the audit of the Supreme Audit Office and other inspection bodies can have very similar or even identical object, focus, and scope. With regard to the provisions of Sections 7 and 8 of the Code of Inspection Procedure[25] and the provisions of Section 21 of the Act on the Supreme Audit Office,[26] the scope of the authorization of the auditors and inspectors and, therefore, the scope of the documents on which the protocols are based is comparable. Public access to the outputs of the public finance inspection or audit follows not only the interest in protecting public finance but also the interest in informing the public as a prerequisite for ensuring that political representation is accountable to its citizens and voters. Any limitation of public access to the outputs of inspection or audit, which is provided by legal regulations, aims to protect the interests of the inspected entities and possibly other persons concerned. The audit or inspection can reveal a wide range of information that is protected by special legal regulations, such as personal data, classified information or trade secrets and also information that *a priori* does not belong to any special category of particularly protected information but can be misused or their publication could harm the person concerned.[27] This protection represents an interest protected by law, which may, depending on specific circumstances, take the form of both private and public interest, depending on who will be the inspected person or the person concerned.

For the sake of completeness, it is necessary to state that even in the case where the inspected person is a public administration body, documents relating to the rights and legally protected interests of private persons may be examined as part of the inspection. One of the general principles of public finance inspection applied for the purpose of information protection is the principle of confidential-

[23] Act No. 106/1999 Coll. on Free Access to Information, as amended.

[24] Judgement of the Municipal Court in Prague of 25 August 2010, 10 Ca 322/2008 – 80; M. Tuháček, J. Jelínková, *Commentary on Section 11*, (in:) J. Jelínková, *Zákon o svobodném přístupu k informacím*, Praha 2019.

[25] Act No. 255/2012 Coll. on Inspection (Code of the Inspection Procedure), as amended.

[26] Act No. 166/1993 Coll. on Supreme Audit Office, as amended.

[27] L. Jemelka, *Zákon o kontrole: komentář*. Praha 2021, p. 168.

ity. In the case of financial control, confidentiality is regulated in the provisions of Section 20 of the Code of the Inspection Procedure.[28] The provision of Section 20, paragraph 3 of the Code of the Inspection Procedure provides that an inspector may be exempted from the obligation of confidentiality in the public interest by the inspector's superior. Since it is a conflict of the public interest in the disclosure of information from the inspection and another interest protected by law, it is necessary to approach the solution carefully and in accordance with the procedures. In the case of a tax inspection, the obligation of confidentiality is regulated in the provisions of Sections 52 to 55 of the Code of Tax Procedure,[29] following the general principle of non-publicity expressed in the provisions of Section 9, paragraph 1 of the Code of Tax Procedure. The Code of Tax Procedure does not allow an inspector to be exempted from the obligation of confidentiality in the public interest. On the contrary, it regulates an exhaustive list of reasons for the provision of information obtained during tax administration, including an exhaustive definition of the range of authorized entities.

5. CONCLUSION

Public interest is a vague legal term that must always be interpreted with regard to the circumstances of the given case as is assumed by the relevant legal regulations that serve its protection. Public interest results directly from the relevant legislation. However, it cannot be assumed that public interest would be constructed *a priori* by the legal regulation. Rather, the legal regulation defines the relevant public interest but not always explicitly. Public interest may result from the purpose of the legal regulation. From the point of view of interpretation, the resolution of its potential conflict, either with a private interest or possibly with another public interest, is essential. This also applies in the case of the protection of public funds which is a public interest protected by the public finance inspection. The inspection, as interference with the rights and legally protected interests of inspected persons, can be considered legitimate and legal only if it is properly justified by the protection of a specific public interest. Inspection, therefore, represents a conflict of public interest in the protection of public funds and another interest which, depending on the nature of the inspected person, can take the form of both private and public interest. As follows from established jurisprudence, it is necessary that the maximum of both conflicting interests, i.e., public interest in the protection of public funds and the interest of the inspected person in the protection of his rights and legally protected interests should be preserved.

[28] Act No. 255/2012 Coll. on Inspection (Code of Inspection Procedure), as amended.
[29] Act No. 280/2009 Coll., Code of Tax Procedure, as amended.

It is therefore imperative to preserve the rights and legally protected interests of inspected persons at maximum.

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SUPPLY OF ELECTRICITY AS A SERVICE OF GENERAL ECONOMIC INTEREST IN THE TIME OF RISING ENERGY PRICES

Abstract

The purpose of the article is to indicate the particular importance of classifying the supply of energy as a service of general economic interest in the time of the recent increase in energy prices. The analysis of the characteristics of a service of general economic interest and a universal service, in particular, its price, allows to indicate the importance of it being competitive, easily and clearly comparable, transparent, and non-discriminatory. Selected actions and measures taken both at the EU level and at the national level – in the Federal Republic of Germany – are presented. These are actions and measures which are aimed at relieving end consumers from high prices and, on the other hand, creating an incentive to save electricity.

KEYWORDS

electricity, service of general economic interest, universal service, price brake

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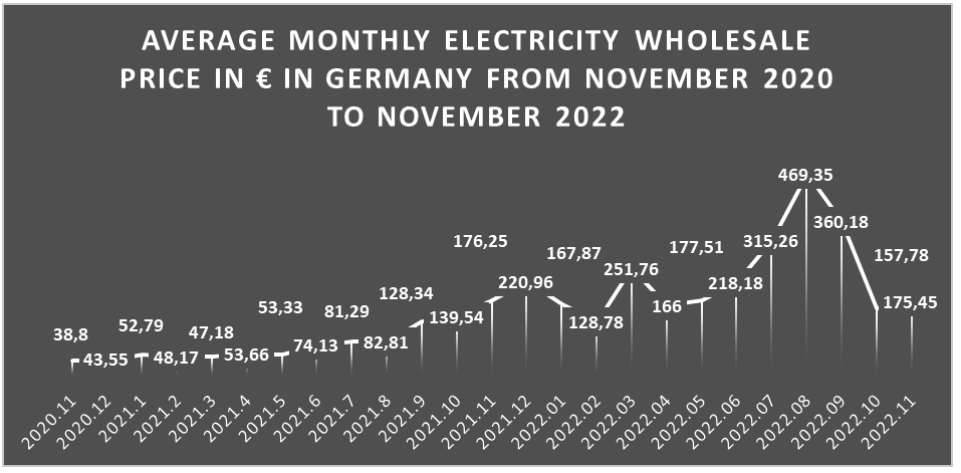
energia elektryczna, usługa świadczona w ogólnym interesie gospodarczym, usługa powszechna, hamowanie cen

1. INTRODUCTION

The costs of purchasing electricity have recently increased rapidly, for example, as indicated in Chart No.1, the average monthly electricity wholesale price in Germany in January 2021 was 52.79 Euros, to triple to 167.87 Euros in January 2022.[1] As the Statista portal shows, in January 2023, the average wholesale electricity price in Germany stood at around 135.6 euros per megawatt-hour, a drop of nearly 19 percent in comparison to the price recorded a year earlier.[2] The current surge in energy and commodity prices is placing a heavy burden on citizens and businesses. The question that arises here is, 'Does recognizing the provision of energy as a service of general economic interest or as a universal service ensure the security of electricity supply to consumers? And will this energy be delivered at affordable prices in the current situation?'

Chart.1 Average monthly electricity wholesale price in Germany from November 2020 to November 2022.



Source: https://www.statista.com/statistics/1267541/germany-monthly-wholesale-electricity-price/

[1] https://www.statista.com/statistics/1267541/germany-monthly-wholesale-electricity-price/ (accessed: 24 March 2023)

[2] *Ibid*.

2. THE CONCEPT OF A SERVICE OF GENERAL ECONOMIC INTEREST

The concept of services of general economic interest is not easy to define. There is no definition of this concept in EU law. The task is not facilitated because of the use of imprecise terminology, both in EU law as well as literature.[3] The term service of general economic interest[4] was used *expressis verbis* in Article 14 of the Treaty on the Functioning of the European Union (hereinafter: TFEU),[5] Article 106 sec. 2 TFEU[6] and in Article 36 of the Charter of Fundamental Rights of the European Union.[7] The inclusion of the concept in the Treaty on the Functioning of the European Union underlines the special importance of services of general economic interest. This particular category of services is not only rooted in the shared values of the Union but also plays a central role in promoting social and territorial cohesion.[8]

The concept of services of general economic interest should be interpreted broadly.[9] As indicated in the literature, the term 'services' is not limited to services within the meaning of Article 57 TFEU but means economic services in a broader sense.[10] It must be an economic activity that serves the common good in a particular way and is provided regardless of the specific cases and eco-

[3] As J. Kociubiński points out, the following terms are used: *services of general economic interest, services of general interest, non-economic services of general interest, public services, universal services*; J. Kociubiński, (in:) A. Wróbel (ed.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz,* Volume I, Warszawa 2012, p. 268; It should be noted that in German-language documents, the abbreviated form *gemeinwirtschaftliche Dienste* is often used.

[4] The concept of services of general economic interest has been defined in numerous acts of secondary law of the European Union, including Communication from the Commission, *Services of general interest in Europe* (COM (1996) 443 final), Communication from the Commission*, Services of general interest in Europe* (COM (2000) 580 final), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A quality framework for services of general interest in Europe* (COM (2011) 0900 final).

[5] Official Journal of the European Union C 326/47, 26 October 2012.

[6] More on the history and evolution of the current wording of the article: M. Szydło, (in:) A. Wróbel (ed.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz*, Vol. II, Warsaw 2012, p. 372.

[7] Official Journal of the European Union C 303/01, 14 December 2007.

[8] Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (Official Journal of the European Union C 8/02, 11 January 2012); the issue of access to services of general economic interest in order to promote the social and territorial cohesion of the Union is also indicated in Art. 36 of the Charter of Fundamental Rights of the European Union.

[9] Ch. Jung, *Commentary on Art. 14 TFEU*, (in:) Ch. Calliess, M. Ruffert (eds.), *EUV/AEUV*, 6. Issue 2022, case law indicated therein.

[10] S. Wernicke, *Commentary on Art. 106 TFEU,* (in:) E. Grabitz, M. Hilf, M. Nettesheim (eds.), *Das Recht der Europäischen Union EUV/AEUV*, 78 Issue 2023, marginal numbers 37–39.

nomic efficiency of each individual transaction. Article 106 sec. 2 TFEU uses the phrases: 'Undertakings entrusted with the operation of services of general economic interest' and 'the performance, (…), of the particular tasks assigned to them'.[11] However, it should be remembered that undertaking provision of services of general economic interest is subject to the rules of primary law, among others, competition rules and internal market rules.

It is up to the Member States to determine which services are services of general economic interest,[12] taking into account the principles and criteria developed at the EU level, including the case law of the Court of Justice of the European Union.[13] These criteria constitute the absolute limits within which the freedom to qualify different types of services must be kept.[14] The EU authorities are tasked with ensuring that the measures taken by the Member States comply with EU law and do not lead to the 'manifest error'.[15] The point here is to reconcile the interests of a Member State with the interests of the Union.[16] It should certainly be stated that the distribution of energy has been classified as a service of general economic interest.[17]

According to Article 1 of the Protocol (No. 26) on services of general interest,[18] the shared values of the Union in respect of services of general economic

[11] More on the form of entrusting services by the state: M. Jaś-Nowopolska, *Charakter prawny umowy kompleksowej*, Warszawa 2016, p. 28 ff. and the literature cited therein.

[12] Judgment of the Court of Justice of the European Union of 23 October 1997 in case C 157/94 Commission v the Netherlands, European Court Report 1997, p. 5815, point 56.

[13] In the Judgment of the Court of First Instance of 29 March 2008 (T-289/03, Reports of Cases 2008 II-00081, marginal number 172 (BUPA/Commission)), the ECJ clarified that a service of general economic interest within the meaning of European law exists only when a specific task is of a universal and mandatory nature and when it has been entrusted to an enterprise by a sovereign legal act.

[14] S. Dudzik, *Usługi świadczone w ogólnym interesie gospodarczym w prawie Wspólnoty Europejskiej*, (in:) C. Mik (ed.), *Prawo gospodarcze Wspólnoty Europejskiej na progu XXI wieku,* Toruń 2002, p. 292 ff.

[15] Judgment of the Court of First Instance, T-289/03, Reports of Cases 2008 II-00081, (BUPA/Commission).

[16] W. Möschel, *Service public und europäischer Binnenmarkt*, 'Juristenzeitung' 2003, pp. 1024–1025.

[17] In the judgment of the Court of Justice in the case of Municipality of Almelo and others v NV Energiebedrijf Ijsselmij it was stated that the supply of energy serves the general economic interest and therefore belongs to the services of general economic interest (Judgment of the Court of Justice of 27 April 1994 in case C 393/92, European Court Report 1994, p. I 01477); This position is presented, among others, in the following judgments: Judgement of the Commission of the European Communities v Kingdom of the Netherlands – Judgment of the Court of Justice of 23 October 1997, Case C 157/94, European Court Report 1997, p. 05699 especially point 41; in the Judgement in case C 159/94 Commission v French Republic – Judgment of the Court of Justice of 23 October 1997, European Court reports 1997, p. 05815, especially points: 57, 89, 106.; in the Judgment in case C 158/94 Commission of the European Communities v Italian Republic – Judgment of the Court of Justice of 23 October 1997, European Court reports 1997, p. 05789.

[18] OJ C 115/308, 9 May 2008.

interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include, in particular: a high level of quality, safety, and affordability, as well as equal treatment and the promotion of universal access and of user rights. Particular attention should be paid to the principle of affordability indicated in the Protocol. It follows that a service of general economic interest must be offered at a price that makes it accessible to everyone. The practical implications of the affordability principle were highlighted by the CJEU Judgment. According to it, regulated unit prices can allow access to a certain service of general economic interest to groups of people who would otherwise be deprived of it because of excessively high prices.[19] In this regard, it should be noted that the classification of the supply of electricity as a service of general economic interest means that it must be offered at an affordable price.

Both the safety and quality of supplies are referred to in Article 9 sec. 2 of Directive 2019/944 on common rules for the internal market in electricity and amending Directive 2012/27/EU, indicating that '(…) Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including the security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection'.[20] These provisions also refer to the possibility that Member States have with respect to undertakings operating in the electricity sector. It should be noted that all these measures are aimed at ensuring the security and regularity of supply of high-quality energy as a service of general economic interest.

From the Opinion of the European Economic and Social Committee on the affordability of SGEIs: definition, measurement, challenges, European initiatives since 2014[21] results that many citizens in the European Union (EU) face severe economic difficulties in accessing services of general economic interest, among others, in the fields of energy. As highlighted in the opinion, since the Member States have a wide margin of discretion in the provision of services of general economic interest within their competence, there is no uniform approach to the price affordability or economic availability of services of general economic interest. The EESC proposes, among others, 'that the EU firstly clarifies the concept of affordability of SGEIs for all and adapts it in line with the requirements of the Treaty of Lisbon (Protocol No. 26), together with the United Nations Convention on the Rights of Persons with Disabilities'.[22]

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[19] Judgment of the Court of First Instance, T-289/03, Reports of Cases 2008 II-00081. (BUPA/Commission); Compare: M. Krajewski, *Commentary on Art. 14 TFEU*, (in:) M. Pechstein, C. Nowak, U. Häde (eds.)*, Frankfurter Kommentar EUV/GRC/AEUV*, 1st edition, 2017, marginal numbers 40–44.

[20] Official Journal of the European Union L 158/125, 14 June 2019.

[21] Official Journal of the European Union C 2014/04, 11 June 2014.

[22] Point 1.4. of the Opinion.

The prices at which electricity is to be supplied are also referred to in Article 27 of Directive 2019/944, indicating that the supply of electricity is a universal service: 'Member States shall ensure that all household customers, and, where Member States deem it to be appropriate, small enterprises, enjoy universal service, namely the right to be supplied with electricity of a specified quality within their territory at competitive, easily and clearly comparable, transparent and non-discriminatory prices'. Also, these features of energy prices were indicated in Recital 22 of the Directive.

As regulated by provision 27 sentence 2 of the Directive: 'To ensure the provision of universal service, Member States may appoint a supplier of last resort'. And it is this solution that many German electricity consumers have had to use recently.

3. INCREASE IN ELECTRICITY PRICES AND SELECTED EU MEASURES

As indicated, among others, in recital 1 of the Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices (hereinafter: Regulation 2022/1854),[23] high electricity prices are a consequence of the high price of gas, which is used as an input to generate electricity. However, this study will omit the analysis of legal acts relating only to gas regulation and will focus on legislation designed to prevent the growth of electricity prices and the threat to the integrity of the internal energy market and security of supply, including Regulation 2022/1854. The measures provided for in this Regulation 2022/1854 are limited in most cases until 30 June 2023 or 31 December 2023.[24] The Regulation sets an EU-wide limit on market revenues from electricity generation in power plants with lower marginal costs, such as renewable energy, nuclear energy, or lignite. Pursuant to Article 10 of the Regulation, all surplus revenues resulting from the application of the cap on market revenues are used to finance measures in support of final electricity customers that mitigate the impact of high electricity prices on those customers, in a targeted manner. § 4 of this Article points to exemplary measures. These include: granting financial compensation to final electricity customers for reducing their electricity consumption, including through demand reduction auctions or tender schemes; direct transfers to final electricity customers, including through proportional reductions in the network tariffs; compensation to suppliers who have to deliver electricity to customers below costs following a state or public intervention in price setting pursu-

[23] Official Journal of the European Union LI 261/1, 7 October 2022.

[24] Art. 22 II Regulation

ant to Article 13 of the Directive; lowering the electricity purchase costs of final electricity customers, including for a limited volume of the electricity consumed; promoting investments by final electricity customers into decarbonization technologies, renewables, and energy efficiency investments.

On 1 February 2023, Council Regulation (EU) 2022/2578 of 22 December 2022 entered into force establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices.[25] The regulation introduces an emergency price brake at the EU level by setting a price limit for front-month TTF derivatives. Title Transfer Facility is a virtual trading point for natural gas in the Netherlands through which the most frequently used reference value of gas price in the EU is shaped. The correction mechanism is to be activated when two conditions are met: on the one hand, the front-month TTF derivative settlement price exceeds EUR 180/MWh for three working days, and on the other hand, TTF prices must exceed the LNG reference price by 35 euros in this period.[26] As indicated in the recitals of the Regulation, higher natural gas prices endanger the economy of the Union through sustained high inflation caused by higher electricity prices, undermining consumer purchasing power, as well as through raising the cost of manufacturing, particularly in energy-intensive industries, and seriously threaten the security of supply.[27]

The measures taken at the EU level were designed to prevent energy price increases and protect the citizens against excessively high prices. Although the above-mentioned acts of EU law refer to high energy prices and not to the supply of energy as a service of general economic interest, it should be noted that these legal acts are intended to ensure the provision of energy at an affordable price.[28]

4. INCREASE IN ELECTRICITY PRICES AND SELECTED ACTIONS OF THE STATE

When analyzing the market situation at the end of 2021 and at the beginning of 2022, attention should be paid to the situation of customers whose energy suppliers had to declare bankruptcy (became insolvent) due to the record prices on the stock exchange or whose supply contracts were terminated due to the market situation. It was a large group of individual and industrial customers. In such cases, these customers were automatically transferred to primary suppliers – often on

[25] Official Journal of the European Union L 335/45, 29 December 2022.

[26] Art. 4 I Regulation.

[27] Recital 1 sentence 4 of the Directive.

[28] https://www.consilium.europa.eu/en/policies/energy-prices-and-security-of-supply/ (accessed: 21 June 2023).

much worse terms.[29] Depending on the number of new customers who were to be supplied with energy on a short-term basis and on the amount of energy already ordered, basic suppliers had to purchase additional volumes on the wholesale market at new, higher prices. 'Replacement energy', purchased over a short period of time and over a year, was more expensive than the energy that the supplier could plan and purchase over a longer period of time.[30] Many primary suppliers passed on the resulting additional costs to their involuntary new customers in the form of new prices, leading to different working prices for new and existing customers in replacement and primary supplies[31] or increased prices for end customers.

The differentiation of prices for new and existing customers in replacement and basic deliveries has raised many questions. The case law indicated that tariff divisions were not generally unacceptable.[32] However, the differences in the tariff had to be objectively justified and motivated.[33] The burden of proof and presentation of an objective reason rested with the primary supplier.[34]

The question that appeared at this point was whether the introduction of different prices for new and existing customers – price differentiation met the conditions of 'competitive, easily and clearly comparable, transparent and non-discriminatory price', indicated in Article 27 of Directive 2019/944. The literature indicates that EU law requires non-discriminatory pricing, understood as a prohibition of arbitrary price fixing but not a general price control as to whether the prices charged are fair, equitable, or reasonable.[35] Neither the required level of protection against energy poverty nor the switching requirements can be inferred from the obligation of the Member States to control prices, although it should be noted that some countries do impose such controls. The requirement of non-discriminatory pricing allows for differentiation according to groups of customers, provided that they are treated equally or there is an objective reason for unequal treatment.[36]

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[29] 260 basic suppliers introduced tariffs for new customers only. They are 106 percent higher than the previous price level. With a larger number of suppliers, price increases apply to all customers. Basic electricity suppliers have already increased their prices in 640 cases, according to the portal: Check 24. In 2022, it was done by 387 suppliers. https://www.energate-messenger.de/news/218905/tarife-der-grundversorgung-schiessen-in-die-hoehe, (accessed: 21 March 2023).

[30] P. Rott, *Deutschland und die Energieversorgung*, 'VuR', 2022, p.162; K. Lange: *Gespaltene Preise in der Grundversorgung für Strom und Gas – energiewirtschafts-, unions- und kartellrechtliche Überlegungen*, 'EnWZ' 2022, p. 165.

[31] K. Lange, *Gespaltene Preise in der Grundversorgung für Strom und Gas – energiewirtschafts-, unions- und kartellrechtliche Überlegungen*, 'EnWZ' 2022, p.165.

[32] OLG Düsseldorf, Order of 1 April 2022 – 5 W 2/22/Kart, BeckRS 2022, 7551.

[33] More on the reasons: OLG Karlsruhe 10 August 2022 – 6 U 93/22.

[34] S. Schnurre, *Commentary on §36 EnWG*, (in:) L. Assmann, M. Peiffer (eds.), *EnWG*, 5th edition, 2022, marginal numbers 23b-23i.

[35] K. Lange, *Gespaltene Preise in der Grundversorgung für Strom und Gas – energiewirtschafts-, unions- und kartellrechtliche Überlegungen,* 'EnWZ' 2022, p. 165.

[36] It should be noted here that the principle of equal treatment is also referred to in Article 1 of the Protocol (No. 26) on services of general interest.

Standardized in §36 I Energy Industry Act (hereinafter: EnWG),[37] the obligation to provide basic supply to household consumers (§3 No. 22 EnWG) applies to the basic supplier specified in §36 II EnWG, i.e., an energy company supplying the majority of household consumers in the area of the general supply network. Paragraph 38 EnWG also regulates the primary supplier's obligation to provide an interim replacement supply. Particularly in cases of very short-term contract termination or insolvency, the provisions of §38 EnWG, with its reference to §36 EnWG, gain importance.[38]

Doubts about the use of different prices prompted amendments to §36 EnWG. The aim of the amendment to the Act[39] was to achieve legal clarity and, in principle, to prevent a situation in which customers are confronted again in a short time with an interruption of energy supply and the introduction of different prices by the energy supplier. The provisions of the Act currently indicate, 'Energy supply companies may not distinguish between the General Terms and Conditions and General Prices depending on the date of conclusion of the universal service contract'. §38 EnWG was also amended. As indicated in the explanatory memorandum, the changes were aimed at creating a clear and strengthened competition framework that would guarantee the functioning of markets and the promotion and protection of competition in the markets.

The implementation of EU regulations, in particular, Regulation (EU) 2022/1854, can be found in the Act on the Introduction of an Electricity Price Brake (hereinafter: StromPBG),[40] which is aimed at curbing the rising electricity prices.[41] The purpose of this regulation is, on the one hand, to relieve end consumers (including the use of extraordinary profits referred to in Regulation 2022/1854 as discounts), and, on the other hand, to create an incentive to save electricity.

Pursuant to §3 StromPBG, the electricity price brake will initially apply from 31 December 2022 until 1 January 2024, whereas in the case of the reduction of energy prices for January and February 2023, it will be retroactive (§49 StromPBG). Pursuant to §4 StromPBG, energy companies that supply electricity

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[37] *German: Energiewirtschaftsgesetz,* Act of 7 July 2005 (BGBl. I p. 1970, 3621), last amended by Article 3 of the Act of 14 March 2023 (BGBl. 2023 I No. 71).

[38] Ch. de Wyl, *§15. Grundversorgungspflichten gegenüber Letztverbrauchern,* (in:) J.-P. Schneider, Ch. Theobald, *Recht der Energiewirtschaft*, 5th edition 2021, marginal number 125.

[39] Act Amending Energy Industry Law in Connection with the Immediate Climate Protection Program and on Adjustments to the Law on End-Customer Supply (EnWRKAnpG) (German: *Gesetz zur Änderung des Energiewirtschaftsrechts im Zusammenhang mit dem Klimaschutz Sofortprogramm und zu Anpassungen im Recht der Endkundenbelieferung*), Act of 19 July 2022 BGBl. I p. 1214 (No. 28)

[40] *German: Gesetz zur Einführung einer Strompreisbremse (Strompreisbremsegesetz),* Act of 20 December 2022 (BGBl. I S. 2512).

[41] T. Rath, F. Ekardt, *Energiekrise: Rechtsentwicklungen auf EU- und Bundesebene*, 'NVwZ' 2023, p. 293.

to the end user are obliged to grant the end user a reduction in electricity costs in the amount of a monthly allowance. For small enterprises and private consumers, the price of electricity is limited to 40 ct/kWh gross – i.e., including all taxes, compensation fees, and network charges – for 80% of historical consumption. For companies with an annual consumption of more than 30,000 kWh, the price of electricity is limited to 13 ct/kWh for 70% of historical consumption.[42] As a rule, historical consumption refers to the previous year. For each kilowatt-hour consumed above the basic amount, the regular market price is payable. The literature indicates that the adoption of the 'basic amount of the previous year of consumption' leads to a situation in which households or businesses that were already frugal before the crisis are disadvantaged compared to the less frugal ones.[43]

As part of the Act on the Introduction of an Electricity Price Brake and on amending other provisions of the Energy Law,[44] §24b EnWG was also included, according to which the network costs of transmission system operators for 2023 are covered proportionally from the federal subsidy in the amount of EUR 12.84 billion. At this point, it should be noted that the measures taken by the state raise many questions, also in the financial aspect, in relation to the short, medium, and long-term security of supply. When analyzing actions aimed at curbing the increase in electricity prices one should also remember about the related costs.

It should be noted that timely measures have also been taken to ensure energy security. As an example, the following should be mentioned – Ordinance on Securing the Energy Supply through Rapid Impact Measures,[45] which during the 6-month period of validity (from 1 September 2022 to 15 April 2023) is designed to create savings that can already start to reduce energy demand during the heating season 2022/2023. A special focus is placed on measures for the public sector, through which it can serve as a role model and provide orientation for other sectors with regard to what savings measures are feasible and practicable. An example of regulating this Regulation, which is intended to reduce the use of energy, is §8, which indicates: The use of outdoor illumination on buildings and monuments is prohibited, with the exception of safety/security and emergency lighting. Exceptions are made for temporary lighting during cultural events and public festivals and, in general, all cases in which lighting is needed to maintain road safety or to avert other dangers and cannot be replaced quickly by other measures.

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[42] §5 II No. 2, § 6 No. 2 StromPBG.

[43] T. Rath, F. Ekardt, *Energiekrise: Rechtsentwicklungen auf EU- und Bundesebene*, 'NVwZ' 2023, pp. 293, 296.

[44] *German*: *Gesetz zur Einführung einer Strompreisbremse und zur Änderung weiterer energierechtlicher Bestimmungen* (StromPBG), Federal Law Gazette 2022 Part I, No. 54, issued on 23 December 2022, p. 2512.

[45] *German: Kurzfristenergieversorgungssicherungsmaßnahmenverordnung*, Ordinance from 26 August 2022 (BGBl. I p. 1446), as last amended by Article 1 of the Ordinance of 13 February 2023 (BGBl. 2023 I No. 37).

The temporal act that includes measures that require a longer, medium-term timeframe in order to be implemented is the Ordinance on Securing the Energy Supply through Medium-Term Impact Measures.[46] The measures are aimed at making energy savings in the coming and the following heating season but also have an effect beyond this. This ordinance is valid for two years.

5. CONCLUSION

Recent events (increase in the energy prices) have shown how important it is to ensure the affordability of services of general economic interest, including, in particular, ensuring the security of electricity supply. The increase in energy prices has highlighted the importance of recognizing the provision of energy as a service of general economic interest and thus ensuring its affordability. The high level of affordability in respect of services of general economic interest is nevertheless one of the shared values embraced by all EU Member States, which must be fully taken into account by the EU and the Member States, within their respective competences when implementing all their relevant policies. And this value has been taken into account by the EU and Member States in recent times.

The analysis of the actions taken in the EU and national arena shows how many legal changes had to be made in a short time to provide household customers the services of general economic interest – to supply the electricity at competitive, easily and clearly comparable, transparent, and non-discriminatory prices.

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PUBLIC INTEREST IN THE BANKING SYSTEM REGULATION

Abstract

This paper deals with issues related to public interest and Polish banking system regulation. It brings several general arguments regarding the actual legal regulation of the banking system, raises questions about the reasons for such detailed regulation, and discovers the public interest in the banking system law. In addition, the author explains what has changed in the architecture of the entire financial market after the global financial crisis of 2008. In the middle part of the paper, several important facts about the functioning of the banking safety net can be found. To be more precise, the activity of the central bank, financial supervision, bank deposit guarantee system, as well as protection of consumers are mentioned and analyzed.

KEYWORDS

financial stability, banking law, banking system, financial safety net, central bank, financial supervision, bank deposit protection

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stabilność finansowa, prawo bankowe, system bankowy, sieć bezpieczeństwa finansowego, bank centralny, nadzór finansowy, ochrona depozytów bankowych

I. INTRODUCTION

The changes in financial market regulation and supervision that took place more than a decade after the global financial crisis of 2008 led to a paradigm change in the functioning of the banking system and the entire financial system, at an international, European, and national level.[1] In view of the ongoing process of the cross-border integration of international financial markets and the creation of a single European financial market, systemic risk has become a threat on a previously unknown scale. One of the crucial goals of the state's activity in the field of banking operations is to ensure the safety of funds derived from the public that have been accumulated in the banking system. Systemic risk has taken on a cross-border dimension and has given rise to concern that the uncontrolled failure of institutions that are too big to fail will put financial systems and the entire global economy at risk. The bankruptcy of one financial institution can produce a kind of 'domino effect'; moreover, the failure of the financial system has serious external effects that 'spill over' (a contagion effect) far beyond the entities directly involved in it. For this reason, strict regulation of the financial market is necessary.

Currently, banking law is a very dynamically developing field of law and, at the same time, an important component of the financial market law.[2] Financial crises, in particular, but also irregularities in the financial market have greatly influenced the increasing legal interference of states in the market mechanism. The amount of funds entrusted by depositors and investors to institutions operating on the financial market, in combination with various types of risk (the risk of loss of entrusted funds, asymmetry of information, the risk of poor management of entrusted funds, and the risk of imposing unfair contract terms on clients that violate those clients' interests), risks connected with financing services by way of those funds, the complexity of those institutions, as well as the complex structure

[1] A. Jurkowska-Zeidler, *The architecture of the European financial market: legal foundations*, Gdańsk-Warszawa 2016, pp. 53-70.

[2] The need to subject the financial market to a separate and specific legal regime is particularly recognized in the context of the functioning of the European Union financial market. See more C. Kosikowski, *Financial Law of the European Union*, Białystok 2008, pp. 193-227.

of banks themselves and of the relationships emerging on the financial market, make it in the public interest to ensure the safety and stability of that market.[3]

Financial market safety is a crucial element of financial stability (the stability of the financial system). The legal protection of the financial market safety is ensured by the financial safety net, which at an institutional level is traditionally provided by the existence of a central bank (as the lender of last resort), financial market supervision institutions, and a deposit guarantee system.[4]

II. FINANCIAL SAFETY AND STABILITY AS A PUBLIC INTEREST

The overall goal of the public interest in the financial system is the stability of the system itself, i.e., financial stability. The term 'financial stability' is not legally defined, but it is broadly used in the legislation of the European Union and the policy of the European Central Bank as well. Financial stability can be found as a condition in which the financial system – which comprises financial intermediaries, markets, and market infrastructures – is capable of withstanding shocks and disruptions in financial balance.

Financial stability as a public interest is understood more broadly as fiscal, monetary, and financial market stability. From this perspective, it has now become the most important goal of financial architecture, the aim of which is the prevention of financial crises (crisis prevention) and crisis management if such crises occur. Central banks have long played a key role in responding to financial panics. As the lender of last resort, they are able to provide an unlimited amount of liquidity support to banks. But for the central bank, the money issue is only the starting point. The central bank determines money issuance by increasing or decreasing the supply of money in circulation in order to influence the level of inflation – that is, any change in the value of money, expressed in terms of goods and services – and the exchange rate. The money supply is increased and decreased via the banking sector, which operates under conditions determined by the central bank. Therefore, with the use of such channels and instruments of influence, monetary policy is of fundamental importance for the scale of lending, economic growth, and the stability of that growth. Failure of monetary policy to adapt to the conditions of a given economy may either lead to its 'overheating' and a financial crisis or it may cause an economic slowdown. An innovative phe-

[3] T. Nieborak, *Creation and enforcement of financial market law in the light of the economisation of law*, Poznań 2016, p. 100.

[4] A. Jurkowska-Zeidler, *Bezpieczeństwo rynku finansowego w świetle prawa Unii Europejskiej*, Warszawa 2009, p. 166.

nomenon since the global financial crisis of 2008 has been a greater reliance on macro-prudential supervision to prevent systemic risks in advance. It should be remembered that when the financial crisis entered its subsequent phase, the situation of many countries, especially in the eurozone, deteriorated significantly and there was the so-called 'feedback loop' between the public finance crisis and the banking crisis.

The aim of the banking and financial law is to protect individuals (depositors, investors, and policyholders) to ensure the smooth operation of the business (fair, efficient, and transparent markets) and to safeguard the payment system and the stability of the financial system at large, thus preventing and containing systemic risk and systemic crises. Historical experience suggests that governmental banking regulation was not a 'natural' product but a reaction to crises and conflicts. Though the specific aims of banking law are the safety and soundness of the financial system, their ultimate goal is to safeguard confidence and trust.[5] Knowledge of the legal mechanisms of banks' operations and their institutional environment has become more and more necessary in order to understand the complexity of the phenomena and events that make up banking activity. In a market economy, banking law plays an important role. It regulates the functioning of a key fragment of the financial market, relating to the creation, organization, and operation of banks as well as state supervision over their activities, and to the regulation of legal relations between banks and their clients.

III. POLISH BANKING SYSTEM: SAFETY NET

The national financial safety network in the Polish banking system consists of: the central bank – Narodowy Bank Polski (NBP); the integrated financial supervision authority – the Polish Financial Supervision Authority (KNF); the financial market regulator – the Ministry of Finance; the resolution authority and the deposit guarantee system – the Bank Guarantee Fund (BFG); banking services; customer protection institutions – the Office of Competition and Consumer Protection (UOKiK); the Polish Financial Supervision Authority; and the Financial Ombudsman.[6] A characteristic feature of the Polish banking system is its dispersion in many legal acts from various periods. The legal basis for the functioning of Polish banking system includes an extensive and very complex set

[5] R. M. Lastra, *International Financial and Monetary Law*, second edition, Oxford 2015, p. 114.

[6] A. Jurkowska-Zeidler, *Financial market law*, (in:) A. Dobaczewska, A. Drwiłło (eds.), *Polish financial law*, Warszawa – Gdańsk 2019, pp. 53-73.

of legal acts of various levels of importance.[7] Banking law has not been codified. The dispersion of various regulations also intensifies the parallel application of the standards of European banking law.[8] In the field of regulation of the European financial market, the integration of law is increasingly based on unification through maximum harmonization of directives and regulations.[9] A special role in the regulation of the banking market is played by acts of 'soft law', which supplement the norms of generally applicable law and fill in those areas that have not been regulated in detail by the legislator.[10]

The National Bank of Poland[11] is responsible for ensuring monetary stability; it acts as the lender of last resort, the activities of which also include measures promoting financial stability; and it is closely involved in macro-prudential supervision.[12] In order to understand the current functions and aims of the NBP, it is essential to understand the evolving nature of the worldwide central banking. In the traditional role of the lender of last resort, a central bank, by providing financial support to banks, ensures that a crisis of liquidity does not become a solvency crisis. The evolution of the role of central banks after the financial crisis, above all, has consisted in the closer integration of the functions of ensuring monetary stability and financial stability, in a deeper awareness of the global dimension of the tasks of central banks and in introducing stronger safeguards for the increasingly fragile independence of a central bank.[13] In the process of

[7] The legal framework of the Polish banking system is contained in the Act of 29 August 1997, the Banking Law. The Act lays down the rules for conducting banking activities, establishing and organizing banks, branches and representative offices of foreign banks, as well as branches of credit institutions, and the rules relating to banking supervision, reorganization, liquidation, and bankruptcy. Z Ofiarski, *Prawo bankowe*, Warszawa 2017, p. 39.

[8] C. Kosikowski, *Publiczne Prawo Bankowe*, Warszawa 1999, pp. 52-55.

[9] A. Jurkowska-Zeidler, *EU financial market law: from minimal harmonization to federalization,* (in:) M. Radvan and others (eds.), *The financial law towards challenges of the XXI century: (conference proceedings)*, Brno 2017, pp. 379-393.

[10] In this sense, they are essential for the proper functioning of financial market entities. In a formal sense, soft law is not binding, but it often significantly influences the evolution of generally applicable legal regulations, as well as the behavior of financial market participants. M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, Warszawa, p. 150.

[11] In the Constitution of the Republic of Poland of 2 April 1997, basic principles are regulated that shape the status of the National Bank of Poland (NBP) as the central bank of the state and the legal position of the two of its three bodies – the President of the NBP and the Monetary Policy Council. The third body of the central bank – the NBP Management Board – is only mentioned. The NBP performs the tasks specified in the Constitution of the Republic of Poland, the Act on the National Bank of Poland, and the Banking Law. These legislative acts guarantee the independence of the NBP from other state authorities.

[12] The NBP performs three basic functions: that of a bank of issue, of the bank of banks, and of the central state bank. E. Fojcik-Mastalska, *Bank centralny*, (in:) E. Fojcik-Mastalska, R. Mastalski (eds.), *Prawo finansowe*, Warszawa 2013, p. 513.

[13] R.M. Lastra, *The Evolution of the European Central Bank, Fordham International Law Journal*, Spring 2012, pp. 4–10. At the same time, the aim of ensuring financial stability, especially

constructing a new, post-crisis architecture of regulation and supervision of the financial market (at an international, European, and national level), the mandate of central banks has been strengthened and supplemented by adding a duty to act in support of the stability of the financial system.[14]

The model of Polish macro-prudential supervision is based on the dual structure of the new Committee for Financial Stability (Komitet Stabilności Finansowej), which is the entity responsible for macro-prudential supervision and crisis management in the national financial system.[15] It is interesting to note that the four institutions involved in the financial safety net – the President of the NBP, the Chair of the Commission for Financial Supervision, the President of the Board of the Bank Guarantee Fund, and the Minister of Finance – belong to the Committee for Financial Stability. Work of the Committee in the area of macro-prudential supervision is overseen by the President of the NBP (and the NBP ensures the servicing of the Committee); in the field of crisis management, it is overseen by the Minister of Finance (and the Ministry of Finance ensures the servicing of the Committee).

In the field of micro-prudential supervision, an integrated model has been used in Poland since 2006.[16] Banking supervision was originally located within the central bank. This model functioned in Poland until 2008. Currently, the Polish Financial Supervision Authority exercises supervision over the banking sector, the capital market, insurance and pension markets, payment institutions and payment service offices, electronic money institutions, as well as the cooperative credit union sector.[17] Supervision over the KNF is exercised by the Prime Minis-

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neglected during the construction of the European Central Bank has taken on a much greater role. T. Knepka, *Rola Europejskiego Banku Centralnego w zapewnieniu stabilności rynku finansowego Unii Europejskiej*, Warszawa 2017, p. 99.

[14] That is why for more than a decade we have observed the process of giving central banks new functions in the area of supervision of the financial market and of adding that supervision to structures of macro-prudential supervision and resolution procedure. See more D. Calvo *et al*., *Financial supervisory architecture: what has changed after the crisis?, FSI Insights on policy implementation*, 2018, No. 8, p. 2.

[15] See more M. Fedorowicz, *Nadzór makroostrożnościowy w Polsce*, Poznań 2019, pp. 1-328.

[16] It should be remembered that in the European Union, financial supervision is characterized by the features of 'complementarity' and 'multiple levels' – since 2011, micro-prudential supervision has also existed at the EU level with the European Supervisory Authorities (the EBA: the European Banking Authority; the ESMA: the European Securities Market Authority, and the EIOPA: the European Insurance and Occupational Pension Funds Authority), and macro-prudential supervision with the European Systemic Risk Board.

[17] The scope and principles of this supervision are specified in the Act on Financial Market Supervision of 21 July 2006, and the Banking Law of 29 August 1997. The purpose of supervision over the financial market is to ensure the proper functioning of this market, its stability, security, and transparency, to ensure confidence in the financial market, and to ensure the protection of the interests of market participants both through providing reliable information on the functioning of the market and by achieving the objectives set out in sectoral acts regulating supervision that is subject to organizational integration as part of financial supervision. Nadolska A., *Komisja Nad-*

ter. The body that manages the early anti-crisis mechanism, both from the point of view of protecting financial institutions threatened with insolvency and also guaranteeing payments to depositors, is the Bank Guarantee Fund.

Within the Polish legal system, the tasks of guaranteeing the deposits held in banks and cooperative credit unions, as well as of carrying out the resolution of financial institutions threatened with bankruptcy have been entrusted to a separate institution – the Bank Guarantee Fund. The rules, instruments, and procedures for the resolution of banks are also set out in the Act of 10 June 2016, on the Bank Guarantee Fund, the deposit guarantee system, and the resolution. Currently, deposit guarantee and resolution systems are indispensable elements of the safety net in a developed financial system.[18]

The crisis of confidence in financial markets and the need to rebuild it have resulted in many legislative actions in the last decade, both at the national and the European level. They are aimed at strengthening the protection of the consumer (customer) of financial services.[19] In Poland, the protection of consumer rights is secured by a provision of the Constitution. Article 76 of the Constitution imposes on public authorities the obligation to protect consumers, *inter alia*, against actions threatening their safety and against unfair market practices. The most important institutions of the financial safety net and the protection of banking market customers are the Office of Competition and Consumer Protection (UOKiK), the Polish Financial Supervision Authority, and the Financial Ombudsman (Rzecznik Finansowy). The Office of Competition and Consumer Protection and the Polish Financial Supervision Authority (KNF) take actions in the interest of all consumers, and the Financial Ombudsman represents the interests of individual clients in respect of financial market entities. It should be emphasized that in the European Union, the legal protection of consumers of financial services has been given a strategic character, one that conditions the development of the cross-border provision of financial services and is crucial for economic security.[20]

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zoru Finansowego w nowej instytucjonalnej architekturze europejskiego nadzoru finansowego, Warszawa 2014, p. 190.

[18] M. Janovec, A. Jurkowska-Zeidler, *The EU bank resolution framework: institutional changes of the financial safety net in Poland and the Czech Republic,* (in:) G. Hulkó, R. Vybíral (eds.), *European financial law in times of crisis of the European Union*, Dialóg Campus, 2019, pp. 201–214.

[19] J. Monkiewicz, E. Rutkowska (eds.), *Ochrona konsumenta na polskim i międzynarodowym rynku finansowym*, Warszawa 2019, pp. 1–416.

[20] D. Cyman, *Nowy model ochrony konsumenta*, (in:) A. Drwiłło, A. Jurkowska-Zeidler (eds.), *System prawnofinansowy Unii Europejskiej*, Warszawa 2017, p. 366.

IV. CONCLUSIONS

Practical experiences (systemic risk, financial crises, consumer protection) require detailed legal regulation of the financial system for many reasons and the public interest is one of the most important ones. In the case of the banking systems analyzed in this paper, banks are still a key element of those financial systems. All banks are subject to special regulations and to the supervision of public authorities. Their activities are strictly regulated by the state, which is reflected in the administrative procedure of licensing and supervising banking activities.

Respecting the complexity of legal relationships in the financial system and the general inequity of a subject entering legal relationships in knowledge and possession of information, it is necessary to put public law requirements onto the primarily private law relationships to ensure fairness in the relationship between the financial institution and its possible client.

The general public interest in the financial system regulation and at the same time the most essential goal of this regulation is to ensure financial stability. Therefore, the most important reason for the regulating banks and the financial system as a whole is the state's interest in a well-functioning, secure, and stable financial system, in which there are no systemic risks caused, for example, by the failure of major financial institutions or the disruption of the financial services infrastructure. The legal guarantees of public trust towards banks include the legal framework for the activities and organization of banks and the banking system, as well as the institutional system of the financial safety net comprising the central bank, banking supervision, and a deposit guarantee system. The financial safety net plays a very important role in the stability of the banking system. The financial system requires a functional and systemic approach, and, above all, a guarantee of the effectiveness of the financial safety net.

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THE LAWYER IN THE AREA OF TENSION BETWEEN THE PUBLIC INTEREST-ORIENTED ADMINISTRATION OF JUSTICE AND FREEDOM TO EXERCISE THE PROFESSION, USING THE EXAMPLE OF ADVISORY ASSISTANCE – A PLEA FOR THE IMPORTANCE OF LEGAL FACT-FINDING STUDIES TO OBTAIN EMPIRICAL DATA

Abstract

As part of his public interest-oriented function of administering justice, a lawyer in Germany must grant advisory assistance (*Beratungshilfe*) to needy litigants with low incomes on the basis of the legal obligation under § 49a para. 1 of the Federal Code of Lawyers (*Bundesrechtsanwaltsordnung – BRAO*)[1] in accordance with the Advisory Assistance Act (*Beratungshilfegesetz – BerHG*).[2] In return, he receives a lower, statutory remuneration claim. The obligation to take over a case with a limited claim to remuneration imposed by law infringes on the lawyer's freedom to exercise his profession (*Berufsausübungsfreiheit)* pursuant to Article 12 para. 1 of the Basic Law

[1] Federal Code of Lawyers, at: https://www.gesetze-im-internet.de/englisch_brao/englisch_brao.pdf (last accessed: 6 April 2023).

[2] Act on Advisory Assistance and Representation for Citizens with a Low Income (Advisory Assistance Act), at: https://www.gesetze-im-internet.de/englisch_berathig/index.html (last accessed: 6 April 2023).

(*Grundgesetz – GG*).[3] Such an infringement is only reasonable (*angemessen*) if the lawyer receives reasonable compensation and it thus becomes constitutional. Legal studies and representative empirical data are required to determine the reasonableness (*Angemessenheit*).

KEYWORDS

public interest orientation, lawyers' remuneration, obligation to contract, reasonable compensation, importance of empirical data, legal fact research/fact research in law, advisory assistance, legal aid

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ukierunkowanie na interes publiczny, wynagrodzenie prawników, obowiązek kontraktowania, rozsądna rekompensata, znaczenie danych empirycznych, badanie faktów prawnych, pomoc doradcza, pomoc prawna

1. INTRODUCTION

From his position as an independent organ of the administration of justice (*unabhängiges Organ der Rechtspflege*)[4] (§ 1 BRAO), the lawyer must, within the framework of his professional practice, provide legal services (*Rechtsdienstleistungen*)[5] which primarily serve the common good in the public interest. This also includes advisory assistance. In Germany, there are 160,438 lawyers,[6] all of whom are obliged under professional law to provide advisory assistance. In recent years, the amounts spent by the state for advisory assistance have varied between just under 31.5 million euros (for the year 2021) to just under 85.5 million euros

[3] Basic Law of the Federal Republic of Germany, at: https://www.gesetze-im-internet.de/englisch_gg/index.html (last accessed: 6 April 2023).

[4] On the independent body of the administration of justice in detail: J. Lefèvre, *The professional profile of the lawyer in Germany: An approach to the innermost professional profile*, p. 37 *et seq.,* (in:) Franz von Liszt Institute Working Papers Legal Professions in Comparative Perspective: Poland-Germany. Part I, 1st edition, Gießen 2021, https://www.uni-giessen.de/de/fbz/fb01/fakultaet-institutionen/franzliszt/forschung/working-paper/copy_of_Legal.pdf (last accessed: 6 April 2023).

[5] For the definition *Rechtsdienstleistung* see § 2 Act on Out-of-Court Legal Services (Rechtsdienstleistungsgesetz, RDG), at: https://www.gesetze-im-internet.de/englisch_rdg/index.html (last accessed: 6 April 2023).

[6] M. Kilian, *Statistisches Jahrbuch 2021/2022*, 1st edition, Baden-Baden 2022, p. 63.

(for the year 2007).[7] The legally prescribed remuneration entitlement for advisory assistance is in part many times lower than the lawyer's remuneration arising from other advice, although the legal services must be the same in terms of scope, content, and quality.[8] The lawyer must perform the advisory assistance mandate *de lege artis*. He is, therefore, obliged to comply with all professional regulations even if he takes over the advisory assistance mandate.[9] Within the framework of the lower remuneration claims for the advisory assistance, the lawyer makes a 'monetary special sacrifice',[10] which is justified by the above-mentioned public interest oriented function of the lawyer as an organ of the administration of justice.[11]

For example, within the framework of out-of-court advisory assistance for counselling pursuant to § 44 sentence 1 in conjunction with No. 2501 of the Remuneration Schedule (V*ergütungsverzeichnis, VV*) of the Act on the Remuneration of Lawyers (*Rechtsanwaltsvergütungsgesetz,*[12] *RVG*), the lawyer receives a fixed fee of 38.50 euros[13].[14] When it comes to the fee, it is irrelevant how extensive and time-consuming the work is, because it arises independently and as a lump sum.[15] Even a very high value of the matter does not affect the above-mentioned fixed fees. In comparison, in the case of an initial consultation with a consumer,[16] who does not fall under the scope of application of the BerGH, the lawyer can charge a fee for a first consultation according to § 34 sentence 3 RVG. Comparatively, the lawyer can charge a fee for an initial consultation of up to a maximum of 190 euros or – based on a remuneration agreement (*Vergütungsvereinbarung*) – negotiate an hourly rate. The current average agreed hourly rate in the out-of-court area is 159 euros, with the highest average hourly rate being 246 euros and the average standard hourly rate being 190 euros.[17] The monetary difference between

[7] Bundesamt der Justiz, Federal Office of Justice, Beratungshilfestatistik 1981-2021, at: https://www.bundesjustizamt.de/SharedDocs/Downloads/DE/Justizstatistiken/Beratungshilfestatistik1981_2021.pdf?__blob=publicationFile&v=5 (as of 27 January 2023).

[8] K. Lindemann, P. Trenk-Hinterberger, *BerHG,* 1st edition, München 1987, § 3 BerHG, marginal no. 7.

[9] K. Nöker, (in:) D. Weyland, BRAO, 10th edition, München 2020, § 49a, marginal no. 21.

[10] S. Offermann-Burckart, *Beratungshilfe: Was muss, das muss*?, Anwaltsbl. 2021, pp. 406 *et seq*.

[11] Bundesverfassungsgericht (BVerfG), NJW 2019, p. 3370.

[12] https://www.gesetze-im-internet.de/englisch_rvg/index.html (last accessed: 6 April 2023).

[13] All amounts are net amounts excluding VAT.

[14] On fees and remunerations as well as on the determination procedure according to § 55 RVG in detail: I.-M. Groß, *Beratungshilfe, Prozesskostenhilfe, Verfahrenskostenhilfe*, 14th edition, Heidelberg 2014, §44 RVG, marginal no. 1 *et seq.,* § 55 RVG. marginal no. 1 *et seq*.

[15] S. Lisser, J. Dietrich, K. Schmidt, *Beratungshilfe mit Prozesskosten- und Verfahrenshilfe*, 4th edition, Stuttgart 2022, marginal no. 290.

[16] For the definition of consumer, see § 14 German Civil Code (*Bürgerliches Gesetzbuch, BGB).*

[17] C. Hommerich, M. Kilian, *Stundensätze der deutschen Anwaltschaft*, NJW 2009, p. 1570.

remunerations (advisory assistance versus other counselling remuneration) shows the actual service value of the legal services of advisory assistance and the savings the state achieves through the legally lower remunerations (according to § 44 RVG).

2. THE LAWYER'S OBLIGATION UNDER § 49A PARA. 1 BRAO

Lawyers have always been consulted for the granting of legal aid, especially for advisory assistance.[18] Since the BerHG[19] came into force, lawyers have been obliged to provide legal aid for needy legal seekers.[20] By doing so, they ensure equal access to justice for needy[21] litigants, i.e., for citizens with low incomes and assets.[22] There is a so-called genuine obligation to contract (*Kontrahierungszwang*), i.e., lawyers must accept a mandate for legal advisory assistance and conclude a contract with the person seeking legal advice according to § 49a para. 1 sentence 1 BRAO.[23] They may only do so in individual cases and for good cause under § 49a para. 1 sentence 1 BRAO in conjunction with § 16a of the Rules of Professional Practice (*Berufsordnung der Rechtsanwälte, BORA*[24]).[25] If the lawyer refuses without good cause, he acts unlawfully.[26]

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[18] On the history: H. Kawamura, *Die Geschichte der Rechtsberatungshilfe in Deutschland*, 1st edition, Berlin 2014.

[19] § 49a para. 1 BRAO introduced by the BerHG on 18 June 1980 (BGBl. I p. 689, Zweiter Abschnitt p. 690 Änderungen von Bundesgesetzen) § 49 para. 2 was introduced by the Gesetz zur Neuordnung des Berufsrecht der Rechtsanwälte und Patentanwälte on 2 September 1994 (BGBl. I p. 2278).

[20] Law of 18 June 1980 – BGBL. I 1980, No. 29, 21 June 1980, p. 689.

[21] Indigence is determined according to §§ 115 *et seq.* Code of Civil Procedure (*Zivilprozessordnung, ZPO*), for more details on the determination: I.-M. Groß, *Beratungshilfe, Prozesskostenhilfe, Verfahrenskostenhilfe*, 14th edition, Heidelberg 2014, § 1 BerHG, marginal no. 45 *et seq.*

[22] M. Hessler, (in:) M. Henssler, H. Prütting, *BRAO*, 5th edition, München 2019, § 49a BRAO, marginal no. 1.

[23] S. Offermann-Burckart, *Beratungshilfe: Was muss, das muss*?, Anwaltsbl. 2021, p. 406.

[24] https://www.brak.de/fileadmin/02_fuer_anwaelte/berufsrecht/BORA_Stand_01.10.2022_en.pdf (last accessed: 6 April 2023).

[25] For possible reasons for refusal, such as time constraints/professional overload, disturbance of the relationship of trust, or illness of the lawyer, see in detail: R. Zuck, (in:) R. Gaier, C. Wolf, S. Wolf, S. Göcken, *Anwaltliches Berufsrecht,* 3rd edition, Köln 2020, § 16a BORA, marginal no. 1 *et seq.*

[26] On the consequences under civil and professional law: S. Offermann-Burckart, *Beratungshilfe: Was muss, das muss?* Anwaltsbl. 2021, pp. 406 *et seq.*

3. INFRINGEMENT ON THE FREEDOM TO EXERCISE ONE'S PROFESSION UNDER ARTICLE 12 PARA. 1 GG AND ITS PROPORTIONALITY (*VERHÄLTNISMÄSSIGKEIT)*

§ 49a para. 1 BRAO and the associated limited remuneration claim under § 8 BerhG, § 44 RVG restrict, to the detriment of the lawyer, the principle of freedom of contract (*Dispositionsfreiheit*) and thus also his freedom of price (*Preisfreiheit*) with regard to his remuneration options under Article 12 para. 1 GG.[27] The fundamental obligation has not been constitutionally challenged, even since the introduction of § 49a BRAO. However, there are concerns about the constitutionality of the reasonableness of the fee amount.[28]

An infringement on Article 12 para. 1 GG may only be made by a law or on the basis of a law, in this case, by § 49a BRAO in conjunction with § 44 RVG. However, such a fee-based restriction is also only permissible and constitutional if it is justified by sufficient reasons of public interest. It also has to be necessary (*erforderlich*), suitable (*geeignet*) and proportionate (*verhältnismäßig*), i.e., it cannot go beyond what is necessary to achieve the purpose.

3.1. LEGITIMATE PURPOSE (*LEGITIMER ZWECK*) TO JUSTIFY THE INFRINGEMENT

The infringement on the lawyer's freedom of profession pursues a legitimate purpose, namely to protect the functioning administration of justice in the public interest but also to protect state expenditure through the commissioning of the lawyer and the associated limitation of remuneration.[29] According to Article 20 para. 1 GG, it is the very task and obligation of the state and the general public to implement and finance the social state (*Sozialstaat*) and, according to Article 20 para. 3 and Article 3 GG, to grant the needy party access to extrajudicial legal protection in the same way as the wealthy ones.[30] For this reason, the BerHG came into force on 1 January 1980,[31] in order to grant assistance to needy litigants with low incomes and assets for the exercise of rights outside of court proceedings (§ 1 BerHG). Today, advisory assistance is an 'indispensable social benefit

[27] W. Hartung, (in:) H. Scharmer, *BORA/FAO*, 6th edition, München 2016, § 16, marginal no. 4.

[28] H. Euba, *Verfassungswidrigkeit der Regelungen über die Höhe der anwaltlichen Gebühren für Beratungshilfe*, NJOZ 2011, p. 1 *et seq.*; W. Hartung, V. Römermann, *Beratungshilfe zu Dumpingpreisen - verfassungswidrig!,* ZRP 2003, pp. 149 *et seq.*

[29] R. Zuck, (in:) R. Gaier, C. Wolf, S. Göcken, *Anwaltliches Berufsrecht*, 3rd edition, Köln 2020, § 16 BORA, marginal no. 19.

[30] BVerfGE 122, 39 = NJW 2009, p. 209.

[31] Consultancy Assistance Act came into force on 1 January 1981 (BGBl. I p. 691).

within the administration of justice'.[32] It serves the function of administration of justice and effective legal protection (*effektiver Rechtschutz*) pursuant to Article 19 para. 4 sentence 1 GG by guaranteeing equality of legal perception in the out-of-court sphere for those seeking justice with low incomes and assets.[33] It is intended to ensure that access to professional advice and necessary representation does not fail for reasons of cost, even for people in need.[34] It is, therefore, one of the essential and indispensable components of a social state under the rule of law.[35] The use of the legal profession, which is legally standardized by § 49a para. 1 BRAO, precisely pursues the realization of the objectives envisaged by Article 20 para. 3 and Article 3 GG.[36] Constitutionally, therefore, the obligation to take on a non-negotiable, lower remuneration is rightly justified on sufficient grounds of the common good.

3.2. SUITABILITY (*GEEIGNETHEIT*) AND NECESSITY (*ERFORDERLICHKEIT*)

'The obligation to take over with limited entitlement to remuneration must be suitable for achieving the purpose'.[37] Suitable does not mean optimal, but it must be conducive to achieving the purpose.[38] The question of suitability for the purpose must be answered empirically.[39] It is assumed that the purpose can be achieved, even though the above-mentioned statistics on advisory assistance show a significant decline in expenditure and applications for advisory assistance by lawyers.[40] The decrease spares the state's expenditure. However, it is recommended that the reductions must be examined more closely. There is a lack of knowledge about possible actual connections and causes between the above-mentioned reductions

[32] K. Nöker, (in:) D. Weyland, *BRAO*, 10th edition, München 2020, § 49a, marginal no. 2; cf. also BVerfGE 35, p. 355.

[33] R. Zuck, *Die verfassungsrechtlichen Rahmenbedingungen der Beratungshilfe*, NZS 2012, p. 441.

[34] K. Nöker, (in:) D. Weyland*, BRAO*, 10th edition, München 2020, § 49a, marginal no. 2.

[35] I.-M. Groß, *Beratungshilfe, Prozesskostenhilfe, Verfahrenskostenhilfe*, 14th edition, Heidelberg 2014, Einl. marginal no. 6.

[36] H. Euba, *Verfassungswidrigkeit der Regelungen über die Höhe der anwaltlichen Gebühren für Beratungshilfe*, NJOZ 2011, p. 29.

[37] H. Dreier, (in:) H. Dreier, *Grundgesetz*, 3rd edition, Tübingen 2013, before Art. 1, marginal no. 147.

[38] H. Dreier, (in:) H. Dreier, *Grundgesetz*, 3rd edition, Tübingen 2013, before Art. 1, marginal no. 147.

[39] H. Dreier, (in:) H. Dreier, *Grundgesetz*, 3rd edition, Tübingen 2013, before Art. 1, marginal no. 147.

[40] Bundesamt für Justiz, Federal Office of Justice, Beratungshilfestatistik 1981-2021, at: https://www.bundesjustizamt.de/SharedDocs/Downloads/DE/Justizstatistiken/Beratungshilfestatistik1981_2021.pdf?__blob=publicationFile&v=5 (as of 23 January 2023).

and the practice of lawyers providing advisory assistance. Since it appears from the above-mentioned statistics that many cases are still being processed, there is no obvious misuse of funds and, therefore, suitability can be assumed.

The above-mentioned infringement is necessary if no means exists that achieves the purpose just as effectively but interferes less intensively with the fundamental rights of those affected.[41] The obligation to pay is basically necessary as a milder legitimate means,[42] however, a more intensive view is required with regard to the amount of the fee. It can be discussed whether the legislator has to comply with its rationalization requirements (*Rationalisierungsanforderungen*) within the framework of its legislation when determining the amount of fees. In principle, the legislator is to be granted the right to decide on the extent to which it pursues legitimate ends and to choose the means by which these ends can be achieved most quickly, most optimally or most likely.[43] In principle, he is granted a margin of appreciation and prognosis.[44] However, independent of the substantive constitutionality, there may also be an independent obligation to clarify and justify the facts.[45] If necessary, also if the fee levels were not determined on the basis of well-founded (empirical) knowledge from facts and interrelationships of effects. Calculations for the assessment and determination of the amount of advisory assistance fees are not known and have apparently not been undertaken so far. Although the legislature has always expanded on the cost situation for the state budget and set out the average remuneration for lawyers per advisory assistance,[46] there is no consideration of the cost and time involved from the lawyer's point of view. The latter are, therefore, to be recommended. Whether this actually constitutes a violation of the rationalization requirements, however, requires further investigation, which cannot be undertaken here.

3.3. ADVISORY ASSISTANCE FEES AS REASONABLE COMPENSATION?

The infringement on Article 12 para. 1 GG must also be reasonable, i.e., the purpose of the infringement and the intensity of it must be in reasonable pro-

[41] H. Dreier, (in:) H. Dreier, *Grundgesetz*, 3rd edition, Tübingen 2013, before Art. 1, marginal no. 148.

[42] In detail: H. Euba, *Verfassungswidrigkeit der Regelungen über die Höhe der anwaltlichen Gebühren für Beratungshilfe*, NJOZ 2011, p. 29.

[43] L. *Michael, M. Morlok, Grundrechte,* 8th edition, Baden-Baden 2022, marginal no. 621.

[44] BVerfGE 102, 197; 115, 276, 126, 112.

[45] BVerfG, Besohl. v. 24.3.2021 – 1 BvR 2656/18, marginal no. 240.

[46] See, e.g., BT-Drucksache 17/2164, Gesetzesentwurf des Bundesrates zur Änderung des Beratungshilfegesetzes of 16 June 2010, pp. 8 *et seq*.; BR-Drucksache 648/08, Entwurf eines Gesetzes zur Änderung des Beratungshilferechts, pp. 7 *et seq*.

portion.[47] As long as the assumption of advisory assistance mandates does not endanger the lawyer's livelihood and does not pose a threat to his existence, or there is no fear of significant financial consequences for the operation of the law firm, these fees are to be considered reasonable and constitutional.[48] The intervention is justified insofar as the limit of the reasonableness of the lower fees is still maintained.[49] The intervention would no longer be reasonable if the limited fees for the lawyer's obligation to provide legal advice were to place an excessive burden on the lawyer[50] and if the state did not provide adequate compensation for the use of legal advice as compensation.[51] Adequate compensation should at least cover the costs associated with the provision of advisory assistance.[52] In order to determine cost coverage, data on turnover, variable and fixed costs of the lawyer, data on working hours, and, above all, data on the processing time of advisory assistance applications are needed. The latter in particular are not available in representative form.

3.3.1. EXAMPLE OF DETERMINATION

A study from 2009 pointed out a noteworthy attempt to determine reasonableness. This study analyzed six different studies on their respective statements on the cost, turnover, and profit structure of lawyers. From this, an average hourly turnover of the lawyer of 43.93 euros and a cost recovery of 22.59 euros, and thus a profit of 21.24 euros/hour were calculated. At the time, this calculation was based on a fixed fee for counselling of 30 euros per session,[53] so according to this calculation, the lawyer did not cover his costs for a counselling session of more than 1 hour and 36 minutes.[54] Lacking knowledge of the scope of advisory of these clients, the investigator at the time observed his own advisory assistance practice. From anecdotal evidence[55] for such consultations, he determined that he had to spend an average of 1 hour and 38 minutes of working time per advisory

[47] BVerfG, Decision of the First Senate of 15 December 1999 1 BvR 1904/95, marginal no. 1-120.

[48] BVerfG, Anwaltsbl. Online 2019, p. 859.

[49] BVerfGE 68, 255 = NJW 1985, p. 727.

[50] BVerfG 83, 1 = NJW 1991, p. 555.

[51] BVerfGE 54, 271 = NJW 2008, p. 1063.

[52] H. Euba, *Verfassungswidrigkeit der Regelungen über die Höhe der anwaltlichen Gebühren für Beratungshilfe*, NJOZ 2011, pp. 293 *et seq*. W. Hartung, V. Römermann, *Beratungshilfe zu Dumpingpreisen - verfassungswidrig*!, ZRP 2003, pp. 149 *et seq*.

[53] This is a former fee under No. 2501 VV RVG; the current fee under No. 2501 VV RVG since 1 January 2021 is 38.50 euros (net).

[54] H. Euba, *Verfassungswidrigkeit der Regelungen über die Höhe der anwaltlichen Gebühren für Beratungshilfe*, NJOZ 2011, p. 296.

[55] Anecdotal evidence refers to data that has been obtained without an inter-subjectively comprehensible selection criterion and is performed by the habits, presence, and abilities of the person who receives it (H. Hamann, *Evidenzbasierte Jurisprudenz*, 1st edition, Tübingen 2014, pp. 56 *et seq*.).

assistance consultation. According to his calculation, he came to a conclusion that, in the absence of cost recovery, this would constitute unreasonable compensation and exceed the limit of the reasonableness of the sacrifice to be borne if an advisory assistance mandate took up more than 1 hour and 36 minutes of his time.[56] This calculation cannot generate general validity due to the lack of representative data. However, it shows possible criteria that play a role in concretizing reasonableness.

3.3.2. INHOMOGENEITY IN THE LEGAL PROFESSION

With 293,166 applications for advisory assistance granted[57] and 160,438 lawyers,[58] each lawyer would have to process 'only' 1.8 applications for advisory assistance[59] per year if the number of applications for it and the number of admissions remained the same. With this *per capita* number, the reasonableness of taking on the limited remuneration claim does not seem to be overly burdensome and sustainable. In legal terms, however, the situation looks different. In fact, the practice of advisory assistance is different. A lawyer in Baden-Württemberg handles 1.1 cases per year, whereas a lawyer in Saxony-Anhalt handles 7.6 cases.[60] In addition, these figures may also differ because in another survey, 34% of the respondents stated that they do not even process advisory assistance mandates.[61] Lawyers in individual and small law firms often handle a wide range of legal matters instead of specializing in a specific area. They handle most of the advisory assistance cases.[62] In addition, it was found that the proportion of female lawyers who take on counselling is much higher than that of their male colleagues.[63]

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[56] H. Euba, *Verfassungswidrigkeit der Regelungen über die Höhe der anwaltlichen Gebühren für Beratungshilfe*, NJOZ 2011, p. 296.

[57] Bundesamt für Justiz, Federal Office of Justice, Beratungshilfestatistik 1981-2021, at: https://www.bundesjustizamt.de/SharedDocs/Downloads/DE/Justizstatistiken/Beratungshilfestatistik1981_2021.pdf?__blob=publicationFile&v=5 (as of 23 January 2023).

[58] Bundesrechtsanwaltskammer (BRAK) member statistics at: https://www.brak.de/fileadmin/04_fuer_journalisten/statistiken/2022/2022_brak-mg_statistik.pdf (as of 1 January 2022).

[59] Cf. in 2007 there were 7 advisory assistance mandates per lawyer/year, C. Hommerich, M. Kilian, *Zugang zum Recht: Die Diskussion um die Reform des Beratungshilferechts,* BRAK-Mitt. 2010, p. 106.

[60] Cf. M. Kilian, *Statistisches Jahrbuch 2021/2022*, 1st edition, Baden-Baden 2022, p. 229; In earlier studies, even greater disparities were evident cf. on this subject C. Hommerich, M. Kilian, *Zugang zum Recht: Die Diskussion um die Reform des Beratungshilferechts*, BRAK-Mit. 2010, pp. 107 *et seq*.

[61] M. Kilian, M. Bertolino*, Das Berufs- und Privatleben von Rechtsanwälten*, 1st edition, Baden-Baden 2022, p. 62; C. Hommerich, M. Kilian, *Zugang zum Recht: Die Diskussion um die Reform des Beratungshilferechts*, BRAK-Mit. 2010, pp. 107 *et seq.*

[62] C. Hommerich, M. Kilian, *Zugang zum Recht: Die Diskussion um die Reform des Beratungshilferechts*, BRAK-Mitteilungen 2010, p. 111.

[63] C. Hommerich, M. Kilian, *Zugang zum Recht: Die Diskussion um die Reform des Beratungshilferechts*, BRAK-Mitteilungen 2010, p. 111.

Furthermore, it is striking that different studies sometimes show great differences in the economic considerations of the legal profession. In 2020,[64] the average annual revenue per lawyer was 129,005 euros. In 2018,[65] it was 145,000 euros (higher in the old federal states – at 156,000 euros, than in the new federal states – at 120,000 euros).[66] Men still achieved significantly higher revenues of 169,000 euros than women did (with an average of 97,000 euros).[67] In addition, the degree of specialization played a decisive role with regard to the amount of revenue. Specialized lawyers reported (sometimes significantly) higher revenue.[68] In 2016, the cost ratio in German law firms was 50.7% on average, whereby the differences varied with regard to the main areas of activity.[69] Lawyers reported average working hours of 51 hours per week, with solo lawyers being the type of lawyers who worked the most, whereas half of all female lawyers reported a weekly working time of 30-50 hours per week.[70] As shown, there is a lack of empirically collected representative data for determining whether the current fees for advisory assistance place an excessive burden on lawyers as they do not cover costs and possibly threaten their existence. Therefore, an abstract reasonableness of the fee level cannot be determined.

4. CONCLUSION

It seems challenging to do justice to these differences with a fixed, flat fee rate. Nevertheless, it is and remains the task of the legislature not only to compensate the public interest-oriented legal profession through reasonable fee levels but also, and above all, to ensure equal access to justice for those in need. It is a legitimate and understandable goal that the expenses of the state must also be in a calculable proportion. However, this goal must not be at the expense of equal access to justice for those in need. Moreover, in 2020 the expenditure for advisory

[64] M. Kilian, *Statistisches Jahrbuch 2021/2022*, 1st edition, Baden-Baden 2022, p. 162 with reference to Umsatzsteuerstatistik des Statistischen Bundesamtes Fachserie 14, Reihe 8.1.

[65] The following data are all from the STAR Report 2020, at: https://www.brak.de/fileadmin/04_fuer_journalisten/star-2020/star2020_ergebnisbericht_02-2021.pdf (last accessed: 6 April 2023).

[66] STAR Report 2020, at: https://www.brak.de/fileadmin/04_fuer_journalisten/star-2020/star2020_ergebnisbericht_02-2021.pdf (last accessed: 6 April 2023), p. 19.

[67] STAR Report 2020, at: https://www.brak.de/fileadmin/04_fuer_journalisten/star-2020/star2020_ergebnisbericht_02-2021.pdf (last accessed: 6 April 2023), p. 19.

[68] STAR Report 2020, at: https://www.brak.de/fileadmin/04_fuer_journalisten/star-2020/star2020_ergebnisbericht_02-2021.pdf (last accessed: 18 March 2023), p. 20.

[69] M. Kilian, *Anwaltstätigkeit der Gegenwart*, 1st edition, Köln 2016, p. 219.

[70] M. Kilian, *Anwaltstätigkeit der Gegenwart*, 1st edition, Köln 2016, p. 311.

assistance *per capita* in Germany amounted to 'only' 0.50 euros,[71] which seems very low when compared to other countries.[72] There must be, therefore, a continued assurance that lawyers fulfill their obligation to assume responsibility in accordance with the law and thus provide equal access to justice for those in need. Subject to the recommended empirical surveys, the fulfillment of the objectives of the BerHG appears to be threatened without an adjustment of the fees for advisory assistance. If one considers the legal market and the structural change in the legal profession,[73] as well as further predicted declines in the number of lawyers admitted to the bar,[74] in the future, the advisory assistance mandates will, in fact, be in even greater competition with more lucrative mandates (and this is connected with partly increased cost pressure on lawyers). There must not be a two-tier society of the well-off and the needy, which could possibly arise. This could be the case, for example, if lawyers are no longer able to take on advisory assistance cases due to time constraints or overwork because of the continuously increasing cost pressure and a possible increase in demand due to the redistribution of mandates and the lack of lawyers.

Although the fees increased on 1 January 2021 by a linear adjustment of 10%,[75] this increase does not really seem to be able to absorb the additional costs caused by the current price increases.[76] For some time now, there have been calls for a dynamic adjustment of the fees to increased costs, and rightly so.[77] The increase was rejected in the last reform with the argument of the additional costs

[71] M. Kilian, *Statistisches Jahrbuch 2021/2022,* 1st edition, Baden-Baden 2022, p. 240.

[72] Cf. M. Kilian, *Securing access to justice: facts, requirements, problems and ideas for solutions,* Anwaltsbl. 2010, pp. 46 *et seq*.

[73] On the 'war of talents' in the legal market: C. Knipping, Der Fachkräftemangel ist auch bei den Juristen längst angekommen, at: https://www.haufe.de/recht/kanzleimanagement/der-war-for-talents-hat-die-juristen-erreicht/der-fachkraeftemangel-ist-auch-bei-den-juristen-laengst-angekommen_222_502354.html (last accessed: 6 April 2023); on the decline in admissions to the bar, see M. Kilian, *Statistisches Jahrbuch 2021/2022*, 1st edition, Baden-Baden 2022, p. 63.

[74] In 2030, there will only be around 122,000 to 133,000 practicing lawyers, which then means a decline of 20,000-34,000 professionals from 2017, cf. M. Kilian, Die aktuellen Anwaltszahlen – genauer betrachtet, Anwaltbl. 2020, p. 416. On the developments of the legal profession in figures, see M. Kilian, Statistisches Jahrbuch der Anwaltschaft 2021/22, 1st edition Baden-Baden 2022, p. 42.

[75] Bundesrat kompakt, zur 998. Sitzung am 18.12.2020, at: https://www.bundesrat.de/DE/plenum/bundesrat-kompakt/20/998/998-node.html#top-8 (last accessed: 6 April 2023) with reference to Gesetz of 21 December 2020 BGBl. I p. 3229.

[76] See also BRAK Opinion No. 40/2020, August 2020, p. 3, at: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Justizkostenrecht.pdf;jsessionid=F298CAE54B45775169E0C8813D0C0538.1_cid289?__blob=publicationFile&v=2 (last accessed: 6 April 2023).

[77] BRAK and Deutscher Anwaltverein (DAV) statement of 28 October 2020, at: https://www.brak.de/fileadmin/newsletter_archiv/berlin/2020/2020_495anlage2.pdf (last accessed: 6 April 2023).

caused by the Covid-19 pandemic (under great protest by lawyers' lobbyists[78]) and postponed until the year 2023.[79] It therefore remains to be seen whether this 'promise' will be kept this year. Even though the reasonableness of the fees could not be assessed in the context of this publication due to the lack of representative data, an appropriate and timely review must be carried out, particularly in the public interest with regard to the functioning of the administration of justice. Equal access to justice must continue to be guaranteed.

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[78] BRAK, at: https://www.brak.de/newsroom/newsletter/nachrichten-aus-berlin/2020/ausgabe-19-2020-v-5112020/anwaltsgebuehren-brak-und-dav-vehement-gegen-verschiebung-der-gebuehrenanpassung/ (last accessed: 6 April 2023); also cf. BT-Drucksache 19/8266 of 12 March 2019 Antrag 'Rechtsanwaltsgebühren zukunftssicher gestalten', at: https://dserver.bundestag.de/btd/19/168/1916884.pdf (last accessed: 6 April 2023).

[79] Haufe Redaktion, at: https://www.haufe.de/recht/kanzleimanagement/anhebung-der-anwaltsgebuehren-um-durchschnittlich-10-geplant_222_525012.html (last accessed: 6 April 2023).

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PUBLIC INTEREST IN SPATIAL PLANNING IN RURAL AREAS

Abstract

This article presents the implementation of the principles of respecting public interest in rural spatial planning. It is juxtaposed with the conflict of private interest, primarily the interference with property rights, as well as the conflict between different public interests. Legal solutions for the economic compensation for the violation of private interest (property rights) in the implementation of the planning public interest are evaluated. The private public interest in national regulations on rural spatial planning is also pointed out.

KEYWORDS

agricultural law, spatial planning, public interest, rural areas, agriculture

SŁOWA KLUCZOWE

prawo rolne, planowanie przestrzenne, interes publiczny, obszary wiejskie, rolnictwo

INTRODUCTION

There are many possibilities to realize public interest in the legal system. In law, each public interest is derived either from legislation or from the current political and economic situation. However, it is not an unambiguous category that can be defined without doubt. Public interest is also present in the spatial management system and, in particular, in spatial planning. Many conflicts arise against the background of its implementation, which has economic consequences. It is already a problem to identify the public interest and determine its validity in relation to the private or public-private interest.

The aim of this article is to identify the public interest in spatial planning in rural areas. It is particularly in rural areas that several phenomena related to the public interest occur. Firstly, those related to its unquestionable primacy. In these areas, the public interest, usually understood as the need to ensure food security, comes first. It also includes the concern for the farmer or for the areas of natural value. In the accumulation of these public interests, the private interest of the agricultural property owner loses much of its importance.

Secondly, it is in rural areas that most conflict situations arise in terms of sustainable development. Rural areas are in the greatest need of large investments such as roads, processing plants and animal husbandry. In this context, there are conflicts over the functions of the land in question – traditional agriculture, on the one hand, and the use of agricultural land for non-agricultural purposes, on the other. Most conflicts against this background arise during the process of spatial planning and later development.

Thirdly, sometimes the public interest in making investments or changing the use of land encroaches on agricultural tradition. Above all, it interferes with the ownership of agricultural property, which has been in some families for several generations. For farmers, the role of being the owner of the farm on which their predecessors farmed is one of the most important roles. The public interest that this ownership interferes with, particularly in the implementation of land-use planning, will be an indicator of trust in the state and the credibility of the actions taken.

SPATIAL PLANNING AND THE MARKETING OF AGRICULTURAL REAL ESTATE

In addition, agricultural spatial planning has been combined with real estate marketing, which strengthens the public interest in preserving the agricultural character of real estate. Since 2016, i.e., since the enactment of the amendment to

the Act on the Formation of the Agricultural System (Ukur),[1] spatial planning has also influenced the turnover of agricultural real estate,[2] defining whether a given property is subject to the Ukur or not.[3] This is also a manifestation of the realisation of the public interest, because in the final analysis the possibility of selling agricultural real estate will be decided by an administrative body, i.e., the Director General of the National Support Centre for Agriculture.[4] This new function of spatial planning combines public regulation with private law trade in agricultural real estate.[5] It should be made clear that the public interest is in a more important position here due to the shape of the regulations on the acquisition of agricultural real estate. The legislator already interferes not only in the sphere of the use of real estate through spatial planning but also in the sphere of its disposal through restrictions related to the possibility to dispose of real estate. The phenomenon of such public interference is not new in agricultural law[6] but has gained in importance in recent years.

Interference in trading in agricultural real estate remaining in the hands of private owners in the name of public interest, which is the protection of agricultural character of the real estate, significantly affects the economic situation of farmers, the market of agricultural real estate in Poland, as well as its value. This juxtaposition of the provisions of the Act on shaping the agricultural system and the local spatial development plan forms the right to property, both in the sphere of using and disposing of it.[7]

A question arises whether, as a result of the realisation of this public interest, we are still dealing with the classical triad of proprietary rights or whether,

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[1] Act of 14 April 2016 on suspending the sale of real estate of the Agricultural Property Stock of the State Treasury and amending certain acts (Journal of Laws 2022, item 507).

[2] K. Marciniuk, *Pojęcie nieruchomości rolnej jako przedmiotu reglamentacji obrotu własnościowego*, 'Studia Iuridica Lublinensia', Lublin 2017, Vol. 26, pp. 94-114.

[3] More on this topic: A. Niewiadomski, *Rola aktów planistycznych w obrocie nieruchomościami rolnymi*, [in:] *Współczesne problemy prawa rolnego i cywilnego. Księga jubileuszowa Profesor Teresa Kurowskiej*, D. Łobos-Kotowska, P. Gała, M, Stańko (eds.), Warszawa 2018, pp. 419-430.

[4] A. Niewiadomski, *Status prawny Krajowego Ośrodka Wsparcia Rolnictwa*, 'Studia Iuridica', Warszawa 2017, Vol. 72, pp. 279-293; P. Czechowski, A. Niewiadomski, *Wybrane zagadnienia prawa europejskiego w zakresie nabywania i gospodarowania gruntami rolnymi*, 'Studia Iuridica' 2020, Vol. 86, pp. 43-56.

[5] K. Marciniuk, *Pojęcie nieruchomości rolnej jako przedmiotu reglamentacji obrotu własnościowego*, 'Studia Iuridica Lublinensia', Lublin 2017, Vol. 26, pp. 94-114.

[6] A. Lichorowicz, *Uwagi w kwestii usytuowania przepisów o obrocie gruntami rolnymi w systemie prawa polskiego (na tle prawnoporównawczym)*, 'Przegląd Prawa Rolnego', 2008, No. 2(4), pp. 29-50.

[7] E. Ura, K. Heliniak, *Ograniczenia własności nieruchomości w administracyjnym prawie materialnym,* [in:] *Jednostka wobec działań administracji publicznej,* [in:] *Jednostka wobec działań administracji publicznej,* E. Ura (ed.), Rzeszów 2001; M. Szewczyk, *Ingerencja publicznoprawna w prawa własności jednostki w demokratycznym państwie prawnym,* [in:] *Jednostka w demokratycznym państwie prawa,* J. Filipek (ed.), Bielsko-Biała 2003.

as Andrzej Stelmachowski wrote, we are dealing with *nudum ius*.[8] If this is the case, a question arises as to whether the public interest thus pursued can properly deprive the farmer of his property in such a manner. Undoubtedly, these provisions also affect the economic dimension of the public interest so pursued. Restrictions for farmers on the trading of property, clearly have an impact on property prices, which is supposed to prevent the process of land speculation or land grabbing.[9]

One of the important issues in the dimension of public interests in the planning sphere in rural areas is compensation for the damage suffered. Here, it is not enough only to regulate Article 36 of the Act on Planning and Spatial Development and the compensations or exchanges provided for therein.[10] The agricultural law in this respect finds compensatory solutions in the concept of agricultural property[11] formulated by Andrzej Stelmachowski. It must be clearly emphasised that the farmer has the right to expect state assistance, in return for the fact that he fulfils extraordinary duties towards the society. The main duty mentioned in the doctrine is ensuring food security. In doing so, the public burden is justified in the name of the public interest.

Undoubtedly, a question arises as to whether the current requirements and restrictions still make it possible to indisputably indicate if the agricultural ownership exists. The number of restrictions, not only strictly planning restrictions but also those aimed at shaping the marketing of agricultural real estate seem to turn agricultural ownership into a highly restricted right. In addition, the compensation measures offered to farmers do not promote certainty in the economic turnover or long-term planning of the agricultural activity carried out. *De lege ferenda*, the level of compensation for farmers for the changes introduced in the conduct of agricultural activities, as well as the inability to use agricultural real estate, must be clearly defined.

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[8] A. Stelmachowski, *Treść i wykonywanie prawa własności,* [in:] *System Prawa Prywatnego, Prawo Rzeczowe*, T. Dybowski (ed.), Warszawa 2007, Vol. 3, pp. 187-314.

[9] R. Pastuszko, *Landgrabbing. Podstawowe zagadnienia prawne,* [in:] *Prawne determinanty polityki rolnej*, ed. B. Jeżyńska, R. Pastuszko, 'Studia Iuridica Lublinensia' Vol. XXVI.1, Lublin 2017, pp. 147-156.

[10] H. Izdebski, *Prawo własności w planowaniu zagospodarowania przestrzeni*, [in:] *Kierunki reform planowania i zagospodarowania przestrzennego*, I. Zachariasz (ed.), Warszawa 2012.

[11] T. Kurowska, *Renesans własności rolniczej*, 'Przegląd Prawa Rolnego', 2014, No. 2 (15), p. 33; M. Korzycka-Iwanow, *Ochrona własności rolniczej w nawiązaniu do koncepcji własności rolniczej Profesora Andrzeja Stelmachowskiego*, 'Studia Iuridica Agraria', Białystok 2011, Vol. IX, pp. 123-127.

PUBLIC INTEREST IN SPATIAL PLANNING

According to the definition contained in Article 2(4) of the Act on Planning and Spatial Development,[12] the public interest should be understood as 'the generalised aim of pursuits and activities, taking into account the objectified needs of the general public or local communities, related to spatial development'.[13] The doctrine of law indicates that the public interest[14] will be the broadly understood general interest, the welfare of the state.[15] In the science of law, the general interest also includes the welfare and the freedom of the individual.[16]

The public interest will arise wherever a legal provision protects a benefit or a subject of value to an administrative regime.[17] For example, such protection will be given to the environment and the concern for its preservation[18] or to the organisation of public space by means of spatial development plans.[19] The question always arises as to the identification of the protected good.

The problem in rural areas is that not only are planning acts not uniform but their multiplicity means that they often pursue conflicting public interests.[20]

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[12] Act of 27 March 2003 on spatial planning and development (Journal of Laws 2022, item 461).

[13] H. Izdebski, *Interes publiczny a interes prywatny. Uwagi na tle legalnej definicji interesu publicznego w ustawie o planowaniu i zagospodarowaniu przestrzennym*, [in:] *Interes publiczny a interes prywatny w prawie*, T. Giaro (ed.), Warszawa 2012, pp. 149-158

[14] A. Mednis, *Prawo do prywatności a interes publiczny*, Kraków 2006.

[15] E. Modliński, *Pojęcie interesu publicznego w prawie administracyjnem*, Warszawa 1932.

[16] M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Warszawa 1986, p. 33.

[17] For example, it is possible to indicate J. Lemańska, *Ochrona prawa własności a obowiązek utrzymania nieruchomości w porządku i czystości*, [in:] *Ochrona człowieka w świetle prawa Rzeczypospolitej Polskiej*, S. Pikulski (ed.), Olsztyn 2002; F. Longchamps, *Ograniczenia własności nieruchomości w polskim prawie administracyjnym*, 'Przegląd Prawa i Administracji' 1939, No. 1-2; M. Szewczyk, *Ingerencja publicznoprawna w prawo własności jednostki w demokratycznym państwie prawnym,* [in:] *Jednostka w demokratycznym państwie prawa*, J. Filipek (ed.), Bielsko-Biała 2003; E. Ura, K. Heliniak, *Ograniczenia własności nieruchomości w administracyjnym prawie materialnym,* [in:] *Jednostka wobec działań administracji publicznej*, E. Ura (ed.), Rzeszów 2001.

[18] J. Stelmasiak, *Ochrona interesu indywidualnego w prawie ochrony środowiska (analiza administracyjno-prawna)*, [in:] *Jednostka wobec działań administracji publicznej. Materiały z międzynarodowej konferencji naukowej*, E. Ura (ed.), Rzeszów 2001.

[19] S. Jarosz-Żukowska, *Konstytucyjna zasada ochrony własności*, Kraków 2003; P. Bojarski, *Konstytucyjne podstawy ochrony przyrody*, [in:] *Ochrona środowiska a prawo własności*, J. Sommer (ed.), Wrocław 2000, p. 29 *et seq*.

[20] J. Goździewicz-Biechońska, *Planowanie przestrzenne wobec współczesnych tendencji rozwoju obszarów wiejskich*, 'Przegląd Prawa Rolnego', 2015, No. 2; A. Suchoń, *Wpływ miejscowego planu zagospodarowania przestrzennego na prawne formy dysponowania nieruchomościami rolnymi*, 'Studia Iuridica Agraria', 2016, Vol. 14, pp. 131-146.

A distinction must also be made between public interests[21] and private interests, as well as social interests.[22] The realisation of public interests such as ensuring food security or preserving the agricultural character of the property is often in line with the interests of individual farmers. The only problem is that other private interests are violated in the pursuit of the public interest. The aforementioned right to property is just one example. Examples include interference in land management, influencing the economic decisions of farmers, or restrictions on agricultural activities.

One rather high-profile example of public interest is the siting of renewable energy sources in rural areas. As a matter of principle, wind power plants and large photovoltaic farms should be specified in the local plan. At the same time, in pursuing the public interest of energy security, the legislator forms special purpose laws to realise this public interest. One example is the Distance Law, the economic impact of which for farmers has not yet been sufficiently assessed.[23] The restrictions introduced by the construction of windmills are clear to property owners who lease or sell their property for these developments. In contrast, there is little scope, apart from the aforementioned Article 36 of the Planning and Spatial Development Act, for other owners who are harmed by these investments, if only through noise emissions. Therefore, in pursuing an important public interest by means of special purpose laws, it would be advisable to specify compensation measures.

EXAMPLES OF CONFLICTS OF INTEREST IN RURAL AREAS

In addition to the standardisation of renewable energy sources and their location in rural areas, there is also the need to improve the regulation of nature conservation. In this area, too, there are planning regulations resulting from, for example, the Nature Conservation Act.[24] Spatial planning does not only include creating local plans but also planning acts concerning national parks, landscape parks, nature reserves or Natura 2000 areas, to name just a few. The status of

[21] B. Jeżyńska, *Proekologiczne instrumenty wsparcia zrównoważonego rozwoju obszarów Wiejskich*, 'Studia Iuridica Agraria', Białystok 2012, Vol. X.

[22] K. Chról, M. Szyrski, *Próba modelowania zadań publicznych jednostek samorządu terytorialnego w zakresie wspierania rozwoju odnawialnych źródeł energii (OZE),* 'Samorząd Terytorialny', 2021, No. 7-8; M. Szyrski, *Rola samorządu terytorialnego w rozwoju odnawialnych źródeł energii (OZE). Analiza administracyjnoprawna*, Warszawa 2017.

[23] A. Cylwik, *Analiza ekonomiczna skutków wprowadzenia postanowień tzw. ustawy odległościowej oraz korzyści z planowanej zmiany regulacji dotyczących rozwoju lądowej energetyki wiatrowej*, 'Internetowy Kwartalnik Antymonopolowy i Regulacyjny', 2021, No. 2(10).

[24] Act of 16 April 2004 on nature protection (Journal of Laws 2022, item 916).

these acts varies. In most cases, they are generally binding acts of law. They pursue one clear public interest – the protection of nature in Poland. Such documents define the functioning of particular forms of nature protection, at the same time imposing quite significant restrictions on farmers in the way they manage their agricultural property.

Against this background, there is a conflict of interest that translates into legal solutions, which in turn affect the economic sphere. Firstly, the traditional conflict between public and private interests is discernible. Where a farmer wants to carry out his activity,[25] he cannot do so because of the restrictions and prohibitions related to nature conservation. In this respect, the legislator has provided for various types of compensation, such as for the restrictions occurring in Natura 2000 areas.[26] The problem is not only their insufficient financial amount but the difficulty in obtaining and claiming them. Therefore, for some farmers, the introduction of nature conservation restrictions is the end of their regular business. This clear conflict of interest between the public and private sphere in this juxtaposition is usually resolved in favour of the public interest. It is the public good that prevails and the farmer must submit to it.[27]

The second conflict of interest[28] in rural areas is the conflict between the public and legal interests. On the one hand, caring for the environment and sustainability, on the other hand, ensuring security and, as far as possible, maximising the use of agricultural property in food production. Reconciling these interests can be a choice between, for example, feeding people or providing them with clean oxygen to breathe. Either of these choices and giving primacy to only one of them will end tragically. Therefore, when introducing restrictions to pursue one public interest, e.g., ensuring food security, it is necessary to take into account others, such as nature conservation. However, it is not possible here to determine the validity of either interest, because giving primacy to only one of them will result in the abandonment of the other.

It is undoubtedly an art, also for the law, to find solutions to the conflicts of interest in the field of public law, as well as private and public law. It can also be pointed out that conflicts also arise in the field of private interests. This is not only exemplified by the well-being of one's own property but also by taking on obligations which are compatible with the exercise of one's own rights. An example of this would be the agri-environmental and climate commitments under the Rural

[25] J. Ciechanowicz-McLean, *Konstytucyjna zasada wolności gospodarczej a ochrona środowiska*, 'Gdańskie Studia Prawnicze', 2014, No. 1, pp. 99-108

[26] A. Niewiadomski, *Problematyka prawna rekompensat za ustanowienie formy ochrony przyrody - obszarów Natura 2000 na obszarach wiejskich*, 'Studia Iuridica Agraria', Białystok 2014, Vol. XII, pp. 65-76.

[27] A. Barczewska-Dziobek, *Interes publiczny i prywatny w prawie ochrony środowiska. Zagadnienia wybrane*, 'Prawo i Środowisko', 2012, No. 1, pp. 65-76.

[28] P.J. Suwaj, *Konflikt interesów w administracji publicznej*, Warszawa 2009; A.S. Duda, *Interes prawny w polskim prawie administracyjnym*, Kraków 2008.

Development Programme 2014-2022. A farmer, by taking on these commitments himself in the name of his economic interest (because he gets funding for them), restricts his property and farming activities. At the same time, he implements the public interest, which is the protection of nature and the environment.[29]

This intersection of public and private interests and their respective scopes creates a difficult system of choices between different values and goods protected by law.[30] Undoubtedly, laws should be the remedy for resolving these conflicts.[31] Unfortunately, they are not. One of the challenges facing the legislator is to frame this conflict in such a way that no one comes out of it as a total loser. Because it is not in the public interest to prioritise the public interest at the expense of the private interest. If we disregard the latter, citizens' trust in the rule of law will suffer, and it is in the public interest to take care of it. It is therefore necessary to point out the need to seek a balance between public and private interests in the legal system.[32]

The examples given from both the sphere of nature conservation and environmental obligations must take into account the economic factor. While the economic valuation of the public interest of preserving natural biodiversity is highly difficult, determining the value of the restrictions introduced and their impact on agricultural production is already measurable. It is, therefore, necessary to postulate the definition of a framework of compensation for bearing the burdens of agricultural activity, where the public authority, in the name of the public interest, restricts or prevents the realisation of the private interest. However, this requires careful study and analysis, if only in the area of valuation of agricultural real estate and the proper application of the real estate management regulations.

CONCLUSION

The above considerations lead to several final conclusions. The public interest is dominant in spatial planning, especially in rural areas. In the clash with private property and private interest – the public interest dominates. Whether it is the organisation of space, nature conservation or food security, these are just three basic determinants of the public interest that dominate the Polish country-

[29] J. Maciejewska, *Bezpieczeństwo ekologiczne jako konstytucyjny obowiązek państwa*, 'Przegląd Prawa Ochrony Środowiska', 2010, No. 2, pp. 59-75.

[30] G. Guzetta, *The Limits of Conflicts Regulations*, [in:] *Conflict of Interest and Public Life. Cross-National Perspectives,* Ch. Trost, A.L. Gash (eds.), Cambridge 2008.

[31] W. Skrzydło, *Ocena rozwiązań prawnych w zakresie zapobiegania konfliktom interesów*, [in:] *Zapobieganie konfliktowi interesów w III RP*, M. Zubik (ed.), Warszawa 2003.

[32] B. Zdziennicki, *Kolizje norm i wartości w sprawach reprywatyzacyjnych*, 'Studia i Analizy Sądu Najwyższego. Materiały Naukowe', Warszawa 2016, Vol. III, p. 64 *et seq*.

side. One can also add the protection of the agricultural character of the land, restrictions in the real estate trade, counteracting land grabbing, and ensuring the profitability of agriculture. These interests take precedence over the ownership of agricultural real estate or the protection of possession. A question arises about the protection of the owner of agricultural property. The imposed planning or related restrictions on the marketing of agricultural real estate do not favour a positive assessment of the public interest that seeks to deprive the essence of the right of ownership.

In addition to the conflict between public and private interests, a clear conflict can be observed between the various public interests (as they can be referred to here in the plural). For example, just looking after nature conservation in rural areas will conflict with investment activities or the development of road infrastructure. An important question arises as to which of these interests should find priority. From the farmers' point of view, it would seem to be the one that is more favourable to them (because this can be called a generalised goal of aspiration). On the other hand, reconciling rural and urban public interests seems to be an extremely difficult task, going far beyond mere legal solutions. In reconciling them, a holistic vision of the development of agriculture and other sectors of the economy is needed. Only then can we speak of the realisation of the public interest.

Finally, the realisation of the public interest in rural areas usually involves burdens for farmers. The value of their property as a result of spatial planning usually loses agricultural value, even if it gains investment value. In this respect, there are a number of compensation solutions in spatial planning, the main shortcoming of which is the problem of property valuation. At the same time, the doctrinal concept of agricultural property, which is already quite embedded in time, can help solve these problems. This concept assumes that, in return for the public burdens incurred for the benefit of society, the farmer can expect state assistance. In this aspect, the implementation of these solutions may prove to be a remedy for reconciling the public and private interests of farmers.

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PUBLIC INTEREST IN THE SOCIAL ECONOMY

Abstract

The social market economy requires multifaceted care to preserve its essence (standard) and the appropriate balance between 'marketisation' and 'socialisation'. This should be fostered by defining the content of the 'public interest' clause, and the social interest in particular, when determining all circumstances related to the functioning of the social market economy because it is in the public (social) interest for the market economy to be linked to social needs. The public (social) interest is at the same time the premise for the formation and development of what is to be regarded as the 'social economy'. The same interest requires that the created social economy should be supported by providing it with the assistance of both a subjective and functional nature.

KEYWORDS

public interest, social economy, social market economy, support, economy

SŁOWA KLUCZOWE

interes publiczny, ekonomia społeczna, społeczna gospodarka rynkowa, wsparcie, gospodarka

1. INTRODUCTION

Both the social economy and the public interest in it have their source in the constitutional principle and, at the same time, they constitute the basis of the Polish economic system, i.e., the social market economy. The social market economy, which is based on the freedom of economic activity, private ownership, solidarity, dialogue, and cooperation,[1] requires from both the legislator and the lawmakers, as well as from the entities participating in this economy, multi-faceted care to maintain its essence (standard) and appropriate proportions between 'marketisation' and 'socialisation'. This care should be fostered by defining the content of the 'public interest' clause,[2] in particular, the social interest, when determining all the circumstances relating to the functioning of the social market economy since it is in the public (social) interest that the market economy becomes linked to social needs.

The public (social) interest is at the same time the premise for the formation and development of what is to be regarded as the 'social economy'. The same interest requires that the created social economy should be supported by means of assistance of both personal and functional nature so that, as if in exchange for the 'costs' it incurs, it may benefit from a variety of support instruments and that these instruments are appropriately and optimally created by the legislator.

[1] Act of 2 April 1997 Constitution of the Republic of Poland, Journal of Laws No. 78, item 483, as amended.

[2] cf. A. Żurawik, *Wykładnia w prawie gospodarczym*, Wydawnictwo C.H. Beck, Warszawa 2021, chapter VIII, § 7, Legalis; E. Komierzyńska, M. Zdyb, *Klauzula interesu publicznego w działaniach administracji publicznej*, Annales Universitatis Mariae Curie-Skłodowska, Lublin – Polonia, Vol. LXIII, 2 2016, pp. 161-179; A. Żurawik, *'Interes publiczny', 'interes społeczny' i 'interes społecznie uzasadniony'. Próba dookreślenia pojęć*, 'Ruch Prawniczy, Ekonomiczny i Socjologiczny', Year LXXV, book 2, 2013, pp. 57-69; R. Blicharz, M. Kania, *Klauzula interesu publicznego w publicznym prawie gospodarczym*, Przegląd Ustawodawstwa Gospodarczego 2010 No. 5, pp. 12-21; W. Jakimowicz, *Wykładnia w prawie administracyjnym*, Kraków 2006, p. 121; M. Wyrzykowski, *'Interes społeczny' jako kategoria proceduralna*, Acta Universitatis Wratislaviensis, No. 1022 Prawo CLXVIII, Wrocław 1990, p. 334.

2. THE SOCIAL MARKET ECONOMY AS A BASIS AND AREA OF FUNCTIONING OF THE SOCIAL ECONOMY

Article 20 of the Constitution of the Republic of Poland, proclaiming the social market economy, indicates that the state, through its organs, should shape the economy by establishing and applying laws allowing for a state of harmony between the free, predominantly private market economy and social needs, while at the same time ensuring conditions for the occurrence of dialogue and cooperation between social partners.[3]

In the above context, in conjunction with the principle of the social market economy, it seems pertinent to conclude that the economic system of Poland should be based on the union of the market economy and the social state. The state may intervene in the economy in order to mitigate the effects of the market mechanism with a view to maintaining macroeconomic equilibrium, programming and forecasting economic development, inspiring market participants to take into account the public interest, and creating actions to balance the market. The functioning of a completely free market would make it impossible to fulfil social needs.[4] However, this type of state action should not be equated with the expansion of the social benefit zone.[5]

Both the need to ensure a state of compatibility between the market economy and social needs, as indicated above, as well as the maintenance of an appropriate balance between marketisation and socialisation of the economy are functions of the state. Their premises are social justice, as indicated in the Constitution of the Republic of Poland (Article 2), and, in a broader sense, the public interest, including the social interest.

The social market economy implies an order for the state to intervene in the economy but with the assumption that such an intervention will be carried out in

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[3] cf., e.g., P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd Edition, LEX 2021, art. 20; W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 7th edition, Lex 2013, Article 20. cf. also: A. Żurawik, *Wykładnia w prawie gospodarczym*, Wydawnictwo C.H. Beck, Warszawa 2021, Chapter II, § 2, Legalis; T. Włudyka, *Model społecznej gospodarki rynkowej a transformacja ustrojowa polskiej gospodarki. Analiza prawnogospodarcza*, Kraków 2002, p. 124 and 191 *et seq*.; J. Ciapała, *Konstytucyjna wolność działalności gospodarczej w Rzeczypospolitej Polskiej*, Szczecin 2009, p. 61 *et seq*.; A. Żurawik, *Zasada społecznej gospodarki rynkowej w konstytucji RP*, (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (ed.), *System prawa administracyjnego*, T. 8A, *Publiczne prawo gospodarcze*, Warszawa 2013, pp. 442-449; T. Długosz, *Społeczna gospodarka rynkowa jako kryterium organizacji gospodarki*, Gdańskie Studia Prawnicze, Vol. XXXVII, 2017, pp. 17-25.

[4] cf. Judgement of the Constitutional Tribunal of 30 January 2001. K17/00, OTK 2001, No. 1, item 4.

[5] Elsewhere K. Strzyczkowski, *Konstytucyjna zasada społecznej gospodarki rynkowej jako podstawa tworzenia i stosowania prawa*, (in:) C. Kosikowski (ed.), *Zasady ustroju społecznego i gospodarczego w procesie stosowania Konstytucji*, Warszawa 2005, pp. 18-19.

order to realise the public (social) interest in a statutory form, which follows from Article 22 of the Polish Constitution. This intervention should not aim to negate the essence of the market economy or promote and introduce a statist economy. However, intervention is also a need based on the identification of social needs, and not only those that arise from the diverse articulation of social groups, organisations, and institutions but also those that should be recognised and identified by the state as *sui generis* representation of the community and an entity embodying the social interest.

The caveat here is that, notwithstanding the functional approach to the social market economy as an area of association between the market economy and social needs, the existence of subjective elements within the social market economy must be noted. These include not only those performing economic activity and purchasers of their services (products) but also all those whom Article 20 of the Constitution of the Republic of Poland treats as social partners conducting dialogue and aiming at cooperation and solidarity. Among all such entities, one should also include those that perform their tasks as entities of the social economy.

3. THE SOCIAL ECONOMY AND ITS OBJECTIVES

In reaching back to the origins of the essence, character, and definition of the social economy, it should be mentioned that in Europe, in the 19th century, manifestations of such an economy were already seen, which was mainly associated with the cooperative, foundation and association movement.[6] At the time, social economy institutions were perceived as those capable of reintegrating the economy into its social environment.

In Poland, during the Second Republic, on the basis of traditions already developed, the organisation of the social economy was developing and a tendency emerged towards *sui generis* organisational and institutional complementarity of associations, foundations, various types of social unions and cooperatives with respect to the activities of government and self-government administration bodies. After the war, when social and economic relations were dominated by a monopolistic conception of the state, including – in terms of defining, identifying, administering, and financing collective needs – the role of social economy entities was significantly reduced. Many institutions and social infrastructure

[6] cf. E. Leś, *Gospodarka społeczna i przedsiębiorstwo społeczne. Przegląd koncepcji i dobrych praktyk*, (in:) E. Leś (ed.), *Gospodarka społeczna i przedsiębiorstwo społeczne. Wprowadzenie do problematyki*, Warszawa 2008, p. 38 *et seq.*

facilities belonging to non-state actors were abolished and their properties were nationalised.[7]

Renewed interest in the concept of the social economy as an instrument of social policy increased after 1989 as a result of changes in the relationship between the basic participants in economic and social processes: the state, entrepreneurs, social organisations, and consumers.[8] Currently, under the doctrine, the social economy is also referred to as the solidarity economy, economy of solidarity, community economy, or civic economy. In subject terms, the social economy is sometimes equated with the third sector in the economy, as it includes organisations other than public (state) and market (commercial) organisations as they combine economic and social objectives within their framework.[9]

The material, functional, and subject matter scope of the social economy is delineated in the content of the 2002 'Charter of Principles for the Social Economy'.[10] The social economy, according to this document, comprises organisations that are economic and social actors operating in all sectors. They are mainly distinguished by their objectives and their characteristic form of entrepreneurship. The social economy includes organisations such as cooperatives, mutual societies, associations, and foundations. They can be particularly active in certain areas such as social protection, social services, health care, banking, insurance, agricultural production, consumer issues, association work, crafts, housing, supplies, neighbourhood services, education and training, as well as in the area of culture, sport, and recreation.[11]

In October 2022, the Social Economy Act[12] came into force. It adopts a subject-function definition of the social economy (*verba iuris*: economy), according to which the concept means – in accordance with Article 2(1) of the ES Act – 'the activity of social economy entities for the benefit of the local community in the field of social and professional reintegration, creation of jobs for persons at risk of social exclusion and provision of social services, realised in the form of economic

[7] cf. A. Piechowski, *Gospodarka społeczna i przedsiębiorstwo społeczne w Polsce. Tradycje i przykłady*, (in:) E. Leś (ed.), *Gospodarka społeczna i przedsiębiorstwo społeczne. Wprowadzenie do problematyki*, Warszawa 2008, p. 13 *et seq*.

[8] cf. in particular A. Giza-Poleszczuk, J. Hausner, *Wprowadzenie – ekonomia społeczna i rozwój*, (in:) A. Giza-Poleszczuk, J. Hausner (ed.), *Ekonomia społeczna w Polsce: osiągnięcia, bariery rozwoju i potencjał w świetle wyników badań*, Warszawa 2008, p. 11 *et seq*.

[9] cf. E. Leś, *op. cit.* p. 38.

[10] The text of the Charter was published in: 'Ekonomia Społeczna Kraków 2004. II Europejska Konferencja Ekonomii Społecznej – Materiały', MPiPS, Warszawa 2005, pp. 4-17; cf. also: J. Blicharz, *Gospodarka społeczna: nowy model przedsiębiorczości w służbie interesu ogólnego?*, Przegląd Prawa i Administracji CXXVIII, Wrocław 2022, pp. 27-30.

[11] 'Karty zasad gospodarki społecznej' from 2002, pp. 5-7; cf. also: D. Wacinkiewicz, *Usługi świadczone w interesie ogólnym jako element europejskiego modelu społecznego*, Studia Prawnicze KUL, 2 (78) Lublin 2019, pp. 255-273.

[12] cf. the Act of 5 August 2022 on the social economy, Journal of Laws, item 1812, hereinafter referred to as the 'ES Act'.

activity, public benefit activity and other activity of a payable nature'. The latter is an activity in the spheres of education, culture and carried out by rural housewives' circles, assuming, however, that it is not an economic activity.

It should be noted that the list of social economy entities includes entities with a normatively established organisational and legal form (social cooperatives, workers' cooperatives), as well as entities taking various forms but distinguished by their activities and their nature (public benefit organisations, NGOs), and also entities with an undefined legal character and undefined organisational and legal form (workshops, establishments, centres, and clubs). The latter, having no established organisational framework and an ascribed capacity to act (legal capacity), can hardly be considered as entities of any activity.

The definition formulated in the aforementioned Act does not concern the essence of the social economy but is based on the recognition that it is a group of many entities of a diverse legal nature. These entities may, by changing their legal status, create another group of entities (organisational units), in which each such entity is called a social enterprise and treated as an entity of economic activity, as well as a public utility and other profit-making activity. At the same time, it is not possible to determine what legal character a social enterprise has, although it follows from the provisions of the Act that it is an 'embodiment' of a social economy entity, being at the same time the basic entity implementing social economy objectives through activities with a statutorily defined purpose.[13]

Taking advantage of the opportunity to apply for social enterprise status entails having the status of a social economy entity and thereby pursuing social objectives and thus acting in the public (social) interest. It should be noted that in the economic literature, social enterprises are seen, among other things, as organisations seeking business solutions to social problems. They create benefits for the community regardless of ownership or legal structure and with varying degrees of financial self-sufficiency, innovation, and social transformation.[14]

Social enterprises, on the basis of the Social Economy Act, are divided into two groups using the criterion of the purpose of their activity. Thus, there are enterprises dealing with social and professional reintegration of persons at risk of social exclusion and enterprises providing social services (Article 4 of the ES Act).

It is emphasised that all social economy entities are characterised (from a functional and organisational point of view) by a number of principles. These include, in particular, the primacy of the social objective over the capital, voluntary and open membership, democratic control by members, the combination of private interests (members' or users') with the social interest, the defence and application

[13] cf. J. Blicharz, *Gospodarka społeczna: nowy model przedsiębiorczości w służbie interesu ogólnego?*, Przegląd Prawa i Administracji CXXVIII, Wrocław 2022, pp. 30-34.

[14] cf. M. Bohdziewicz-Lulewicz, D. Murzyn, A. Pacut, *Tworzenie regulacji prawnej dotyczącej przedsiębiorstwa społecznego w Polsce w kontekście teorii demokracji deliberatywnej*, Horyzonty Polityki, 2022, Vol. 13, No. 43, p. 55.

of the principles of solidarity and responsibility, self-governance and independence from public authorities, the use of the majority of surpluses to achieve social objectives.[15]

4. THE IMPLEMENTATION OF THE PUBLIC INTEREST IN THE SOCIAL ECONOMY

If it is reasonable to assume that the public interest formula may be a premise for limiting the freedom of economic activity, and consequently for narrowing or changing the character of the market economy, one cannot, at the same time, consent to arbitrary actions taken in the name of the public interest, unidentified as to their purpose and content. The Constitution of the Republic of Poland, in creating the legal construction of a social market economy and indicating its pillars, as well as in treating the possibilities of limiting the freedom of economic activity as one of these pillars, does not give any consent to exclude or significantly restrict the freedom and negate the market economy, even in the name of an important public interest. In order to prevent the use of the general public interest for actions contrary to the principle of the social market economy, it is necessary to recognise, first, the primacy of the freedom of economic activity over the public interest and, second, the need to identify the public interest, in order to ascertain, by means of legal and social control, the correctness of the actions of state bodies and their adherence to the said principle. On the other hand, however, it should be noted that the public interest is the starting point for the creation of the social economy, which, in turn, is exercised to realise the indicated interest.

According to the legislator's will, all social economy entities should be oriented towards meeting the needs of the local community in terms of social and professional reintegration, creating jobs for people at risk of social exclusion and providing social services.[16] Besides, the very term 'social economy' indicates the existence of a link between this type of activity and the social market economy.[17]

The social economy is (as a concept and a real institution) a specific consequence of the need and even necessity to respect the nature of the economy in

[15] cf. M. Małecka-Łyszczek, *Zakres podmiotowy i klasyfikacja pojęcia „podmiot ekonomii społecznej"*, (in:) J. Blicharz L. Zacharko (ed.), *Trzeci sektor i ekonomia społeczna. Uwarunkowania prawne. Kierunki działań*, Prace Naukowe Wydziału Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, Wrocław 2017, p. 207; cf. also J. Defourny, *Social Enterprises in Western Europe: Some Insights from the EMES Experience*, UNDPEMES Regional Workshop on Social Enterprises in CEE and CIS, Brussels, 11-12 December 2006.

[16] cf. Article 2(1) of the ES Act.

[17] cf. E. Przeszło, *Ekonomia społeczna w wymiarze podmiotowym i przedmiotowym – nowa konstrukcja prawna*, Przegląd Ustawodawstwa Gospodarczego 2023, No. 2, pp. 22-23.

general. This is because it should, in principle, function according to the rules of freedom (i.e., be a market economy), but at the same time, in accordance with the principle of a social market economy, it should take into account social needs, manifested through the demand for various types of social services as well as social and professional reintegration in the form of creating jobs for disadvantaged persons. These needs may be met by social economy entities, including mainly social enterprises. Their activity may and should be based both on striving to achieve a surplus of income over incurred costs and aiming to implement social objectives (needs). For its maintenance and prevention of excessive commercialization, this peculiar 'hybridity' of directions of social economy entities' activity requires the interference of external entities, mainly public ones that have adequate funds at their disposal, which may be allocated to support the process of satisfying social needs.[18]

5. PUBLIC INTEREST AS A RATIONALE FOR SUPPORTING THE SOCIAL ECONOMY

When treating support in the area of the social economy[19] one should, first of all, notice that it is mainly subjective and personalised. It usually concerns a certain group of entities, and these may be exclusively social economy entities or social enterprises but at the same time such support may be individualised due to the different degree of fulfilment of conditions for benefiting from the support, and thus, it may be selective. The support is also of a functional (object-oriented) nature and is connected with a general delineation of a number of activities addressed to all social economy entities (including social enterprises) but with the indication that it is intended for the 'development of social economy'.[20]

Support for the social economy seems to be primarily linked to the social market economy and, consequently, to the public interest in associating the market (commercial) economy with social needs. It should be noted that the role of the state is to act as a 'super-arbitrator' and, at the same time, as a decision-maker, aiming to reconcile various types of interests and various oppositions that often arise in areas of social and economic functioning. This role is reduced to, among other things, creating the conditions for the provision of assistance (support) and the actual provision of such assistance to all those who should, in view of their

[18] M. Chomątowska, *Możliwości wsparcia publicznego dla podmiotów ekonomii społecznej realizujących zadania publiczne*, Ekonomia Społeczna, 2014, No. 2, p. 21 *et seq.*

[19] M. Schröder, *Gospodarka społeczna jako część polskiego systemu gospodarczego. Rozważania definicyjne*, https://repozytorium.bg.ug.edu.pl (accessed: 1 April 2023), p. 262 *et seq.*

[20] This is stated in Section III of the ES Act.

objectives of action, provide social services and create jobs for those in need. After all, these objectives and their implementation are in close correlation with the public interest.[21]

It should be noted, moreover, that in a situation where it is possible to limit the freedom, thus narrowing the area of the rights of economic (including social) actors, and, consequently, their autonomy and freedoms, it should be possible to support those actors, in accordance with the content of the principle of a social market economy. Taking away a certain amount of their freedom from entrepreneurs and other economic actors on the basis of a public interest premise, therefore, justifies providing them with support, also in the public interest. This support, too, should be based on a premise of public interest and entail the need to take into account the interest of economic operators in the free market and to combine it with the public (social) interest in a simultaneous, even, and proportionate manner.

5. CONCLUSIONS

The public interest is a factor which is relevant to the social market economy, and within it, to the social economy that is motivated by the public interest, which is both its premise and its objective.

At the heart of the construction of the social market economy is the assumption that it is necessary, for reasons of public interest, to associate the organisation and functioning of the market economy with social needs. In turn, the social economy as a sum of entities and relevant functionalities is, as if by nature, oriented towards the realisation of the public interest. This interest should be the guideline for the state (its bodies) when creating the normative structure and delimiting the area of activity of the social economy but also, and perhaps above all, for providing comprehensive support to these entities. It is necessary from the perspective of the role and place of the social economy and social needs.

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[21] cf. A. Powałowski, (in:) A. Powałowski, M. Szczepaniec, A. Kociołek-Pęksa, *Wsparcie dla przedsiębiorców, aspekt prawny, ekonomiczny i społeczny*, Warszawa 2021, p. 2 *et seq.*

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HOW THE CONSTRUCTION OF WIND TURBINES CAN BE LEGISLATIVELY CONTROLLED ON THE BASIS OF PUBLIC INTEREST

– on the constitutionality of the Citizens' and Municipalities' Participation Act in wind farms in Mecklenburg-Western Pomerania and on the concept of 'overriding public interest'

Abstract

In order to implement the energy transition,[1] the Federal Republic of Germany has been relying increasingly on wind energy for several years. Wind farms, both offshore[2] and onshore,[3] play an important role here. Nevertheless, wind energy in Germany

[1] To clarify the term *Energiewende*: 'The energy transition in Germany means, on the one hand, the move away from fossil fuels, such as coal and lignite (coal phase-out) as well as oil and gas, the use of which leads to an increase in greenhouse gases, towards the use of renewable energies. In Germany, these are now mainly wind and solar ones on the basis of the Renewable Energy Sources Act (EEG). This is accompanied by a move away from the use of nuclear energy. The energy turnaround also includes increasing energy efficiency. The energy turnaround is thus the central instrument for achieving the climate protection goals that go back to the earlier Kyoto Protocols. M. Hakenberg, *Energiewende* (in:) K. Weber, Rechtswörterbuch, 29th ed., 2022.

[2] On the legal framework for investments in offshore wind farms and connection lines, see J. Butler, C. Hinderer, NVwZ 2013, 1377.

[3] Current view on aspects of accelerating onshore wind energy planning as a 'booster' K. J. Grigoleit, J. Engelberg, L. Strothe, M. Klanten, NVwZ 2022, 512.

suffers from a problem of acceptance. Local residents are afraid of visual and acoustic emissions, species protection concerns are raised, adverse effects on the landscape are claimed, and there are also fears of decrease in value of the properties.[4] For this reason, the federal state of Mecklenburg-Western Pomerania has enacted a law[5] that provides for mandatory participation of citizens and communities in the operating companies of wind turbines (the so-called 'citizens' wind farms'[6]). With this law, the federal state shows in an excellent example how state's influence on the economy and finances can look like in relation to public interests. But this is not the only way the legislator controls these public interest purposes. Recently, it has increasingly been using the 'overriding public interest' in legal texts to speed up the construction of wind power plants. These two juxtaposed instruments will be examined in more detail and their suitability will be analysed separately. Finally, the article presents an outlook with a recommendation for action to the federal legislature.

KEYWORDS

increasing acceptance, freedom of occupation, citizen wind farms, energy transition, renewable energies, climate change, entrepreneurial freedom, wind turbines

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rosnąca akceptacja, swoboda działalności gospodarczej, obywatelskie farmy wiatrowe, transformacja energetyczna, odnawialne źródła energii, zmiany klimatu, swoboda przedsiębiorczości, turbiny wiatrowe

I. INTRODUCTION

The mandatory participation of the citizens or municipalities, which is also to the detriment of the wind farm operators, leads to a quite significant encroachment on the operators' freedom of occupation protected under Article 12 para. 1 of the Basic Law (GG),[7] so a question arises as to whether such participation

[4] S. Muckel, JA 2022, 875 (875 f.).

[5] Law on the Participation of Citizens and Municipalities in Wind Farms in Mecklenburg-Vorpommern (Citizens' and Municipalities' Participation Act – BüGembeteilG M-V) of 18 May 2016, GVBl. M-V, p. 258.

[6] On the term in general, see H. Kramer, *Bürgerwindparks*, 2018, p. 42 ff.

[7] Basic Law for the Federal Republic of Germany, https://www.gesetze-im-internet.de/englisch_gg/.

can be justified under constitutional law and, if so, for what public interest. After the presentation of the Mecklenburg-Western Pomerania law (II.), the decision of the Federal Constitutional Court (BVerfG) on this participation obligation is analysed (III.). Later, the legal phenomenon of 'overriding public interest', which has recently emerged in federal legislation, is discussed as a further steering influence on the energy transition (IV.). Finally, the article gives an outlook and recommendations to the federal legislator on both instruments (V.).

II. THE CITIZEN AND MUNICIPAL PARTICIPATION ACT IN MECKLENBURG-WESTERN POMERANIA

For the areas to be dealt with here, the most important provisions are §§ 3, 4, 5 and 10 of the Citizen and Municipal Participation Act of Mecklenburg-Vorpommern (BüGembeteilG M-V). These read as follows:

§ 3 Project Company; Limitation of Liability

(1) The construction and operation of wind energy installations shall be carried out by a project-related company exclusively serving these purposes. The company shall be project-related if it concerns a project. Participation in other companies is only permissible if it is a subordinate auxiliary or ancillary business.[4] In the case of outsourcing of activities to other companies, the company shall expressly reserve the rights of organization, control, and instruction.

(2) In accordance with its legal form and concrete structure, the company must ensure the liability of the persons entitled to purchase under this Act, limited to the amount of the contribution, in external and internal relations.

(3) The memorandum or articles of association shall be drafted in accordance with the provisions of the municipal constitution for the participation of municipalities, municipal special-purpose associations or municipal undertakings in enterprises and institutions under private law.

§ 4 Obligation to participate and time of participation

(1) The developer shall offer to purchase at least 20 percent of the shares in the company pursuant to § 3. This quota shall be determined by the sum of all contributions to the company. Only shares which fulfil the requirements under section 3 para. 2 shall be counted towards this quota. The obligation pursuant to sentence 1 may be fulfilled by an indirect participation if such participation is equivalent to a direct participation in terms of its rights and is not subject to the scope of application of the *Kapitalanlagegesetzbuch*.

(2) The partnership agreement or the articles of association may not place the offered shares in a worse position than the other shares.

(3) The offer may be made no earlier than two months prior to the planned commissioning of the first wind turbine belonging to the project, provided that the approval within the meaning of section 4 of the Federal Immission Control Act has been obtained, and must have been made by the time the first wind turbine belonging to the project is commissioned. Immediately upon receipt of the immission control permit, the developer shall inform in writing those entitled to purchase pursuant to section 5 para. 2 of the project. If the remuneration for the quantity of electricity generated by wind energy installations pursuant to section 1 subsection (1) is determined by means of a public invitation to tender and if this invitation to tender takes place after receipt of the immission control permit, the developer shall publish the result on the Internet immediately after winning the invitation to tender and shall then, at the latest, fulfil the obligation to provide information incumbent upon it pursuant to sentence 2. Section 7 para. 2 sentence 1 shall apply *mutatis mutandis* to the content of the information, whereby with regard to numbers 5, 6, 9, 11, and 12 the communication of the anticipated data and with regard to numbers 7, 8, and 13 the communication of the developer's own preliminary calculation shall be sufficient.

§ 5 Persons entitled to purchase

(1) All natural persons who, at the time of publication of the offer, have been registered for at least three months with their residence at a distance of no more than 5 kilometers from the erection site or the location of the wind turbine are entitled to purchase within the meaning of § 4.

(2) Furthermore, the municipalities in whose territory the wind turbine is located as well as municipalities whose municipal territory is not more than 5 kilometers away from the location of the wind turbine shall be entitled to purchase.

(3) Instead of a municipality entitled to purchase pursuant to subsection 2, a municipal special-purpose association or an office of which the municipality is a member shall be entitled to purchase if the municipality expressly declares to the developer before the expiry of the subscription period that it waives its right to purchase and, in the case of a waiver in favor of a special-purpose association, the association is not economically active. The same shall apply with regard to a municipal undertaking or a joint municipal undertaking which is in the ownership of the municipality, insofar as it is not economically active.

(4) The distance pursuant to subsection (1) shall be measured between the property line of the registered place of residence of the respective person and the location of the wind energy installation. In the case of a wind farm, the site of

construction or the site of the nearest wind turbine of the project shall be decisive for determining the distance pursuant to paragraphs 1 and 2.

§ 10 Exemption clause

(1) In addition to the offer pursuant to section 4, the developer may offer the persons entitled to purchase an alternative possibility of economic participation, in particular, a reduced local electricity tariff. The offer pursuant to section 4 and the offer pursuant to sentence 1 do not necessarily have to be economically equivalent. (...)

(5) Instead of the offer under section 4, the developer may ensure the economic participation of the municipalities and residents by paying a compensatory levy under section 11 to the municipality or municipalities and offering a savings product under section 12 to the residents. (...)

In brief: According to § 3 of the Act, wind turbines may only be erected and operated in Mecklenburg-Western Pomerania by a 'project company' which exclusively serves the generation of wind energy. Pursuant to § 4 para. 1 sentence 1 BüGembeteilG M-V, the developer must offer at least 20% of the shares in the project company to those entitled to purchase them. Persons who live within a distance of no more than five kilometers from the site of the wind farm and those municipalities on whose territory the facility is located or which are located no more than five kilometers from the site are entitled to purchase. Instead, the developer can offer, as 'economic surrogates' of a shareholding under company law, the annual payment of a 'compensatory levy' to the municipalities entitled to purchase and the purchase of a savings product to the residents. The amount of the levy and the interest on the savings product are based on the income of the project company.[8]

A company that erects and operates wind turbines defended itself against these regulations. The company essentially justified its constitutional complaint on the following grounds: Anyone wishing to erect and operate wind turbines in Mecklenburg-Western Pomerania would be forced to establish an external company for each individual project, even if this did not make sense for tax, personnel, or administrative reasons. This would constitute a disproportionate encroachment on the freedom of occupation under Article 12 para. 1 of the Basic Law.

[8] *Overview* S. Muckel, JA 2022, 875 (875).

III. THE DECISION OF THE BVERFG

In its decision of 23 March 2022, the BVerfG ruled that the obligation of residents and municipalities to participate in wind energy companies is constitutional.[9]

1. Features of the judicature

The decision of the BVerfG can be divided – based on the typical examination of a violation of fundamental rights – into the scope of protection of the freedom to exercise an occupation, the obligation to participate as an encroachment on the freedom to exercise an occupation, a focus on legitimate purposes as justification for this encroachment, and proportionality in the narrower sense.[10]

a) The operation of wind turbines as a subject of freedom of occupation

The BVerfG first established that the freedom of occupation protected by Article 12 of the Basic Law also includes the freedom to establish and run businesses. This also involves the freedom to organise and contractually structure the entrepreneurial professional activity and to economically exploit the professionally rendered services.[11] This statement can also be applied to the operation of wind turbines without any problems.

b) Obligation to establish and participate as encroachments on the freedom of occupation

Next, the BVerfG defines the encroachments on the freedom of occupation by the paragraphs of the Mecklenburg-Western Pomerania Act challenged by the complainant. The obligation of the companies to specially establish holding companies (§§ 3 *et seq.* of the Act) and to offer at least 20% of the shares for purchase to the residents and municipalities entitled to purchase and to offer a savings product to natural persons (§ 4 para. 1 of the Act) are each independent encroachments on the freedom of occupation.[12]

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[9] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861. The court only declared an information obligation under § 10 para. 6 sentence 2 of the Act – which is not relevant here – unconstitutional. For lack of relevance, this will not be discussed in more detail here.

[10] The points of examination of suitability and necessity are not dealt with in detail here. The court's comments on this can be found in paragraphs 109-132.

[11] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 43.

[12] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 49.

c) Legitimate purposes as justification for the interventions

The BVerfG cites five legitimate purposes as justification for the interventions.

aa) Improving the acceptance of wind turbines

The direct purpose of the standard is to improve the acceptance of wind turbines. The court considers the latter to be an independent, constitutionally legitimate purpose. This is shown through the structuring of the developers' obligations by delimiting the circle of residents and municipalities entitled to participate according to a radius of 5 kilometers around the site of the wind turbine at the special visibility of the turbines, which is decisive for acceptance, as it results from the typical nature of the landscape in Mecklenburg-Western Pomerania.[13]

bb) Expansion of wind energy in Mecklenburg-Western Pomerania

The overriding purpose of the law can be derived from the direct purpose of the norm – the general expansion of wind energy plants in Mecklenburg-Western Pomerania.[14]

cc) Climate protection requirement, Article 20a GG

In the court's view, the first two purposes served the constitutionally legitimate climate protection requirement under Article 20a of the Basic Law.[15] This is because electricity can be generated from renewable energies, such as wind power, without emitting climate-damaging CO^2 during the generation process, as is the case with conventional electricity generation through the consumption of fossil fuels. With a reference to the climate protection resolution of 2021,[16] the BVerfG states succinctly that, in addition to measures for energy efficiency and energy saving, any measure aimed at further expanding the use of renewable energies serves to protect the climate, to which the state is obligated under the climate protection requirement of Article 20a of the Basic Law.[17]

dd) Duty to protect against the dangers of climate change

In addition, according to the court, again referring to the climate protection decision from 2021, the measures were also to be protected from the dangers of climate change as an expression of the state's duty under Article 2 para. 2 sen-

[13] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 100.

[14] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 102.

[15] On this in detail G. Britz, NVwZ 2022, 825.

[16] Decision of the Federal Constitutional Court of 24 March 2021, 1 BvR 2656/18, *et al*., NJW 2021, 1723.

[17] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 104.

tence 1 of the German Constitution (life and health) and Article 14 para. 1 of the German Constitution (property). The promotion of the expansion of wind energy plants thus also served to protect these fundamental rights from the dangers of climate change.[18]

ee) Securing the power supply

As a final, constitutionally legitimate purpose, the court recognises the public interest objective of securing the electricity supply. This is served by the increased expansion of electricity generation from renewable energies. At the same time, dependence on energy imports is reduced and self-sufficiency is strengthened.[19] Although the security of energy supply,[20] which is stipulated in Article 194 para. 1 TFEU and in § 1 para. 1 of the Energy Industry Act (EnWG),[21] is not explicitly mentioned in the Basic Law on Energy Security, it is a service that citizens need in order to secure a decent existence.[22] In short, energy is like 'daily bread'.

d) Proportionality in the narrower sense

With regard to proportionality in the narrower sense, i.e., the appropriateness of the challenged regulations, the court has to weigh the degree of encroachment on the freedom of occupation, on the one hand, and the constitutionally legitimate objectives, on the other. The requirement of proportionality in the narrower sense requires that the severity of the legislative restriction of fundamental rights is not disproportionate to the weight and urgency of the reasons justifying it. In doing so, an appropriate balance must be struck between the weight of the encroachment of the regulation and the legislative goal pursued, between individual and general interests.[23]

aa) Considerable weight of encroachment to the detriment of the freedom of occupation on the one hand

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[18] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 105.

[19] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 para. 106, 108.

[20] For a detailed discussion of energy supply security from a legal perspective: M. Ludwigs, NVwZ 2022, 1086.

[21] Electricity and Gas Supply Act (Energiewirtschaftsgesetz – EnWG) of 7 July 2005, BGBl. I, 1970, last amended by Art. 3 Gesetz zur Beschleunigung von verwaltungsgerichtlichen Verfahren im Infrastrukturbereich of 14 March 2023, BGBl. I No. 71, https://www.gesetze-im-internet.de/enwg_2005/BJNR197010005.html.

[22] Decision of the Federal Constitutional Court of 20 March 1984, 1 BvL 28/82, NJW 1984, 1872.

[23] Standing case law of the Federal Constitutional Court; cf. Decision of the Federal Constitutional Court of 17 October 1990, 1 BvR 283/85, NJW 1991, 555; Judgement of the Federal Constitutional Court of 14 July 1999, 1 BvR 2226/94 *et al*., NJW 2000, 55; Judgment of the Federal Constitutional Court of 17 December 2013, 1 BvR 3139, 3386/08, NVwZ 2014, 211.

The court assumes a 'considerable'[24] encroachment with regard to the entrepreneurial freedom in the form of the obligation to establish each individual wind energy project and the structure of such a project company. This is because the companies cannot carry out such projects through their own company or in any other form of company chosen by them, for example, on the basis of considerations of tax or organisational expediency; they may only participate in other companies within the framework of subordinate auxiliary or ancillary business and must enable participation of the municipalities entitled to purchase in accordance with the municipal law provisions existing for this purpose. In addition, the regulations reduce the return on the professional activities of the project developers. The natural persons and municipalities entitled to purchase must be offered shares in the project company amounting to at least 20% for purchase or, alternatively, as an 'economic surrogate', a savings product and payment of a compensatory levy. This leads to a reduction in the prospects of return.[25]

bb) Considerable public interest objectives on the other hand

On the other hand, according to the BVerfG, public interest objectives of 'considerable' weight are also at stake.[26] The court thus places the conflicting concerns of freedom of occupation, on the one hand, and climate protection, the protection of fundamental rights against the consequences of climate change and the security of electricity supply, on the other one, on an equal footing.

cc) Reasons for appropriateness

In the opinion of the court, the appropriateness of the participation obligations is supported by the fact that the legislator has not unilaterally given priority to the interest of improving acceptance over the opposing interests of the project developers. The obligation to sell 20% of the shares in the project company is limited to an extent that does not convey a blocking minority so that those entitled to purchase can neither determine the operative business of the project company nor block shareholder decisions.[27] Furthermore, according to § 10 para. 5 of the Act, the project developers are free to offer the natural persons entitled to purchase a savings product instead of a participation under company law, in order to be able to avoid the burdens resulting from the shareholder position of a large number of residents.[28]

[24] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 135.

[25] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 139.

[26] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 140.

[27] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 155.

[28] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17 NVwZ 2022, 861 marginal no. 155.

The private-benefit character of the measure also relativises the reduction in the return that the project developers have to accept as a result of the participation of the persons entitled to purchase in the distribution of profits or in the projected income of the project company. This is because the statutory objective of improving acceptance in order to create a prerequisite for the increased use of onshore wind energy coincides with the overall interest of the industry of plant operators in an expansion of suitable areas available for the use for the generation of wind energy.[29]

2. Effects

With this decision, the court has provided a building block for the success of the energy turnaround and for the achievement of the constitutionally required climate protection goals.[30] Thus, the Mecklenburg-Western Pomerania law can serve as a model for other federal states. The federal legislature has sometimes remained reticent in this regard. A uniform federal solution seems preferable so that there are no uncoordinated regulations between the federal states, which could in turn inhibit the expansion of wind energy plants. An increase in acceptance through direct participation can also lead to fewer complaints against the construction of wind turbines.

a) Model for other federal states

The court already points out that the law can serve as a model for comparable regulations to ensure citizen and community participation in the expansion of wind energy (for other federal states).[31] This is because strengthening the 'diversity of actors' through locally anchored projects is seen as an essential prerequisite for the successful expansion of onshore wind energy.[32]

b) Reaction of the federal legislature before the decision of the BVerfG

Even before the BVerfG decision, the federal legislator had taken a step towards greater financial participation for municipalities and citizens in the vicinity of wind turbines in § 36g and § 36k of the Renewable Energy Sources Act (EEG)[33]

[29] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 155.

[30] W. Köck, ZUR 2022, 412 (428).

[31] Decision of the Federal Constitutional Court of 23 March 2022, 1 BvR 1187/17, NVwZ 2022, 861 marginal no. 146.

[32] BT-Drs. 18/8832, p. 214; Federal Ministry of Economics and Climate Protection, Climate Protection Plan 2050, p. 39.

[33] Act on the Expansion of Renewable Energies (Renewable Energies Act – EEG 2023) of 21 July 2014, Federal Law Gazette I, 1066), last amended by Art. 6 G on the Immediate Improvement of the Framework Conditions for Renewable Energies in Urban Development Law of 4 January 2023, Federal Law Gazette I No. 6, https://www.gesetze-im-internet.de/eeg_2014/.

and created facilitations for citizen energy companies[34] (§ 36g EEG 2017), as well as the possibility of voluntary payments by turbine operators to municipalities (§ 36k EEG 2021, now § 6 EEG 2023). However, these regulations remained significantly behind those of the Mecklenburg-Western Pomerania Act.[35]

c) Uniform federal solution

In the coalition agreement of 2021, the governing parties agreed 'that municipalities should benefit appropriately financially from wind energy plants on larger open-space solar plants on their territory'.[36] This passage could serve as a gateway for a more far-reaching regulation, namely following the model of the Mecklenburg-Western Pomerania law on mandatory participation in all onshore wind energy plants. Admittedly, the law also serves as a model for the remaining federal states. However, different, uncoordinated regulations by the federal government and the states could lead to a situation where states with more far-reaching requirements for financial participation are economically less attractive from the point of view of wind energy companies and thus a nationwide regulation is necessary.[37]

e) Fewer lawsuits

Legal protection is often sought against the erection of wind turbines, which further delays construction and commissioning. If the project fails, it usually refers to wind farms with several wind turbines, a step towards the energy transition is missed. A positive side effect of participation through citizens' wind farms could therefore be that the affected citizens file lawsuits against the construction of wind turbines less frequently than is currently the case because they benefit financially from the construction.

3. Summary

The BVerfG found the obligation to participate in wind energy plants to be constitutionally permissible, despite the intensive encroachment on the freedom of occupation, with convincing reasons. In its decision, it appropriately balanced the tension between freedom of occupation and the public interest. At the same time, the court declared the improvement of acceptance for wind turbines and the expansion of wind energy to be constitutionally legitimate goals and purposes. Likewise, it has concretised the climate protection requirement enshrined in Article 20a of the Basic Law as a legitimate purpose of an encroachment on

[34] For the legal definition, see § 3 No. 15 EEG 2023.

[35] Thus convincingly and with more detailed justification W. Köck, ZUR 2022, 412 (428).

[36] Coalition agreement between SPD, Bündnis90/Die Grünen and FDP for the legislative period 2021-2025, p. 58.

[37] W. Köck, ZUR 2022, 412 (428).

the freedom of occupation in the present case of the obligation to establish and participate in wind energy plants. The Mecklenburg-Western Pomerania law can therefore rightly be considered a model for other federal states and for the federal government. By increasing acceptance, it represents an important building block in the context of the ongoing energy transition. However, a competitive situation between the individual federal states must be avoided. For this reason, the federal legislature should develop a uniform solution at the federal level and make participation mandatory by law. It is precisely through a uniform federal solution that the legislator prevents different forms of more or less intensive financial participation by municipalities and citizens. From an economic point of view, the latter are also of existential importance for the companies and must not be allowed to deter them from setting up in principle. However, there is not (yet) a uniform (legal) solution at the federal level.[38]

IV. THE SO-CALLED 'OVERRIDING PUBLIC INTEREST' IN ACCELERATING THE EXPANSION OF RENEWABLE ENERGIES

Still, it is not only through financial participation in wind turbines that the legislator is attempting to steer with public interest purposes. In July 2022, German Bundestag passed three laws with which it attempts to accelerate the expansion of renewable energies and especially in the area of wind turbines through the concept of 'overriding public interest'.

1. For the expansion of renewable energy, § 2 EEG

On the one hand, the federal legislator reworded § 2 EEG. It defined the 'overriding public interest' in the use of renewable energies, § 2 sentence 1 EEG.[39] By defining renewable energies as being in the overriding public interest and serving public safety, it must result in the particularly high weight of renewable energies being taken into account in the case of balancing. Therefore, according to § 2 sentence 2 EEG, renewable energies must be included as a priority concern in the weighing of protected interests until greenhouse gas neutrality is achieved. In concrete terms, renewable energies should only be given priority over seismological stations, radar installations, water protection areas, the landscape, monument protection or in forestry, immission control, nature conservation, building or road law in exceptional cases. Particularly in external areas under planning law, if

[38] On possible options for the federal legislator R. Weidinger, KlimR 2022, 212.

[39] Art. 1 No. 2 of the Act on Immediate Measures for an Accelerated Expansion of Renewable Energies and Further Measures in the Electricity Sector of 20 July 2022, Federal Law Gazette I, 1237.

no exclusion planning has been carried out, the priority of renewable energies must be taken into account when weighing up the protected goods. In this case, public interests can only oppose renewable energies as an essential part of the climate protection requirement if they are legally anchored or legally protected with a constitutional rank comparable to Article 20a GG, or have an equivalent rank.[40] Viewed as a whole, this legislative determination in the form of the weighing directive (§ 2 sentence 1 EEG) and the weighing requirement (§ 2 sentence 2 EEG) is intended to achieve an accelerated expansion of renewable energies.[41]

2. The operation of onshore wind turbines, § 45b para. 8 no. 1 BNatSchG

The legislature also added a new § 45b para. 8 no. 1 to the Federal Nature Conservation Act (BNatSchG)[42].[43] This is intended to clarify that the operation of onshore wind turbines is in the 'overriding public interest' and serves public safety. This provision is directly related to § 45 para. 7 BNatSchG. The latter makes it possible to grant exemptions from the ban on killing and disturbing specially protected animal and plant species. According to the will of the legislator, state authorities must now take this 'overriding public interest' into account when weighing it against other legal interests. This is also to be assumed in the present context within the framework of the decision on the existence of an exceptional reason pursuant to Article 45 para. 7 sentence 1 no. 5 BNatSchG.[44]

The background to the regulation was that the prohibitions under species protection law significantly limited the options for the use of wind energy.[45] Overall, the new regulation should make it easier to grant an exemption under species protection law for the operation of wind turbines in order to accelerate the expansion of wind energy.[46]

3. Offshore wind turbines and offshore connection lines, § 1 para. 3 WindSeeG

Since 1 January 2023, the construction of offshore wind turbines and offshore connection lines has also been subject to a legal standard of 'overriding public

[40] BT-Drs. 20/1630, p. 159.

[41] S. Schlacke, H. Wentzien, D. Römling, NVwZ 2022, 1577 (1578).

[42] Nature Conservation and Landscape Management Act (Bundesnaturschutzgesetz – BNatSchG) of 29 July 2009, BGBl. I, 2542, last amended by Art. 3 Erstes G zur Änd. des Elektro- und ElektronikgeräteG, der EntsorgungsfachbetriebeVO und des BundesnaturschutzG of 8 December 2022, BGBl. I, 2240, https://www.gesetze-im-internet.de/bnatschg_2009/.

[43] Art. 1 No. 3 of the Fourth Act to Amend the Federal Nature Conservation Act of 20 July 2022, Federal Law Gazette I, 1362.

[44] BT-Drs. 20/2354, p. 27.

[45] German Advisory Council on the Environment (ed.), Klimaschutz braucht Rückenwind: Für einen konsequenten Ausbau der Windenergie an Land, statement February 2022, p. 39.

[46] BT-Drs. 20/2354, p. 26.

interest', § 1 para. 3 of the Wind Energy at Sea Act[47] (WindSeeG).[48] This clarification is accompanied by the idea that the particularly high weight of renewable energies will be taken into account in the event of a balancing process and that renewable energies will be included as a priority concern in the balancing of protected interests until greenhouse gas neutrality is achieved.[49]

4. Summary

With the concept of the 'overriding public interest',[50] the legislator is attempting to accelerate the expansion of wind energy in the Federal Republic of Germany in several specialised laws. It is doubtful whether the acceleration of the expansion can be achieved by abstract (federal law) amendments to the law alone.[51] For the experience of enforcement to date and the evaluation of case law have shown in practice that the concepts of overriding public interest and the 'overriding public interest' used so far have not led to projects for the expansion of renewable energies being given priority in individual cases.[52] This is because public law is always subject to enforcement by the authorities. In order for it to take effect, it will be important for the authorities to give the new concern of overriding public interest the necessary importance in the approval decisions.[53] However, a first step in the right direction has been taken, because by introducing the 'overriding public interest', the legislator has narrowed the weighing decisions to be made by the authorities with this new term.[54] It is to be expected that this term will also be used in further specialised legislation on the expansion of renewable energies or generally to accelerate planning and approval procedures in order to realise political goals of the federal government.[55]

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[47] Act on the Development and Promotion of Wind Energy at Sea (Wind Energy at Sea Act – WindSeeG) of 13 October 2016, Federal Law Gazette I, 2258, 2310, last amended by Art. 10 G on the Introduction of an Electricity Price Brake and on the Amendment of Further Energy Law Provisions of 20 December 2022, Federal Law Gazette I, 2512, https://www.gesetze-im-internet.de/windseeg/.

[48] Art. 1 No. 2 lit. b) of the Second Act amending the Wind Energy at Sea Act and other provisions of 20 July 2022, Federal Law Gazette I, 1325.

[49] BR-Drs. 163/22, p. 67.

[50] In § 2 EEG, which covers the use of renewable energy in general, as well as in § 45b para. 8 no. 1 BNatSchG, which refers specifically to onshore wind turbines, and § 1 para. 3 WindSeeG, which refers to offshore wind turbines and offshore connection lines, cf. above.

[51] For more details, see A. Versteyl, K. Marschhäuser, KlimR 2022, 74 (78) on the EU legal requirements that must still be observed.

[52] This is impressively demonstrated by A. Versteyl, K. Marschhäuser, KlimR 2022, 74 (77).

[53] More detailed and with further evidence A. Versteyl, K. Marschhäuser, KlimR 2022, 74 (79).

[54] I. Gillich, DÖV 2022, 1027 (1031).

[55] Thus for the construction of LNG terminals, see § 3 sentence 3 LNG Act. On this in detail I. Gillich, DÖV 2022, 1027.

V. OUTLOOK AND RECOMMENDATION

The legislator can control the construction of wind power plants in various ways for reasons of public interest. However, the two instruments presented here require further development in order to ensure the accelerated expansion of wind power plants and their acceptance in the long term. Thus, in consistent implementation of the coalition agreement, the federal government should quickly enact the financial participation obligation in wind turbines, which the Federal Constitutional Court has deemed constitutionally permissible, in a federal law and take the model from Mecklenburg-Western Pomerania as a reference point. Whether this can be expected in the short term, however, seems questionable in view of the politically tense situation of the three coalition partners between SPD, Bündnis90/Die Grünen and FDP. In order to check whether the mere stipulation of the 'overriding public interest' leads to an acceleration of the approval procedures, the federal government should evaluate this instrument in a few years on the basis of a legal study.

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CREDITORS' SATISFACTION, FAIR DISTRIBUTION, OR AVOIDING THE STRUGGLE FOR SURVIVAL – WHICH PUBLIC INTERESTS IS CORPORATE INSOLVENCY LAW SUPPOSED TO SERVE?

Abstract

For a long time, insolvency proceedings were understood as a special civil law procedure with the aim of maximizing creditor satisfaction. To the extent that public interests played a role in this, it was a matter of giving preferential treatment to particular groups of creditors. This was expected to contribute to the realization of sociopolitical values.

For good reasons, such values are receiving less and less consideration in insolvency law. Instead, it has been recognized that proper structuring of the legal relationship between the debtor company and its creditors is likely to minimize macroeconomic damage in the public interest. This has led to a substantial change in the objectives of insolvency law, which – especially thanks to the Restructuring Directive (2019/1023/EU) – has arrived in all European legal systems. This article traces the paradigm shift and shows, using the example of German and Polish insolvency law, that despite having its foundations in European law, it has not yet been fully internalized in the legal systems of all Member States.

KEYWORDS

insolvency and restructuring, Restructuring Directive, privileged creditors, macroeconomic efficiency

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upadłość i restrukturyzacja, dyrektywa restrukturyzacyjna, uprzywilejowani wierzyciele, efektywność makroekonomiczna

1. INTRODUCTION

The insolvency laws of almost all continental European countries have undergone considerable reform in recent decades. The main reason is a changing conception of the issues that corporate insolvency law is designed to serve. It was traditionally conceived as a mechanism for maximum creditor satisfaction through the enforcement of debtor's liability.[1] The foundation in the history of ideas is the ancient Roman bankruptcy procedure.[2] In contrast, hardly any weight was attached to the issues of a debtor company (or its shareholders). According to the traditional view, they had failed economically and were therefore not worthy of further participation in the market. A broader public purpose of corporate insolvency law was also seen in this context. It used to serve as a vehicle for market consolidation by excluding economically failed entrepreneurs.[3] However, the assumption that the insolvency of a company indicates that it cannot operate profitably and should therefore be excluded from the market has proven to be also unfounded.

Indeed, a company may also get into financial trouble after not optimally using its resources due to poor management or it may collapse under the interest burden of debt previously taken although operating profits are now being generated. Moreover, exogenous factors such as the coronavirus pandemic, the Russian war of aggression in Ukraine, and the subsequent inflation have recently put basi-

[1] On German law, amongst others, German Federal Court of Justice, Judgement of 20 February 2003, IX ZR 81/02. The situation used to be similar under Czech law, cf. C. Zezulková Vitková, O. Zezulka, *Preventive Restructuring*, in: N. Grmelová (ed.), Perspectives of Law in Business and Finance, 2023, pp. 65-66.

[2] For an overview of insolvency proceedings in ancient Roman law see R. Obenchain, *Roman Law of Bankruptcy*, Notre Dame Law Review 1928, No. 4, pp. 180 *et seq*.

[3] From a German perspective, C. Paulus, *Die „Aufgabe" des Insolvenzrechts*, Zeitschrift für Restrukturierung und Insolvenz 2021, No. 2, pp. 45-46.

cally healthy companies into financial distress.[4] Finally, excluding such companies from the market activity is harmful, especially, if this is accompanied by the dismantling of their previously coordinated entrepreneurial units.

This realization is the starting point of a paradigm shift that has now reached the insolvency laws of all Member States, especially thanks to the assistance of the European legislator. The focus is no longer solely on the maximum creditor satisfaction, if necessary, at the expense of breaking up the debtor company. Instead, the public interest in avoiding macroeconomic damage has found its way into insolvency law.[5] Insolvency law hence no longer primarily regulates the legal relationships between a company in crisis and its creditors. It has become a matter that takes a business crisis as an opportunity to enable macroeconomically useful restructuring of ailing companies[6] (*infra* 2.). Furthermore, a question arises as to whether insolvency law is also a suitable vehicle to enforce sociopolitical ideas of a 'fair' distribution of debtors' assets (*infra* 3.).

2. THE PUBLIC INTEREST IN REDUCING MACROECONOMIC DAMAGE THROUGH INSOLVENCY LAW

The first objective in shaping insolvency law is, therefore, to minimize macroeconomic costs. A distinction must be made here. The losses from the previous entrepreneurial activity that got the company into difficulties have already been incurred; they cannot be reversed but only distributed in restructuring or insolvency proceedings. However, insolvency law can help to avoid the destruction of further assets.

2.1 THE PUBLIC INTEREST IN AVOIDING STRUGGLES FOR SURVIVAL

In this sense, it is the function of insolvency law to avoid an intense struggle for the survival of a distressed company. Here, managers and shareholders[7] desperately try to avert insolvency. This is, in fact, harmful in many regards.

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[4] A. J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, Columbia Law Review 2020, No. 7, p. 1738; C. Cavallini, M. Gaboardi, *Towards a Transnational Model of Bankruptcy Law*, UC Davis Business Law Journal 2023, No. 1, pp. 78-79.

[5] Cf. recital 16 to the Restructuring Directive.

[6] For an overview on the recent development in European legislation and its backgrounds cf. C. Cavallini, M. Gaboardi, *supra* note 5, pp. 65 *et seq.*

[7] For the sake of simplicity, it shall be assumed here that the shareholders are willing and able to determine the course of the company in which they hold an interest.

Firstly, the shareholders of ailing companies have an incentive to make economically damaging investment decisions. Since their shares are worthless or almost worthless anyway, they will not lose much, even in the case of high losses of the company; rather, the losses will be charged to its creditors, whose insolvency dividend will decrease. If, on the other hand, profits are made, the shareholders will benefit from them in full because they can be distributed or (if left in the company) lead to an increase in the value of the shares.[8]

As a result, taking almost any entrepreneurial risk becomes worthwhile for the shareholders, because even if there is little likelihood of making a profit, they can possibly avoid insolvency and obtain the profit, whereas the (much more likely) losses resulting from taking that risk no longer have any influence on their financial position. Even investments that very likely lead to the destruction of values become worthwhile from the shareholders' perspective.[9] To put it bluntly, it may be favorable from their point of view to use the remaining liquid assets in the casino. Fittingly, such excessively risky investment behavior in the perspective of insolvency is broadly referred to as 'gambling for resurrection'.[10]

Secondly, the damage resulting from the fact that new creditors repeatedly try to access the assets of an insolvent company is considerable. If the liquid assets are not sufficient to satisfy a creditor, the company is forced to convert production means, i.e., the foundations of its continued economic existence, into money. If the company does not do this itself, individual creditors can compulsorily bring about this conversion into cash in the course of individual enforcement. As a result, a cohesive productive unit is torn apart and it becomes increasingly unlikely that revenues can be generated from the continued entrepreneurial activity, which could be satisfactory for the remaining creditors.[11]

The creditors are hence caught in the so-called 'prisoner's dilemma'. From the point of view of the creditors as a whole, it seems optimal to refrain from accessing the debtor company's assets so that the company remains intact and can later yield a profit or at least be liquidated as a coordinated unit. From an individual creditor's point of view, however, immediate access to the debtor's assets is advisable, because otherwise other creditors could get faster access to them. In order to achieve the optimal result, all creditors must, therefore, agree to behave optimally in the interest of the entire group of creditors and to refrain from individual

[8] M. C. Jensen, W. H: Meckling, *Theory of the firm: Managerial behavior, agency costs and ownership structure,* Journal of Financial Economics 1976, No. 4, pp. 334 *et seq.*

[9] For an in-depth theoretical substantiation cf. A. Rivera, *Dynamic Moral Hazard and Risk-Shifting Incentives in a Leveraged Firm*, Journal of Financial and Quantitative Analysis 2020, No. 4, pp. 1333 *et seq*.

[10] Cf. J.-P. Décamps, A., Faure-Grimaud, *Bankruptcy Costs, Ex Post Renegotiation and Gambling for Resurrection*, Finance 2000, No. 2, pp. 71 *et seq*.

[11] Fundamentally D. G. Baird, T. H. Jackson, *Cases, Problems and Materials on Bankruptcy*, Boston 1985, pp. 31 *et seq.*

compulsory enforcement measures.[12] In order to reach this agreement, however, they need a forum to coordinate their interests, which a debtor in his struggle for survival cannot offer them.

Thirdly, in the struggle for the survival of the debtor company, individual (major) creditors gain a superior position, which they can exploit to the detriment of the debtor company and the other creditors. Thus, by threatening to otherwise proceed to individual enforcement and thereby make the debtor company extinct, they can induce the debtor to grant him special advantages. Practice has shown that the subsequent securing *in rem* of already existing (unsecured) significant loans plays a role here.[13]

An economically sound company would hardly agree to such disadvantageous transactions. However, if this is the only way to avoid immediate collapse, its shareholders will give in. After all, they thereby preserve the possibility of later dividend payouts in the (unlikely) event of rescue through their own efforts. They do not have to consider the (much more likely) case of imminent failure. In this case, all the company's assets will be lost to the creditors anyway. It is then irrelevant from the shareholders' point of view how much of these assets will each creditor then receive. This illustrates the fourth problem. For the shareholders of an ailing company, there is no longer any incentive to ensure a distribution of its assets that is in line with the market or perceived as 'fair' from any point of view.

2.2. THE PUBLIC INTEREST IN MAINTAINING COORDINATED ECONOMIC UNITS

The fact that the decomposition of coordinated productive units can be macroeconomically harmful has already been mentioned in connection with the struggle for survival. There, the decomposition was an undesirable consequence of the efforts of the debtor company to survive the permanent claims by individual creditors on its own. In contrast, state regulation of the legal relationship of insolvent enterprises is only justified if it succeeds in keeping at least potentially profitable coordinated productive units alive. In this case, insolvency law also has a desirable market-ordering effect. Only those enterprises are excluded from

[12] This fundamental finding by T. H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, Yale Law Journal 1985, No. 5, p. 862, remains prevalent until now., cf. L. Ponoroff, *The Resiliency of the Equality of Creditors Ethos in Bankruptcy*, American Bankruptcy Institute Law Review 2022, No. 1, p. 26-27 (with further evidence in fn. 185 and 190).

[13] The German Federal Court of Justice (BGH) gave detailed reasons for the immoral nature of such arrangements in two early decisions – BGH, Judgements of 5 January 1955, IV ZR 154/54 and of 24 November 1964, V ZR 169/62 – the substance of which has not since been doubted. Cf. most recently Saarbrücken Higher Regional Court (OLG Saarbrücken), Judgement of 13 October 2021, 5 U 20/21.

market activity that cannot be operated profitably.[14] The resources tied up in such companies can then be used for more profitable businesses.

2.3. SHIFT OF PARADIGMS AS A LEGISLATIVE REACTION

A progressive corporate insolvency law must therefore, firstly, provide an economically more favorable alternative to entering the struggle for survival and, secondly, offer the parties involved sufficient incentives to go through this procedure.[15] Thus, if the law wants to avoid the break-up of productive units, it must, at least temporarily, prevent measures of individual compulsory enforcement. During this time, creditors must be given the opportunity to gain an overview of the situation at the debtor company and, on this basis, coordinate their interests in order to escape the 'prisoner's dilemma'.[16]

These findings are not new and have always been applied in the 'classic' insolvency proceedings.[17] However, in terms of avoiding social costs, these mechanisms are only effective if as many ailing companies as possible make use of them. To this end, the law must set incentives for such companies that discourage them from entering the struggle for survival.[18]

The traditional method of making the struggle unattractive relies on deterrence by stating the delayed filing of insolvency a criminal offence. Added to this is personal liability for those responsible for the delay.[19] However, this approach in itself is insufficient for both practical and theoretical reasons. Only a very small proportion of cases of delayed filing of insolvency are actually prosecuted; the number of unreported cases is high and proving the delay is extremely difficult in practice, even in retrospect.[20] From a theoretical point of view, the threat of punishment for the delayed filing of insolvency is insufficient because it does not by far cover all cases in which an ailing company enters the struggle for survival. Firstly, natural persons as company owners are not obliged to file for

[14] H. Eidenmüller, *What Can Restructuring Laws Do?*, European Business Organization Law Review 2023, No. 2, p. 247.

[15] R.C. Picker, *Voluntary Petitions and the Creditors' Bargain*, University of Cincinnati Law Review 1992/1993, pp. 519 *et seq*. (with the conclusion on p. 540).

[16] H. Eidenmüller, *What is an Insolvency Proceeding?,* American Bankruptcy Law Journal 2018, No. 1, pp. 67-68.

[17] H. Eidenmüller, *ibid,* pp. 56 *et seq*.

[18] H. Eidenmüller, *Reformperspektiven im Restrukturierungsrecht*, Zeitschrift für Wirtschaftsrecht (ZIP) 2010, No. 14, p. 652.

[19] Under German law, this liability arises from § 823 para. 2 BGB (Civil Code) and § 15a InsO (Insolvency Code). Internationally, according to British terminology, it is often referred to as 'wrongful trading'.

[20] H. C. Hirt, *The Wrongful Trading Remedy in UK Law: Classification, Application and Practical Significance*, European Company and Financial Law Review, 2004, pp. 102 *et seq*. (on the liability due to wrongful trading).

insolvency, and secondly, it only takes effect as soon as the inability to pay or a qualified form of over-indebtedness has occurred.[21] However, the struggle for survival often begins earlier, for instance, if the debtor company is still liquid but will no longer be so in the foreseeable future.

If the threat of criminal and liability law consequences is obviously not particularly deterrent and hardly discourages shareholders of the distressed companies from entering the struggle for survival,[22] positive incentives are needed to generate the macroeconomically desirable behavior. In any case, the initiation of 'classic' insolvency proceedings does not appear to be attractive to the debtor company's shareholders. First of all, they lose the power to determine the business policy and they do not have any influence on the proceedings. Their company might even be closed down and they will lose their shares without compensation.[23] Moreover, their reputation as entrepreneurs is at risk of being damaged once their economic failure becomes public knowledge.[24]

In relation to such prospects, entering the struggle for survival seems perfectly rational to the shareholders of an ailing company. A progressive insolvency law must, therefore, offer better prospects to shareholders who refrain from the struggle. Optimally, they retain control over business policy and have the prospect of still holding (at least a partial) stake in their company after an agreement on the restructuring of debts has been reached with creditors. Such an agreement can include, for example, deferrals or a moderate debt waiver and it can only be reached with all creditors together. Then, within the creditors' collective, not every single creditor may have the power to derail the entire agreement. Such a power would invite the use of it to pursue undeserved special advantages. For example, insignificant creditors, in particular, could threaten to derail the settlement if their claims were not fully satisfied immediately.[25] What is necessary, but also sufficient, is a majority-supported formation of will within the collective of creditors.[26]

Many of these insights are most likely already known to Polish readers, especially as the Polish legislator recognized the aforementioned necessities and, on

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[21] Under German law, cf. §§ 15a, 16, 18 InsO, under Polish law Art. 21 para. 1, Art. 11 Prawo Upadłościowe.

[22] For empirical evidence see H.-J. Kirstein, *Ausführungen zur real existierenden Situation bei Eröffnungs- und Befriedigungsquoten in Insolvenzverfahren*, Zeitschrift für das gesamte Insolvenz- und Sanierungsrecht (ZInsO) 2006, p. 966 *et seq.* and H.-J. Kirstein, *Der früh beginnende und lang anhaltende Todeskampf juristischer Personen – Ein Erfahrungsbericht aus der Praxis*, ZInsO 2008, pp. 131 *et seq.* (both on the situation in Germany).

[23] L. A. Weiss, *Bankruptcy resolution. Direct costs and violation of priority of claims*, Journal of Financial Economics 1990, No. 2, pp. 288-289.

[24] E. Moustaira, *International Insolvency Law*, 2019, pp. 2 *et seq.*

[25] H. Eidenmüller, *supra* note 19*,* p. 659.

[26] Recital 47 to the Restructuring Directive. On alternative approaches to a solution cf. H. Eidenmüller, *supra* note 17*,* p. 68.

this basis, created an insolvency law in 2015 that included a fundamental paradigm shift[27] and was subsequently rightly described as one of the most progressive on the European continent.[28]

In order to avoid social costs, four restructuring procedures were introduced simultaneously, all of which were intended to offer the shareholders of a debtor company better options than entering the struggle for survival. These were regulated in a separate act outside the Insolvency Code,[29] mainly for psychological reasons. No shareholder should worry about being branded as a failing entrepreneur because of recourse to proceedings according to an insolvency-related act.[30] Restructuring proceedings are initiated at the request of a debtor company that need not yet be insolvent (Art. 6 para. 1 Prawo Restrukturyzacyjne), the debtor can retain the power of disposal and is supervised only by a trustee, and finally the creditors' meeting decides on a settlement with the debtor by a (qualified) majority (Art. 119 para. 1 Prawo Restrukturyzacyjne). Moreover, the restructuring filing takes priority over the insolvency filing according to Article 9a Prawo Upadłościowe, so that it is mandatory to first discuss the possibilities of preserving productive units before proceeding to liquidate the assets and distribute the revenues to the creditors.

2.4 THE IMPLEMENTATION OF THE PARADIGM SHIFT

All these requirements are now also met by the Restructuring Directive, which forces national legislators to implement the paradigm shift already anticipated by Polish law in 2015 and also in their less progressive insolvency law systems – for example, in the German one. However, it is interesting to look at the extent to which the readjustment of the public interest in avoiding social costs influences (or does not yet sufficiently influence) the answers to individual legal questions.

The legal treatment of the so-called 'pressure filings' is an illustrative example of the following situation. Here, a (usually rather insignificant) creditor, who initially could not obtain satisfaction from the debtor company, files for insolvency although he is not primarily interested in actually initiating the debtor's insolvency but rather in getting the debtor company to make payments in order to ward off insolvency proceedings.[31]

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[27] Polish Journal of Laws: Dz.U. 2015, item 978.

[28] M. Tallen, P. Kuglarz, *(Vor-)insolvenzliche Sanierungsverfahren – Ein Vergleich zwischen dem polnischen und dem deutschen Recht*, Osteuroparecht 2016, No. 2, p. 239.

[29] The new act is called 'prawo restrukturyzacyjne' (Prawo Restrukturyzacyjne), in distinction to 'prawo upadłościowe' (Prawo Upadłościowe).

[30] Sejm, printed matter No. 2824 of 9 October 2014, p. 278.

[31] The German term for this is *Druckantrag*. For a detailed description of this phenomenon in German law cf. D. Wegener, § 14 para. 73-75 (in:) W. Uhlenbruck, H. Hirte (eds.), *Insolvenzordnung*, 15th ed., Munich 2019.

Under the traditional approach, the creditors' petition is a necessary means to force out of the market distressed companies whose shareholders fail to file for insolvency. Individual creditors are thereby given the power to herald the 'civil death' of failed entrepreneurs. If one proceeds from this understanding, 'pressure filings' are undesirable because the filing creditor exploits its power for purposes unrelated to the proceedings. This understanding is still followed by German insolvency law, on which the aforementioned shift of paradigms was merely imposed from the outside as part of the implementation of the Restructuring Directive.

The fact that the traditional assumption still prevails in the treatment of pressure filings in German law can also be seen from the fact that under German law a creditor can withdraw his insolvency petition as long as the insolvency proceedings have not yet been opened by the court.[32] If the debtor satisfies the filing creditor in full, the prevailing opinion in German case law even assumes that the interest of the filing creditor in the continuation of the insolvency proceedings has thereby ceased and that they may therefore not be continued at all.[33] As a result, many creditors withdraw their insolvency petitions as soon as they have received a payment from the debtor company. In such cases, insolvency proceedings are not opened; rather, the debtor company can continue their struggle for survival.[34]

Polish law, which coherently focuses on the avoidance of economic damage caused by the struggle for survival, is much more advanced in this respect. Here, the creditor filing is not regarded as necessary but undesirable, but rather as a welcome means of early initiation of orderly proceedings on ailing debtor companies, which prevents or at least shortens the struggle for survival. Therefore, the insolvency court may declare the withdrawal of a creditor filing inadmissible if this results in disadvantaging other creditors (namely because of the continuation of the struggle for survival) according to Article 29a para. 1 Prawo Upadłościowe. Systematically, this welcome approach is rounded off by Article 9a Prawo Upadłościowe. According to this, even the pressure filing does not necessarily lead to the opening of insolvency proceedings. If the pressure filing opens the eyes of the shareholders and they now recognize that the economic viability of their company is at risk, they may themselves seek restructuring and file a corresponding petition. Such a filing must then be given priority over the creditor's insolvency filing as long as insolvency proceedings are not yet opened and may result in the shareholders restructuring their ailing company on their

[32] German Federal Court of Justice (BGH), Judgement of 11 November 2004, IX ZB 258/03; German Federal Court of Justice (BGH), Judgement of 24 September 2020, IX ZB 71/19.

[33] Göttingen District Court (AG Göttingen), Judgement of 9 January 2018, 74 IN 210/17; Leipzig District Court (AG Leipzig), Judgement of 5 September 2017, 403 IN 1109/17.

[34] The fact that some rulings on pressure filings appear incoherent seems to be recognized only slowly in the German academic discussion, as by G. Pape, § 13 para. 226 *et seq*. (in:) B. Kübler *et al.* (ed.), *Kommentar zur Insolvenzordnung*, 95th edition, Cologne 2021.

own, in consultation with the creditors. The pressure filing, therefore, does not necessarily lead to the breakup of the debtor company; due to Article 29a para. 1 Prawo Upadłościowe, its shareholders are rather left with options to save their business idea at an early stage and to the benefit of all sides.

3. THE PUBLIC INTEREST IN AN ACCEPTABLE DISTRIBUTION OF THE DEBTOR'S ASSETS

If, on the other hand, the exclusion of a structurally unprofitable enterprise from market activity appears inevitable, it is the task of insolvency law to distribute the losses accumulated by the failed enterprise. In the public interest, this distribution must meet with the highest possible acceptance by those affected.[35] In this sense, equal treatment of all creditors is particularly obvious. It finds its normative justification in the consideration that equality is the simplest principle of justice.[36]

This raises the question of whether deviations from the principle of equal distribution of debtors' assets in favor of particular creditor groups by granting them absolute liquidation preferences are a suitable means of enforcing political concepts of justice in the public interest. Such approaches, with varying degrees of specificity, have long existed in most jurisdictions; however, they have been cut back in recent decades.[37]

The remaining categories of cases that cover preferential treatment of certain creditor groups in insolvency proceedings are based on the consideration that social hardship should be avoided[38] and are intended to express a special socio-

[35] V. Finch, *The Measures of Insolvency Law*, Oxford Journal of Legal Studies 1997, No. 2, pp. 228-229.

[36] This assumption, which was fundamentally substantiated, e. g., by E. Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, Michigan Law Review 1983, No. 3, pp. 579 *et seq*., has yet recently been challenged by D. A. Skeel Jr., *The Empty Idea of "Equality of Creditors"*, University of Pennsylvania Law Review 2018, No 3, pp. 741-742.

[37] For example, as part of the reform of Polish insolvency law in 2015, numerous privileges for specific creditor groups were abolished. Similar changes were already made in German insolvency law in 1994.

[38] This purpose is served by the first-ranking classification of employee claims according to Art. 342 para. 1 fig. 1 Prawo Upadłościowe. Under German law, employees in insolvency are no longer given preferential treatment.

political appreciation for certain groups.[39] Moreover, in some constellations, the state grants public entities the right to preferential satisfaction.[40]

In the first two constellations, a question arises as to whether it makes sense to burden the other creditors with the costs of pursuing welfare and sociopolitical goals. Even from a normative point of view, this seems doubtful. After all, the appreciation of farmers – if one considers it politically desirable – is a task for society as a whole, so that it stands to reason that it should also be financed by society as a whole through taxes, and not by creditors already battered by the debtor's insolvency. In the case of privileges based on social policy, for example, in favor of employees, there is the additional factor that they are far less targeted than measures under social law. The funds accruing to privileged employees from the insolvency estate do not necessarily have to be sufficient to cover their living expenses, while on the other hand, particularly well-off employees could also enjoy benefits (at the expense of the other creditors) even though they are not needy at all. Only social legislation can achieve the desirable accuracy of targeting (exclusively) affected employees with the benefits necessary to maintain their living expenses.[41]

This leaves the direct preferential treatment of public bodies, in particular, the social security funds. This is explained by the fact that it is specifically these institutions that need funds to later cushion the social impacts of insolvency.[42] Here, too, the other creditors (via the social security funds) are called upon instead of the general public to finance the socially desirable consequences. Finally, the detour via the social security fund prevents every employee from enjoying preferential treatment without further differentiation depending on social neediness.

4. CONCLUSION

According to its original conception, corporate insolvency was designed primarily for the state-supervised settlement of civil law relations between a debtor

[39] This purpose is served by the first-ranking classification of farmers' claims under Art. 342 para. 1 fig. 1 Prawo Upadłościowe. Those multi-purpose approaches in insolvency law have also been justified by the consideration that employees, due to their lack of flexibility and diversification, hardly have any means to make provisions against the insolvency of their employer, cf. Z. Yu, *An Analysis of the Multiple Aims of Insolvency Law: From the Internal and External Perspectives*, Law & Economy 2022, No. 5, p. 34; V. Finch, D. Milman, *Corporate Insolvency Law*, 3rd ed., Cambridge 2017, p. 519.

[40] For this reason, overdue social security contributions for the last three years are satisfied as a priority under Polish law (Art. 342 para. 1 fig. 1 Prawo Upadłościowe).

[41] For this reason, even advocates of a multi-purpose approach doubt the need to privilege employees when they are effectively protected by social legislation measures, cf. V. Finch, D. Milman, *Corporate Insolvency Law*, 3rd ed., Cambridge 2017, p. 523.

[42] Sejm, printed matter No. 2824 of 9 October 2014, p. 308.

and its creditors. The focus was on the maximum satisfaction of creditors from the debtor's assets, which were likely to be decomposed and liquidated for this purpose. To the extent that public interests played a role in this process, it was a matter of giving preferential treatment to specific groups of creditors in order to thereby contribute to the realization of sociopolitical goals.

In the meantime, a change has occurred. While sociopolitical values are, for good reasons, given less consideration in insolvency law, it has been recognized that proper structuring of the legal relationship between the debtor company and its creditors is likely to minimize macroeconomic damage in the public interest. Such damage is particularly likely to occur if ailing companies refrain from filing for insolvency and thereby accept the decomposition of their productive units.

Legislators were subsequently faced with the challenge of motivating debtor companies to participate in measures that make macroeconomic sense – in particular, to make early use of insolvency and restructuring mechanisms. This objective has now been incorporated into European law in the form of the Restructuring Directive. In the course of its implementation, less progressive insolvency law systems, such as the German one, have been supplemented. However, this is not the end of the story. It will still take some time for German practitioners to internalize the replacement of this cornerstone of insolvency law and to find consistent answers to specific legal questions in line with the new concept of public interest in insolvency law.

In contrast, the Polish legislator had already implemented the aforementioned paradigm shift in 2015. It not only supplemented the existing insolvency law but also created a coherent legal framework that facilitates consistent answers to individual legal questions. The legal treatment of pressure filings provides an apt illustration of this case. Anyway, all this is probably also due to the fact that the Polish legislature endeavored on its own initiative to create a coherent overall system and not merely to implement European law.

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ON THE CONCEPT OF FINANCIAL STABILITY IN THE PUBLIC INTEREST

Abstract

In this text, the author examines the concept of financial stability and its importance in the public interest, particularly in the context of the European Union (EU). He mainly outlines the core measures in the EU set for maintaining financial stability, including regulation and supervision, supervisory bodies and institutions, financial assistance funds, and monetary policy. The author emphasizes the critical role of financial stability in ensuring households' and businesses' access to credit and promoting economic growth, job creation, and rising standards of living. He argues that maintaining financial stability is the key responsibility of central banks and financial regulators and is necessary for achieving broader goals. The author concludes that further multidisciplinary research is needed to fully understand the complex interactions among the various components of the financial stability framework in the EU and to develop more effective policies for maintaining financial stability.

KEYWORDS

financial stability, public interest, regulation, supervision, prudential requirements, macroprudential measures, financial assistance funds, extraordinary tools, monetary policy, financial market participants, providers of financial services

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stabilność finansowa, interes publiczny, regulacja, nadzór, wymogi ostrożnościowe, środki makroostrożnościowe, fundusze pomocy finansowej, narzędzia nadzwyczajne, polityka pieniężna, uczestnicy rynku finansowego, dostawcy usług finansowych

1. INTRODUCTION: BACKGROUND AND CONTEXT OF FINANCIAL STABILITY AS PUBLIC INTEREST

Over the past two decades, a series of crises, including the US financial crisis of 2008,[1] the euro debt crises of the early 2010s,[2] and, more recently, the higher inflation and issues facing several European banks have brought financial stability to the forefront of concern for lawmakers, regulators, and central bankers. Financial stability is an economic term that describes a state of the economy in which the financial system is robust, resilient, and capable of withstanding shocks and disturbances without significant disruption, while maintaining a relative balance among the core players in the financial markets. Financial stability is widely regarded as a prerequisite for the financial system to provide credit, which supports sustainable economic growth. A stable financial system is essential for promoting the well-being of individuals and households, as well as supporting economic growth. An unstable financial system can lead to financial crises, which can have broad consequences, including widespread economic disruption and hardship for individuals and firms. There are many examples of financial instability throughout history, including:

- **Banking crises**, which are characterized by widespread failures of banks, are frequently accompanied by a loss of faith in the financial system, resulting in a decline in credit extension and an economic slowdown. Notable examples of such crises include the 2008 global financial crisis, the savings and loan crisis that plagued the United States in the 1980s, and the banking crisis that struck Greece in the early part of the 2010s.[3]
- **Stock market crashes**, marked by a sudden and significant drop in stock prices often lead to financial instability by investors' loss of confidence in

[1] For more, see, e.g. H. Paulson, *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System*, 2010; or A. R. Sorkin, *Too Big to Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System-and Themselves*, 2010.

[2] For more, see, e.g. J. Pisani-Ferry, *The Euro Crisis and Its Aftermath*, Oxford: Oxford Press, 2014.

[3] For more, see, e.g. Y. Varufakis, *Adults in the Room.* London: Penguin Random House UK, 2017, p. 562.

the financial system, connected with a decrease in the value of assets, and leading to a decrease in spending and investment. Examples include the 1929 stock market crash and the 2000 dot-com bubble.

– **Sovereign debt crises** are instances where a country is unable to meet its debt obligations or refinance its debt, which can trigger financial instability and cause losses for holders of sovereign debt. These situations are often connected to banking crises, as the banking sector is often a major holder of sovereign debt. Notable examples include the eurozone sovereign debt crisis of the 2010s.[4]
– **Currency crises** are characterized by a sharp and considerable depreciation of a particular state's currency, which can trigger financial instability and erode confidence in the currency, assets denominated in the currency, and the financial system as a whole. The severity of the impact depends on the relative importance of the currency and can include reduced access to credit and a decline in economic activity. Examples of currency crises include the UK's crisis of 1992 and the collapse of the Bretton Woods system in the 1970s.

These are just a few examples of financial instability, and there may be other types of financial disruptions leading to widespread instability, such as real estate bubbles or asset price bubbles in many sectors of the financial market.

To achieve financial stability, new bodies/authorities may be established or existing ones may be given additional powers to oversee and regulate the financial system as a whole or its individual participants in areas that could affect stability. In this paper, my focus will be mainly on outlining the overall network of measures designed to help achieve financial stability, rather than concentrating on a particular measure. Financial stability is maintained through a combination of regulation, supervision, and the establishment of new entities, often in the form of funds.

Although the term 'financial stability' has been used in the economic and financial fields for several decades, the approach to how to achieve the stability has evolved over time, reflecting changes in the financial system, such as technology, level of interconnectedness among the key participants, the ups and downs of cross-border capital flows, and some other significant changes in the broader economy. Hence, although an economic concept, the meaning of the term is important from the legal perspective as it is the objective to be achieved for the well-being of individuals, firms, and the proper functioning of states. Maintaining financial stability is currently considered the key goal of central banks and financial regulators in many countries, who monitor the financial system and take actions to prevent or mitigate financial crises.

[4] For more, see, e.g. N. Nevečeřalová, J. Schweigl, *Právní aspekty evropských fondů finanční asistence*, Brno: Masarykova univerzita, 2020.

The use of the term became more widespread in the 1990s and early 2000s, following a number of financial crises. To name a few, the savings and loan crisis in the USA, the Asian financial crisis of late 1990s, and the dot-com crisis of the new millennium. As a result of these events, policymakers began to focus more attention on the need for a stable financial system and the importance of financial stability for economic growth and prosperity. These efforts were further reinforced by the two more recent crises mentioned earlier, i.e., the US financial crisis of 2008 and the following euro debt crisis.

In the next chapter, I will detail the key measures that are implemented to establish or maintain financial stability in the European Union. Then, in the final chapter, I will present the main arguments that are commonly put forward to demonstrate the clear public interest in achieving and preserving financial stability.

2. FINANCIAL STABILITY IN THE EU

2.1. REGULATION AND SUPERVISION

The first category of measures aimed at strengthening the financial system are **legislative measures**, which involve passing laws or issuing ordinances to establish rules for market participants to follow.[5] These rules set strict standards for **entry** into the financial sector, including requirements for obtaining a license and regulations related to organizational structure, equity maintenance, risk management, board membership, liquidity, and financing. The licensing requirements vary based on the provider's importance to the sector, risks posed to the stability of the sector, and potential impact on clients' money in the event of misconduct or failure. For example, it is relatively easy to become an independent mortgage or insurance broker, but obtaining a bank license requires meeting numerous requirements. Once a provider **has entered** the financial sector, they are required to meet a range of regulations in order to ensure that they are providing services in a safe and secure manner. Generally, regulations become more complex and strict for services that are more intricate, risky or have a higher impact on other people's funds. Prudential requirements are typically imposed to limit the providers in taking on too much risk, while other requirements focus on maintaining certain levels of organizational and control structures, as well as contributing to certain funds such as deposit insurance or resolution funds in case of emergency. Providers are typically required to report to supervisory authorities, which brings us to the area of supervision.

[5] M. Janovec, *Finanční trh a jeho stabilita*, Praha: Wolters Kluwer ČR, 2023, p. 23.

Supervisory authorities typically have multiple powers. In addition to ensuring that financial service providers comply with legal requirements, they often have the authority to issue ordinances or decrees to implement laws enacted by lawmakers. Financial markets are highly complex, so laws may not always contain detailed regulations but rather core principles on which technical rules are established by the supervisory authorities. These authorities possess extensive knowledge and expertise in the particular sector of the financial market to which they apply these rules. Nonetheless, the authority of supervisory authorities to issue implementing ordinances or decrees must be established by law and the obligations imposed on the addressees of these ordinances cannot exceed the general obligations established by the law or be in conflict with the law.

In addition to regulations and supervision that target individual financial service providers, there are also efforts to regulate and supervise the financial system as a whole. However, these areas often overlap and it is not always clear whether a particular regulation aims to promote the stability of an individual provider or the entire financial system. For example, if a law or regulatory agency imposes limits on how much one institution can be exposed to another, such a measure can be seen as addressing both individual and systemic stability concerns.

This approach aiming at the entire financial system has to be reflected not only in the area of regulation but also in the area of supervision, where the notion of **'macroprudential'** supervision is used for it.[6] The term 'macroprudential' originated from unofficial documents drafted by the BIS and the Bank of England in the late 1970s. It was initially used to refer to a regulatory and supervisory approach that was focused on the macroeconomy and the overall financial system, rather than on the supervision of individual market participants.[7] In the 1980s, the BIS started publicly discussing macroprudential policy as a means of ensuring the safety and soundness of the financial system and payment mechanisms. The concept gained renewed attention in the early 2000s due to the widespread use of macroprudential policies in emerging markets and growing concerns about financial stability in advanced economies. After the financial crisis of 2008, the use of the term 'macroprudential' became more common and establishing an effective macroprudential policy framework became a top priority for organizations like the G20, EU, and IMF.[8]

[6] For more on macroprudential policies, see, e.g. BIS. Macroprudential policy. BIS Papers No. 86, 2016, p. 169, https://www.bis.org/publ/bppdf/bispap86.htm (accessed: 21 April 2023).

[7] T. Kenç, *Macroprudential regulation: history, theory and policy*, BIS Papers No. 86, 2016, pp. 1-15.

[8] T. Kenç, *Ibid*.

2.2. FINANCIAL STABILITY AUTHORITIES

Having introduced the system of regulations and supervision, I will now outline the role of the key authorities and institutions responsible for maintaining financial stability in the EU. The first institution to mention is the **European Central Bank (ECB)**. The ECB has a dual mandate: to maintain price stability in the eurozone and to supervise the largest banks in the eurozone. In both of these areas, the ECB plays a vital role in contributing to the stability of the financial system. Maintaining price stability is primarily achieved through monetary policy instruments, including setting key interest rates, establishing eligibility criteria for credit, and conducting direct asset purchases on financial markets.[9]

The ECB employs the strategy of setting key interest rates to achieve its target inflation rate of 2 percent as the extremes of high inflation or deflation can adversely affect economic growth and financial stability. Through its implementation of monetary policy tools, the ECB regulates the quantity of money in circulation, ultimately affecting the availability of credit. The primary objective of the ECB's monetary policy is to maintain price stability, which fosters a steady and foreseeable economic climate that supports growth and financial stability. Additionally, as part of its supervisory mandate, the ECB carries out macroprudential supervision of the financial system to identify and address systemic risks that could threaten financial stability.

Another important authority to mention is the **European Banking Authority (EBA)**. The EBA is an independent EU body having the power to oversee the stability of the banking sector of the EU member states. In addition, it can implement some of the EU banking rules and issue guidelines. The EBA frequently coordinates its policies with the **European Securities and Markets Authority (ESMA)**, which is also an EU body targeting the stability of the securities markets and trading. The EBA and ESMA sometimes issue joint guidelines. The ESMA is responsible for implementing EU securities rules. These two EU bodies are accompanied by the **European Insurance and Occupational Pensions Authority (EIOPA)**. The EIOPA is an independent EU body responsible for overseeing the stability of the European insurance and pensions sector. Its main responsibilities include supervising the implementation of EU insurance and pensions rules, as well as monitoring and addressing risks to the stability of the insurance and pensions sector.

Apart from the aforementioned regulatory bodies, the EU introduced several other institutions that have the duty and powers to monitor financial stability. Among these are the **European Systemic Risk Board (ESRB)** and the **Euro-**

[9] J. Schweigl, *The Monetary Policy of the European Central Bank in the 2020s*, (in:) A. Powałowski, *Economy in the Synergy of Economic, Financial and Environmental Law*, Warszawa 2022, pp. 121-128.

pean System of Financial Supervision (ESFS), which are responsible for maintaining a stable financial system.

The ESRB is an EU institution that was established in 2010, based on a Council regulation[10] as a response to the global financial crisis and as a result of the findings made by a group of experts (called after its chair Mr Jacques de Larosière – de Larosière Group) established by the Commission. It operates independently and is based in Frankfurt, Germany. Among other powers and responsibilities, the ESRB is responsible for the macroprudential oversight of the EU financial system. It takes measures to identify and evaluate any potential systemic risks to the stability of the financial system in the EU, mainly by means of analysis. In addition to this mandate, the ESRB provides recommendations to the EU and national authorities on measures to be taken. It is led by the General Board, consisting of senior representatives from the ECB, EBA, ESMA, as well as some other authorities and national central banks. The General Board sets the overall strategic direction of the institution. The ESFS is rather a network of institutions centred around EBA, ESMA, EIOPA, ESRB, and national supervisors. Its primary objective is to ensure consistent and appropriate financial supervision across the EU.

Although this text is primarily focused on EU measures and financial stability authorities, it is important to acknowledge the role of the **Financial Stability Board (FSB)** in promoting financial stability worldwide. The FSB was established in 2009 following the global financial crisis, with the aim of promoting global financial stability. It is based in Basel, Switzerland, and is composed of representatives from central banks, regulatory authorities, international organizations, and the private sector from around the world. The FSB's primary role is to facilitate and encourage international cooperation in the development and implementation of financial stability policies, including monitoring and analysing risks to the financial system at the global level. They also can give recommendations to national supervisory authorities.[11] The FSB cooperates on a regular basis with ECB and the European Commission, as both are members of the FSB.

2.3. FINANCIAL ASSISTANCE FUNDS

In addition to regulation, supervision, and financial stability authorities, another essential component of the overall framework of financial stability is provided by financial assistance funds. These funds have the general objective of providing financing to countries experiencing difficulties in raising funds

[10] Council regulation (EU) No. 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board.

[11] For more on FSB, see, e.g.: R. Douady, C. Goulet, P. Pradier, *Financial Regulation in the EU*, Zürich: Springer International Publishing AG, 2017.

through the financial markets or, in some cases, offering capital to the banking sector in these countries. Since 2010, several of these funds have been established in various forms.[12] This chapter will focus on two of the most significant funds in the EU, namely the **European Stability Mechanism (ESM)** and the **European Financial Stability Facility (EFSF)**.[13]

The establishment of the two financial assistance funds in response to the sovereign debt crisis of the early 2010s in the eurozone represents a significant step towards financial stability in the region. The ESM and the EFSF have been given certain tools to provide financial assistance to euro area member states having difficulties obtaining funds on the financial markets. These funds play a crucial role in promoting financial stability by serving as a safety net for member countries in crisis. However, it is worth noting that the provision of financial assistance is often contingent upon the implementation of specific economic and structural reforms aimed at ensuring greater financial stability. Nonetheless, there remain concerns over the level of integration of these funds into the legal framework of the EU, given that they currently operate as independent entities rather than EU bodies.

2.4. PROS AND CONS OF THE CONTEMPORARY FINANCIAL STABILITY MEASURES

Having discussed the key components of the EU's legal framework for ensuring financial stability, I will now outline some of the potential benefits and drawbacks associated with these measures. The following analysis provides a broad overview of areas that may warrant further interdisciplinary research. The potential pros include:

- **Broad oversight**: The EU's framework covers numerous institutions and bodies with different areas of focus (macroprudential and microprudential oversight, fiscal measures and monetary policy). Together, the system can provide a comprehensive view of the financial system with the ability to identify potential risks to stability.
- **Coordination**: The various institutions within the EU's financial stability framework are designed to create one system and work together. This can help promote better coordination between national authorities and across borders.

[12] P. Mrkývka, J. Schweigl, *Public Finance and Financial Assistance Funds*, (in:) P. Mrkývka, J. Gliniecka, E. Tomášková, E. Juchniewicz, T. Sowiński, M. Radvan, *The Financial Law Towards Challenges of XXI Century,* Brno: Masaryk University Press, 2020, pp. 822-833.

[13] For more on ESM and EFSF, see, e.g., P. Mrkývka, J. Blažek, E. Tomášková, J. Schweigl *et al*., *Vybrané právní otázky fiskální odpovědnosti státu*, Brno: Masarykova univerzita, 2020.

– **Stronger confidence**: A broad network of institutions trying to maintain financial stability in the EU can help promote greater confidence in the system.

The potential cons include:

– **Being too complex and fragmented**: The framework for financial stability is very complex, involving a large number of institutions with different roles and responsibilities. This complexity can make it difficult to understand the overall system and lead to delays in decision-making. The large number of participating authorities and bodies can create situations where inconsistencies or even contradictory tendencies can appear.
– **Having limited resources**: There may still be limits to resources or capabilities or the institutions or funds involved in ensuring financial stability, which could potentially limit their ability to effectively identify and address risks.

3. CONCLUDING REMARKS ON PUBLIC INTEREST IN HAVING FINANCIAL STABILITY

Financial stability is widely recognized as being in the public interest. A stable financial system facilitates access to credit for households and businesses, promoting investment, growth, job creation, and consumption. Conversely, financial instability may render financial transactions and bank deposits more risky, given the potential impact of economic slowdowns on government expenses and sovereign debt, which in turn may cause a drop in bond prices and losses for banks. A stable financial system is, therefore, crucial for the proper functioning of the economy, the development of a thriving society, and the attainment of higher living standards. Consequently, financial stability is widely regarded as a public good, and central banks and financial regulators play a critical role in promoting and safeguarding the stability of the financial system.

Moreover, financial stability is not only important for households and businesses and job creation but also for the wider society. It lowers the possibility of social unrest and political instability. It is also essential for the smooth functioning of financial markets and for maintaining the trust of investors and consumers. It is also in the public interest, as it promotes fairness and allows states to function properly.

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THE LEGAL CONCEPT OF '(OVERRIDING) PUBLIC INTEREST' AS AN INDICATOR FOR CHANGING PREMISES IN GERMAN ENERGY LAW WITH REFERENCES TO THE EUROPEAN LEVEL FOCUSING ON RECENT DEVELOPMENTS

Abstract

The aim of this article is to highlight the close correlation between the government's regulatory ambitions and the use of the value-based term 'public interest' in the field of energy law, which is particularly shaped by political considerations. Special emphasis will be placed on the recent reforms in Germany and at the European level in the field of renewable energy (RE) in the electricity sector. These reforms, driven by the significant geopolitical changes since February 2022, aim to accelerate the deployment of renewable energy sources (RES), in particular, the construction and operation of energy plants using renewable energy sources and the related grid infrastructure. To achieve this goal, (selected) RES projects are recognised (presumably) as being of public interest and by these means given priority.

KEYWORDS

electricity, RES, (overriding) public interest, paradigm shift

SŁOWA KLUCZOWE

energia elektryczna, OZE, (nadrzędny) interes publiczny, zmiana paradygmatu

I. INTRODUCTION

Since the Russian war of aggression against Ukraine, the accelerated RES deployment is no longer perceived solely as one of climate policy but rather as an imperative necessity of security policy that ensures an affordable and reliable energy supply.[1] This change in perception is reflected in the law itself: § 2 Sentence 1 of the Renewable Energy Sources Act (EEG)[2] now states that the construction and operation of RES plants and related ancillary facilities serve the overriding public interest and public safety. § 2 Sentence 2 of the EEG provides a directive for balancing interests in favour of an absolute priority weighting.[3] These national developments run parallel with those at the European level, where a similar provision has been established with Art. 3 of Council Regulation (EU) 2022/2577.[4] Thus, the construction and operation of RES plants and infrastructure, necessary to integrate the 'green' electricity generated therein, are now brought into the focus of the state and EU action. In consequence, the scope and instruments of the intervention were expanded, or rather deepened. As far as the original goal of the EEG was to increase the share of RES,[5] as quantified in legally prescribed trajectories (§§ 4 and 4a EEG), and to integrate these energies into the market – mainly through state subsidy systems – with the start of the *Energiewende*[6], elements of network

[1] G. Hermes, *Die Systementicklungsplanung – Instrument zur klimagerechten Transformation des Energiesystems*, EnWZ 2022, p. 99; also, German government refers to RE as 'freedom energies' (Federal Government, 'Modernisierungspaket für Klimaschutz und Planungsbeschleunigung', 28 March 2023, available online: https://www.spd.de/fileadmin/Dokumente/Beschluesse/20230328_Koalitionsausschuss.pdf).

[2] German: *Gesetz für den Ausbau erneuerbarer Energien* (Erneuerbare-Energien-Gesetz), Act of 21 July 2014 (Federal Law Gazette: BGBl. I p. 1066), last amended by Art. 4 of the Act of 3 July 2023 (Federal Law Gazette: BGBl. 2023 I No. 176) – *EEG 2023*.

[3] S. Schlacke, H. Wentzien, D. Römling, *Beschleunigung der Energiewende: Ein gesetzgeberischer Paradigmenwechsel durch das Osterpaket?*, NVwZ 2022, p. 1578 *et seq*.

[4] OJ L 335, 29 December 2022, pp. 36–44.

[5] Cf. § 1 EEG in the version applicable before 1 January 2021 (Act of 21 July 2014, Federal Law Gazette: BGBl. I p. 1066, last amended by Art. 8 of the Act of 8 August 2020, Federal Law Gazette: BGBl. I p. 1728 – *EEG 2017*).

[6] The term *Energiewende* describes the paradigm shift in German energy policy, characterized primarily by two elements: the accelerated departure from fossil fuels and the exit from nuclear energy (M. Ludwigs, *Die Energiewende im Zeichen des Europa- und Verfassungsrechts*, RW 2014, p. 254 *et seq*.). The latter aspect sets it apart from the so-called 'green transition' (European Commission, The European Green Deal, 2019, COM[2019] 640 final 2019, p. 16).

infrastructure planning were gradually introduced[7] to meet the increased demand for network capacity and network transport.[8] Still, the legal regime governing the planning and realization of these projects is primarily the spatial and planning law.[9] However at present, the EEG, which – along with the Energy Industry Act (EnWG[10]) – is the second national core energy law, and the European emergency regulation[11], both also contain substantive law provisions which give priority for the RES projects – although, in the case of regulation, only for the selected ones – not only in the planning but also in the permit-granting process. The enforcement tool is the declaration that these projects are such of an overriding public interest, in the case of Art. 3 Regulation (EU) 2022/2577, by use of a rebuttable presumption.[12] These provisions address RES plants and the related grid infrastructure as well as storage assets,[13] not (primarily) the grid itself.[14]

These illustrated developments indicate a paradigm shift.[15] In the specific sense of the terminus, to a change in the fundamental legal framework for deci-

[7] Reference is made here to the introduction of the Power Grid Expansion Act (German: *Gesetz zum Ausbau von Energieleitunge*n [Energieleitungsausbaugesetz – EnLAG], Act of 21 August 2009, Federal Law Gazette: BGBl. I p. 2870, last amended by Art. 3 (3) of the Act of 2 June 2021, Federal Law Gazette: BGBl. I p. 1295), the Grid Expansion Acceleration Act (German: *Netzausbaubeschleunigungsgesetz Übertragungsnetz* – NABEG), Art. 1 of the Act of 28 July 2011, Federal Law Gazette: BGBl. I p. 1690, last amended by Art. 7 of the Act of 22 March 2023, Federal Law Gazette: BGBl. 2023 I No. 8) and the Federal Requirements Plan Act (German: *Gesetz über den Bundesbedarfsplan* [Bundesbedarfsplangesetz – BBPlG]), Art. 1 of the Act of 23 July 2013, Federal Law Gazette: BGBL. I p. 2543; 2014 I p. 148, 271, last amended by Art. 5 of the Act of 22 May 2023, Federal Law Gazette: BGBl. 2023 I No. 133.

[8] J. Senders, N. Wegner, *Die Bedarfsplanung von Energieinfrastrukturen*, EnWZ 2021, p. 243.

[9] For an overview of indirect spatial control approaches of the EEG through the design of funding rules, see A. Grüner, F. Salier, *Das EEG als Instrument des Bundes zur räumlichen Steuerung der erneuerbaren Energien – zugleich ein Beitrag zur Diskussion um eine Energiefachplanung*, ZNER 2016, p. 122 *et seq*., however, with regard to the EEG in the respective version as valid before September 2016.

[10] German: *Gesetz über die Elektrizitäts- und Gasversorgung* (Energiewirtschaftsgesetz), Art. 1 of the Act of 7 July 2005 (Federal Law Gazette: BGBl. I p. 1970; 3621), last amended by Art. 9 of the Act of 26 July 2023 (Federal Law Gazette: BGBl. 2023 I No. 202).

[11] Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, OJC L 335 from 29 December 2022, pp. 36–44.

[12] Cf. recital (4, 8) Council Regulation (EU) 2022/2577.

[13] On the national level, this is done via § 11c EnWG.

[14] Art. 3 Council Regulation (EU) 2022/2577 covers also – unlike § 2 EEG – the related grid itself. But, according to the results of the latest coalition committee, such prioritizing regulations are also to be developed for selected infrastructure projects in the road and rail sectors (cf. Federal Government, 'Modernisierungspaket für Klimaschutz und Planungsbeschleunigung', 28 March 2023 pp. 4–5; available online: https://www.spd.de/fileadmin/Dokumente/Beschluesse/20230328_Koalitionsausschuss.pdf).

[15] S. Schlacke, H. Wentzien, D. Römling acknowledge these developments in the context measures accelerating the planning and permit-granting process (S. Schlacke, H. Wentzien, D. Römling, *Beschleunigung der Energiewende: Ein gesetzgeberischer Paradigmenwechsel durch das Osterpaket?*, NVwZ 2022, p. 1586).

sions in individual cases concerning the construction of RES plants and related infrastructure, and also in its general meaning, to a shift in fundamental value judgments.[16] This insight is primarily indicated by the use of the term 'public interest' imbued with new content; the evidence that the concept of what constitutes the 'common good' has changed, at least for the decision-making majority. This article aims to examine this connection more closely, assessing to what extent these indices can be verified, focusing on the German legal system with reference to European law and with a particular emphasis on recent reforms.

II. THE LEGAL CONCEPT OF 'OVERRIDING PUBLIC INTEREST'

Firstly, a definition of the terminology used to discuss this topic is necessary, as there is a great deal of linguistic diversity in this context. The term 'public interest' is regularly equated with the 'common good', the 'welfare of the community', the 'public welfare', the 'general welfare' and the 'interests of the public'.[17] Herein also, these terms are used synonymously.

The notion of 'public interest', as defined above, does not represent a predetermined quantity but rather a value decision established by the group of stakeholders responsible for the respective decision-making process through the application of the majority principle.[18] Accordingly, there is no independent state interest but rather a variable concept of values formed by the general public,[19] whose definition is of crucial importance to political currents[20].[21] The subject of these decisions is the determination of tasks whose fulfilment has been deemed desirable by the responsible parties through compliance with the predetermined decision-making process, or in other words, the determination of 'public tasks'. The concepts of 'public task' and 'public interest' are therefore interchangeable.[22]

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[16] Comprehensive on the notion of 'paradigm' and 'paradigm shift' as established by T. S. Kuhn G. Anand, E.C. Larson, J. T. Mahoney, *Thomas Kuhn on Paradigms*, Production and Operations Management 29 (7), p. 1650 *et seq.*

[17] F. Ossenbühl, *Umweltschutz und Gemeinwohl in der Rechtsordnung,* (in:) Bitburger Gespräche, Jahrbuch 1983, München 1983, p. 6 *et seq*.; R. Viotto, *Das öffentliche Interesse*, Baden-Baden: 2009, p. 22 *et seq*.; an alternative view has presumably Koltsoff, who defines the notion of the common good separately from the one of public task, referring only in the context of the last one to the public interest (L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, pp. 41–43).

[18] R. Viotto, *Das öffentliche Interesse,* Baden-Baden: 2009, p. 230 *et seq.*

[19] R. Viotto, *Das öffentliche Interesse*, Baden-Baden: 2009, p. 20 *et seq.*

[20] Reference here is made to state-theoretical approaches such as liberalism, conservatism, etc.

[21] R. Viotto, *Das öffentliche Interesse*, Baden-Baden: 2009, p. 137.

[22] Similar to L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 40.

The fulfilment of these responsibilities is not restricted to the state alone, nor does the state hold a monopoly over them.[23] Rather, it is the role of the legislature to distribute their execution between the state and private entities,[24] subject to constitutional constraints.[25]

This state-theoretical background is a crucial factor in shaping the legal concept of the 'public interest', because 'legal considerations on the subject of the common good [cannot] [...] do without thematizing the fundamental concepts of state and society'.[26] The legal concept of the 'public interest' is an indeterminate legal notion which requires continual redefinition. It is primarily found in the realm of public law as a regulatory matter, for example, in the Federal Immission Control Act.[27]

III. THE CONCEPT OF THE 'PUBLIC INTEREST' IN THE ENERGY SECTOR

1. ENERGY SUPPLY AS A PUBLIC TASK WITH INTERNAL POLARITIES

Energy supply constitutes a public task and, therefore, is a matter of public interest. The various facets of this interest can be deduced from § 1 (1) of the Energy Industry Act. Supply security, price affordability, consumer-friendliness, environmental responsibility, efficiency, and now also greenhouse gas neutrality are goals which are to be achieved through the supply of electricity to the general public. These concrete legal specifications sometimes conflict with each other

[23] C. Theobald, (in:) *Energierecht*, C. Theobald, J. Kühling (ed.), 119th Edition, February 2023, München: 2023, EnWG § 1 Marginal No. 15.

[24] L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 40.

[25] I. Gillich, *Das „überragende öffentliche Interesse" an der beschleunigten Umsetzung industrieller Großprojekte*, DÖV 2022, p. 1033 (own translation).

[26] R. Viotto, *Das öffentliche Interesse*, Baden-Baden: 2009, p. 137. In this context, it is sometimes argued that the definition of the common good can simply be achieved through the interplay of all three branches of government; the legislature can solely establish an abstract and general framework that is filled with substance only through the application of norms (executive) and norm concretization (judiciary) (I. Gillich, *Das „überragende öffentliche Interesse" an der beschleunigten Umsetzung industrieller Großprojekte*, DÖV 2022, p. 1032).

[27] § 21 (1) No. 4 Federal Immission Control Act (German: *Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge* [Bundes-Immissionsschutzgesetz]) revised by Resolution of 17 May 2013, Federal Law Gazette: BGBl. I p. 1274, BGBl. 2021 I p. 123; last amended by Art. 11 of the Act from 26 July 2023, Federal Law Gazette: BGBl. 2023 I p. 202.

and require a case-by-case weighing against one another, to be ultimately reconciled through a practical concordance.[28] These internal tensions manifest themselves primarily in spatial conflicts,[29] which due to their complexity and intensity, require legislative guidelines. Lately, especially the new regulations aiming to accelerate the deployment of RES were discussed in light of their relationship to species protection and the realignment of these two public policy issues.[30] However, regularly these are polarities between the individual components of the common good 'energy supply',[31] often in the form of ecological internal conflicts within the environmental protection interest itself.[32]

2. GOVERNMENT INTERVENTION IN THE ENERGY SECTOR

Against the backdrop of energy supply as part of public welfare, the state has always been involved in energy policy. However, its role and instruments employed have changed over time, depending on the premises pursued. The first paradigm shift occurred in 1998 with the opening of monopolistic network structures in the gas and electricity sectors, which were meant to create competition in areas where it was considered economically sensible. No interventions were made where the continuation of the monopoly was still regarded as the most efficient organizational form due to cost structure. Thus, areas, where market failure was identified, became the subject of state regulation,[33] with central instruments for their remediation being primarily unbundling, cost and tariff regulation, as well as regulated network access, supplemented by market entry controls (approval requirements for starting a network operation), network connection obligations and the basic supply obligations.[34] Since then, the new regulatory law that has emerged in this context primarily assumes the task of creating competitive and

[28] L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 75.

[29] In this sense for the network infrastructure, see also J. Senders, N. Wegner, *Die Bedarfsplannung von Infrastrukturen*, EnWZ 2021, p. 243.

[30] So, e.g., A. Leisner-Egensperger on the topic of wind energy (A. Leisner-Egensperger, *Artenschutzrechtliche Ausnahme für Windenergieanlagen. Zur Klärung des Verhältnisses von Artenschutz und Klimaschutz*, NVwZ 2022, p. 745).

[31] F. Ossenbühl, *Umweltschutz und Gemeinwohl in der Rechtsordnung*, (in:) Bitburger Gespräche, Jahrbuch 1983, München 1983, pp. 10–11.

[32] Comprehensive on the different components of environmental law (S. Schlacke, *Umweltrecht*, 8th Edition, Baden-Baden: 2021, § 2).

[33] The term 'state regulation' is here used with the notion of a structure-oriented, goal-achieving formula of action that is oriented towards a specific objective in the respective sector (L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 44).

[34] L. *Koltsoff*, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors,* Speyer: 2022, p. 47.

promotive structures, which can also be associated with other public interest objectives, as long as they are achieved through market-based means rather than regulatory measures.[35] It is not a core area of government regulation and, according to the guiding principles of network regulation, not a government task[36] to design a competitively organized[37] power generating 'market' and plant construction. Here, the decisive regime is the spatial planning law and sectoral legislation.[38] In particular, there is still no codified demand planning at the power generation level.[39] Network optimisation, network reinforcement, and network expansion are the responsibility of the network operators,[40] mainly controlled by the obligation to expand the network in a demand-oriented manner, limited by the economic unreasonableness threshold.[41] In 2009, the second 'fundamental turn'[42] in German energy policy occurred. The so-called *Energiewende* consisted of two pillars: the departure from nuclear power and the massive shift towards electricity production from renewable energies.[43] This 'second' shift,[44] originally motivated primarily by climate policy, has since experienced numerous positive legal concretisations – most notably in energy law[45] – such as the inclusion of greenhouse gas neutrality in the purpose of the EnWG and, particularly, in the reformed provisions of §§1, 1a, 2 EEG. In the course thereof, it became necessary to expand and strengthen renewable energy facilities and networks to an extent that could not be achieved

[35] J. Säcker, *Das Verhältnis von Wettbewerbs- und Regulierungsrecht*, EnWZ 2015, p. 534.

[36] Cf. § 11 (1) EnWG; F. Gärditz, W. Kahl, (in:) *Umweltrecht*, W. Kahl, F. Gärditz (ed.) 12th Edition, München: 2021, § 6 Marginal No. 88.

[37] L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 134.

[38] L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors,* Speyer: 2022, p. 135.

[39] L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 134; for a more comprehensive view on the problems of infrastructure planning in the context of the energy transition see Franzius, *Infrastrukturen zwischen Regulierung und Planung*, EnWZ 2022, p. 302 *et seq.*

[40] Cf. § 12 (1) EnWG; on the dispute as to whether the concept of grid expansion also covers quantitative expansion see C. König, (in:) *Berliner Kommentar zum Energierecht*, J. Säcker, J. Steffens (ed.), Volume 8, 5th Edition, Frankfurt am Main: 2022, § 12 EEG Marginal No. 34 *et seq*.

[41] §§ 11 (1) Sentence 1, 12 (3) EnWG.

[42] J. Säcker, (in:) *Berliner Kommentar zum Energierecht*, J. Säcker (ed.), Volume 1, 4th Edition Frankfurt am Main: 2018, Chapter 1 A , Marginal No. 1 (own translation).

[43] For a more comprehensive view on the specific concept oft he German *Energiewende* see M. Ludwigs, *Die Energiewende im Zeichen des Europa- und Verfassungsrechts*, RW 2014, p. 254 *et seq*.

[44] In this sense, also J. Säcker, (in:) *Berliner Kommentar zum Energierecht*, J. Säcker (ed.), Volume 1, 4th Edition, Frankfurt am Main: 2019, Chapter 1 A., Marginal No. 3 (own translation).

[45] The integrative, cross-sectoral legal Act in German in terms of climate protection is the Federal Climate Change Act (German: *Bundes-Klimaschutzgesetz* - KSG), Art. 1 of the Act of 12 December 2019 (Federal Law Gazette: BGBl. I p. 2513), last amended by Art. 1 of the Act of 18 August 2021 (Federal Law Gazette: BGBl. I p. 3905).

within the existing system focused on short-term stability. A significant change with the *Energiewende* was that new objectives focused on transformation were added alongside the previously pursued regulatory ones. Initially, these did not affect the grid stability and, therefore, did not immediately generate a need for network expansion. At the same time, there were no relevant significant economic incentives within the established system for the mostly private market-oriented actors to expand the network for future challenges or to change the existing supply structures on a large scale and at a fast pace. As a consequence, an expansion gap arose with regard to RES facilities and infrastructure construction in pursuit of the goals of the *Energiewende*. The change in the supply structures has significantly contributed to the problem of increased demand for network infrastructure. The energy transition has led to a greater spatial divergence between generation and consumption,[46] as the expansion of renewable energy facilities has primarily occurred in the most profitable regions due to the fiction of a bottleneck-free market area without context to other infrastructures. Regulatory law, understood as the 'legal implementation of the insights of network economics',[47] created to promote competition in parts of the energy supply, did not provide the necessary instruments to adequately meet these challenges. Correspondingly, legal regulations outside of regulatory law have been created, in particular, certain projects were normatively declared as 'overriding public interest' and 'in the interest of public safety', namely in § 1 (2) Sentence 3 EnLAG, § 1 Sentence 3 NABEG and §1 (1) Sentence 2 of the BBPlG. Recently, § 3 Sentence 3 of the LNG Acceleration Act (LNG-G)[48] was added.

3. THE 'OVERRIDING PUBLIC INTEREST' AS A GOVERNMENT INSTRUMENT

a) Existing Regulations

Initially, in 2009, the Energy Networks Expansion Act was enacted, which classified the expansion of some high-voltage power lines as urgently needed and affirmed their necessity, even before the initiation of a planning permitting pro-

[46] J. Senders, N. Wegner, *Die Bedarfsplanung von Energieinfrastrukturen*, EnWZ 2021, p. 243.

[47] J. Säcker, *Das Verhältnis von Wettbewerbs- und Regulierungsrecht*, EnWZ 2015, p. 534 (own translation).

[48] German: *Gesetz zur Beschleunigung des Einsatzes verflüssigten Erdgases* (LNG-Beschleunigungsgesetz), Act of 24 May 2022 (Federal Law Gazette: BGBl. I p. 802), last amended by Art. 1 of the Act of 12 July 2023, Federal Law Gazette: BGBl. 2023 I No. 184; on the constitutionality of this law, see I. Gillich, *Das "überragende öffentliche Interesse" an der beschleunigten Umsetzung industrieller Großprojekte*, DÖV 2022, p. 1029 *et seq*.

cedure (German: *Planfeststellungsverfahren*).[49] The basis for the selection of the lines was primarily the 'dena-Netzstudie-I'[50] and the guidelines for the Trans-European Energy Networks (TEN-E) of the EU,[51] both of which are based on private planning.[52] After that, in 2011, primarily in response to the needs of the *Energiewende*,[53] the Grid Expansion Acceleration Act came into force. In this legal act, the law regarding the planning and permit-granting process is regulated in one legal act at the federal level – the NABEG. It regulates the federal planning and planning approval procedure for transmission line corridors. This law also does not represent statutory but a positive legal codification of private planning. The NABEG serves the purpose of the realisation of network expansion projects based on the federal demand plan, which is based on the confirmed network development plan of the transmission system operators[54].[55] Finally, in 2013, the BBPlG came into force. It legally institutionalises the Federal Requirement Plan and establishes the energy-economic necessity, as well as the urgent need for the projects listed therein to ensure a safe and reliable grid operation.

These regulations reflect the division of tasks and responsibilities between the state and private entities. Operation and expansion of the energy supply network are the 'tasks of the network operators'[56] and are also financed by them, while the state withdraws to its responsibility for ensuring availability as a fallback responsibility.[57] Although the Federal Network Agency (BNetzA) now has ultimate decision-making authority, conceptually, it is only assigned ex-post con-

[49] L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors,* Speyer: 2022, p. 192.

[50] dena-Netzstudie – Energiewirtschaftliche Planung für die Netzintegration von Windenergie in Deutschland an Land und Offshore bis zum Jahr 2020 of 24 February 2005, accessible online: https://www.dena.de/newsroom/publikationsdetailansicht/pub/studie-dena-netzstudie-i/.

[51] Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC, OJ L 262, 22 September 2006, pp. 1–23.

[52] L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, p. 192.

[53] For a more comprehensive view on the subject of the state's guarantee responsibility concerning energy supply see M. Schiller, *Staatliche Gewährleistungsverantwortung und Sicherstellung von Anschluss und Versorgung im Bereich der Energiewirtschaft*, Baden-Baden: 2012. This responsibility is characterised above all by regulatory responsibility (M. Schiller, *Staatliche Gewährleistungsverantwortung und Sicherstellung von Anschluss und Versorgung im Bereich der Energiewirtschaft*, Baden-Baden: 2012, p. 126).

[54] Cf. § 1 (1) Sentence 1 BBPlG in conjunction with § 12e (1, 4) EnWG.

[55] L. Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors,* Speyer: 2022, p. 192 *et seq*.

[56] Cf. Heading of Section 1.1 in Part 3 of the EnWG as well as §11 (1) EnWG (own translation).

[57] Koltsoff, *Die Wahrnehmung der Gemeinwohlbelange durch Private unter besonderer Berücksichtigung des Energiesektors*, Speyer: 2022, pp. 124-125.

trol.[58] Materially, the regulations address the discrepancy between the economic concept of demand[59] and the notion of demand in terms of public services, which is not (only) the result of market-based considerations but also the ones concerning normative goals.[60] The desired acceleration effect should be achieved – next to other measures[61] – by simplifying issuing exemption decisions under nature conservation law, in particular under §§ 34 (3), 45 (7) Sentence 1 No. 5 Federal Nature Conservation Act (BNatSchG)[62], in regards to the respective power line projects on a case-by-case basis.[63] This shifts the burden of justification carried by the authorities in charge to the case scenario where such a project is to be denied due to conflicting interests.[64] In this way, the approval level is also addressed but only in the special regime of the planning approval procedure which has been established for these projects.

b) Recent Reforms

The Russian attack on Ukraine in February 2022 gave a 'dramatic urgency'[65] to the systemic restructuring of the energy supply, to which the German legisla-

[58] J. Senders, N. Wegner, *Die Bedarfsplanung von Energieinfrastrukturen*, EnWZ 2021, p. 246.

[59] This describes 'a need endowed with purchasing power that appears on the market as a request for an economic good' (Köck, [in:] *Das Instrument der Bedarfsplanung - Rechtliche Möglichkeiten für und verfahrensrechtliche Anforderungen an ein Instrument für mehr Umweltschutz*, W. Köck, J. Bovet, H. Fischer, G. Ludwig, S. Möckel, K. Faßbender, UVA Texte 55/2017, p. 64 [own translation]).

[60] J. Senders, N. Wegner, *Die Bedarfsplanung von Energieinfrastrukturen,* EnWZ 2021, p. 244.

[61] The EnLAG aimed to achieve acceleration through statutory planning requirements primarily by the means of legally establishing the need for planning, which is an essential requirement if seeking for an approval for the realization of the projects governed there; in other words, the burden of proof that would normally apply to the authorities in this context was meant to be eliminated (for the presumption of the urgent necessity of line development projects set out in this legal act cf. U. Prall, W. Ewer, [in:] *Umweltrecht*, H. Koch, E. Hofmann, M. Reese [ed.], 5th Edition, München: 2018, § 9 Marginal No. 151). In contrast, with the NABEG the approval regime for some chosen extra-high voltage lines was changed as a whole (M. Appel, [in:] *Berliner Kommentar zum Energierecht*, J. Säcker [ed.], Volume 1, 4th Edition, Frankfurt am Main: 2019, NABEG, foreword, Marginal No. 1).

[62] German: *Gesetz über Naturschutz und Landschaftspflege* (Bundesnaturschutzgesetz), Art. 1 of the Act of 29 July 2009 (Federal Law Gazette: BGBl. I p. 2542), last amended by Art. 3 of the Act of 8 December 2022 (Federal Law Gazette: BGBl. I p. 2240).

[63] This rationale underpins all three regulations (A. Versteyl, K. Marschhäuser, *Überragendes öffentliches Interesse als Abwägungsbelang zur Beschleunigung von Klimaschutzvorhaben,* KlimR 2022, p.75); cf. for § 1 (1) Sentence 3 NABEG Wiesendahl, (in:) *Energierecht*, C. Theobald, J. Kühling (ed.), 119th Edition, February 2023, München 2023, § 1 NABEG Marginal No. 19-20.

[64] M. Appel, (in:) *Berliner Kommentar zum Energierecht*, J. Säcker (ed.) Volume 1, 4th Edition, Frankfurt am Main: 2019, § 1 NABEG Marginal No. 16.

[65] G. Hermes, *Die Systementwicklungsplanung – Instrument zur klimagerechten Transformation des Energierechts*, EnWZ 2022, p. 99 (own translation).

ture responded primarily by enacting the so-called *Sofortmaßnahmen-Novelle*[66].[67] This omnibus act (German: *Artikelgesetz*) has realigned German energy law, which is reflected, in particular, in the Renewable Energy Sources Act, which now aims not only to promote the expansion of renewable energy but to transform the power supply system to a sustainable and greenhouse gas-neutral one that is completely based on renewable energy sources.[68] Consequently, § 2 EEG has been revised, which now in Sentence 1 contains a directive with a positive pre-setting (German: *positive Abwägungsdirektive*) that aims to give greater enforceability to projects subject to official balancing processes.[69] While the chosen formulation is not new, as it draws inspiration from § 1 (2) Sentence 3 EnLAG, § 1 Sentence 3 NABEG, and § 1 (1) Sentence 2 BBPlG and the acceleration instrument – easing the burden of argumentation – is already known, what is exceptional is the substantive legal approach of general scope that will have an impact on all relevant administrative discretional decisions in the specialized legal field.[70] In addition, § 2 Sentence 2 EEG has been established as a norm with a qualitative difference from the previous ones. It creates a weighting requirement that establishes a rule presumption with absolute weighting priority for the admissibility of renewable energy plants in individual cases when balancing legal interests; nevertheless including the possibility to allow sufficiently weighty conflicting interests to prevail, albeit only in atypical cases.[71] This technology-neutral acceleration element is reinforced especially for wind energy by technology-specific regulations which repeat and reinforce the preadjustment of § 2 EEG for the granting of permits for wind energy installations,[72] namely §§ 1 (3) Wind Energy at Sea Act (WindSeeG)[73] and 45b (8) No. 1 BNatSchG.

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[66] Act on Immediate Measures for the Accelerated Expansion of Renewable Energies and Further Measures in the Power Sector (German: *Gesetz zu Sofortmaßnahmen für einen beschleunigten Ausbau der erneuerbaren Energien und weiteren Maßnahmen im Stromsektor*) of 20 July 2022, Federal Law Gazette: BGBl. I p. 1237, 2023 I No. 87, last amended by Art. 2 of the Act of 19 December 2022, Federal Law Gazette: BGBl. I p. 2479.

[67] § 3 LNG-G is not discussed here, as it does not concern the electricity sector but the one of (natural) gas (N. Kämper, [in:] *BeckOK VwVfG*, J. Bader, M. Ronellenfitsch [ed.], 60th Edition, München: 2023, § 72 VwVfG Marginal No. 31h).

[68] § 1 (1) EEG.

[69] S. Schlacke, H. Wentzien, D. Römling, *Beschleunigung der Energiewende: Ein gesetzgeberischer Paradigmenwechsel durch das Osterpaket?,* NVwZ 2022, p.1578.

[70] S. Schlacke, H. Wentzien, D. Römling, *Beschleunigung der Energiewende: Ein gesetzgeberischer Paradigmenwechsel durch das Osterpaket?*, NVwZ 2022, p.1586.

[71] S. Schlacke, H. Wentzien, D. Römling, *Beschleunigung der Energiewende: Ein gesetzgeberischer Paradigmenwechsel durch das Osterpaket?*, NVwZ 2022, p.1578.

[72] For storage assets cf. § 11c EnWG.

[73] German: *Gesetz zur Entwicklung und Förderung der Windenergie auf See* (Windenergie-auf-See-Gesetz), Art. 2 of the Act of 13 October 2016 (Federal Law Gazette: BGBl. I p. 2258, 2310), last amended by Art. 14 of the Act of 22 March 2023 (Federal Law Gazette: BGBl. 2023 I No. 88).

At the European level, Art. 3 Sentence 1 Regulation (EU) 2022/2577 establishes that the planning, construction, and operation of facilities and installations for the generation of energy from renewable sources, as well as their grid connection, the relevant grid itself, and the storage assets shall be presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in individual cases. This rebuttable presumption,[74] the scope of which is limited to four exhaustively listed balancing decisions in European environmental and biodiversity law,[75] was introduced in December 2022. Additionally, paragraph 2 of the Article requires prioritization of RES projects that have been recognized as serving the public interest in the case-by-case weighing of legal interests. In substance, Art. 3 of Regulation (EU) 2022/2577 anticipates planned Art. 16d of RED IV-E[76] and already gives effect to its regulatory content before the enactment of the legal act.[77]

c) Interim Conclusion

The scope of state control over the energy sector has gradually expanded,[78] parallel to the implementation of the political concept of the energy transition. Initially, limited to traditional regulatory tasks, carried out by the BNetzA, which is independent of state directives, at least in its core area of network tariff setting and access regulation, state control has expanded to cover parts of network planning and now passed through the decision-making level of planning and permit-granting processes of renewable energy facilities, related infrastructure, and storage. This is consistent insofar as this high zoning is accompanied by a decision on the content of the public interest, which accordingly requires a majority decision by society as a whole, and thus, a parliamentary act.[79] At the same

[74] Cf. recital (4, 6) Council Regulation (EU) 2022/2577.

[75] Namely, when balancing legal interests in the individual case for the purposes of Art. 6 (4) and Art. 16 (1) lit. c of the Habitats Directive (OJ L 206, 22 July 1992, pp. 7–50), Art. 4 (7) Water Framework Directive (OJ L 327, 22 December 2000, pp. 1–73) and Art. 9 (1) lit. a Birds Directive (OJ L 20, 26 January 2010, pp. 7–25).

[76] Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings, and Directive 2012/27/EU on energy efficiency from 18 May 2022, COM(2022) 222 final.

[77] On the general function of the Council Regulation (EU) 2022/2577 as a 'bridge' cf. S. Schlacke, E. Thierjung, *Krisenbewältigung durch EU-Ratsverordnung zur Beschleunigung des Ausbaus erneuerbarer Energien: Überbrückung durch Notfallrecht*, EnK-Aktuell 2023, 01011.

[78] Thus, with regard to the EnLAG, de Witt speaks of the first step on the way to transforming energy law towards governmental control of transmission grids (S. de Witt, [in:] *NABEG*, S. de Witt, F. Scheuten [ed.], München: 2013, EnLAG § 1 Marginal No. 1).

[79] In this context, Gillich speaks of a graded responsibility for concretization, which is characterized to a considerable extent by the legislature's competence to elevate certain goods to the rank of public interests through its own balancing decision (I. Gillich, *Das „überragende öffentliche Interesse" an der beschleunigten Umsetzung industrieller Großprojekte,* DÖV 2022, p. 1033).

time, however, there is an expansion or deepening of the state's access to energy-economic structures, although, partially for a limited period of time, [80] outside of market-economy incentive instruments with the use of relative consideration directives at the project approval level.

IV. CONCLUSION

Against the background of multiple crises, a change in values has recently taken place in European and national energy policy, at least at the level of legislative power. The expansion of possibilities for using renewable energies is now qualified as a public interest in order to achieve the overriding target of transforming the energy system. At the same time, this public interest was given priority over others (§ 2 EEG, Art. 3 Regulation (EU) 2022/2577).[81] Thus, on the one hand, the relevant regulations are a positive legal concretisation of a political value decision; on the other hand, they are coincidently an instrument for its implementation.[82] Its first practical results can already be identified.[83]

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[80] In the case of § 2 Sentence 2 EGG, the temporal restriction is obtained by the condition that the priority position only exists until electricity generation in the federal territory is almost greenhouse gas neutral. At European level, the application of Art. 3 of the Regulation (EU) 2022/2577 is initially limited to 18 months (Art. 10 (2) Council Regulation (EU) 2022/2577).

[81] The limit of this prerogative of assessment is laid down in the constitution (I. Gillich, *Das "überragende öffentliche Interesse" an der beschleunigten Umsetzung industrieller Großprojekte*, DÖV 2022, p. 1033).

[82] On the concept of 'public interest' as means of legal control R. Uerpmann, *Das öffentliche Interesse: Seine Bedeutung als Tatbestandsmerkmal und als dogmatischer Begriff,* Tübingen: 1999, p. 321 *et seq*.

[83] So, cf., e.g., the ruling of the Higher Administrative Court for the State of Mecklenburg-Western Pomerania from 23 February 2023 (5 K 171/22) or the ruling of the Higher Administrative Court of North Rhine-Westphalia from 27 October 2022 (22 D 363/21.AK).

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RIGHT TO MAKE A MISTAKE BY ENTREPRENEURS IN THE CONTEXT OF PUBLIC INTEREST

Abstract

This study refers to the new institution regulated in the Entrepreneurs' Act of 6 March 2018 – the right to make a mistake. The study aims to answer the question of what values impacted the formation of this new institution, its purpose, and what circumstances determine its application.

KEYWORDS

right to make a mistake, entrepreneur, public interest, principle of the entrepreneur's trust in public authority, Entrepreneurs' Act

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1. INTRODUCTION

In the Act of 31 July 2019 on the amendment of certain acts to limit regulatory burdens,[1] Article 21 was added to the Entrepreneurs' Act[2] of 6 March 2018, which introduced an institution previously unknown in Polish law – namely the 'right to make a mistake'. In the opinion of the legislator, this institution is 'based on the assumption that most of the violations committed by emerging Polish entrepreneurs are not the result of their bad will but rather have the nature of unintentional mistakes'.[3] Therefore, these mistakes neither pose a threat to the interests of other legal entities nor do they harm public safety or the legal order. The legislator also points out that very often errors and violations on the part of entrepreneurs are a consequence of unclear regulations, their incoherent interpretation by individual authorities and institutions, as well as the non-uniform practice of public administration.[4] The intent of the legislator was that in the event of a violation of the regulations related to the conduct of economic activity, an entrepreneur would have the opportunity to rectify his mistake. It is obvious that this particular benefit might not have been addressed to all entrepreneurs and applied in all situations related to the conduct of economic activity. At the stage of drafting the Act, it was necessary to take into account many substantive and procedural issues. Introducing a new institution also required considering whether, *inter alia*, the possibility of rectifying a mistake by entrepreneurs is in line with the public interest and whether this also excludes potential abuses. It was the public interest that was the main reason why Article 21a of the Entrepreneurs' Act provided for exceptions excluding the possibility of invoking the right to make a mistake and therefore preventing misuses.

This study aims to show the essence of the institution of the right to make a mistake and its rationale in the context of public interest. The most important ideas about public interest will be presented in the first part of the study.

[1] Journal of Laws, item 495, as amended.

[2] Consolidated text: Journal of Laws of 2021, item 162 as amended – hereinafter referred to as the Entrepreneurs' Act.

[3] Justification of the draft of the act amending certain acts in order to limit regulatory burdens – Parliamentary printed matter No. 3622, https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=3622 (accessed: 20 March 2023) – hereinafter referred to as: Justification of the draft of the act, printed matter No. 3622.

[4] Ditto, p. 48.

2. CONCEPT OF PUBLIC INTEREST

The concept of public interest was and still is the subject of numerous research studies.[5] The public interest clause is one of the essential general clauses in Polish law of a constitutional[6] but also political, economic, and social nature. This clause, on the one hand, is the basis for interference in the sphere of individual freedom; on the other one – according to A. Żurawik – is also to play a huge role in implementing the postulates of the social market economy.[7] The author rightly points out that what is in the public interest should be subject to assessment on the part of the legislator because it is the act that reflects the principles and values guiding the adoption of this and not the other solutions.[8] The public interest does not have a general, all-encompassing descriptive meaning. Its meaning is associated with the social and political context,[9] which further emphasizes the dependence of this concept on the state of the social market economy.

So what is the public interest? *Utilitas publica* is a concept known to Roman law. We cannot forget about the sentence spoken by Ulpian: '*Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorium utilitatem*' ('Public law is the law that applies to the Roman state, and private law is the law that serves the interests of individuals'). In this approach, the law should serve creating and maintaining social and economic relations beneficial to those entities in whose interest each state organization acts. Therefore, if the law permits an individual to perform certain activities, it does so bearing in mind also the interest of the state as a whole.[10] However, 'at that time, this maxim was used not in the

[5] In particular: A. Żurawik, *„Interes publiczny", „interes społeczny" i „interes społecznie uzasadniony". Próba dookreślenia pojęć,* Ruch Prawniczy Ekonomiczny i Socjologiczny, 2013, Vol. 2, p. 60 *et seq.*; *idem*, *Interes publiczny w prawie gospodarczym,* Warszawa 2013, p. 127 *et seq.*; *idem*, *Pojęcie interesu publicznego,* (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (ed.), *System prawa administracyjnego. Publiczne prawo gospodarcze,* Vol. 8A, Warszawa 2013, p. 410 *et seq.*; E. Komierzyńska, M. Zdyb, *Klauzula interesu publicznego w działaniach administracji publicznej,* Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia, 2016, Vol. LXIII, 2., p. 161 *et seq.*

[6] This reference is included in Art. 1, which indicates that the Republic of Poland is the common good of all citizens, Art. 17 or 22, as well as Art. 31 sec. 3. Cf. M. Zdyb, *Interes publiczny w orzecznictwie Trybunału Konstytucyjnego,* (in:) A. Korybski, M.W. Kostyckij, L. Leszczyński (ed.), *Pojęcie interesu w naukach prawnych, prawie stanowionym i orzecznictwie sądowym Polski i Ukrainy*, Lublin 2006, p. 206.

[7] A. Żurawik, *Pojęcie interesu publicznego, op. cit*., p. 410.

[8] *Ibidem*, p. 410.

[9] J. Blicharz, *Kategoria interesu publicznego jako przedmiot działania administracji publicznej,* Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji 2004, Vol. 40, p. 39.

[10] Z. Brodecki, B. J. Kowalczyk, *Podstawowe wartości jurysprudencji rzymskiej,* Gdańskie Studia Prawnicze, Vol. XXXV 2016, p. 111.

interest of the entire Roman society, but of its strata deriving individual profits at the expense of work of vast quantity of citizens employed in farm works'.[11]

According to Aristotle, 'so it turns out that systems which aim at the common good are found in accordance with the principle of absolute justice to be the right ones, while those which aim only at the good of the rulers are erroneous and represent all the degenerations of the right ones; for they are despotic, and yet the state is a community of freeborn people'.[12]

This conflict between the opposites represented by an individual, on the one hand, and the community, on the other, still represents an element of legal reality.[13]

The concept of public interest has been the subject of extensive research in the science of administrative law. As indicated in the literature, the concept of public interest always depends on the adopted system of values and is not closed conceptually.[14] It must be acknowledged that there is no rational justification for creating a legal definition of 'public interest' as it is impossible to construct one objective definition of public interest.[15] When discussing the public interest, it must be underlined that the intention of acting stems from implementing goals for the common good, not from an individual goal. Its importance should be interpreted in relation to constitutional values.[16] In the opinion of M. Wyrzykowski, the concept of public interest is defined by basic, universally recognized values for which there is a fundamental social consensus.[17]

E. Schmidt-Aβmann, juxtaposing the concepts of public and private interest, indicates that the public interest is the one that is aimed at directly supporting a common goal, which, however, cannot be identified with the general interest. Still, when the state's interest as a community is at stake, we can talk about common interests. The author stresses the need to weigh public and private interests, as both can serve the same purpose.[18]

In France, the clash of public interest with private interest was most evident in a very intense study by J. Ellul, who compared the concept of general interest to a rhetorical device used by the bourgeois class to impose the ideal of progress, regardless of the costs for individuals. He strongly opposed the notion that technical progress was in the general interest since the venture could be very

[11] See W. Rozwadowski, *Prawo rzymskie. Zarys wykładu wraz z wyborem źródeł,* Poznań 1992, p. 26.

[12] Arystoteles*, Polityka,* Book III, Part 4.

[13] Z. Brodecki, B. J. Kowalczyk, *op. cit*., p. 111.

[14] J. Zimmermann, *Prawo administracyjne,* Zakamycze 2006, pp. 265-266.

[15] W. Jakimowicz, *Publiczne prawa podmiotowe,* Zakamycze 2002, p. 115.

[16] L. Bielecki, *Pojęcie „interesu publicznego" (społecznego)*, (in:) M. Zdyb, J. Stelmasiak (ed.), *Prawo administracyjne*, Warszawa 2016, p. 109.

[17] After: Z. Duniewska, *Cel publiczny, interes publiczny i dobro wspólne,* (in:) M. Stahl (ed.), *Prawo administracyjne. Pojęcia instytucje, zasady w teorii i orzecznictwie*, Warszawa 2019, p. 86.

[18] E. Schmidt-Aβmann, *Ogólne prawo administracyjne jako idea porządku. Założenia i zadania tworzenia systemu prawnoadministracyjnego,* Warszawa 2011, p. 192.

questionable, similarly to its results.[19] On the other hand, F. Rangeon equated the concept of public interest with ideology.[20]

Strong links between administrative law and public economic law[21] make many representatives of public economic law draw from the theory of administrative law also as regards decoding the concept of public interest. They treat it as an element of the general principles of public economic law, within the scope of which the realization of the common good based on a common idea and a common goal was distinguished.[22] When defining 'administrative, economic law', A. Chełmoński pointed out that it reflects mutual sequences 'expressed in the attempt to satisfy the public good, on the one hand, and protect the rights and freedoms of the individual's interests, on the other'.[23] The public interest is recognised in the context of principles of public economic law also by M. Zdyb, who states that there is no public interest that digresses from the interest of an individual and that 'weighing interests makes sense only when both interests will come down to the same level and one can look at it through the prism of interests at stake'.[24] In turn, according to K. Jaroszyński, 'the public interest embraces the values necessary for the survival and development of a community, including the protection of rights and freedoms of other people'.[25]

The protection and realisation of public interest is the main objective of public administration within the area of public economic law. A. Borkowski is of the opinion that 'Public interest is not an independent entity. Its meaning depends on the social context in the sense of realising certain values accepted and desired in a given society at a certain time. Hence, the public interest requires continuous redefinition, analysis, re-evaluation, and assessment. Justified in this process is

[19] cf.: J. Ellul, *Exégèse des nouveaux* lieux communs, Paris, Calmann – Lévy, 1966.

[20] cf.: F. Rangeon, *Idéologie d'intérêt général*, Paris, Éditions Economica, 1986. As an example of a conflict of public and private interest, the author cited the airport project in Notre Dame des Landes, which was completed after several decades of political, legal and economic struggle only in 2018.

[21] T. Rabska, R*efleksje nad nauką publicznego prawa gospodarczego,* Roczniki Nauk Prawnych, Vol. XXI, No. 1, 2011, p. 270.

[22] Similarly L. Kieres, *Konstytucyjne publiczne prawo gospodarcze,* Ruch Prawniczy Ekonomiczny i Socjologiczny 2014, No. 2, p. 200.

[23] A. Chełmoński, *Realizacja dobra publicznego a ochrona interesów jednostki*, (in:) A. Borkowski, A. Chełmoński, M. Guziński, K. Kiczka, L. Kieres, T. Kocowski*, Administracyjne prawo gospodarcze*, Kolonia Limited 2005, p. 65.

[24] M. Zdyb, *Publiczne prawo gospodarcze,* Kraków – Lublin 1997, p. 100.

[25] K. Jaroszyński, *Klasyfikacja funkcji administracji gospodarczej*, (in:) H. Gronkiewicz-Waltz, M. Wierzbowski (ed.), *Prawo gospodarcze. Zagadnienia administracyjnoprawne*, Warszawa 2017, p. 191.

the participation of jurisprudence of common and administrative courts and the Constitutional Tribunal'.[26]

Whereas R. Blicharz writes about the public interest as a universal category classified as values. On the other hand, A. Żurawik, by systematizing the concept of public interest designated on the basis of value criterion, presents the so-called axiological concept in which value and good complement each other. In this sense, the public interest is assessed from the perspective of a specific community. The axiological rationale of public interest forces the need to refer to specific situations and changes taking place in society. Another concept links public interest with goals (the so-called praxeological concept) regarding relations between the state and the public interest, in which public interest is not considered the same as the interest of the state. Another concept is a notion that links public interest and needs. However, when determining the meaning of the concept of public interest, it is reasonable to apply the deduction method, i.e., adopting *a priori* a specific labelled definition of public interest and then examining how the legal status based on a legal norm meets the requirements of the facts understood in such way. This is how F. Longchamps formulated this concept. A. Żurawik also indicates the so-called mixed concepts, which combine different foundations of interest, in which values and goals complement and condition each other. E. Żurawik listed Modliński, M. Wyrzykowski, A. Szafrański, and W. Jakimowicz as representatives of this concept.

3. RIGHT TO MAKE A MISTAKE – THE ESSENCE AND OBJECTIVES OF THE REGULATION

The institution of the right to make a mistake entered into force on 1 January 2020. It does not embrace all entrepreneurs but only those who are listed in the Business Activity Central Register and Information Record (CEIDG) and who violated the law related to their business activity within the period of 12 months from the date of undertaking business activity for the first time or again after at least 36 months from the date of its last suspension or termination. Limiting the application only to natural persons entered into the CEIDG[27] was intentional. This was intended to eliminate potential abuses consisting in situations where, among others, 'persons establishing, for example, a limited liability company could bring

[26] A. Borkowski, *Interes publiczny a partnerstwo publiczno – prywatne,* (in:) J. Blicharz (ed.), *Prawne aspekty prywatyzacji*, Prace Naukowe Wydziału Prawa, Administracji i Ekonomii UWr, Wrocław 2012, p. 445.

[27] M. Etel, *Prawo do popełnienia błędu według przepisów ustawy – Prawo przedsiębiorców,* Przegląd Ustawodawstwa Gospodarczego, 2021, No. 10, p. 38.

about its liquidation after a year from the commencement of its business activity and the commencement of operations of a new company with practically the same profile, assets, and personnel, which would once again benefit from the benefits of the said law'.[28] The right to make a mistake is also unrelated to the size of an entrepreneur.[29]

The legislator not only deliberately limited the subjective scope of the institution of the right to make a mistake but also specified what law violations he had in mind. Namely, only those that result in the initiation of proceedings by police penal orders or proceedings for the imposing or levying of an administrative fine – before imposing a fine on an entrepreneur by way of a penalty ticket or levying an administrative fine on him, this authority calls on an entrepreneur, by means of an order, to remove the identified violations of the law and the effects of these violations, if such effects occurred, within the deadline prescribed by them. Pursuant to Article 21a sec. 2 of the Entrepreneurs' Act, in the event of proceedings by police penal orders, a representative of the competent authority may collect a written statement from an entrepreneur in which an entrepreneur undertakes to remove the identified violations of the law and the effects of these violations, if such effects occurred, within the prescribed deadline. In this case, the competent authority does not call on an entrepreneur to remove the identified violations of the law and the effects of these violations. Removal of violations may occur by submitting a statement 'on the spot' (directly) without the need for a separate call by means of an order. It should be pointed out that if an entrepreneur refuses to submit a statement, he is deprived of benefiting from this provision. It is also essential that correcting the error will not always be possible at the same time as submitting a statement. Therefore, the authority may set a deadline for an entrepreneur to remove the violations. Pursuant to Article 21a sec. 3 of the Entrepreneurs' Act, if an entrepreneur abides the request or fulfils the obligation contained in the written statement, the competent authority will refrain from imposing or levying an administrative fine on him. Instead, the proceedings will end up with a warning, and if the violation of the law is a petty offense or a tax offense, an entrepreneur will not be subject to a penalty.[30]

The provision of Article 21a sec. 5 of the Entrepreneurs' Act also provides for the possibility that an entrepreneur who violates the law will be able to escape penalties if he voluntarily, without any call, ceases to violate the law and removes the effects of these violations (voluntary disclosure).[31] The drafter also indicates that 'solutions similar to voluntary disclosure are introduced by Article 21a sec.6 of the Entrepreneurs' Act in respect of acts for which fines would be imposed by

[28] Justification of the Law, printed matter No. 3622, p. 51.

[29] *Idem*, pp. 51-52.

[30] *Idem*, p. 49.

[31] cf. A. Hołda-Wydrzyńska, *'Prawo do popełnienia błędu' w świetle nowelizacji Prawa przedsiębiorców,* Acta Universitatis Wratislaviensis, Prawo CCCXXIX, No. 3977, 2019, p. 81.

way of a penalty ticket, i.e., petty offenses and tax offenses. However, it would be possible if an entrepreneur submitted the corresponding notification. It could be, however, submitted also to the representative of the authority present on the spot'.[32]

From the public interest perspective, not only subjective and time-related limitations but also the introduction of subject-matter restrictions are relevant. The legislator accepted that despite the fulfillment of subjective and time-related prerequisites, the right to make a mistake cannot always be exercised. It concerns situations indicated in Article 21a sec. 8, i.e., such cases when: 1) violation concerns the provisions of law that have been violated by an entrepreneur in the past, or 2) violation of the law is flagrant, or 3) it is not possible to rectify the violations of the law or they have caused irreversible consequences, or 4) the need for imposing a fine by way of a penalty ticket or imposing, or levying an administrative fine results from a ratified international agreement or directly applicable provisions of law of the European Union, or 5) the violation of the law consists in conducting business activity despite the lack of a license, permit or entry in the register of regulated activities required by law, or operating without obtaining a consent, permit or permission of the competent authority for this action beforehand, if the provisions provide for the obligation to obtain them, or activities inconsistent with such consent, permit or permission, or 6) separate provisions providing for imposing a fine by way of a penalty ticket or imposing, or levying an administrative fine for a failure to implement post-audit recommendations.

In the justification for a draft of the law amending certain acts in order to limit regulatory burdens, it is indicated that the idea underlying the new institution is that the introduced regulations can be used as a kind of lesson for an entrepreneur who, by exercising the right to make a mistake, was also instructed about how to proceed in order to avoid possible penalties in the future. That is why the subsequent violation of the law will result in specific sanctions.

The right to make a mistake also cannot be exercised in a situation of gross wrongdoing. When determining whether this is such a case, it is necessary to take into account the specific nature of the violation, the type of business conducted, the behaviour of an entrepreneur, the time and nature of the violation, and the assessment of the importance of the good protected by law. In the justification for a draft of the law, it was indicated that an example of such a violation may be 'a violation of the obligation to pay the electronic fee referred to in Article 13 sec. 1 point 3 of the Act of 21 March 1985 on public roads.[33] This fee was introduced in order to provide funds for the implementation of road construction projects. Since the construction of roads in the Republic of Poland is treated by the national legislator and the Constitutional Tribunal as a goal subject to constitutional protection'.[34]

[32] Justification of the Law, printed matter No. 3622, p. 50.

[33] Consolidated text: Journal of Laws of 2022, item 1693, as amended.

[34] Justification of the Law, printed matter No. 3622, p. 54.

Running a business without a license, permit, or entry in the register of regulated activities is considered a distinct type of gross violation of the law.

It is also worth noting that 'there may be instances where the removal of violations of the law is not possible or where these violations have caused irreversible consequences'.[35] Imposing an obligation on the competent authority to request an entrepreneur to remove the identified breaches of the law and the effects of these violations when it is not objectively possible to meet these requests, is pointless.[36]

The right to make a mistake also does not apply when there is a need to impose a fine by way of a penalty ticket or imposing or levying an administrative fine arising from a ratified international agreement or directly applicable provisions of European Union law. This exclusion stems from the system of sources of law adopted in the Constitution of the Republic of Poland, in which ratified international agreements or directly applicable provisions of European Union law take precedence over the Act.

The drafter also explained that the 'right to make a mistake' will not apply in situations where the provisions of other acts provide for imposing a fine by way of a penalty ticket or imposing, or levying an administrative fine for a failure to comply with post-audit recommendations. Procedures provided for in such separate regulations are already implementing the primary intention of the 'right to make a mistake', i.e., punishing an entrepreneur only if he fails to rectify irregularities indicated by the competent authority.[37]

The right to make a mistake also does not apply if a fine by way of a penalty ticket is imposed as a result of a road check. In matters linked with the SENT system,[38] the Ombudsman for Small and Medium-Sized Enterprises pointed out that the so-called rational punishment, which means that one should refrain from punishment when circumstances of the case lead to the belief that the non-observance of law: was of a formal nature; was a consequence of an error or unawareness of an entrepreneur; did not result in depletion of the state budget and the premises of public interest; or would be possible if an entrepreneur submitted the corresponding notification vital interest of an entrepreneur – did not occur.[39] The subject of the Ombudsman's critical position were such instances of applying the provisions of the SENT Act by customs and tax officers, heads of customs and tax offices, and directors of tax administration chambers which led to the violations of the entrepreneurs' rights in the SME sector and are contrary to the objective of adopting the SENT Act. In the Ombudsman's opinion, the provision of Art. 22 sec. 3

[35] *Idem,* p. 55.

[36] After: justification of the Law, printed matter No. 3622, p. 54.

[37] Justification of the Law, printed matter No. 3622, p. 56.

[38] Act of 9 March 2017 on the monitoring system for the road and rail transport of goods and trading in heating fuels, consolidated text Journal of Laws of 2023 item 104 – SENT Act.

[39] SME Ombudsman, SENT system report. Issue of imposing fines on entrepreneurs, 9 December 2020.

of the SENT Act, stipulating the possibility of refraining from the imposition of a fine, is not applied in practice.[40]

In its judgment of 20 June 2020, the Voivodship Administrative Court in Warsaw decided that it was wrong to deem the SENT notification incomplete without a road permit (license) number. Since this deficiency was supplemented by the carrier in the notification already in the course of a road check, during which the driver also presented an extract from his transport license. The Voivodship Administrative Court did not share the opinion of the authorities of both instances, according to which refraining from imposing a penalty should be treated as a special institution and granting this type of relief would put the carrier in a privileged position in relation to other entities performing transport that fulfil the obligations arising from the SENT Act or pay fines for non-compliance.

In its judgment of 13 January 2023, the Supreme Administrative Court asked a very important question – 'Is it in the public interest to impose fines of several thousand zlotys on entities only for formal defects related to the violation of obligations provided for in the SENT Act, or has there been a depletion of tax in this case; or whether the identified defect posed a real threat of depleting the tax revenue of the state budget by an entity in question (including, in particular, by making arrangements regarding this specific vehicle whose registration number was entered in the notification); whether it was committed as part of fraud or other crimes; whether or not this non-compliance bears the hallmarks of intentional action and is a sign of the carrier's disrespectful attitude as a professional to fulfil the obligations imposed by the Act; whether it happened once (occasionally) or the non-compliances occur so often with that carrier that they indicate at least undue diligence in conducting business; whether the imposition of a fine on the complainant was of a preventive nature with regard to subsequent transports; whether in the circumstances of the case the complainant meets the purpose of the SENT Act; whether the fine imposed on it does not violate the principle of proportionality provided for in Art. 31 sec. 3 of the Constitution of the Republic of Poland, which requires state authorities to apply only such measures which are necessary to achieve a specific purpose; what is the ratio of penalties imposed for transports performed at the same time by the same transport to the complaining party's income from these transports?'.[41]

At this point, it is worth referring to the applicable French regulation, as Polish solutions broadly refer to it. J. Chevallier rightly points out that the very term the 'right to make a mistake' can be misleading since it is rather about the right

[40] Using a sledgehammer to crack a nut. SME Ombudsman's report https://www.truck.pl/pl/article/1343/z-armat%C4%85-na-much%C4%99-czyli-przesadne-kary-w-systemie-sent-raport-rzecznika-ma%C5%82ych-i-%C5%9Brednich-przedsi%C4%99biorc%C3%B3w,9 (accessed: 20 March 2023).

[41] Judgment of the Supreme Administrative Court of 13 January 2023, II GSK 684/22, https://orzeczenia.nsa.gov.pl/doc/723CA5F300 (accessed: 20 March 2023).

to correct mistakes committed in good faith in order to avoid punishment.[42] In French law (LOI n° 2018-727 du 10 août 2018 *pour un Etat au service d'une société de confiance*),[43] the legislator assumed that it is necessary to transform the relationship between administrative authorities and citizens, in which administration authorities should act prudently and support any initiatives communicated by citizens. The idea of the *pour un Etat au service d'une société de confiance* Act is about creating a new model of relations between administrative authorities and citizens, which should be based on mutual trust. The adopted solutions allow citizens, thus not only entrepreneurs, to correct 'correctable' mistakes in mandatory tax declarations and filings (ESFP) and in the social security system (PMSS), provided that they do so before the expiry of the relevant deadline (if there is such a deadline), which, if not corrected, might result in penalties. This right covers material errors and errors emerging from not knowing the applicable law. It is also subject to certain conditions. Firstly, citizens may claim they do not know specific provisions only once. Secondly, they must not act in bad faith or commit fraud. In this case, the burden of proof is on the government (authority). Therefore, the Act establishes a new principle under which 'the government (administrative authority), as a rule, trusts natural and legal persons acting in good faith'.[44]

The Act specifies two ways of correcting mistakes by citizens: in a 'proactive' mode ('proactively' when a citizen corrects a mistake without a reminder) and in a 'reactive mode ('reactively' when an authority notifies a citizen of the mistake and asks them to correct it). As long as the provided information is correct, a citizen will not be punished for the original mistake.[45]

4. PRINCIPLE OF TRUST OF ENTREPRENEURS IN ADMINISTRATION BODIES

Referring to the principle of trust, it should be stressed that the Entrepreneurs' Act, as one of the few legal acts in Poland, was preceded by a preamble, the doctrine of which makes it essential in the context of principles and values in the science of public economic law.[46] The content of the preamble includes principles that are not *ad hoc*; their amalgamation creates not only a model of

[42] J. Chevallier, *Trust and the right to make mistakes,* https://www.economie.gouv.fr/igp-de-editions-publications/thearticle_n6, (accessed: 20 March 2023)

[43] https://www.legifrance.gouv.fr/loda/id/JORFTEXT000037307624 (accessed: 20 March 2023).

[44] *Idem*.

[45] *Idem*.

[46] K. Kokocińska, *Podstawowe wartości i zasady porządku gospodarczego*, (in:) M. Wierzbowski (ed.), *Konstytucja biznesu. Komentarz*, Warszawa 2019, p. 29 *et seq*.

prevailing economic relations but also stresses the importance of an entrepreneur as an administered entity, which is supposed to have a sense of legal certainty.[47] The legislator acknowledges the principle of legal certainty in the provision of Article 14 of the Entrepreneurs' Act and in the provision of Article 12 of this Act introduces the principle of entrepreneurs' trust in public authorities. Both of these principles are closely interrelated. 'The principle of citizen's trust in the state and the law enacted by it is based on legal certainty, understood in the jurisprudence of the Constitutional Tribunal as a certain set of features vested in the law, which ensure legal security for an individual'.[48]

The Constitutional Tribunal points out that the principle of trust is a manifestation of the principle of the rule of law, from which arises the need to: protect citizens' trust in the state and the law enacted by it; provide legal security; maintain appropriate *vacatio legis*, certainty and specificity of law; maintain the principles of decent legislation and respect for the sustainability of court judgments and final administrative decisions; use the principle of non-retroactivity.[49] In the jurisprudence of the Constitutional Tribunal, Article 2 of the Constitution is of fundamental importance for the legal situation of citizens and state authorities and must be considered as the foundation of the constitutional and legal order of the Polish State.[50] The principle of protecting the citizen's trust in the state and the law enacted by it is also defined in the jurisprudence of the Tribunal as the principle of loyalty of the state towards the citizen. 'It is expressed in such making and applying the law to prevent it from becoming a kind of trap for a citizen who should be able to sort his things out in confidence that he does not expose himself to legal consequences that are unforeseeable at the time of making a decision and that his actions, undertaken in compliance with applicable law, will also be recognized by the legal order in the future. New regulations adopted by the legislator must not surprise their addressees. They should have time to adapt to the amended regulations and calmly decide how to proceed.[51]

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[47] J. Jagielski, P. Gołaszewski, *O zasadzie zaufania administracji publicznej do jednostki w prawie administracyjnym,* (in:) J. Jagielski, D. Kijowski, M. Grzywacz (ed.), *Prawo administracyjne wobec współczesnych wyzwań. Księga jubileuszowa dedykowana Profesorowi Markowi Wierzbowskiemu*, Warszawa 2018, p. 37.

[48] Speech by Dr. J. Kochanowski, the Human Rights Defender at the scientific conference 'The language of Polish legislation, or comprehensibility of the message and the application of law', https://bip.brpo.gov.pl/pliki/1165502902.pdf (accessed: 20 March 2023).

[49] Judgment of the Constitutional Tribunal of 5 January 1999, K. 27/98. Journal of Laws of 1999 No. 1, item 5.

[50] See judgment of the Constitutional Tribunal of 21 March 2001, K. 24/00, M.P. 2001 No. 10, item 160.

[51] Judgment of the Constitutional Tribunal of 15 September 1998, K 10/98, OTK ZU 1998, No. 5, item 64.

5. CONCLUSIONS

The consequence of implementing the principle of entrepreneurs' trust in public authorities is the introduction of the institution of the right to make a mistake. Based on the assumption that there is a specific catalogue of apparent mistakes that emerging entrepreneurs make,[52] and correction of which is more desirable from the perspective of public interest than punishing an entrepreneur, this solution is most certainly justified. The cited judgment of the Supreme Administrative Court of 13 January 2023 contains all the essential elements that should be at the heart of applying the institution of the right to make a mistake. The public interest, which is based on constitutional principles – a democratic state ruled by law and the principle of proportionality – when granting an entrepreneur the right to make a mistake, requires to consider several circumstances, including the purpose of this institution, the type of culpability, the entrepreneur's conduct, the consequences of the entrepreneur's mistake and taking into account whether the benefits of applying the institution are more favorable from the perspective of the entrepreneur's trust in the authorities than sanctioning violations that are of marginal importance. Acting on the basis of the principle of trust creates a new type of relationship between entrepreneurs and state authorities and this right direction is acknowledged by solutions adopted in the Entrepreneurs' Act – established interpretation or resolving legal and factual doubts in favor of entrepreneurs.

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ORDER FOR THE CONTINUATION OF ECONOMIC ACTIVITY BY AN ENERGY COMPANY IN THE SOCIAL INTEREST

Abstract

Article 40 of the Energy Law Act of 10 April 1997 provides for the possibility for the President of the Energy Regulatory Office to order the continuation of economic activity by an energy company despite the expiry of a license. This is a special regulation related to the need to ensure the continuity of supplies and protection of recipients of energy services when required by social interest. Therefore, this regulation provides for an exception to the principle of the freedom to undertake, perform, and terminate economic activity.

The purpose of this article is to draw attention to the fact that the necessity to ensure the provision of energy services in a continuous manner means that the state imposes an obligation on energy companies to continue economic activity, at the same time not guaranteeing the entrepreneurs sufficient compensation in the form of appropriate remuneration for continuing the economic activity. Pursuant to the provisions of the Energy Law Act of 10 April 1997, an energy company is only entitled to loss coverage and only in the amount limited to the justified costs of the ordered activity.

KEYWORDS

energy company, social interest, President of the Energy Regulatory Office

SŁOWA KLUCZOWE

przedsiębiorstwo energetyczne, interes społeczny, Prezes Urzędu Regulacji Energetyki

1. INTRODUCTION

Economic rationing is one of the basic functions of the state. It ensures the functioning of the economy in accordance with the public interest. The essence of rationing is the presence in the legal order of a number of instruments (orders and prohibitions) towards entrepreneurs, characterized by varying degrees of formalism and the onerousness of public law interference. One of them is, undoubtedly, the order for an energy company to continue its economic activity despite the expiry of a license.

The purpose of this article is to draw attention to the fact that the need to ensure the provision of energy services in a continuous manner causes the state to impose various public law obligations on energy companies, including the obligation to continue economic activity, at the same time not guaranteeing the entrepreneur sufficient compensation in the form of appropriate remuneration for continuing the economic activity.

In order to perform an analysis in this respect, it is first necessary to present the nature, subjective, and temporal scope, as well as the form of the order to continue economic activity by an energy company. Subsequently, considerations will be made on the powers of an energy company to obtain compensation from the State Treasury for losses incurred as a result of continuing operations. This article will also present the practice of the public administration body – the President of the Energy Regulatory Office – when using the order regulated in Article 40 of the Energy Law Act of 10 April 1997.[1]

[1] Journal of Laws of the Republic of Poland: Journal of Laws 2022, item 1385, as amended.

2. THE ORDER TO CONDUCT ECONOMIC ACTIVITY – ESSENCE, SCOPE, AND FORM

2.1. SOCIAL INTEREST AS A PREREQUISITE FOR CONTINUING ECONOMIC ACTIVITY

The principle of freedom of economic activity adopted in the Constitution of the Republic of Poland covers undertaking, performing, as well as terminating economic activity. Whereas restrictions on this principle are permissible only by way of an act and only on the grounds of an important public interest (Art. 22 of the Constitution of the Republic of Poland).

Article 40 of the Energy Law Act of 10 April 1997 introduces the possibility of restricting the freedom to terminate economic activity of an energy company, if required by social interest. However, the provisions of the Energy Law Act of 10 April 1997, as well as other legal acts, do not specify the scope of the concept of social interest. On the other hand, various definitions of 'social interest' are adopted in the literature. For example, A. Matusiak believes that social interest should lead to the common good by shaping the position of an individual.[2] According to M. Sakowska-Baryła, social interest is related to the existence of certain social groups, the source of which is a diverse society, and with the help of this concept, it is possible to describe other interest groups than those within the public interest.[3] A. Jaworski and A. Komenda claim that social interest is the sum of individual interests but with a reservation that 'the protection of individual, most legitimate interests is not always at the same time the protection of the social interest'.[4] Some authors also identify social interest with public interest, putting an equality sign between them and often using them interchangeably.[5]

Based on the above examples, it can be concluded that there is no fixed and absolute definition for the concept of 'social interest'. Each of the above-mentioned interpretations gives a different picture of this concept. In addition, some of them are inconsistent with each other. Moreover, as M. Wyrzykowski points out, the content of social interest is a constantly changing composition and bal-

[2] A. Matusiak, *Pojęcie interesu społecznego jako przesłanki udziału prokuratora w postępowaniu*, Zeszyty Prawnicze 13.3./2013, p. 152.

[3] M. Sakowska-Była, *Ochrona danych osobowych a dostęp do informacji publicznej i ponowne wykorzystywanie informacji sektora publicznego*, Warszawa 2022, Published: WKP 2022.

[4] A. Jaworski, A. Komenda, Chapter 9. *Kurator ustanawiany w postępowaniu rejestrowym*, (in:) A. Komenda (ed.), *Krajowy Rejestr Sądowy i postępowanie rejestrowe*, Published: WKP 2021.

[5] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne*, Warszawa 2009, p. 358; K. Płonka-Bielenin, *Czynniki decydujące o uregulowaniu prawnym instytucji partnerstwa publiczno-prywatnego w Polsce a interes społeczny*, PPP 2016/7-8, pp. 163-171.

ance of various values of a specific society at a specific time.[6] Thus, the President of the Energy Regulatory Office, when imposing on an energy company the obligation to continue operations after the expiry of a license, must indicate what specific social interest is involved and prove that it is so important and significant that it absolutely requires limiting the individual powers of the energy company. Both the demonstration of social interest and its meaning, as well as the premises may be subject to thorough judicial review, especially when, in the opinion of the authority, it is in the social interest to limit the rights set out in the Constitution of the Republic of Poland.[7]

It should be noted that social interest should not be equated with the concept of 'public interest'. The diverse nature of these legal categories is emphasized by their adjectives. According to the definition included in the PWN Dictionary of the Polish language, the adjective 'public' refers to all people, serving the general public, intended, available to all.[8] In contrast, 'social' means 'relating to a society or part of it, appearing, forming in a society, realized in a society, by a society, connected with a society'.[9] In addition, as some authors point out, 'since a rational legislator distinguished these two terms, it should be assumed that they are not identical and should not be used interchangeably'.[10] As a side note, it should also be noted that the term 'social interest' appears in 3,322 legal acts,[11] in turn, 'public interest' can be found in 10,574 legal acts.[12] However, the above does not mean that these concepts are not correlated categories. Both concepts are the basis for limiting rights and freedoms, and at the same time, they are the limit of the activity of public administration. They are also the opposite of the term 'private' which refers to someone's personal affairs, is someone's personal property, and is not subject to the state or any public institutions.

2.2. SUBJECTIVE SCOPE

The scope of the subjective application of the legal norm contained in Article 40 sec. 1 of the Energy Law Act of 10 April 1997 may apply only to an energy company that held a license to conduct a given type of activity and the license

[6] M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Warszawa 1986, p. 47.

[7] Z. Muras, *Artykuł 40*, (in:) M. Swora, Z. Muras, (ed.), *Prawo energetyczne. Tom II. Komentarz do art. 12-72*, Warszawa 2016, p. 589.

[8] M. Szymczak, *Słownik języka polskiego PWN, L–P*, Warszawa 1999, p. 1022.

[9] S. Dubisz, *Wielki słownik języka polskiego PWN, R–T*, Warszawa 2008, p. 500.

[10] A. Matusiak, *Pojęcie interesu społecznego jako przesłanki udziału prokuratora w postępowaniu*, Zeszyty Prawnicze 13.3./2013, p. 163.

[11] Including 3120 sources of local law.

[12] Including 9489 sources of local law.

expired. However, the regulation contained in Energy Law Article 40 of the Act of 10 April 1997 does not specify the grounds (premises) for its expiration.

Issues related to the expiry of the license are regulated in Articles 42-42b of the Energy Law Act of 10 April 1997. Pursuant to them, a license expires as a result of the expiry of the period for which it was issued, on the date of deletion of the energy company from the relevant register or from the records (for reasons other than the death of the entrepreneur), or in the event of a failure to demonstrate or perform the activity covered by the license by the energy company over the next 12 months. A different mechanism is described in Article 162 of the Code of Administrative Procedure Act of 14 June 1960.[13] According to it, a public administration body may declare expiration by way of an administrative decision in two cases. First, when a decision has become groundless and the revocation of such a decision requires a provision of law or when it is in the social interest, or in the interest of the party. Secondly, the decision was issued subject to the fulfillment of a certain condition by the party and the party failed to meet this condition.

When analyzing the above-mentioned legal provisions, it should be stated that it is not possible to order an energy company to continue operating in each case where the license granted by way of an administrative decision expires. In the event of the deletion of the company from the relevant register or records, the legal existence of the energy company ceases and thus the entity that could be ordered to conduct licensed activity ceases to exist. Moreover, as indicated by some authors, taking into account the premises for determining the expiry of the decision pursuant to Article 162 of the Code of Administrative Procedure Act of 14 June 1960 and the fact that this occurs as a result of an action of a public administration body, it is difficult to indicate situations in which it would then be possible to order the performance of licensed economic activity due to social interest in a situation where the same interest is the basis for its termination.[14] The regulation contained in Article 40 sec. 1 of the Energy Law Act of 10 April 1997 therefore may only apply to cases where a license expires as a result of the expiry of the period for which it was granted or as a result of the cessation of activity by an entrepreneur but in a manner other than deletion from the relevant register or records. Thus, one cannot agree with the view of some authors that 'the reason for the expiry of the license is irrelevant'.[15] A *de lege ferenda* request should be made to specify in Article 40 of the Energy Law Act of 10 April 1997 the basis for the expiry of the license.

Article 40 of the Energy Law Act of 10 April 1997 also applies to an entrepreneur who is not the owner of the infrastructure that is to be used to continue oper-

[13] Journal of Laws of the Republic of Poland: Journal of Laws 2022, item 2000, as amended.

[14] Z. Muras, *Artykuł 40*, (in:) M. Swora, Z. Muras, (ed.), *Prawo energetyczne. Tom II. Komentarz do art. 12-72*, Warszawa 2016, p. 584.

[15] A. Kościuk, *Prawo energetyczne, Komentarz*, ed. II. Published Lex/el.2023, Commentary on Art. 40.

ations,[16] and to an entrepreneur subject to bankruptcy or liquidation proceedings. On the other hand, in the event that bankruptcy is declared, the entity obliged by the President of the Energy Regulatory Office to continue economic activity will be the administrative receiver.[17] However, this standard will not apply to a buyer of a bankrupt enterprise. As indicated by the Supreme Court in one of its judgments, 'the wording of Article 40 sec. 1 of the Energy Law, its unique character and the adopted way of its interpretation preclude its application to third parties who did not hold a license'.[18]

2.3. TIME SCOPE OF THE ORDER

Pursuant to the content of Article 40 sec. 1 of the Energy Law Act of 10 April 1997, the President of the Energy Regulatory Office may order the continuation of economic activity for a period not longer than 2 years. The indicated period shall be calculated from the date of expiry of the license. The designated time scope of the obligation to continue operations should be proportionate to the objective of protecting the specific social interest it is intended to serve. It should be noted that the President of the Energy Regulatory Office may issue multiple decisions ordering the continuation of operations but the total period of extension of all the decisions may not exceed 2 years. Thus, the legislator adopted the principle according to which a 2-year period of compulsory functioning of an energy company should be sufficient to take action by both consumers and other energy companies in order to ensure access to the fuel or energy market.[19]

2.4. FORM OF THE ORDER TO CONTINUE ECONOMIC ACTIVITY

Referring to the legal form of the order to continue operations of an energy company, it should be pointed out that the legislator in Article 40 of the Energy Law Act of 10 April 1997 did not define it directly. However, the doctrine and case law clearly indicate the form of the decision issued on the basis of Article 104

[16] Judgment of the Court of Appeal in Warsaw – VII Commercial Division of 19 April 2018, VII Aga 1285/18, LEX No. 2538277.

[17] It should be noted that case law indicates that 'the administrative receiver should be released from the obligation to conduct activities in the field of trading and distribution of gaseous fuel, since the receiver, within the scope of the function entrusted to him, should aim at satisfying creditors by liquidating the bankrupt's assets, and therefore not to continue operations of the company, only to phase it out, as indicated by the wording of Art. 173 of the Act of 28 February 2003 – Bankruptcy Law.' Judgment of the District Court – Court of Competition and Consumer Protection of 19 September 2017, XVII AmE 185/16, LEX No. 2436806.

[18] Judgment of the Supreme Court of 16 January 2020, I NSK 107/18, LEX No. 3018617.

[19] Z. Muras, *Artykuł 40*, (in:) M. Swora, Z. Muras, (ed.), *Prawo energetyczne. Tom II. Komentarz do art. 12-72*, Warszawa 2016, p. 585.

§ 1 of the Code of Administrative Procedure Act of 14 June 1960 in connection with Article 40 of the Energy Law Act of 10 April 1997.[20] It should be noted that the decision in question will not be a license within the meaning of Article 32 of the Energy Law Act of 10 April 1997 but only a decision ordering the continuation of a specific licensed activity. It should be noted that the President of the Energy Regulatory Office in the period from 2015 to 2021[21] issued five decisions ordering the continuation of operations after the expiry of a license. In 2016, one decision was issued (which was later overturned in court proceedings), and in 2019, four decisions were issued (including two decisions for one energy company).[22] In 2022 and January 2023, the President of the Energy Regulatory Office, in turn, did not issue any decisions ordering an energy company to continue conducting licensed economic activity despite the expiry of a license, pursuant to Article 40 of the Energy Law Act of 10 April 1997.[23]

3. COVERING THE COMPANY'S LOSSES FOR CONTINUING OPERATIONS

Pursuant to Article 41 sec. 2 of the Energy Law Act of 10 April 1997, an energy company is entitled to loss coverage for continuing economic activity from the State Treasury in the amount limited to the justified costs of the activity specified in the license. If the continued economic activity is not conducted at a loss, the energy company is not entitled to compensation.

Coverage of possible losses of an energy company is also limited to the justified costs of continuing operations. Therefore, the compensation from the State Treasury will cover only the costs related to conducting economic activity in the period from the date of expiry of the license to the date of expiry of the period in which the energy company's economic activity is to be continued, as specified in the decision of the President of the Energy Regulatory Office. Thus, the State Treasury is not liable for losses incurred prior to the issuance of the deci-

[20] Judgment of the Supreme Court of 16th January 2020, I NSK 107/18 , LEX No. 3018617; Z. Muras, *Artykuł 40*, (in:) M. Swora, Z. Muras, (ed.), *Prawo energetyczne. Tom II. Komentarz do art. 12-72*, Warszawa 2016, p. 589; A. Walaszek-Pyzioł, W. Pyzioł, *Prawo energetyczne, Komentarz*, Wydawnictwo Prawnicze PWN, Warszawa 1999, p. 113.

[21] There is no documented information prior to 2015 due to the five-year period of archiving decisions requiring energy companies to continue conducting activities covered by the license, resulting from the Office Instruction of the Energy Regulatory Office.

[22] Reply of the Energy Regulatory Office to the author's request submitted under the provisions on access to public information. Letter of 29 July 2021, number DSK. WKS.056.54.2021.IRŚ.

[23] Reply of the Energy Regulatory Office to the author's request submitted under the provisions on access to public information. Letter of 8 March 2023, number DSK.WKS.056.19.2023.IRŚ.

sion ordering the continuation of economic activity. In addition, only the costs intended to prevent the energy company from generating losses are subject to approval. The rest of the costs remain unapproved, for example, the cost of energy efficiency certificates in the case of electricity sold to end users.[24]

The possibility of claiming compensation for losses is also closely related to the scope of activity indicated in the decision ordering the continuation of the economic activity. The coverage of losses applies only to the economic activity that the energy company was ordered to perform. As some authors point out, if the decision limits the scope of economic activity in relation to the issued license, it will be possible to cover the justified costs only in the scope of losses resulting from the activity within this limited scope.[25]

On the basis of Article 40 sec. 2 of the Energy Law Act of 10 April 1997, it is also not possible to cover losses resulting from the damage caused by the improper activity of an energy entrepreneur. The above applies in particular to the coverage of any claims for damages arising from torts or for non-performance or improper performance of own obligations.[26] On the other hand, the obligation to cover losses applies only to losses in the scope of justified costs of operations conducted with due diligence. As indicated by some authors, due diligence of an enterprise should result from its professional nature, knowledge, and reliability typically required from an entity for this type of activity.[27]

In accordance with the wording of Article 40 sec. 3 of the Act of 10 April 1997, reasonable costs of activities carried out with due diligence are subject to approval by the President of the Energy Regulatory Office. Thus, losses will be covered by a decision issued by the President of the Energy Regulatory Office. The burden of proof of the loss, its amount, and justified nature will be borne in this case by the entrepreneur requesting its coverage.[28] In addition, as indicated in case law, 'due to the fact that the relations between parties may often be very complicated and the claims arising from them may have a source or basis in various legal provisions, it is the duty of the plaintiff (energy entrepreneur) to precisely define the actual basis of the request so that it can be clearly determined what legal basis it has. This is necessary in order for the defendant to undertake appropriate protection and in order for the court to determine the limits of the resolution of the case'.[29] The entrepreneur may appeal against the decision of the

[24] Z. Muras, *Artykuł 40*, (in:) M. Swora, *Z. Muras,* (ed.), *Prawo energetyczne. Tom II. Komentarz do art. 12-72*, Warszawa 2016, p. 591.

[25] Z. Muras, *Artykuł 40*, (in:) M. Swora, *Z. Muras,* (ed.), *Prawo energetyczne. Tom II. Komentarz do art. 12-72*, Warszawa 2016, pp. 590-591.

[26] A. Walaszek-Pyzioł, W. Pyzioł, *Prawo energetyczne, Komen*tarz, Wydawnictwo Prawnicze PWN, Warszawa 1999, p. 114.

[27] M. Kuliński, *Artykuł 40*, (in:) M. Kuliński (ed.), *Prawo Energetyczne. Komentarz*, Warszawa 2017.

[28] *Ibid*.

[29] Judgment of the Supreme Court of 11 December 2009, V CSK 180/09, LEX No. 551156.

President of the Energy Regulatory Office to the District Court in Warsaw – the Court of Competition and Consumer Protection – pursuant to Article 30 sec. 2 of the Energy Law Act of 10 April 1997.

4. CONCLUSION

The considerations presented above lead to the following conclusions:

1. The need to guarantee the provision of energy services in a continuous manner means that the state may impose an obligation on an energy company to continue its economic activity despite the expiry of a license. This allows not only for the permitted limitation of the freedom to conduct economic activity but also rationing control over the economic activity of energy companies.
2. An order to continue economic activity by an energy company may only be made when it is required by social interest. Taking into account the fact that the concept of social interest is a general clause, its content will be specified each time by the President of the Energy Regulatory Office in a specific case. The scope of this concept is conditioned by many variables and requires constant updating and reference to specific factual and legal relations in a given place, time, and value system.
3. It is not possible to order an energy company to continue its economic activity in every case in which a license expires. The regulation contained in Article 40 sec. 1 of the Energy Law Act of 10 April 1997, therefore, may only apply to cases where a license expires as a result of the expiry of the period for which it was granted or as a result of the cessation of economic activity by an entrepreneur but in a manner other than deletion from the relevant register or records. A *de lege ferenda* request should be made to specify in Article 40 of the Energy Law Act of 10 April 1997 the basis for the expiry of the license.
4. The subjective scope of application of the legal norm contained in Article 40 sec. 1 of the Energy Law Act of 10 April 1997 may apply to an energy company. However, in the event of bankruptcy, the entity obliged by the President of the Energy Regulatory Office to continue conducting economic activity will be the administrative receiver. *De lege ferenda* request should be made for exemption from the obligation to conduct economic activities by the administrative receiver due to the fact that the role of the receiver mainly involves liquidating the assets of a bankrupt entrepreneur and determining the circle of creditors who will be repaid in the course of bankruptcy proceedings.
5. The legal regulation contained in Article 40 of the Energy Law Act of 10 April 1997 is applied in the practice of the public administration body – the President of the Energy Regulatory Office.
6. The provision of Article 40 sec. 2 of the Energy Law Act of 10 April 1997 defines the upper maximum limit of the State Treasury's liability. An energy

company is entitled to loss coverage in the amount limited to the justified costs of the ordered activity. The entrepreneur is not entitled to any other costs that may be necessary for the effective continuation of economic activity. He is also not entitled to any additional compensation in the form of appropriate remuneration for continuing his economic activity.

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