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THE IMPACT OF EUROPEAN LAW ON POLISH AND UKRAINIAN LEGAL SYSTEMS

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SPIS TREŚCI

Dear Readers,

It is with great pleasure that we present a new volume of our faculty journal, "Studia Iuridica", a product of cooperation between the *Centre for Promotion of Polish Legal Research*, founded on 12 December 2016 at the Faculty, and our Ukrainian partners. The Centre, directed by Dr. Krzysztof Szczucki, was established following the receipt by Warsaw University's Faculty of Law And Administration of a PLN 1.8m grant (for years 2017-18) from the Ministry of Science and Higher Education for the project entitled "Centre for Promotion of Polish Legal Research" as part of the "Dialog" Programme.

The aim of the project is, broadly speaking, to internationalize Polish legal scholarship and research, and to raise awareness of and publicize its achievements, particularly in Eastern Europe. The Centre disburses funds to scholars employed by the Faculty with a view to providing them with linguistic and logistical support necessary to partake in international research undertakings and academic conferences abroad. Ukraine is the priority area for the Centre. Activities of the Centre for Promotion of Polish Legal Research have offered tremendous opportunities to establish ties with representatives of Ukrainian universities and non-governmental organizations, invite selected authorities to Poland as *visiting scholars* and *visiting professors* and to partake in expert internship programmes. The project has brought closer the academic worlds of Poland and Ukraine, which paves the way for the formation of international research teams, exchange of expertise and circulation of the most interesting research outcomes, whilst opening a host of options regarding the engagement of Polish experts in cooperation with Ukrainian public administrative authorities, non-governmental organizations and entrepreneurs.

The Centre for Promotion of Polish legal research coordinated the creation of an outpost of the Warsaw University's Faculty of Law and Administration in Kiev. The unit, operating as a foreign section, with a structure and mode of operation reminiscent of institutions known in Anglo-Saxon countries as international gateway, carries out a number of tasks related to promotion of Polish legal research in Eastern Europe, dissemination of knowledge concerning Polish legal institutions as well as experience gained during the time of the so-called constitutional transformation and the process of adjustment of Polish legal standards to the EU benchmark, in furtherance of an intensification of Polish–Ukrainian research cooperation and support of mutual research initiatives. The outpost is

also tasked with establishing contacts with entities other than academic (non-governmental organizations of the watch-dog type, whose statutory activity entails, *inter alia*, monitoring of compliance with the rule of law, abiding by human rights, involvement in the political decision-making process and lobbying in favour of social-political reforms), and organizations with an economic profile (entrepreneurs, employers, exporters and importers). It is anticipated that operation of such a foreign gateway will ultimately become a forum of cooperation between Polish science and scholars on the one hand and, on the other, entities carrying out economic activity on the Ukrainian market as well as organizations belonging to its "third sector". The intention, therefore, is to turn the Centre into an effective tool of extracting experts, whose specialist knowledge in the fields of law and the constitution will be utilized to usher in reforms and significantly conduce to an upturn in the level of cooperation between Polish and Ukrainian think tanks and sectoral business organizations.

Among the successful results of the project hitherto are, for instance: the entering into close cooperation of the Faculty of law and Administration of Warsaw University with the Faculty of Law of the Taras Shevchenko National University of Kyiv and the Polish–Ukrainian Chamber of Commerce, participation of Polish scholars and practitioners in numerous Ukrainian conferences, several debates between Polish and Ukrainian experts devoted to, *inter alia*, a reform of Ukrainian administrative procedures, the opening of the School of Polish Law in Kiev, visits of Ukrainian academics in Warsaw and their participation as speakers in academic conferences, launch of internship programmes for Ukrainian representatives of non-governmental organizations in Poland and participation of Polish teams in international competitions, tournaments and student conferences organized in Ukraine.

Ukraine may call upon a plethora of historical references in the currently unfolding process of reinforcing its state and national autonomy: Kievan Rus', Cossacks (from 16th to 18th century) and national rebirth in the 19th century. A special role in that last process was played by national universities: in Kharkiv (founded in 1805), Kiev (1834) and Odessa (1864). It is with the Kiev university, established as the Saint Vladimir University and renamed the Taras Shevchenko University, that our Centre for Promotion of Polish Legal Research primarily collaborates with.

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THE ROLE OF LAY JUDGES IN THE PROCESS OF ADJUDICATION[1]

Although the paper addresses a very narrow issue – the role of the social factor in adjudicating – it fits well in the ongoing debate concerning the shape of reforms of the judiciary in Poland.

At the time the paper is being submitted for publication, legislative works are underway in the Sejm on, *inter alia*, a draft bill on amending the Law on the Organization of Ordinary Courts and numerous other acts (hereinafter: "the draft bill", Sejm paper No. 1491[2]). The draft bill was sent to the Sejm on 12 April 2017 and on 19 April it was directed to its first reading. Opinions on the proposed amendments were tendered by the Supreme Court, the National Council of the Judiciary, the Polish Bar Council, and the Institute of Law Studies of the Polish Academy of Sciences[3].

We believe that participation of the social factor in judicial procedures is important and any changes in this area require thorough scrutiny, based upon, on the one hand, a dogmatic analysis of the subject, and, on the other hand, the relevant research of sociologists and lawyers. This is even more so as the Polish research in sociology of law is considered classic in the field. It is significant that the highest award in sociology of law is named after Adam Podgórecki who devoted some of his work to the functioning of Polish courts, including the question of lay judges. Of relevance also are the voices expressed in public debate – for only such procedural changes which acknowledge the stance of the citizens, for whom judicial procedures should be transparent and, in their estimation, just, are

[1] The paper was written on the basis of A. S. Bartnik's doctoral thesis entitled *Rola ławnika w wymiarze sprawiedliwości III RP. Analiza socjologiczno-prawna*, published as: A. S. Bartnik, *Sędzia czy kibic? Rola ławnika w wymiarze sprawiedliwości III RP. Analiza socjologiczno-prawna*, Warszawa 2009.

[2] Available on the Sejm's official website: www.sejm.gov.pl (accessed 23 March 2017).

[3] All of these opinions are available on the Sejm's official website: www.sejm.gov.pl (accessed 23 March 2017).

capable of functioning. This will, in turn, lead to a rise in trust among citizens to law enforcement, a rise in the overall feeling of justice and security of Poles. Aside from Podgórecki, also other sociologists and lawyers have done work on Polish judicial institutions – for instance, Jacek Kurczewski[4], Paweł Skuczyński, Krzysztof Pałecki[5], Elżbieta Łojko[6], Jan Winczorek[7], Paweł Maranowski[8]. Interestingly, this matter is often explored in reports and analyses of non-governmental organizations and watchdogs. The largest citizenly monitoring programme of court trials worldwide is underway in Poland[9].

Historically, the idea of participation of the social factor in the process of adjudication traces back to the 18th century. The Constitution of the Republic of Poland of 2 April 1997 (Polish Official Journal of Laws of 1997, No. 78, item 483) preserved the role of citizens in administering justice (Article 182). That role is not perceived uniformly in the literature. S. Waltoś, for instance, argued that society may participate in adjudicating and that the principle of cooperation between the citizenry and public institutions in prosecuting crimes is a fundamental element of criminal procedure. Such cooperation has adopted the following forms in the past:

– A purely social court (e.g. magistrates' courts in England);

– A juried court (with participation of lay judges alongside professional judges) – currently in existence in Poland;

– A full jury court – functioning in common law systems[10].

F. Prusak has approached the problem in a similar fashion (besides lay judges, to the social factor in administering justice he also adds jury courts, social organizations and auxiliary prosecutors[11]). A. Siemaszko refers the notion of a social factor merely to lay judges and jurors[12]. Divergences in perceiving the institution of social participation in governing can also be seen across legislative systems worldwide. The competences of lay judges differ not only according to the legal system in question, but also to the degree of democratization of law in a given state. These are not, however, the only determinants impacting the constitutional structure of the conception of a lay judge or its practical ramifications. By way

[4] J. Kurczewski, M. Fuszara, *Polskie spory i sądy*, Warszawa 2004.

[5] M. Borucka-Arctowa, K. Pałecki, *Sądy w opinii społeczeństwa polskiego*, Kraków 2003.

[6] E. Łojko, *Wizerunek zawodu sędziego w opiniach sędziów, prawników i społeczeństwa*, "Krajowa Rada Sądownictwa" 2010, Vol. 4, pp. 64–72.

[7] J. Winczorek, *O potrzebie badań empirycznych nad dostępem do prawa*, "Państwo i Prawo" 2016, issue 12, pp. 18–38.

[8] J. Winczorek, P. Maranowski, *Komunikacja w sądach po reformie kodeksu postępowania cywilnego z maja 2012 r.*, "Radca Prawny" 2014, issue 1, pp. 209–243.

[9] See: https://courtwatch.pl/baza-wiedzy/publikacje/ (accessed 23 May 2017).

[10] S. Waltoś, *Proces karny. Zarys systemu*, Warszawa 2005, p. 227.

[11] F. Prusak, *Komentarz do Kodeksu postępowania karnego*, Warszawa 1999.

[12] A. Siemaszko (ed.), *Ławnicy. Rezultaty badań empirycznych*, Warszawa 1994.

of example, S. Machura[13] and R. Wandall[14] have argued that in both post-Soviet states or young democracies and states with an established and independent judiciary most amendments to civil and criminal procedure consist in attempts to expedite the processes.

Findings presented in this paper are the fruit of research conducted by the authors since 2002[15] concerning Polish lay and professional judges as well as advocates and prosecutors. Trials in district courts are also within the remit of the study. All data obtained during the course of the research has been anonymized, including the names of places where surveys were undertaken. Research of S. Zawadzki and L. Kubicki[16] from the 1960s served as a starting point for the current study.

The latest legislative changes go in the direction of restricting the participation of the citizenry in the judicial process. Lay judges in criminal trials have been preserved almost only in the most severe cases[17]. The need for change has been explained by high costs of remuneration for lay judges as well as their lack of professionalism. Curiously, no efforts have been made in Polish history to remodel or strengthen the position of lay judges, alter the way they are selected or trained. Instead, all changes have consisted in, usually, undercutting their significance within the system of administration of justice[18]. This corollary is echoed by Juchacz who emphasizes that whilst many contemporary democracies are increasingly more open to letting citizens into the decision-making processes, no such tendencies (in fact, the opposite) are discernible in Poland[19], even though 2006 saw the introduction of public hearings into law[20].

The current Polish Code of Criminal Proicedure (Polish Official Journal of Laws of 1997, No. 89, item 555 as amended) envisages that lay judges adjudicate in cases related to felonies (Article 28 § 2, in a panel composed of one

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[13] S. Machura, *Silent Lay Judges – Why Their Influence in the Community Falls Short of Expectations*, "Chicago-Kent Law Review" 2011, issue 86, pp. 769–788.

[14] R. Wandall, *Imprisonment. A Socio-Legal Study of Danish County Courts' Decisions to Impose Immediate Imprisonment*, Copenhagen 2004.

[15] Research funded by the State Committee for Scientific Research between 2004–2006 as project No. 1H02A03227, entitled *Instytucja ławnika w wymiarze sprawiedliwości III RP. Analiza socjologiczno-prawna*, under the supervision of prof. Jacek Kurczewski.

[16] S. Zawadzki, L. Kubicki (eds.), *Udział ławników w postępowaniu karnym. Opinie a rzeczywistość*, *Studium prawnoempiryczne*, Warszawa 1970.

[17] Government draft bill on amending the Code of Civil Procedure, the Code of Criminal Procedure and numerous other acts (Sejm paper No. 639).

[18] More on this: A. S. Bartnik, *Sędzia czy kibic? Rola…*, *passim*.

[19] More on this: P. W. Juchacz, *Trzy tezy o sędziach społecznych i ich udziale w sprawowaniu wymiaru sprawiedliwości w Polsce*, "Filozofia Publiczna i Edukacja Demokratyczna" 2016, Vol. 5, issue 1, pp. 155–168.

[20] P. W. Juchacz, *Deliberatywna filozofia publiczna. Analiza instytucji wysłuchania publicznego w Sejmie Rzeczpospolitej Polskiej z perspektywy systemowego podejścia do demokracji deliberatywnej*, Poznań 2015.

judge and two lay judges), in cases concerning criminal offences for which the Act stipulates life imprisonment (Article 28 § 4, two judges and three lay judges); in addition, the court may, due to particular complexity of a case or to its importance, decide on hearing it in a panel of three judges or one judge and two lay judges (Article 28 § 3).

The Polish Code of Civil Procedure (Journal of Laws of 1964, No. 43, item 296) institutes the concept of lay judges in Article 47 § 2, which lays out the catalogue of cases which are heard in the court of first instance composed of one judge and two jurors. These are cases:

1) within the subject-matter and scope of labour law:

– determining the existence, establishment or expiry of an employment relationship, recognizing the invalidity of termination of an employment relationship, re-employment and restoration of previous work or salary conditions and jointly pursued claims and damages in the case of termination without just cause or illegal termination of an employment relationship,

– breach of the principles of equal treatment in employment and related claims,

– damages or compensation for harassment;

2) in the field of family relationships:

– divorce,

– legal separation,

– determining the ineffectiveness of the recognition of parentage,

– dissolution of adoption.

Furthermore, Article 509 of the Code states that cases concerning adoption in the first instance court shall be heard by a panel of one judge and two lay judges.

In spite of the above provisions, it is an observable tendency that lay judges are gradually being eliminated from the process of adjudication, regardless of which political faction happens to be in power. The legal community supports, by and large, the proposed changes, which is unsurprising considering that adjudication is deemed the ultimate accomplishment of a lawyer. Therefore, it would be puzzling if lawyers found any appeal in the model of social, non-lawyer adjudication[21].

An analysis of the latest amendments to the Code of Civil Procedure reveals that the legislator has begun to devote more attention to the interests of lawyers' associations and court statistics than to the interests of citizens and the social sense of justice[22]. A. Turska as early as 1970 noted that, as a rule, "the legislator,

[21] Comments by lawyers interviewed by the authors.

[22] We refer here to the 2004 amendments to the Code of Civil Procedure, especially to Articles 5 and 184. For more on this, see: G. Bieniek (ed.), *Komentarz do kodeksu cywilnego. Zobowiązania*, *Księga III*, t. 2, Warszawa 1999; W. Siedlecki, Z. Świeboda, *Postępowanie cywilne. Zarys wykładu*, Warszawa 2001; Z. Radwański., *Podmioty prawa cywilnego w świetle zmian kodeksu cywilnego przeprowadzonych ustawą z dnia 14 lutego 2003 r.*, "Przegląd Sądowy" 2003, issue 7–8; H. Pietrzykowski, *Prawo do rzetelnego procesu w świetle zmienionej procedury cywilnej*,

by bringing to life a group which adjudicates in a panel of professionals and lay judges, assigned to each of those components a different role in administering justice. To hold otherwise would lead to the conclusion that it was the legislator's intention to merely create a façade where the social component, unable to perform judicial duties due to a lack of legal training and education, must pretend to be a judge. Second, the lay judge and the professional judge are situated in the legal system in a way that reflects their separate, different organizational positions in the system of administering justice. This divergent position stimulates approaches characteristic of, on the one hand, the professional, and, on the other – the social component. Third, it is clear that the *ratio legis* of the legislator was, first and foremost, to create objective opportunities to render optimal decisions"[23]. These assumptions apply also in the current constitutional model.

Corollaries drawn in the course of the authors' research should be divided into the following categories, pertaining to, respectively:

1) the role of lay judges in their own opinions;

2) the actual role of lay judges in the process of adjudication;

3) lawyers' opinion on lay judges;

4) an assessment of legal provisions governing lay judges.

The notion of a lay judge is dramatically complicated. We found that the legislator assigned to lay judges a plethora of duties, and lay judges themselves take on a variety of additional tasks. A research team formed under S. Zawadzki and L. Kubicki at the Institute of Law Studies of the Polish Academy of Sciences distinguished three basic functions of a lay judge:

– social judge;

– a factor of social control;

– a connection with the society.

The researchers stressed that these functions are mutually inclusive to a certain extent, however the social control function is the boldest and most significant. It was defined in the following terms: "through his mere presence a lay judge (even where he does not fully realize it himself) influences the workings of the court in the direction of:

– a more meticulous consideration of a case (e.g. a judge who expects the presence of a lay judge prepares better in advance of a hearing);

– promoting the principle of judicial independence;

– bolstering the right of an accused to defend himself"[24].

"Przegląd Sądowy" 2005, issue 10; J. Mucha, *Nowe regulacje w kodeksie postępowania cywilnego*, cz. I, "Radca Prawny" 2005, issue 2.

[23] A. Turska, *Analiza odrębności postaw ławnika i sędziego zawodowego w orzekaniu*, (in:) S. Zawadzki, L. Kubicki (eds.), *Udział ławnika w postępowaniu karnym. Opinie a rzeczywistość*, Warszawa 1970, p. 195.

[24] S. Zawadzki, L. Kubicki (eds.), *Udział ławnika*..., p. 225.

Whilst 35 years ago lay judges considered this function as the most important, Bartnik's research shows that nowadays, although it could and should be at the forefront of the priorities, it is not realized in practice[25]. Both lay judges and lawyers interviewed testified to this corollary. Bartnik's hypotheses were confirmed in the 2009 study as well as the newest research from 2015–2017. In general, lay judges do not know what their duties are and training provided to lay judges fails to equip them with basic knowledge requisite to perform their functions. It is still true of contemporary lay judges that they are either unfamiliar with or they do not understand their tasks and obligations. An example is *votum separatum* – lay judges, even if they know that they are free to disagree with a professional judge regarding guilt or punishment, they perceive it as merely a possibility of voicing their opinion which need not be taken into consideration by the chairman of the adjudicating panel. Alongside the objective factor impacting the passivity of lay judges, noted above, Zawadzki and Kubicki also wrote about numerous subjective factors such as:

– lack of preparation of lay judges;

– inappropriate conduct of the judge.

Bartnik also pointed to those circumstances. A rather novel factor is the financial one – lay judges want to participate in adjudicating so much that in pursuit of additional income they would rather refrain from "interrupting" the professional judge so that they are assigned to court cases in the future. Research from 2009 and 2017 also appears to suggest that contemporary judges, advocates and prosecutors fail to appreciate the social control function of lay judges so much so that they do not even bother to disguise their lack of preparation, unfamiliarity with the case at hand or violations of procedures. Not without significance is, however, lay judges' participation in a deliberation if it occurs. For this is the forum where the judge may discuss, try out and explain his judgment. P. Skuczyński has contributed substantially to analyses of theories of argumentation and legal reasoning. He has argued that, pertinently to the subject of lay judges, "Argumentative rationality in this concept is not grounded in argumentative discourse through strict reflection, per K.-O. Appel, but in communicative activities where

[25] This corollary is drawn based upon the fact that the lay judges surveyed by the Institute of Law Studies of the Polish Academy of Sciences were aware that they could control the professional judge, whilst the lay judges I talked to were oblivious to that. Furthermore, professional judges stressed they ignore lay judges, and their presence is often treated merely as a procedural requirement. I interpreted professional judges' statements and reactions concerning lay judges in the context of their social control function as jokes. Whilst, theoretically, one could conceive of a scenario where the function is performed by a lay judge's mere presence, in practice a proper reaction from the controlled professional judge is requisite. Notwithstanding, professional judges insisted that a lay judge's presence did not in any way affect how they conduct trials. It is therefore our hypothesis that the lay judges interviewed do not, in general, perform the social control function.

discourse is an important linguistic game, as it justifies and critiques (argues for and against) problematized claims, however it is not the starting point"[26].

S. Zawadzki and L. Kubicki emphasized that the function of a social judge was realized by lay judges to a lesser extent than the social control function. This finding has been confirmed by Bartnik – for in practice a lay judge does not impact the process of adjudication although his position is, from the perspective of the law, equal to that of a professional judge throughout the trial and deliberations.

During interviews with lay judges it was attempted to discover whether and, if so, how responsible they feel for the judgment that they participate in handing down. They were asked questions such as "do you feel responsible for the judgment", with an intention to elicit from the interviewees a comment on judicial responsibility or their own sense of justice. The reality turned out to be more complicated. Lay judges found questions about responsibility for the judgment and responsibility stemming from the function they perform quite difficult. Perhaps one reason for that is related to difficulties with defining who they represent and who they shall serve. During interviews one could notice that lay judges did not connect the issues of responsibility for the judgment with a lay judge's responsibility in general. These issues were separate for them. One could sense that those lay judges for whom handing down a judgment was the central function of their job, and even those who perceived themselves as a full-fledged member of the adjudicating panel, often failed to understand why they were being asked about responsibility, as if adjudication did not give rise to such implications. Among the lay judges, who had already participated in adjudication, three types of senses of responsibility were differentiated[27]:

1) the ideal type – lay judges responsible for the judgment and their function;
2) the unclear type ("murky"), including:

– lay judges who felt full responsibility for their function accompanied by a relative[28] sense of responsibility for the judgment,

– full responsibility as a lay judge and no responsibility for the judgment[29],

– full responsibility as a lay judge and lack of awareness of or no responsibility for the judgment,

– relative responsibility as a lay judge and full responsibility for the judgment,

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[26] P. Skuczyński, *Uzasadnienie refleksyjne i problem jego recepcji w teorii Roberta Alexy'ego*, (in:) K. J. Kaleta, P. Skuczyński (eds.), *Refleksyjność w prawie. Konteksty i zastosowa*nia, Warszawa 2015.

[27] Research undertaken between 2015–2017 confirmed Bartnik's typology from 2009.

[28] The word "relative" denotes such comments from lay judges as: "I think I slightly am", "I am partly", "perhaps I feel responsible", "it is just relative responsibility" etc.

[29] It should be noted that the typology was devised based upon lay judges' comments concerning accountability. A pilot study of previous term's lay judges at the criminal division of a district court separated the performance of the functions of a lay judges (described by the interviewees as "being a lay judge") from adjudication.

– relative responsibility as a lay judge and relative responsibility for the judgment,

– relative responsibility as a lay judge and no responsibility for the judgment,

– no responsibility as a lay judge and full responsibility for the judgment;

3) the antitype – lay judges who openly declared an utter lack of responsibility;

4) unaware lay judges.

As it was the case in 2009, also our current research evinces that lay judges had less problems with identifying who they felt they were accountable to – in general, to the judge and the society at large. Some lay judges declared accountability before the law, people who selected local councillors who then elected lay judges, themselves and their conscience, their own sense of justice or the system of administration of justice, the Minister of Justice and God. P. Skuczyński has noted that moral responsibility of professionals (which, by its nature, also touches upon professional accountability) is ambiguous: "the mere fact of being a member of society constitutes a condition of entering into numerous professional rules – these, however, should not be equated. This is so because many individuals do not perform any professional roles, and concepts which put such people outside of the ambit of society are commonly considered erroneous. Performance of a professional role is, therefore, added on top, as it were, of an individual's socialization. The former is one of the latter's types, a special one. Alongside professional roles there are others such as family, schools, churches and social organizations etc. Of course, one's occupation has, in contemporary times, sizable significance because of extensive functional diversification and divisions of labour. This is without prejudice to the fact, however, that it does not precede and is not primary as against other forms. This differentiation has fundamental significance for justifying universal moral responsibility"[30]. Consequently, the question of responsibility for the judgment should be studied not only in respect of lay judges but also professionals who perform their roles in the courtroom – professional judges, advocates and prosecutors.

Lay judges were also asked about when and how a judgment is formed. Based upon their responses, as well as the responses of judges, prosecutors and advocates, four potential moments of composing a judgment could be noticed:

– during deliberations;

– in between cases;

– conversations with prosecutors;

– voluntary acceptance of liability (plea bargain).

It is in the first two cases that lay judges have the largest chance to co-author the judgment. There are several types of deliberations: ranging from such that do

[30] P. Skuczyński, *Problem zakresu odpowiedzialności moralnej profesjonalistów i jego zastosowania w etyce prawniczej*, "Acta Universitatis Lodziensis. Folia Iuridica" 2015, issue 74.

not take place to full domination of the judge to the ideal type. Five types were distinguished:

– deliberation without deliberation;
– deliberation dominated by the judge;
– deliberation *pro forma*;
– the ideal type;
– deliberation and a discussion – bargaining.

Lay judges, who mentioned cases where a judgment was handed down without a deliberation, stressed that these were not common. They still do take place, however. The second type of deliberation – dominated by the judge – is one where the judge expresses his opinion and asks the lay judges whether they agree. Whilst describing this type, lay judges took notice of the judge's unkind demeanour, bossiness, boorishness and ruggedness as well as the pace of work at the court, and, as a result, a lack of time and unwillingness to discuss. Deliberations of the third type – the most common in practice – are still dominated by the judge, however some procedures are obeyed. Here, the professional judge expresses his opinion first, to then ask the lay judges whether and why they agree with his position. The fourth type – most commonly mentioned by professional judges – is present where all procedures are followed: the judge asks the lay judges for their opinion before presenting his own. Judges had full awareness of how a perfect deliberation should look like and in interviews they preferred describing the ideal type as enshrined in the provisions of the Code of Criminal Procedure, whilst avoiding discussing their own practice and experience. Nevertheless, they tended to assert that due to lay judges' inactivity they must float a proposition first to then have any discussion at all. The fifth type is a deliberation together with a discussion – deliberations where lay judges express their opinions, however they could be called bargains. The object of the bargain is normally the level of punishment – lay judges wish to lower or increase it. Researchers hoped this type would be ubiquitous and lay judges would manifest the most fervent activity at this stage of the adjudicating process. Unfortunately, the fifth type is very rare[31]. Lay judges tend to explain this lack of discussion by the judge's demeanour and personality, whilst judges – by lay judges' personality who, in their estimation, are badly chosen and too old, and are are said to have no ability to make independent decisions and to reason.

Another moment where a judgment is formed is a conversation between the judge and the prosecutor. Lay judges say that conversations in between cases often pertain to important questions, such as assessing the trustworthiness of a witness. Comments were mostly positive, and lay judges often confused remarks made by judges and prosecutors (sic!) during breaks in between cases with deliberations or mistakenly considered the former an element of the latter.

[31] The typology presented does not include numbers as the lay judges interviewed could not determine exactly which type of deliberation (and how often) takes place.

There are cases where the prosecutor agrees with the judge on the judgment to be handed down. Such cooperation is liked by lay judges even though they rarely contribute to these discussions. Such agreements are normally struck in between cases or before the commencement of a session. These informal conversations are significant when it comes to determining the practical role of a lay judge in court because, under the law, a professional judge adjudicated upon guilt and punishment together not with prosecutors but with lay judges. Everyday practice in courtrooms, however, suggests that exchanges between judges and prosecutors exert greater influence than deliberations with social lay judges. The following types of judge-prosecutor conversations were discerned:

– conversations on cases which have been closed but no judgment has been handed down;

– conversations on cases which are yet to be tried and a judgment is to be rendered;

– conversations on cases which are yet to be tried but no judgment will be rendered;

– conversations on other cases.

These dialogues have impact upon judgments because the judge derives therefrom information theoretically unconnected with the case, yet relevant to e.g. an assessment of the trustworthiness of a witness. It is also sometimes the case that the prosecutor voices his private opinions on the parties to the case, whom he may be familiar with from other disputes.

Considering that the described problems in judicial application of the law stem, to a large extent, from inadequate legal regulations governing the recruitment of lay judges, the legislator shall unify the law and specify where "judge" refers only to a professional judge or also to a lay judge. The existing imprecision in the law may be the basis for malpractice. The selection procedure of lay judges must be amended, in particular it must be clarified whether a member of a political party may be a lay judge (or propose his candidacy at all) or whether he must suspend his membership during his service. It is submitted that the best way to go with regard to the selection procedure would be to introduce a general election. Apoliticality should be imposed also upon the lay judges currently in office. Any and all information concerning the membership of a political party of a judge or lay judge should be publicly available so that if any suspicion arises, the parties to a case could demand that the composition of the adjudicating panel be changed at the beginning of their trial, not in the midst of it.

It must be noted that the authors of the draft bill mentioned at the outset of our discussion saw the necessity of amending the provisions that directly regulate the institution of the lay judge and its situation in courtrooms.

Chief emphasis of the proposed changes to the judicial system is put upon:

– changing the selection procedure of presidents and vice-presidents of courts towards strengthening the position of the Minister of Justice when it comes to

recruiting officials who ensure proper administrative conditions for common courts;

– introducing new instruments of internal and external supervision of the administrative activity of the courts by imposing upon presidents of the courts at all levels an obligation to submit yearly reports and by turning attention to irregularities in the courts' administrative activity;

– introducing, as a constitutional principle, random allotment of cases to judges and the principle of equal burden of cases for all judges, so as to ensure equal and just distribution of work across judges and guarantee impartiality to complainants and defendants.

Random allotment should also be applied to lay judges. Bartnik in 2009 found that the main criteria of selecting lay judges are their availability and professional judges' preferences. This is not conducive to lay judges' participation in adjudication. Perhaps the reform should strengthen the social factor in the system of administration of justice in the person of lay judges. Bartnik has maintained that the position of the lay judge as a guarantee of judicial independence is also to be bolstered. For a lay judge is not subordinated to the Minister of Justice, nor to the president of the court, the chairman of the division, or any other professional judge. Hence, the mere idea of collegial decision-making at any time, under any government and circumstance – may not only be a guarantee of independence, but also of reliability and a deeper analysis of the case and judgment.

Even though the picture of lay judges is not positive, Kubicki and Zawadzki were right in holding that the presence of lay judges adds a social, humane sense of justice to the process of adjudication that is consistent with the law and procedure. It follows that lay judges should be kept within the legal system and their rights and duties should remain unchanged (these should mirror and be equal to those of professional judges). The legislator shall focus on regulating the questions of responsibility (accountability), training and political party membership of lay judges. Therefore:

– general elections for lay judge positions should be instituted;

– the persons elected should be forced to waive their political party membership;

– publicly available information pertaining to lay judges' political affiliation should be collected, together with data concerning whether they performed any functions etc.;

– training sessions for lay judges should be conducted by institutions independent from courts which would put predominant emphasis upon the role and responsibility of lay judges.

By way of example, J. Kurczewski proposed that lay judges be transformed into jurors[32]. It is a suggestion worth discussing. Even though it would be implau-

[32] J. Kurczewski, *Rządy prawa*, "Res Publica" 1989, issue 3, p. 18.

sible in the current state of the law, it appears every now and again in public discourse and is often hailed as one which would increase the citizens' trust towards the judiciary. A sense of justice among the citizens of a given country is an ideal state to which all legislators should aspire. It is our opinion that this state is achievable only by basing all legislative changes upon the outcomes of broad public consultations with groups directly and indirectly interested in amendments to a given area of the law. It is our hope that good practices prevail.

The debate on the usefulness of lay judges in courts was triggered by practising lawyers. For in the common opinion a lay judge comes late to the courtroom, does not read case files, sleeps during trial and does not understand what happens during it. Notwithstanding, Bartnik has found that not all those allegations are serious, more than that: many of them are frequently posed against other legal professions – the charge of lack of familiarity with case files is, for instance, often addressed at advocates and prosecutors, whilst being late – at judges and advocates. Therefore, professionalism and preparation of lawyers is also wanting. This, however, does not warrant calls that these professions be scrapped, and knowledge and experience constitute a shield against such attacks. This is why we argue that lawyers should be provided with training on the foundations of the law and their rights and duties, which would facilitate them in fulfilling their functions and raise the quality of adjudication and performance of legal occupations in Poland[33]. A lay judge who comes from the outside world will then not be an alibi for unprepared advocates, judges or prosecutors. A trained social judge will be able to prevent judgments from being agreed upon between the prosecutor and the judge. The lay judge will be an institution that guarantees the society observance of procedures associated with adjudicating. Pertinently, "in the proceedings, a lay judge counteracts the routine of professional adjudication and provides a fuller and broader view of the case at hand, its circumstances and an assessment of the accused's behaviour"[34].

The foregoing arguments show that the concern that the social sense of justice may be eradicated from courts by peculiar legal reasoning and thinking is fully justified. If today's lay judges, as representatives of the society, fail to perform their role due to, *inter alia*, more and more expeditious court proceedings, observance of procedures and presence of a sense of justice in the process of a criminal trial are questionable where adjudication is left only to professionals. For whilst one may suspect that agreeing upon the outcome of a case does not violate the

[33] We would recommend training covering the basics of the law with an emphasis upon the criminal and civil procedures as well as the functioning of the system of administration of justice. Also, the law should specify which provisions apply exclusively to professional judges and which have within their ambit lay judges. This should be included within the curriculum of training sessions provided to lay judges. Such training should take place outside of courts, should not be led by judges, and should aim to raise lay judges' ability to make independent decisions.

[34] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne*, Warszawa 2003, p. 231.

supreme rules of criminal trial due to the presence of a lay judge, lawyers should not be left alone in such a scenario. The mere idea of a lay judge is overwhelmingly correct also in the opinion of the proponents of abolishing it. So if the problem consists in mere malpractice, perhaps we should think about improvements instead of depriving the society of any say over the functioning of the judiciary.

THE ROLE OF LAY JUDGES IN THE PROCESS OF ADJUDICATION

Summary

The paper attempts to expound upon the actual and statutory role of lay judges in the process of adjudication. A theoretical model was confronted with the practice of making judicial determinations. The authors analysed the state of the law on the matter and the functions of lay judges accorded thereto by the legislator. In addition, as a result of extensive sociological-legal studies, a typology of the moments of composing a judgment (i.e. during deliberations; in between cases; conversations with prosecutors; voluntary acceptance of liability (plea bargain)) and of types of deliberations present in Polish courts (deliberation without deliberation, deliberation dominated by the judge, deliberation *pro forma*, the ideal type, deliberation and a discussion – bargaining) is described.

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KEYWORDS

lay judges, participation of the social factor in judicial proceedings, legislative changes, functioning of the system of administration of justice, justice

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ławnicy, udział czynnika społecznego w procedurach sądowych, zmiany legislacyjne, funkcjonowanie wymiaru sprawiedliwości, sprawiedliwość

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FOREIGN TERRORIST FIGHTERS FROM THE PERSPECTIVE OF POLISH AND EUROPEAN CRIMINAL LAW

1. INTRODUCTION

For many years the influence of European law upon criminal legislation of the European Union Member States was insignificant, chiefly on account of the extremely conservative position of members of both the EU and the Council of Europe who enviously insulated their ability to single-handedly criminalize acts held to be reprehensible. Clearly, penal laws often times perform not only a regulatory, but also a variety of moralising functions by exemplifying and bolstering (and on occasion even creating) the values commonly accepted in a given society. Many of those are deeply culturally conditioned and bound with a particular state. Also, it appears indisputable that criminal law was and still remains a key element of the notion of state sovereignty[1]. It is because of these reasons that a plan to form one, worldwide system of repressive law is doomed to failure[2].

Together with the burgeoning globalization of all aspects of human life, in the last decades it has become pressing to draw up mutual penal standards with a view to maximizing the effectiveness of the fight against crime, particularly where the impact of increasing social mobility and global cash flows (transnational phenomena) is observable[3]. Some of these phenomena, hitherto conceived of as inter-

[1] *Cf.* A. Sakowicz, *Zasada ne bis in idem w prawie karnym w ujęciu paneuropejskim*, Białystok 2011, pp. 137–138; K. Karski, *Realizacja idei utworzenia międzynarodowego sądownictwa karnego*, "Państwo i Prawo" 1993, issue 7, p. 65 *et seq.*; N. Boister, *The concept and nature of transnational criminal law*, (in:) N. Boister, R. J. Currie (eds.), *Routledge Handbook of Transnational Criminal Law*, Oxford–New York 2015, pp. 11–26.

[2] I refer here, however, not merely to common acceptance of international criminal law, but, first and foremost, to harmonization of domestic legal systems. *Cf.* also comments in: R. Cryer, *International Criminal Law vs State Sovereignty: Another Round?*, "European Journal of International Law" 2005, issue 5, pp. 979–1000.

[3] One response to the problem of transnational crime endangering the interests of the European Union may be the establishment of the European Public Prosecutor's Office (Article 86

nal problems of the state, are becoming of concern for the so-called international community, which leads, slowly but surely, to the creation of a culture of transnational values and legal goods. It is in this light that the dynamic development of international criminal law *sensu largo* and regional law – in the case of Poland, in particular EU law – should be analysed[4]. The subject of the paper, *terrorism*, albeit present since the ancient times[5], is a fitting example by reason of its contemporary frequency of incidence and international character. Data provided by the United Nations suggests that an estimated 30,000 volunteers from 100 countries have joined the Islamic State (hereinafter: ISIS, ISIL, Da'esh) or other terrorist groups associated with Al-Qaeda[6]. In parallel with terrorism, it is noted with regard to foreign terrorist fighters that, even though it is not a new occurrence, contemporarily it poses a danger the scale of which is greater than anything seen before[7]. Global challenges demand global responses.

This paper is intended to provide answers to three broad research questions: first, how the notions of foreign terrorist fighters and mercenaries are defined in binding international documents and in the literature; second, how travel by Polish citizens to join the Islamic State should be classified from the perspective of the Polish criminal law (*de lege lata*); lastly, the relevant provisions of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism will be commented and expounded upon[8]. The summary will be devoted to discussing, in brief, the mutual normative relations between the Directive and the Polish law. The crucial question is whether the attainment of the goal enshrined in Article 288 of the Treaty on the Functioning of the European Union (TFEU) necessitates a reform of Polish criminal law.

TFUE). *Cf.* also the Proposal for a Regulation on the establishment of the European Public Prosecutor's Office, http://data.consilium.europa.eu/doc/document/ST-5766-2017-INIT/pl/pdf (accessed 22 April 2017).

[4] V. Mitsilegas, *EU Criminal Law*, Oxford–Portland–Oregon 2009, pp. 5–9; M. Fletcher, R. Lööf, B. Gilmore, *EU Criminal Law and Justice*, Chelthenham–Northampton 2008, pp. 7–18.

[5] *Ibidem.*

[6] *Implementation of Security Council Resolution 2178 (2014) by States affected by foreign terrorist fighters: A compilation of three reports* (S/2015/338; S/2015/683; S/2015/975), p. 4.

[7] The phenomenon of FTFs is far from new but the magnitude of the threat is unmatched. *Cf. Implementation of Security Council resolution 2178 (2014) by States affected by foreign terrorist fighters: A compilation of three reports* (S/2015/338; S/2015/683; S/2015/975). *Cf.* also T. Hegghammer, *The Rise of Muslim Foreign Fighters. Islam and the Globalization of Jihad*, "International Security" 2011, Vol. 35, issue 3, pp. 53–94.

[8] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

2. DEFINITION OF "FOREIGN TERRORIST FIGHTERS"

The Polish Criminal Code does not avail itself of the concepts of foreign fighters or foreign terrorist fighters. Likewise, they are absent from other commonly binding domestic pieces of legislation and directly applied international agreements. Curiously, the aforementioned Directive does not provide a suitable definition either, despite underscoring the need to harmonize antiterrorist laws in the Member States of the European Union[9]. Inconsistent use of terminology and non-uniform reach of criminalization of terrorist acts across states generate fundamental cognitive dissonances and regulatory problems on an international scale. Many semantic issues remain unresolved as academic writers have put forward and pushed for definitions dissimilar in scope. The differentiation between foreign fighters and foreign terrorist fighters, adopted by the UN Security Council, has only compounded the confusion. Another problematic area concerns the special characteristics of foreign terrorist fighters compared to mercenaries.

In an attempt to resolve the terminological problems, the Security Council of the United Nations in its Resolution 2178 held that foreign terrorist fighters are "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict"[10]. The definition proposed by the Council, therefore, has three parts. First, the crime described may only be committed by a natural person. Second, a terrorist crime must be committed by such a person outside of their place of residence or nationality – this is the "foreignness" element in relation to the destination country. Third, the scope of criminalization propounded by the Council includes a myriad of choate and inchoate offences, causative acts that must obligatorily arise in connection with terrorist activity. The SC's definition does not refer to the motivations of fighters (be it financial or ideological). One may surmise, therefore, that the reason why a fighter decides to move to a war zone is irrelevant in the light of the SC's qualification. The sheer act of leaving the country of origin is sufficient, regardless of the mental

[9] *Cf.* recital 6: "Taking account of the evolution of terrorist threats to and legal obligations on the Union and Member States under international law, the definition of terrorist offences, of offences related to a terrorist group and of offences related to terrorist activities should be further approximated in all Member States, so that it covers conduct related to, in particular, foreign terrorist fighters and terrorist financing more comprehensively (…)".

[10] United Nations Security Council Resolution 2178 (2014), adopted by the Security Council at its 7272nd meeting on 24 September 2014, S/RES/2178 (2014). *Cf.* also Article 4 of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, concluded on 16 May 2015 in Warsaw, signed by Poland in Riga on 22 October 2015; N. Piacente, *The Contribution of the Council of Europe to the Fight against Foreign Terrorist Fighters*, "EUCRIM" 2015, issue 1, pp. 12–15.

attitude of the person towards their action. What is more, materialization of any of the causative acts provided for in the Resolution warrants, on its own, a finding of liability, notwithstanding the actual consequences of one's travel (e.g. whether there were any victims by virtue of one's participation in terrorist training). In this sense the SC's definition is preventative in its nature[11]. In other words, the Council instituted controversial, from the human rights' perspective, limitations on the the free movement of people into territories controlled by terrorist organizations, to minimize the risk of further escalation of the pending conflicts there on the one hand, and, on the other, to reduce the probability of obtaining by the volunteers who venture into such territories of skills (e.g. in preparing terrorist attacks) and contacts they could utilize in their countries of residence or nationality[12]. That the definition is wide-reaching one may be satisfied by looking at the manner in which the connection with a military conflict was regulated. A connection with a military conflict may exist, yet even in its absence any actions undertaken remain, in the eyes of the Resolution, illegal. Despite the evident imperfections of the definition, especially where it refers to the equally indefinite term of terrorism, it manages to encapsulate some of the relevant characteristics of foreign fighters.

I will now call upon a number of doctrinal accounts of foreign fighters to amplify the picture of the indefiniteness of the definition. Thomas Hegghammer has claimed that foreign fighters are those who: (1) have joined, and operate within the confines of, an insurgency, (2) lack citizenship of the conflict state or kinship links to its warring factions, (3) lack affiliation to an official military organization, and (4) are unpaid[13]. The unpaid nature of foreign fighters' actions implies their non-financial motives and a lack of institutional and national connection with the parties to the conflict. The requirement of there being an ongoing insurgency drastically narrows down the catalogue of qualifiable factual situations, albeit it differentiates foreign fighters from international terrorists "who specialize in out-of-area violence against noncombatants"[14]. David Malet

[11] United Nations Security Council Resolution 2178 (2014), adopted by the Security Council at its 7272nd meeting, on 24 September 2014, S/RES/2178 (2014). *Cf.* also Article 4 of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, concluded on 16 May 2015 in Warsaw, signed by Poland in Riga on 22 October 2015. *Cf.* also: N. Piacente, *The Contribution…*, *passim*.

[12] *Cf.* Scheinin's critique of Resolution 2178, where he shines light on the indefiniteness of terrorism as a phenomenon and a related risk that the instruments prescribed in the Resolution may be used for purposes other than combatting terrorism (e.g. suppressing internal opposition). *Cf.* M. Scheinin, *Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters*, https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/ (accessed 28 April 2017).

[13] T. Hegghamer, *The Rise of Muslim…*, pp. 57–58.

[14] *Foreign Fighters under International Law*, Geneva Academy of International Humanitarian Law and Human Rights, October 2014, Academy Briefing No. 6, p. 6.

has written generally that foreign insurgents are "non-citizens of conflict states who join insurgencies during civil war"[15].

From the foregoing cross-section of definitions of foreign terrorist fighters and foreign fighters it appears clear that the principal line of division between them attaches to the circumstances in which they travel outside of their country of origin. What is pertinent is whether such travel is undertaken with a view to acting – not necessarily militarily (e.g. participating in training) – in an organization considered by the international community a terrorist group (e.g. ISIS), or partaking in activities under the auspices of an entity that cannot, in any event, be categorized as terrorist. It is in this sense that the Security Council's definition – by virtue of introducing another condition – confines the definitions of academic writers recorded above. Nonetheless, the definition of foreign terrorist fighters is broader to the extent that it does not obligatorily link the activity of foreign terrorist fighters with a military conflict or – in the words of Hegghammer and Malet – an insurgency – in this way covering participation in training. The ambits of both definitions overlap to a limited degree, it appears[16]. It must be noted too that Hegghammer's unpaid service criterion is highly controversial and inconsistent with contemporary practice[17]. This requirement could be reasonably neutralized by allowing for the existence of financial motivations alongside ideological, religious or ethnic ones. E. Karska and K. Karski rightly note that "(…) material reward is not a principal motivation in this respect"[18]. The categorical reservation of the unpaid service criterion helps, it must be said, to put a clear line between foreign fighters and insurgent activity of mercenaries[19].

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[15] D. Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts*, Oxford 2013, p. 9.

[16] *Cf.* J. Petzel, *Elementy teorii relacji*, (in:) A. Malinowski (ed.), *Logika dla prawników*, Warszawa 2005, p. 93.

[17] Although it is a criterion approved by other academics. *Cf.* S. Krahenmann, *Foreign Fighters under International Law and National Law*, "Recueils de la Societe Internationale de Droit Penal Militaire et de Droit de la Guerre" 2015, Vol. 20, pp. 249–250. See also press reports on the worsening financial situation of ISIS and decreses in the salaries of foreign fighters fighting in its ranks: http://www.cnbc.com/2016/01/20/isis-cuts-fighters-salaries-due-to-exceptional-circumstances.html (accessed 20 April 2017).

[18] *Cf.* E. Karska, K. Karski, *Introduction: The Phenomenon of Foreign Fighters and Foreign Terrorist Fighters. An International Law and Human Rights Perspective*, "International Community Law Review" 2016, issue 18, pp. 379–380. In fairness, it shall be mentioned that in an amended definition of foreign fighters, J. Colgan and T. Hegghammer express a similar opinion. *Cf.* J. Colgan, T. Hegghammer, *Islamic Foreign Fighters: Concept and Data*, paper presented at the International Studies Association Annual Convention, Montreal 2011, p. 6 (citing after: M. Flores, *Foreign Fighters Involvement in National and International Wars: A Historical Survey*, (in:) A. de Guttry, F. Capone, Ch. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, Hague 2016, p. 31).

[19] Ross Frenett and Tanya Silverman point to three basic motivations: (1) outrage at what is alleged to be happening in the country where the conflict is taking place and empathy with the people being affected; (2) adherence to the ideology of the group an individual wishes to join and (3) a search for identity and belonging. R. Frenett, T. Silverman, *Foreign Fighters: Motivations for*

Analogous definitional problems are observable in connection with the pair of seemingly close, semantically speaking, terms: foreign (terrorist) fighters and mercenaries. Mercenarism is defined in Article 47 of the Additional Protocol to the Geneva Conventions of 12 August 1949, under which a mercenary is a person who: "a) is specially recruited locally or abroad in order to fight in an armed conflict; b) does, in fact, take a direct part in the hostilities; c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; e) is not a member of the armed forces of a Party to the conflict; and f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces"[20]. That a mercenary takes a direct part in the hostilities must be the key requirement as recruitment of foreign insurgents is typically motivated by the will to expedite a victory in a conflict where own potential proves insufficient. The Protocol's definition has been opined to be very restrictive as all 6 requirements must be met to regard anyone a mercenary[21]. It is relevant that the parties that negotiated the wording of the provision put forward a variety of divergent positions and stances in respect of the material compensation requirement, with material benefit being the primary motivation for mercenaries[22].

Indisputably, mercenaries and foreign fighters alike constitute external agents against the parties to a conflict. It is sometimes argued, however, that such "externality" in case of foreign fighters need not be national, for they "may encompass nationals of a party to the conflict, such as from the diaspora, while mercenaries are necessarily non-nationals"[23]. Furthermore, it is plausible that a defining element of mercenarism is the manner of recruitment that resembles a business transaction between two interested parties, at least to a greater extent than as

Travel to Foreign Conflicts, (in:) A. de Guttry, F. Capone, Ch. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, Hague 2016, p. 65.

[20] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977.

[21] Its narrow scope was subject to criticism as early as at the preparatory stage. *Cf.* in this regard: J. M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law. Volume I*, Cambridge 2009, p. 393.

[22] Rule 108: Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial. See: J. M. Henckaerts, L. Doswald-Beck, *Customary International*..., p. 391.

[23] *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination* (A/70/330), p. 6.

regards foreign fighters[24]. The object of the transaction is always determined beyond a doubt – it comprises military services.

To conclude the terminological discussion, I wish to emphasize again that a delineation of semantic boundaries between the three terms noted above is impossible. If it is to be assumed that one motivational element of foreign fighters is the obtainment of a material benefit, as evidenced by the practice of rewarding ISIS fighters, then both terms, foreign fighters and mercenaries, almost fully overlap. One recognizable difference would be the nationality requirement, inasmuch as one is prompted to accept the definition proffered by the UN Security Council. Hence, it is incorrect to say that "the risks of overlap between the two categories is extremely limited" considering the rewarding mechanisms employed by ISIS, whose fighters, nevertheless, are typically not considered mercenaries[25]. I surmise that the UN definition, given its direct reference to terrorism and the circumstances of its inception (ISIS activity), is bound to have limited practical impact as proper application thereof hinges upon working out a sufficiently exact definition of terrorism, a feat which has proven almost insurmountably difficult[26].

3. CRIMINAL LAW METHODS OF SOLVING THE PROBLEM OF FOREIGN TERRORIST FIGHTERS

Foreign terrorist fighters represent a threat for both the international order and internal security of individual states. It is commonly stressed that criminalization in this respect is predicated upon, to a greater extent than in the case of mercenaries – by the risk of foreign terrorist fighters' returning to their country

[24] The recruitment of Western foreign fighters is widely presumed to occur mainly via social media platforms. *Cf. Social media used to recruit new wave of British jihadis in Syria*: https://www.theguardian.com/world/2014/apr/15/social-media-recruit-british-jihadis-syria-twitter-facebook (accessed 28 April 2017).

[25] E. Sommario, *The Status of Foreign Fighters under International Humanitarian Law*, (in:) A. de Guttry, F. Capone, Ch. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, Hague 2016, p. 157.

[26] B. Saul has written about the futile attempts to formulate a universal definition of terrorism: "As early as 1983, 109 different official and academic definitions of terrorism were identified in one much cited study". Further, however, he soberly notes that "[d]espite the divergence of opinion, there is no technical impossibility in defining terrorism; disagreement is fundamentally political". *Cf.* B. Saul, *Defining Terrorism in International Law*, Oxford 2006, p. 57 *et seq.*; Another question is which authority would be empowered to officially hold that a given entity is a terrorist organization. It is to be presumed that monopoly in this regard would be left to the UN Security Council, therefore every decision would be bound to be strictly political, not legal.

of residence or nationality to continue their terrorist activity there[27]. It is not the sheer event of fighting under the auspices of a foreign organization that is legally relevant, and so participation in training carried out by terrorist organizations carries so much weight in the definition of foreign terrorist fighters. In this sense the catalogue of legal goods protected by criminalizing the activity of foreign terrorist fighters is broad as it covers not only goods of international significance (e.g. world peace and security) or goods relevant domestically (e.g. state security). Such complexity justifies the adoption of a comprehensive approach underpinned by legislative activity on both levels.

There are at least two methods that domestic law may utilize to tackle the problem of foreign terrorist fighters. First, an internationally approved definition could be transposed domestically, a corresponding definition of terrorism could be worked out, and new offences instituted so that particular causative acts that foreign fighters manifest are penalized. A competing account holds that the instruments already available may suffice. Law enforcement and judicial authorities shall bring the activity of foreign terrorist fighters under the remit of offences already in existence in national criminal codes, from those most reprehensible (so-called core crimes of international criminal law) to crimes less socially harmful (e.g. provocation to commit an offence).

Below I attempt to analyse, in brief, the currently existing legal bases allowing for holding a Polish citizen criminally liable for undertaking activity as a foreign terrorist fighter. Next, the EU Directive on combatting terrorism will be discussed. Finally, the exact scope of changes mandated by the legislation to be transposed into domestic law will be expounded upon.

3.1. COMMENTS *DE LEGE LATA* IN THE LIGHT OF POLISH CRIMINAL LAW ON FOREIGN TERRORIST FIGHTERS' DEPARTURES

Per the International Centre for Counter-Terrorism, "Between 20 to 40 Polish nationals are believed to have travelled to Syria/Iraq, most of them residing at the time of departure not in Poland itself but in other European countries. Amongst them was an individual who had carried out a suicide attack on a refinery in Iraq in June 2015 together with three other FF"[28]. Consequently, the undertaking

[27] *Cf.* Ch. Lister, *Returning Foreign Fighters: Criminalization or Reintegration*, Policy Briefing, Brookings Doha Center, August 2015, https://www.brookings.edu/wp-content/uploads/2016/06/En-Fighters-Web.pdf (accessed 28 April 2017).

[28] Data cited after: B. van Ginkel, E. Entenmann (eds.), *The Foreign Fighters Phenomenon in the European Union Profiles*, *Threats & Policies*, ICCT Research Paper, April 2016, p. 46. In response to parliament written question No. 423 dated 8 February 2016, Bartosz Kownacki, the Secretary of State at the Ministry of National Defence, argued that "since the beginning of the Syrian conflict in 2011, 21 Polish citizens have travelled to the war zone. 10 of them remain in Syria, 6 returned to Poland or other European countries, and 5 have died. Polish citizens who find

of activities characteristic of foreign terrorist fighters by Polish citizens is a rather minimal problem[29]. This is not to say, however, that it is overlooked by Polish law enforcement authorities. For instance, in 2015 the Internal Security Agency initiated three proceedings investigating Polish citizens in Syria, including two in respect of the crime under Article 258 § 2 of the Criminal Code and one under Article 141 § 1[30].

The current Criminal Code contains a number of provisions pertaining to terrorist activity. These include, in the general part, Articles 65, 110, 115 § 20 and, in the specific part, Articles 165a, 255a, 258a, 259, 259a, 259b. Relevant to the discussion about foreign terrorist fighters are also Articles 141 and 142. I will seek to interpret only a few of those regulations to the extent that it informs the argument presented in the paper.

3.1.1. CRIME OF A TERRORIST CHARACTER – ARTICLE 115 § 20 OF THE CRIMINAL CODE

A dogmatic discussion should start with Article 115 § 20 of the Criminal Code which defines a crime of a terrorist character. The provision was enacted at the time of Poland's accession to the European Union and represents an attempt to adjust the Polish criminal law to the EU law[31]. The regulation sets two criteria to be used to determine whether a given crime is of a terrorist character. The first one is formal and pertains to the upper threshold of punishment, standing at 5 years imprisonment or more[32]. The second requirement concerns the motivations of the perpetrator or, to be exact, the purpose of the activity undertaken (serious intimidation of many people; compelling of an authority of the Republic of Poland or another state or an international organization to act in a certain way or refrain from doing so; causing of serious disturbances in the workings of the government or the economy of the Republic of Poland, another state or an international organization). Pertinently, the list of motivations is enumerative and exhaustive, therefore the existence of any of them decides whether a crime under

themselves in Syria primarily join the Islamic State (…)". *Cf.* http://www.sejm.gov.pl/Sejm8.nsf/interpelacja.xsp?typ=INT&nr=423 (accessed 25 April 2017).

[29] Such conclusions may be drawn especially when one considers the estimated number of foreign fighters coming from other European States, for instance: the United Kingdom: 700–760, Germany: 720–760, France: more than 900, Belgium: around 500.

[30] *Cf.* B. Kownacki's response to parliamentary written question No. 423.

[31] This provision was enacted by the Act of 16 April 2004 on Amending the Criminal Code and Numerous Other Acts (Polish Official Journal of Laws of 2004, No. 93, item 889 as amended); Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).

[32] The draft bill on terrorist activity envisaged a reduction of the upper threshold of punishment to at least 3 years. In such a case the pool of crimes potentially qualifying as of a terrorist character would expand significantly. *Cf.* the reasons appended to the bill by the Government Legislation Centre, p. 18, https://legislacja.rcl.gov.pl/docs//2/12284561/12348751/12348752/dokument218596.pdf (accessed 28 April 2017).

Article 115 § 20 has been committed. The Polish parliament utilized a different legislative method than the EU legislator in the Framework Decision, however. This divergence will reappear in the context of the newest EU directive on combatting terrorism discussed under the next heading and comprehensively spelt out in the paper's summary.

3.1.2. UNDERTAKING MILITARY DUTIES IN A FOREIGN MILITARY FORCE – ARTICLE 141 OF THE CRIMINAL CODE

Article 141 § 1 of the Criminal Code stipulates that: "Whoever, being a Polish citizen, undertakes military duties in a foreign military force or a foreign military organisation without the permission from a competent authority, is subject to the penalty of deprivation of liberty for between 3 months and 5 years"[33]. It is an individual crime whose causative act consists of assuming or undertaking military duties without a competent authority's permission[34]. Pursuant to Article 199a of the Act of 21 November 1967 on the Common Duty to Protect the Republic of Poland, that authority is the Minister of the Interior or – where professional soldiers are involved – the Minister of National Defence[35]. Permission may only be given provided that the requirements listed in Article 199b and 199c of the Act are met. One requirement is that "the duty must not be forbidden by international law" makes it clear that the undertaking of military duties for Da'esh would be outright prohibited[36]. In addition, liability does not arise where the duty has

[33] Hence this excludes from the ambit of criminalization both foreigners and stateless persons. *Cf.* the Act of 2 April 2009 on the Polish Citizenship (Polish Official Journal of Laws of 2012, item 161). Considering that the provision is situated in the specific instead of the military part of the Criminal Code, the crime may be committed by every citizen and not merely by a soldier. *Cf.* M. Ścibior, *Udzielanie zgody obywatelowi polskiemu na służbę w obcym wojsku lub obcej organizacji wojskowej*, "Wojskowy Przegląd Prawniczy" 2011, issue 2, pp. 21–35.

[34] Note that, by virtue of § 3 of the Article, no liability arises in respect of a Polish citizen who is also a citizen of a foreign state and resides in its territory if he decides to undertake military service there. *Cf.* S. Małecki, *Podwójne obywatelstwo a służba w obcym wojsku*, "Wojskowy Przegląd Prawniczy", 1993, issue 3–4, pp. 83–87; S. M. Przyjemski, *Powszechny obowiązek obrony Rzeczypospolitej Polskiej a służba obywatela polskiego w obcym wojsku lub obcej organizacji wojskowej*, "Wojskowy Przegląd Prawniczy" 2007, issue 4, pp. 3–14. It is worth noting that § 3 is an exception from the rule in Article 3(2) of the Act of 2 April 2009 on the Polish Citizenship, pursuant to which "a Polish citizen cannot, before the authorities of the Republic of Poland, effectively rely on any rights or dutiies resultant from simultaneously having another citizenship".

[35] The Act of 21 November 1967 on the Common Duty to Protect the Republic of Poland (Polish Official Journal of Laws of 1967, No. 44, item 220). *Cf.* also: Resolution of the Council of Ministers of 13 April 2010 on the rules of granting consent to Polish citizens as regards service in a foreign military or a foreign military organization (Polish Official Journal of Laws of 2010, No. 68, item 438).

[36] *Cf.* "Recalling that the Al-Nusrah Front (ANF) and all other individuals, groups, undertakings and entities associated with Al-Qaida also constitute a threat to international peace and security (…). Condemns also in the strongest terms the continued gross, systematic and widespread abuses of human rights and violations of humanitarian law, as well as barbaric acts of destruction

the nature of paid employment in a foreign military force or organization that is of a purely service-like character[37]. In this aspect the *actus reus* of the offence under Article 141 § 1 of the Criminal Code diverges from the Security Council Resolution's standard as the latter also covers training activity not necessarily strictly connected with military duty. Article 141 § 1, however, penalizes participation in military training[38].

The phrasing of the provision, particularly the word "undertakes", is controversial as, theoretically, it conjures up a model where one is made a proposal to join a military force which then is either accepted or declined. In other words, on its face it appears like voluntary joining of a military force or organization falls beyond the ambit of the offence[39]. Problems also arise in relation to delineating the boundaries of the *mens rea* required of the perpetrator, however it is advisable to adopt the view suggesting full intent[40].

The phrase "foreign military force" definitely pertains to military forces other than the Polish one, i.e. belonging to other states[41]. By a military organization one should understand "a foreign organizational structure which, whilst not being a military force (foreign army), has aims, a programme or tasks of a military nature (…)"[42]. The doctrine hints that no link with state structures must be present[43]. Other characteristics of foreign military forces proposed in the literature include: a hierarchical structure of command, concentration of leadership in

and looting of cultural heritage carried out by ISIL also known as Da'esh", Security Council Resolution 2249 (2015), 20 November 2015.

[37] Judgment of the Polish Supreme Court of 10 July 1992, ref. number WRN 75/92, OSNKW 1993, No. 1–2, item 12.

[38] "Military service is fulfilling one's function as a soldier by force of common or individual military duty, as well as the service of volunteers whose essence is undergoing military training, performing the functions of a professional soldier, and, in times of war, participation in military activities" – *ibidem*.

[39] This is specially momentous as foreign terrorist fighters often profess, when talking about their motivations, that they decide to travel to Syria voluntarily, often due to ideological reasons, believing they will be admitted to the terrorist organizations operating there.

[40] This view has been espoused by Zbigniew Ćwiąkalski. *Cf.* Z. Ćwiąkalski, *Art. 141*, (in:) A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–277 k.k.*, Lex 2013; both types of intent are accepted in: J. Kulesza, *Art. 141. Służba w obcym wojsku*, (in:) M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do art. 117–221*, Legalis 2013.

[41] According to the Polish Supreme Court, also covered are "means earmarked by the state to protect its interests and undertake military action, grouped as an organizational entirety consisting of military units and collective entities of diverse type and dimension". *Cf.* judgment of the Polish Supreme Court of 10 July 1992, ref. number WRN 75/92, OSNKW 1993, No. 1–2, item 12.

[42] *Ibidem*.

[43] M. Kiziński, *Wybrane aspekty prawnokarne służby obywatela polskiego w obcym wojsku lub w obcej organizacji wojskowej (art. 141 § 1–3 k.k.)*, "Wojskowy Przegląd Prawniczy" 2006, issue 1, p. 37.

the hands of one person, subordination, official (even if partial) uniformization[44]. On the contrary, the mode of legal regulation of the entity is irrelevant (e.g. formal registration). J. Kulesza, it is submitted, may be, however, incorrect to avail himself of the term "legality" as it obscures the division into formal and material correspondence with the law of a given, legally relevant activity[45]. It looks as if the legislator treats as irrelevant the legal basis for the functioning of the suspect entity, that is whether its operation rests on a legal foundation (e.g. as an association, an insurgency faction etc.) or whether it is informal. Importantly, it is a different qualification to hold a given entity to be illegal – such whose form of activity is inconsistent with the currently binding provisions of the law or, in the long run, is penalized by virtue of specific regulations (e.g. a criminal organization). Therefore, it remains open whether a terrorist organization may be classified as a "military organization".

Z. Ćwiąkalski, prompted by the indefiniteness of the term "military organization", has rightly noted that "the legislator intended to sketch the reach of penalization as broadly as possible"[46]. Another academic has also correctly asserted that "the punishability of the crime is not dependent upon the place where it was committed"[47]. In the light of this, one may suppose that, given ISIS's extensive structure and military aims, it could be brought within the ambit of the definition of a "foreign military force", despite its previous classification as a terrorist organization. Therefore, where a Polish citizen enters into military cooperation with ISIS or other similar terrorist organizations, both in Syria, the bordering countries and as a consequence of assignments completed elsewhere (e.g. in Poland)[48], it would be feasible to hold such a person criminally liable under Article 141 § 1 of the Criminal Code[49]. On account of the crime's formal character, liability arises as soon as cooperation is forged, regardless of whether any planned

[44] D. Szeleszczuk, *Art. 141*, (in:) A. Grześkowiak, K. Wiak (eds.), *Kodeks karny. Komentarz*, Legalis 2017; *M. Flemming*, (in:) M. Flemming, J. Wojciechowska (eds.), *Zbrodnie wojenne. Przestępstwa przeciwko pokojowi i obronności. Rozdział XVI*, *XVII*, *XVIII Kodeksu karnego. Komentarz*, Warszawa 1999, p. 176.

[45] J. Kulesza, *Art. 141. Służba w obcym wojsku*, (in:) M. Królikowski, R. Zawłocki (red.), *Kodeks karny…*

[46] Z. Ćwiąkalski, *Art. 141*, (in:) A. Zoll (ed.), Kodeks *karny*...

[47] A. Kamieński, *Art. 141*, (in:) O. Górniok (ed.), *Kodeks karny. Komentarz*, Lex 2006.

[48] Also in this aspect the scope of penalization envisioned in Article 141 of the Criminal Code diverges from the definition of foreign terrorist fighters in the Security Council Resolution, which makes it a condition for a person to be classified as a foreign fighter to travel outside of their place of residence or nationality.

[49] Similar corollaries are drawn by D. Szeleszczuk, who writes: "There are no obstacles, it appears, to holding in violation of Article 141 § 1 of the Criminal Code those Polish citizens who undertake duty for the Islamic State (ISIS)". *Cf.* D. Szeleszczuk, *Art. 141*, (in:) A. Grześkowiak, K. Wiak (eds.), *Kodeks karny*...

military actions succeed and a pre-determined consequence materializes[50]. Yet this regulation does not criminalize participation in training conducted by a foreign military organization so long as it is not strictly tied to military activity.

Another type of service in a foreign military force is prohibited by Article 141 § 2 of the Criminal Code, which stipulates that "whoever assumes duties in a mercenary military service prohibited by international law shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years". The legislator does not avail itself of the personal noun "mercenary", instead opting for a word that is undefined in either international or domestic law – "mercenary military service". In the literature, it is noted that this encompasses "units organized with a view to arranging military takeovers or protecting the interests of local warlords, as well as undertaking preparations to instigate and participate in ongoing civil wars. It is irrelevant where such units are situated geographically"[51]. Another condition, that is designation of such duties as "prohibited by international law", may be evaluated by reference to both the Additional Protocol and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries enacted by the UN General Assembly on 4 December 1989[52]. Article 3(1) of the Convention stipulates that: "A mercenary (…) who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention".

The above definitions evince that every natural person capable of being held criminally liable may be legally qualified as a mercenary. Contrary to Article 141 § 1 of the Criminal Code, § 2 penalizes Polish citizens, foreign citizens and stateless persons alike. As regards Polish citizens, it is rightly noted in the literature that Article 141 § 2 codifies an aggravated version of the crime under § 1[53], introducing a crime of the common type into the system.

The *actus reus* of the crime under Article 141 § 2 is also more broadly cast in comparison to § 1. The indefiniteness of the phrase "undertaking of the duties" leads me to believe that, *a contrario* to the corollaries drawn in respect of Article 141 § 1, § 2 refers to duties of not only military nature, but also of other kind (e.g. service like, by analogy to the aforementioned judgment of the Polish Supreme

[50] For instance, Article 141 § 1 of the Criminal Code would penalize the undertaking by a Polish citizen of military duty as a member of the French Foreign Legion, even if he later abandons the service. *Cf.* judgment of the Polish Supreme Court of 10 February 1994, ref. number WR 8/94, OSNKW 1994, No. 5–6, item 38.

[51] Z. Ćwiąkalski, *Art. 141*, (in:) A. Zoll (ed.), *Kodeks karny…*

[52] General Assembly Resolution 44/34 of 4 December 1989 (International Convention against the Recruitment, Use, Financing and Training of Mercenaries). Poland signed the Convention on 28 December 1990, yet, as of June 2017, it has not ratified it. *Cf.* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-6&chapter=18&clang=_en (accessed 26 April 2017).

[53] S. Hoc, *O penalizacji służby w obcym wojsku*, "Roczniki Nauk Prawnych" 2005, Vol. 10, issue 1, p. 187.

Court). As it was the case with Article 141 § 1, the "undertaking of duties" phrasing is problematic. D. Gruszecka has noted that "undertaking of duties denotes (…) stable contribution to the functioning of an organization, not merely a one-off service"[54]. In principle, this view goes a long way to clarify the exact meaning of this legal category, yet one may doubt whether the word "stable", indefinite itself, truly reflects the nature of mercenary duty. The requirement of stability is absent from the definition of a mercenary and mercenary service recorded above. Consequently, it appears that even short-term performance of certain duties meets the requirements of the *actus reus* of mercenarism, provided that all the other elements are present. Going further, one may reasonably conceive of circumstances where foreign terrorist fighters would perform the *actus reus* of the crime under Article 141 § 2 and could be, pursuant thereto, held criminally liable.

3.1.3. CRIMES OF A TERRORIST CHARACTER IN CHAPTER XXXII OF THE CRIMINAL CODE

One of the aims of the Act of 10 June 2016 on Anti-Terrorist Activity was to "implement domestically the provisions of UN Resolution No. 2178", which resulted in the creation of several new "offences pertaining to the undertaking of activity by so-called foreign insurgents" (*inter alia*, Articles 255a § 2, 259a, 259b of the Criminal Code)[55]. The *ratio legis* of the new legislation, according to Parliament itself, was to "enhance the ability of law enforcement as regards the prevention of crimes of a terrorist character. The projected solution ensures that those who participated in the preparations to commit a crime escape liability provided that they refrain from actually going ahead with them. It is the Act's intention that the capacity of law enforcement in terms of extracting information about planned terrorist incidents be strengthened and that solidarity between members of terrorist groups be hindered, the latter being a key element from the perspective of the state's ambition to destabilize such organizations"[56].

Article 255a § 1 of the Criminal Code penalizes the spreading of information that are capable of facilitating the commission of a crime, including a crime of a terrorist character. Liability arises in detachment from and precedes actual terrorist activity, and may therefore be classified as subsidiary, as the provision recites: "whoever spreads or publicly presents contents capable of facilitating the

[54] D. Gruszecka, *Art. 141*, (in:) J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Lex 2014.

[55] Polish Official Journal of Laws of 2016, item 94. Parliament also affirmed that: "The Act will also institute penal provisions mandated by the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism concluded on 16 May 2005 in Warsaw, to which Poland is a party (Polish Official Journal of Laws of 2008, No. 161, item 998)".

[56] *Cf.* the reasons appended to the Act, p. 20.

commission of a crime of a terrorist character (…)"[57]. It is § 2 of the Article, however, that holds the most significance in relation to foreign terrorist fighters since it criminalizes participation in training capable of facilitating the commission of a crime of a terrorist character. Analysed in conjunction with Article 115 § 20, Article 255a § 2 of the Criminal Code imposes liability even where an actual terrorist act is not committed – within the ambit of the provision is even participation in relevant training that potentially may assist in a terrorist act eventuating some time down the road. Surely, criminalized is travel by Polish citizens abroad to partake in such training or doing so via the Internet. In the literature it has been qualified that participation in training sessions must "in an objective sense (…) facilitate" one in committing a terrorist crime[58]. I recognize that evidential problems may arise as regards proving this requirement, therefore a different construction should be favoured. Mere participation in relevant training should give rise to a presumption that commission of a terrorist crime was facilitated thereby. This is buttressed by the fact that that the legislator does not demand that a particular consequence eventuate. Neither does it limit the potential set of perpetrators – the crime is of the formal and common type. In this way the scope of criminalization of any activity connected with terrorist activity has been broadened[59].

Besides individual activity, the Criminal Code also penalizes acts committed by organized criminal groups or associations, including crimes of a terrorist character. Article 258 lays down the illegality of a number of causative acts related to such organizations, i.e. forming, leading and participating in their activities. This has limited relevance for foreign terrorist fighters.

Crossing the country border to commit a crime of a terrorist character is regulated in Article 259a of the Criminal Code. It is a new offence, introduced to the Code in 2016, and it holds that "whoever crosses the border of the Republic of Poland with an intention to commit, in the territory of another state, a crime of a terrorist character or a crime under Articles 258a or 258 § 2 or § 4, is subject to the penalty of deprivation of liberty from 3 months to 5 years". In Article 259a the legislator again criminalizes an act occurring before the commission of a terrorist crime. Clearly, the provision is aimed at foreign terrorist fighters. Importantly, it refers to crossing the border of the Republic of Poland, so it covers situations where a person X leaves the territory of Poland to commit a terrorist act in country Y, but also where a person X uses the territory of Poland as transit area

[57] This method is used to implement the provisions (particularly Article 1) of the Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism and the duties imposed by Articles 5 and 7 of the Council of Europe Convention on the Prevention of Terrorism of 16 May 2005 (Polish Official Journal of Laws of 2008, No. 161, item 998).

[58] K. Wiak, *Art. 255a. Rozpowszechnianie treści mogących ułatwić popełnienie przestępstwa*, (in:) A. Grześkowiak, K. Wiak, (eds.), *Kodeks Karny. Komentarz*, Legalis 2017.

[59] See the reasons appended to the Act, pp. 19–20.

on the way from country Z to country Y, crossing the Polish border in the meantime. By criminalizing the act of "crossing the border" it is the Polish parliament's intention to curb the international character of terrorism. It goes without question that Da'esh would not be as successful if it was not for the fact that so many people from so many countries fight for it. Article 259a gives grounds for criminalizing crossing the border to participate in terrorist training (Article 255) as well as travel beyond the Polish borders by organized groups and associations[60]. The reach of the provision does not, however, catch crossing the Polish border in the other way around, i.e. from another country into Poland to commit a terrorist crime there. It is a crime of the formal and common type. Significantly, Article 259a normatively complements Article 141 § 1 discussed above, as its ambit also covers acts undertaken before the commission of an actual prohibited act.

3.2. FOREIGN TERRORIST FIGHTERS IN EUROPEAN UNION LAW

3.2.1. GENERAL CHARACTERISTICS OF A DIRECTIVE IN THE SYSTEM OF EU LAW

A directive is a secondary legislative instrument of the European Union aimed at harmonizing the domestic legislations to the extent that it regulates[61]. Under Article 288 of the Treaty on the Functioning of the European Union (TFEU), "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions (…) [a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods"[62]. Commentators indicate that a directive is "a peculiar legislative document of the EU, something confirmed by its unique character in the transnational legal order"[63]. The peculiarity of a directive consists in limiting the duty imposed on the Member States to the result to be achieved whilst leaving to them the decision regarding the method of implementation so that diverse solutions typically employed in a given

[60] This has been pointed out by: A. Lach, *Art. 259a. Przekroczenie granicy RP w celu popełnienia przestępstwa o charakterze terrorystycznym*, (in:) V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Legalis 2016; A. Herzog, *Art. 259a KK*, (in:) R. A. Stefański (ed.), *Kodeks karny. Komentarz*, Legalis 2017.

[61] M. Szwarc-Kuczer notes that "after the Lisbon Treaty has entered into force, a directive is the only legal instrument that serves to harmonize the substantive criminal law in the EU (…)". *Cf.* M. Szwarc-Kuczer, *Kompetencje Unii Europejskiej w dziedzinie harmonizacji prawa karnego materialnego*, Warszawa 2011, p. 94.

[62] The Treaty of Accession 2003, signed in Athens on 16 April 2003 (Polish Official Journal of Laws of 2004, No. 90, item 864).

[63] B. Kurcz, *Art. 288*, (in:) A. Wróbel (ed.), *Traktat o Funkcjonowaniu Unii Europejskiej. Komentarz. Tom III*, Warszawa 2012, p. 651.

country may be utilized and the sovereignty of the Member States is respected[64]. As the normative aims of directives are not determined explicitly therein, to that end construction of every individual directive must be meticulously conducted. Latitude as to the process of implementation is not absolute. The Court of Justice of the European Union (CJEU) has held that the Member States must choose "the most appropriate forms and methods to ensure the effectiveness" of a directive whilst fulfilling the requirements of "clarity and legal certainty"[65]. A directive is addressed to states and binds only them, to the exclusion of citizens and other entities[66]. Transposing of a directive, where differences between the state of the domestic law and the result envisaged by the provisions of a given directive are discerned, consists in enacting primary legislation whose effect is to either eliminate all the defective – from the perspective of the directive – provisions or filling any voids resultant from the directive legislating in an area previously unregulated. Where no discrepancies are detected, the Member State need not undertake any legislative activity[67]. The Member States are obliged to "ensure that domestic authorities responsible for the application of a given legal device act accordingly with the directive"[68]. In this sense their duty is broader than mere implementation of a directive's provisions, i.e. mechanical transposition; it also necessitates guaranteeing the effectiveness of the new laws within a national legal system[69]. Other important elements of a directive are the date of its entering into force and the deadline for its implementation. It is accepted that directives form part of domes-

[64] S. Prechal, *Directives in EC Law*, Oxford 2004, p. 73; the discretion is, however, not unconstrained. C. Mik has argued that "achieving the envisaged result encompasses materializing all the substantive provisions of a directive in the context of the general goal expressed therein". *Cf.* C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki. Tom I*, Warszawa 2000, p. 499.

[65] Judgment of the Court of Justice of the European Union of 8 April 1976 in Case C-48/75 *Jean Noël Royer*; judgment of the Court of Justice of the European Union of 6 May 1980 in Case C-102/79 *Commission of the European Communities v Kingdom of Belgium*. I am citing the cases after: R. Adam, M. Safjan, A. Tizzano, *Zarys prawa Unii Europejskiej*, Warszawa 2014, p. 139.

[66] Case 152/84 *Marshall v Southampton and South-West Hampshire Health Authority* ("*Marshall I*") [1986] ECR 723; Case C-91/92 *Faccini Dori* [1994] ECR I-3325. *Cf.* K. Lenaerts, J. A. Gutiérrez-Fons, *To say what the law of the EU is: methods of interpretation and the European Court of Justice*, EUI AEL; 2013/09; Distinguished Lectures of the Academy, p. 13, http://cadmus.eui.eu/handle/1814/28339 (accessed 2 May 2017); D. Simon, *La directive européenne*, Paris 1997, p. 3. It should be noted, however, that the above statement is not accurate where, after the deadline for the implementation of a directive has passed, it becomes binding *erga omnes*.

[67] N. Foster, *Foster on EU Law*, Oxford 2009, p. 108.

[68] A. Grzelak, (in:) A. Grzelak, M. Królikowski, A. Sakowicz (eds.), *Europejskie prawo karne*, Warszawa 2012, p. 161.

[69] This is pointed out in: M. Rams, *Specyfika wykładni prawa karnego w kontekście brzmienia i celu Unii Europejskiej*, Warszawa 2016, p. 100.

tic legal systems from the moment they are enacted and, in this sense, they bind[70]. Their application, however, hinges upon the degree of correctness of their implementation. Where it has been done rightly, it will be the implementing piece of legislation that will form the basis of all proceedings, determinations and other legal acts. So direct implementation of a directive occurs "only following the passing of the deadline for implementation and only where there are no domestic laws consistent with the directive"[71]. Importantly for the purposes of this paper, a directive cannot serve as a foundation of criminal liability even where all the elements of the offences envisaged therein are present[72]. It is also contrary to EU law to increase or otherwise harshen, by means of a pro-EU construction, the criminal liability of persons where the directive has not been implemented into domestic law[73]. Optimally, a directive touching upon criminal matters should be transposed into domestic law, which introduces order into the law and realizes the principle of legal certainty at the same time[74]. It is by this reason that EU criminal law should be interpreted textually and its implementation into the law of the Member States cannot lead to violations of fundamental guarantees such as the prohibition on analogies or the prohibition on retroactive application of criminal provisions[75].

3.2.2. FOREIGN TERRORIST FIGHTERS UNDER THE DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

15 March 2017 saw the enactment of Directive (EU) 2017/541 of the European Parliament and of the Council on combatting terrorism. Its Treaty foundation is Article 83(1) of the TFEU: "The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to

[70] B. Kurcz claims that "the case law of the CJEU clearly states that EU law constitutes an integral part of the domestic law in force in each of the Member States (6/64 *Costa*)". *Cf.* B. Kurcz, *Art. 288*, (in:) A. Wróbel (ed.), *Traktat o Funkcjonowaniu Unii Europejskiej*..., p. 665.

[71] *Ibidem*, p. 666. A directive specifies both the date of its entering into force (see Article 297 TFEU) and the deadline for its implementation.

[72] Judgment of the European Court of Justice of 3 May 2005 in joint cases C-387/02, C-391/02 i C-403/02, *Berlusconi*. Citing after: A. Grzelak, (in:) A. Grzelak, M. Królikowski, A. Sakowicz (eds.), *Europejskie prawo*..., p. 163.

[73] C-168/95, *Arcaro*. *Cf.* also: A. Wróbel, *Zasada bezpośredniego skutku prawa unijnego*, (in:) A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Vol. I, Warszawa 2010, p. 119.

[74] This method puts into reality the idea of transnationality of the law. For it is noted that the essence of transational criminal law lies in the fact that "it does not create an underpinning of criminal liability of individuals by reference to international law or a specialized subsystem thereof. Instead, it is a species of indirect criminalization founded upon duties to criminalize or rules of dealing in state parties to a given treaty (…)". *Cf.* M. Królikowski, (in:) A. Grzelak, M. Królikowski, A. Sakowicz (eds.), *Europejskie prawo karne*, Warszawa 2012, p. 5.

[75] *Cf.* , *inter alia*: Case 63/83 Kirk [1984] ECR 2689, paras 21–23.

combat them on a common basis. These areas of crime are the following: terrorism (…)".

The Directive has a hefty preamble and 31 Articles. Title III establishes various criminal offences revolving around terrorist activity. Articles 3 (where the category of a terrorist offence is defined) and 7–10 are key as regards foreign terrorist fighters.

As noted above, the EU legislator differs from the Polish one in its definition of a terrorist offence[76]. The Directive adopts a different formal criterion whilst retaining the same substantive one. Instead of focusing on the gravity of punishment meted out for qualifiable offences, Article 3(1) of the Directive uses, as the formal criterion, a list of intentional acts, "which, given their nature or context, may seriously damage a country or an international organisation". These include: attacks upon a person's life, kidnapping, seizure of aircraft and manufacture, possession, acquisition, transport, supply or use of explosives or weapons. The substantive criterion is contained in Article 3(2) and comprises the aims that a perpetrator intends to achieve by committing an act listed in subsection 1. These are: seriously intimidating a population, unduly compelling a government or an international organisation to perform or abstain from performing any act, and seriously destabilising or destroying the fundamental (…) structures of a country or an international organisation".

Breaking down the offence of providing training for the purposes of terrorism according to the agent involved is also a novelty compared to the Polish regulation. Article 7 of the Directive regulates a crime of providing training that may only be committed by an instructor whereas Article 8 covers the receipt of training as a participant. The latter provision also lists a number of causative acts the existence of which decides whether a given training session may be classified as provided "for the purposes of terrorism". The catalogue, however, is not exhaustive and should be interpreted as a guideline (e.g. instruction on the making or use of explosives, firearms etc.).

Article 9 intends to penalize travelling for the purposes of terrorism from a Member state to another country. To assign liability for a crime under this law it is of crucial importance that the perpetrator started his journey in a Member State – his destination is legally irrelevant. In other words, it may be any country in the world so, for practical purposes, it is sufficient to prove that a country border has been crossed. The Article applies to travelling in three different roles that may generally be referred to as: individual participation (committing or contributing to the commission of a crime), participation in a terrorist organization (also a group organized in the context of Article 4), and receiving or providing terrorist training. As already shown, the travelling must be intentional, and it must be done

[76] A different definition was embraced already in the Council Framework Decision of 13 June 2002 on combating terrorism (Official Journal of the European Union, L 164, 22.6.2002, p. 3–7).

with the aim of committing or contributing to the commission of a terrorist crime. Inasmuch as the first causative act amounts to direct commission, the other refers to complicity.

Under Article 10 illegal are any acts of organisation or facilitation that assists any person in travelling for the purpose of terrorism. Article 14, which regulates aiding and abetting, inciting as well as attempts, extends legal liability even to acts that were not actually committed (see Article 14(3)), and this applies also to travelling for terrorist purposes. As regards foreign terrorist fighters it is relevant that, in the light of the Directive, it is punishable to incite to travel for terrorist purposes and to attempt to commit that crime. Interestingly, this liability applies also to legal persons (Article 17).

4. FOREIGN TERRORIST FIGHTERS IN POLISH AND EU CRIMINAL LAW. SUMMARY

Article 115 § 20 of the Polish Criminal Code and Article 3 of the Directive are not mutually exclusive even though the legislative methods used to craft the definitions of a terrorist crime differed in each case. Conversely, it is right to say the Code's definition, which leaves the formal criterion slightly more indefinite, is broader than that of the Directive[77]. That this is so has been criticized[78] but, it appears, only partially fairly. The Polish definition is devoid of needless casuistry, as opposed to the EU regulation, which rationally supports the method opted for domestically[79]. It is always a question whether the Polish legislator should automatically copy-paste the transposed EU provisions into domestic law or whether it should resort to creating offences by reference to the methodology accepted under Polish law. Real doubts, I submit, are given rise to by incorporating threats to commit a crime of a terrorist character into Article 115 § 20 of the Criminal Code. For the regulation of punishable threats is too narrow to encompass all

[77] Whilst C. Sońta refers to the Council Framework Decision of 13 June 2002 and not the 2017 Directive, it appears that his opinion remains relevant under the new regime. For both definitions of that criminal act are strikingly similar, and the introduced amendments are limited to specifying one type of a causative act and adding one offence consisting of illegal interference with IT systems. *Cf.* C. Sońta, *Przestępstwo o charakterze terrorystycznym w polskim prawie karnym*, "Wojskowy Przegląd Prawniczy" 2005, issue 4, p. 17.

[78] *Ibidem*, p. 17; P. Daniluk rightly states that "[in] practice it is hardly conceivable that one could qualify as such the crime of possession of pornographic content involving a minor (Article 202 § 4a of the Criminal Code). *Cf.* P. Daniluk, *Art. 115 KK*, (in:) R. A. Stefański (ed.), *Kodeks karny. Komentarz*, Legalis 2017.

[79] This has been noted by J. Majewski, *Art. 115*, (in:) W. Wróbel, A. Zoll (eds.), *Kodeks karny. Część ogólna. Tom II. Część II. Komentarz do art. 53–116*, Lex 2016.

acts associated with terrorist activity. Article 190 § 1 protects merely two agents, i.e. the person who a threat to commit an offence is directed against and that person's next of kin, provided that the perpetrator intends to act to their detriment[80]. Abstract threats against agents other than persons fall outside of the scope of the definition. The EU Directive, at the same time, explicitly lists threats in Article 3(1) and refers them to all the causative acts of terrorism contained therein. This prompts me to argue that in this aspect the scope of criminalization in Polish law is narrower than the European one.

Notwithstanding, as regards Articles 7–10 of the Directive, correspondence with the Polish regulations is discernible, including the crime of participation in "terrorist training" since – as shown above – the concise wording of Article 255a § 2 of the Criminal Code must be understood to cover both active and passive participation in such training, in line with Articles 7 and 8 of the Directive. Similarities arise also in the context of provisions pertaining to travelling for terrorist purposes. Article 141 of the Code, I submit, complements the precise disposition of Article 259a by regulating service in a foreign military force or a foreign military organization. I would venture to claim that currently under Polish law any activity undertaken by foreign terrorist fighters, provided that they are Polish citizens, is criminalized by virtue of Article 259a.

On the contrary, a good deal of problems is immediately triggered by Article 17 of the Directive which mandates that the EU Member States take the necessary measures to ensure that legal persons can be held liable for any of the offences referred to in Articles 3 to 12 and 14. For *de lege lata* Polish law does not envisage criminal liability of collective entities (legal persons or others) "in the strict sense of the word"[81]. A separate model of liability has been introduced by the Act of 28 October 2002 on Criminal Liability of Collective Entities for Punishable Offences[82]. Stopping short of delving deeply into the provisions of the Act, it does not, relevantly for the purposes of the paper, allow for the imposition of liability on collective entities for the crimes codified in Article 259a of the Criminal Code which, as proven above, is key as regards the activity of foreign terrorist fighters. The Article does not appear in the list in Article 16 of the 2002 Act where the extent of liability of collective entities is determined by reference to

[80] For an account of different types of threats from a historical and psychological perspective, see: K. Nazar-Gutowska, *Pojęcie i rodzaje groźby w prawie karnym i innych działach prawa stosowanego*, "Przegląd Sądowy" 2007, No. 9, pp. 49–62.

[81] So, rightly: M. Królikowski, R. Zawłocki, *Prawo karne*, Warszawa 2016, p. 33. After the Constitutional Court handed down its judgment of 3 November 2004 (ref. number K 18/03) B. Namysłowska-Gabrysiak suggested that the Act "instituted liability of a criminal character as regards collective entities, at least at the constitutional level". *Cf.* B. Namysłowska-Gabrysiak, *Konstytucyjność przepisów ustawy z 28.10.2002 r. o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary*, "Monitor Prawniczy" 2005, issue 9.

[82] Act of 28 October 2002 on Criminal Liability of Collective Entities for Punishable Offences (Polish Official Journal of Laws of 2002, No. 197, item 1661).

particular offences. Polish law, therefore, does not fully realize the aim of Article 17 of the Directive. On top of amending Article 115 § 20 of the Criminal Code to bring the domestic law in line with the EU standard as regards threats, Article 259a of the Code should be added to the catalogue of crimes in Article 16 of the 2002 Act. Until that time the Polish law will not be fully compatible with the EU regulations.

FOREIGN TERRORIST FIGHTERS FROM THE PERSPECTIVE OF POLISH AND EUROPEAN CRIMINAL LAW

Summary

Foreign terrorist fighters represent one of the powerful threats to the security of states and humanity in the 21st century. Besides participating in the actions of the Islamic State, they also pose a significant danger when they return to their countries of origin to recruit new volunteers, radicalize local communities and actively partake in terrorist attacks. So as to increase the effectiveness of the fight against terrorism, states and international organizations (the EU, Council of Europe, UN) have been moving in the direction of criminalizing all manifestations of terrorist activity. The paper strives to achieve the following: providing a definition of foreign terrorist fighters; proffering a legal qualification of travel abroad undertaken by Polish citizens for terrorist purposes by reference to selected provisions of the Polish Criminal Code; conducting an analysis of the provisions of EU Directive of 15 March 2017 on combating terrorism against the backdrop of the criminalization of the activity of foreign terrorist fighters; comparing the Polish and European criminal legislations within the pertinent scope. *De lege ferenda* comments will be offered by means of a summary.

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KEYWORDS

foreign terrorist fighters, foreign fighters, EU directive, Polish Criminal Code

SŁOWA KLUCZOWE

foreign terrorist fighters, foreign fighters, dyrektywa Unii Europejskiej, polski kodeks karny

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RESTRICTIONS ON TRADING IN AGRICULTURAL LAND AND EUROPEAN UNION LAW

1. POLISH LAW

30 April 2016 saw the entering into force of the Act of 14 April 2016 on the Suspension of Sale of Land of the Agricultural Property Stock of the State Treasury and on Amending Numerous Acts[1]. The amendments pertained to, *inter alia*, the Act of 11 April 2003 on the Formation of the Agricultural System[2], and introduced a variety of alterations thereto, thus restricting significantly the freedom of trading in agricultural land. The Act was enacted by virtue of the lapse of the 12-year transition period as regards acquiring agricultural and forest land. Acquisition of land by foreigners is for many, especially the new, Member States of the EU a highly sensitive subject for both economic and historical reasons. Poland, under Annex XII to the Accession Treaty, could retain its restrictions on the acquisition of land by non-residents[3]. The Treaty laid down that "in no instance may nationals of the Member States or legal persons formed in accordance with the laws of another Member State be treated less favourably in respect of the acquisition of agricultural land and forests than at the date of signature of the Accession Treaty".

The Act on the Formation of the Agricultural System begins with a preamble which discloses the *ratio legis* of the Act's provisions. The principal aims are: protection and development of family farms which, pursuant to the Polish Constitution, are the foundation of the agricultural system of Poland. To better understand the motives of the legislator it is relevant to quote from the reasons appended to the 2016 draft bill: "Agricultural land is the most important means of production of food and realizing the fundamental duty of feeding the entire population. Circumstances and characteristics which allow for agricultural use

[1] Polish Official Journal of laws of 2016, item 585.

[2] Polish Official Journal of laws of 2016, item 2052, as amended.

[3] B. Bacia, A. Zawidzka, *Swoboda przepływu kapitału i usługi finansowe w Unii Europejskiej*, Warszawa 2011, p. 33

of land are neither stable nor permanent. Civilizational progress, urbanistic processes and climate change lead to a marked reduction of the agricultural property stock by changes to their legal purpose, degradation of productive characteristics or utter devastation of the environment. This is why agricultural land shall be considered a finite public good and as such be subjected to extraordinary legal regulation. Legal protection should be quantitative, aimed at maintaining the current level of agricultural stock and the productive characteristics of soil as well as reviving the characteristics lost beforehand. Consequently, the protective profile dominates the provisions governing the principles and methods of trading in agricultural land. In the light of the above, it is necessary to institute an appropriate legal regime whereby a proper distribution of agricultural land as a finite legal good is ensured.

1 May 2016 marked 12 years of Poland's membership in the European Union. Section 4.2 of Annex XII to the Accession Treaty allowed Poland to maintain in force for twelve years from the date of accession the rules laid down in the Act of 24 March 1920 on the Acquisition of Real Estate by Foreigners, regarding acquisition of agricultural and forest land by foreigners. There is a threat that after that date land hitherto subjected to the transition period may be of fervent interest for investors form other EU Member States, especially those where agricultural land is proportionately more expensive and where there are harsh restrictions on trading in agricultural land as regards foreigners and citizens who are not farmers. Such restrictions are in force in, *inter alia*, France, Germany and Denmark. Moreover, as food security is increasingly more endangered and the worldwide agricultural property stock is shrinking, interest in agricultural land may receive a boost as a purchase could represent a beneficial investment. The above concerns are compounded by the fact that Polish farmers are discriminated against as they receive far lower direct payments from the EU than the average, which makes it so that Polish farmers will be unable to compete, when it comes to purchasing agricultural land, with better subsidized EU farmers. The 2016 Act intends to strengthen the protection of agricultural land in Poland by shielding it from the danger of speculative purchases by domestic and foreign investors where such purchases do not further the public interest that lies in using such land for agricultural purposes. Previously, in no way did the law counteract speculative purchases of agricultural land nor guarantee that land bought would have been used for agricultural purposes"[4].

The Act contains several provisions whose compliance with EU law is doubtful. First, the right to purchase agricultural land is reserved for individual farmers, that is, under Article 6(1) of the Act, an owner, perpetual usufructuary, owner-like possessor or lessee of agricultural land whose joint area does not exceed 300

[4] Reasons appended to the draft bill of 4 March 2016 on the suspension of sale of land of the Agricultural Property Stock of the State Treasury and on amending numerous acts, Sejm paper No. 293.

ha, who has agricultural qualifications and has resided for at least 5 years in the district where at least one of the agricultural parcels forming part of the farm in question is located, and who runs the farm by themselves. Among the persons exempted from those restrictions are: a family member of the seller, a local government authority, the State Treasury, legal persons operating on the basis of the provisions concerning the relations between the Catholic Church and the Republic of Poland, the relations between the state and other churches and religious associations, and national parks. The restrictions do not apply, moreover, to land that is subject to succession or a bequest (Articles 151 and 231 of the Civil Code[5]) and during a restricting process as part of rehabilitation proceedings. The Act also envisages an exception where a purchase of agricultural land may go through provided the Chief of the Agricultural Property Agency authorizes it. To that end, however, several conditions must be met: it must be proven that the entities exempted from purchasing restrictions cannot buy the land in the immediate case; a warranty for the running of proper agricultural activity must be given, and the purchaser must undertake to reside, for 5 years from the day the land is bought, within the territory of the locality where the land being purchased is situated. The buyer must also commit to running a farm, on the parcel of land purchased, for at least 10 years since the date of purchase. Where the buyer is a natural person, the farm must be run personally. Within the prescribed period it is illegal to dispose of the land, e.g. by selling it to another, except where a court authorizes such a disposal by virtue of fortuitous circumstances. By force of law, a purchase of agricultural land in breach of the foregoing restrictions is ineffective.

2. LAW OF THE EUROPEAN UNION

It is a common description in the literature that "The free movement of capital is one of the pillars of the internal market. (…) It is to ensure access to capital and a possibility of investment thereof in circumstances as beneficial as possible – for investors may offer their disposable capital in whichever Member State they please, where they need not fear administrative nor legal obstacles"[6]. The free movement of capital is enshrined in Article 63 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). The Article prohibits any and all restrictions on the free movement of capital between the Member States and between them and non-EU states. Trading in land is a significant element of the

[5] Polish Official Journal of Laws of 2017, item 459.

[6] A. Zawidzka-Łojek, *Swoboda przepływu kapitału*, (in:) A. Zawidzka-Łojek, R. Grzeszczak (eds.), *Prawo materialne Unii Europejskiej: swobodny przepływ towarów, osób, usług i kapitału, podstawy prawa konkurencji*, Warszawa 2013, p. 303.

free movement of capital (see Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty). The free movement of capital covers investments in land abroad conducted by non-residents within the territory of a Member State as well as investments in land abroad by residents.

EU law admits introducing certain restrictions on the free movement of capital. Under Article 65 TFEU the Member States may apply relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested, and take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information. The Article also includes a classic reference to public order and security[7]. The latter notion is present in the CJEU's judgment in *Albore*[8]. The Court considered the compatibility with EU law of Italian legislation which released Italians, to the exclusion of foreigners, from the duty to obtain a permission to acquire land located in an area considered strategic for reasons of state security. The Court held that the provisions in issue violated the the free movement of capital, were discriminatory against non-Italian EU citizens, disproportionate, and therefore in breach of Article 65 TFEU. No instruments or procedures prescribed may be used to arbitrarily discriminate nor to covertly restrict the the free movement of capital. The member States must not implement protectionist policies[9]. "Article 63 TFEU has introduced a clear and unconditional prohibition on restrictions of the free movement of capital, it does not require implementation, and it equips individuals with rights they can assert before courts. Finally, not only does it have vertical, but also horizontal direct effect"[10]. Vertical direct effect makes it possible for citizens to assert their rights against states, whilst horizontal direct effect extends this right to cover claims against other natural and legal persons.

In the *Ospelt* case[11], the CJEU examined a requirement to obtain a permission to purchase agricultural and forest land. An Austrian regulation necessitated that a purchaser of land prove they will retain its agricultural character. Mrs Ospelt intended to transfer the ownership of her land to a foundation uninvolved in agricultural activity. The Court held that the requirement is not, in and of itself, inconsistent with the free movement of capital, however the duty to cultivate the

[7] *Ibidem*, p. 324.

[8] Judgment of the Court of Justice of the European Union of 23 July 2000 in Case C-423/98 *Alfredo Albore*.

[9] A. Zawidzka-Łojek, *Swoboda przepływu*..., p. 324.

[10] M. Daulenov, *Przepływ osób, usług, towarów i kapitału w umowach międzynarodowych Unii Europejskiej*, Toruń 2016, p. 293.

[11] Judgment of the Court of Justice of the European Union of 23 September 2003 in Case C-452/01 *Ospelt*.

farmland personally goes beyond what is indispensable to retain the agricultural character of the land.

Another important judgment in the realm of land trade was rendered in the case of *Festersen*[12]. The CJEU held that "the residence requirement, particularly since it is coupled in this case with a condition that residence be maintained for eight years, to which the acquisition of agricultural properties of less than 30 hectares is made subject by the national legislation at issue in the main proceedings does not appear to be a measure which is proportionate to the objective pursued and therefore constitutes a restriction to the the free movement of capital which is incompatible with Article 56 EC". Domestic provisions laying down a duty to reside on given land, intended to prevent the purchase of land for speculative purposes, correspond with an aim conducive to the general interest of a Member State. The residence duty interferes not only with the principle of the free movement of capital but also with the right to freely choose one's place of residence as codified in Article 2(1) of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR). Pursuant to Article 6(3) of the Treaty on the European Union, "the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law"[13]. It appears that the residence duty goes beyond what is necessary to achieve the set goal, therefore it is disproportionate. The CJEU noted also that Article 56(1) EC (now Article 63 TFEU) prohibits those restrictions on the the free movement of capital that are capable of discouraging non-residents from investing in the EU Member State in question or residents from purchasing land in other Member States. An instrument restricting the the free movement of capital may be permissible only if it serves the general interest, is applied in a non-discriminatory manner and follows the rules of proportionality, namely is appropriate for the ensuring of the realization of the goal pursued and does not go beyond what is necessary to achieve it.

3. CONCLUSIONS

As shown above, many of the provisions of the Polish Act on the Formation of the Agricultural System may be compared to the legislation of other Member States restrictive of trading in agricultural land that have already been scruti-

[12] Judgment of the Court of Justice of the European Union of 25 January 2007 in Case C-370/05 *Festersen*.

[13] Judgment of the Court of Justice of the European Union of 27 June 2006 in Case C-540/03 *European Parliament v Council of the European Union*, para 36.

nized by the CJEU. The principle of primacy mandates that domestic laws be consistent with the relevant EU standards, and past considerations of the CJEU facilitate an assessment whether Polish laws meet this condition. Primacy of EU law, established primarily in the CJEU's case law (e.g. Rewe-Zentral AG[14], Van Gend & Loos[15]) binds all national authorities and covers all domestic legislative enactments. As EU law is to be accorded priority over national law, the Member States shall ensure the effectiveness of the former and, where inconsistencies arise, apply the EU standard.

An analysis of the compatibility of Polish restrictions on the purchase of agricultural land must start by asserting that the mere definition of an "individual farmer" is questionable. First, the duty to reside, for at least 5 years, in the district where at least one of the agricultural parcels forming part of the farm in question, was featured, in a similar form, in *Festersen*. Since such a requirement interferes not only with the principle of the free movement of capital but also with the right to freely choose one's place of residence, it breaches the principle of proportionality.

Analogous conclusions may be drawn as regards the duty to personally run the farm. As held in *Ospelt*, this requirement is not essential to maintain the agricultural character of land. Suppose a farmer owns a large farm, e.g. of 250 ha, and naturally requires the help of other people to run it. Doubts are not dispelled by Article 6(2) of the 2016 Act which defines "personal running of a farm" as: (1) personal work on the farm; (2) making all decisions in respect of undertaking agricultural activity by the farm. First, it is unclear, judging by the wording of the Act, whether these conditions must be met jointly or alternatively. Second, interpretation of the terms used is uncertain.

Another duty concerns having to run the farm, to which a purchased parcel of land belongs, for at least 10 years following the purchase. As noted above, during that time the parcel may not be sold. Of course, whilst the instrument may successfully realize the goals it pursues, it completely defies the principle of the free movement of capital as the parcel in issue is exempted from trade for a relatively long period of time. Regardless, another charge against the regulation may be its potential incongruity with the right to property, guaranteed by Article 64 of the Polish Constitution and Article 17 of the Charter of Fundamental Rights of the European Union. Article 31(3) of the Constitution holds that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Importantly,

[14] Judgment of the Court of Justice of the European Union of 20 February 1979 in Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*.

[15] Judgment of the Court of Justice of the European Union of 5 February 1963 in Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*.

such limitations shall not violate the essence of freedoms and rights. The Charter breaks down the right to property into rights to use, own and dispose of property. Limitations may be imposed only in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. Exclusion of the possibility of disposing of one's property appears to violate the essence of the right to property. Whilst it is true that the limitations are in accordance with the public interest, even so it is difficult to deny that they go too far. The goal pursued here was preventative, i.e. the legislator intended to prevent a hypothetical situation, projected to eventuate following the lapse of the 12-year transition period, from materializing. One must realize that the restrictions attach not only to the purchase of agricultural land by foreign persons, but also they hamper agricultural or other business activity carried out by Polish entities.

The Act on the Formation of the Agricultural System envisages a scenario where a court may permit a sale of land before the 10-year period elapses, due to fortuitous events. Similarly to the circumstances present on the facts of *Festersen*, the wording of the Act seems too general. The Danish agricultural legislation authorized the Minister for Food, Agriculture and Fisheries to permit the sale of agricultural land where the residence requirement was unfulfilled, however only under "extraordinary circumstances". It was the CJEU's assessment that this was excessively broad a description as lack of clarity impedes individuals in their recognition of the rights and duties applicable thereto, which, in turn, constitutes a violation of the principle of legal security: "Although the Danish legislation on agriculture does not discriminate between Danish nationals and nationals of the other Member States of the European Union or the European Economic Area the fact nevertheless remains that the residence requirement which it imposes and which may be waived only with the authorisation of the minister responsible for agriculture restricts the the free movement of capital"[16].

I will turn my attention now to the provision which authorizes the purchase of agricultural land by persons other than those enumerated in the 2003 Act following the issuance of a permission by the Chief of the Agricultural Property Agency. A permission is granted by means of an administrative decision. The requirements attached to the obtainment of the permission may be assessed subjectively, according to the individual circumstances of the buyer (e.g. a warranty of the proper running of the farm). In fact, some may prove very difficult or even impossible to meet (e.g. asserting that there was no possibility of selling the land in issue to any of the entities listed in the Act). This state of affairs may give grounds to discriminatory treatment and trigger doubts in the context of the principle of legal certainty.

[16] *Festersen*, para 25.

It should be noted that a number of EU Member States have attempted to institute restrictions on trading in agricultural land. Denmark's regulations are considered one of the strictest: "purchase of agricultural land larger than 30 ha by a natural person is possible provided that: the buyer is at least 18 years old; they are a citizen of Denmark, an EU or EFTA Member State, and, pursuant to the regulations in force therein, they are authorized to purchase land in Denmark; the buyer or their spouse or children, at the time of purchase of land in Denmark, do not own or co-own any agricultural property abroad; if the buyer owns agricultural land in their country of origin, they must sell it before being able to purchase land in Denmark; the buyer must be a permanent resident of Denmark; they must move to Denmark within 6 months of the purchase; they must have completed agricultural studies and possess qualifications recognized by the Ministry of Agriculture; the buyer must manage the land on their own, personally. Agricultural land may also be purchased by companies. The following requirements must then be met: shares entitling to a majority of votes and at least 10% must be in the hands of a natural person meeting the requirements to buy agricultural land for their own benefit, however the duty to manage the land personally attaches not to that person but to the company (except where land is bought for special purposes, such as social, educational, experimental or scientific; the rest of shares belongs to family members of the principal shareholder, a pension fund, or an insurance company (in case of a joint-stock company – all shares are registered).

In Germany, sale of forest and agricultural land is subjected to administrative control. Permissions for the sale of agricultural land are granted by a general administrative authority or a district-level body, depending on the state concerned. This is applied by analogy to exchanges, donations, agreements and testamentary matters related to agricultural land. A permission is not issued if: the sale results in an irrational division of agricultural land; the sale of part or all of land comprising a farm brings about its division that makes the running of the farm financially unsustainable; the division of land reduces the area of any parcel concerned below 1 ha; the land price differs markedly from the prices offered on the local market"[17].

4. CONSEQUENCES

It must be reminded that the principle of the free movement of capital is not absolute and it allows exceptions. However, such exceptions must be proportion-

[17] Reasons appended to the draft bill of 4 March 2016 on the suspension of sale of land of the Agricultural Property Stock of the State Treasury and on amending numerous acts, Sejm paper No. 293.

ate and non-discriminatory. To violate these rules could subject Poland to liability by virtue of a breach of Community law. "The notion of a breach by a Member State of their Treaty obligations is very broad and encompasses every instance of non-compatibility of national law with EU law both when it comes to enactment and application of law"[18]. "It is the European Commission that monitors the application of EU law by the Member States as part of its function of the guardian of the Treaties under Article 17 TEU, an authority which has exclusive competence as regards lodging complaints before the Court by virtue of Article 258 TFEU"[19]. If the Commission assumes that the administrative proceedings have failed, it may take a given matter to the Court, whose judgment the Member State concerned must implement. In an extreme case, where a Member State neglects this obligation, the Commission may require that the Court impose a financial penalty on the State.

Tortious liability of the State Treasury is relevant here as, under Article 417^1 § 1 of the Polish Civil Code[20], one may demand redress of damage caused by the issuance of a normative act that contradicts the Constitution, a ratified international treaty or a statute. Availability of a compensatory claim depends on a prior establishment of incompatibility during the appropriate proceedings (the Constitutional Court is the fundamental authority competent to issue such a ruling). Poland's accession to the EU is momentous as ever since EU law is in force also domestically and should the domestic legislator violate it, the victim has a compensatory claim. The CJEU has held that a claim in tort lies only where a national legislator has violated a law intended to accord rights to individuals. The EU provisions which establish the principle of the free movement of capital may be used by individuals to assert their rights[21]. CJEU's judgments take precedence over national courts' determinations. Although the CJEU tends to refrain from adjudicating upon the compatibility of domestic laws with EU law before a domestic court hands down their opinion, it accepts prejudicial questions concerning the bindingness of Community law. In the light of the above, as well the principle of ensuring complete effectiveness of EU law, the requirement to go through pretrial proceedings before a case is considered by a court does not apply to cases of incompatibility of Polish law with EU law. Support for this conclusion may be found in Article 417^1 § 1 of the Polish Civil Code where EU law, as a category separate from international treaties, is not mentioned[22].

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[18] A. Sikora, *Skargi o stwierdzenie uchybienia prawu unijnemu przez państwo członkowskie (art. 258, 259 oraz 260 TFUE)*, (in:) A. Zawidzka-Łojek, A. Łazowski (eds.), *Instytucje i porządek prawny Unii Europejskiej*, Warszawa 2015, p. 237

[19] *Ibidem*, p. 235.

[20] Polish Official Journal of Laws of 2017, item 459.

[21] Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna*, Warszawa 2016, p. 228.

[22] J. Kremis, (in:) E. Gniewek, P. Machnikowski (eds.), *Kodeks cywilny. Komentarz*, Warszawa 2013, p. 741.

RESTRICTIONS ON TRADING IN AGRICULTURAL LAND AND EUROPEAN UNION LAW

Summary

30 April 2016 saw the entering into force of the Act of 14 April 2016 on the Suspension of Sale of Land of the Agricultural Property Stock of the State Treasury and on Amending Numerous Acts . The amendments pertained to, *inter alia*, the Act of 11 April 2003 on the Formation of the Agricultural System , and introduced a variety of alterations thereto, thus restricting significantly the freedom of trading in agricultural land. This article provides an analysis of conformity of Polish legislation with European Union legislation and also explains the liability of the State Treasury in case of violations of EU law.

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EUROPEANISATION OF POLISH LAW FOLLOWING POLAND'S ACCESSION TO THE EUROPEAN UNION

The article concerns primarily the effects of the membership of the European Union on national (Polish) law and, to a limited extent, on the political system of the state. It discusses also the successes and deficits resulting from the process of broad Europeanisation of state structures and law. The aim of the article is therefore to analyse the influence of European law on the sources of law applicable in Poland. Europeanisation can be discussed both from a historical perspective and from the perspective of particular branches of law, from philosophy and axiology of law to internal organisation of the state and its institutions to public law (such as constitutional, administrative and tax law) and private law (property law, commercial law, family law, criminal law, etc.). Given the limited scope of the article, many relevant issues will be omitted or merely mentioned in passing and selected ones will be analysed in detail.

The conclusions presented in the article are of universal value. Although the article deals with Polish affairs, the principles, tendencies and consequences identified are typical of the relationship state – the EU, both before and after the accession, regardless of the state concerned. It should however, be noted that the path to membership and the membership itself are different in each case.

1. INTRODUCTORY REMARKS

In the last twenty-plus years, i.e. since the political changes initiated in 1989, Poland has come a long and difficult way of political, system, legal, economic and, above all, social transformation – from democratic transformation and the adoption of the new Constitution in 1997, which set out a framework of governance, to further legal and political experiences resulting from, among others, the full implementation of constitutional principles and from Poland's accession to supranational structures (NATO and the European Union). For several years now, Poland has been in the process of Europeanisation of law, politics, economy as

well as culture and society. On the other hand, the last decades have seen a political reform of the Union itself and its deep crisis. At the same time, Poland – in various forms and styles and with a varying degree of effectiveness – has placed focus on its national interests and the areas of "expansion" of the EU. It remains open whether it is possible and appropriate to transform national interests into interests of the Union as a whole. Before the accession (since the signing of the Europe Agreement) and during the first years of membership, mutual relations between state authorities as regards EU affairs were shaped. Since that time, there have been major political changes[1] concerning the organisation of the state and Polish institutions, which – since the accession – are also subject to EU law, with all its consequences. Transfer of "the competence in relation to certain matters"[2] to the EU has, on the one hand, hindered the competence of the Polish parliament and, on the other hand – increased the importance of the executive power (government)[3]. A separate topic is the extent of changes for the Polish jurisdiction. Given the limited scope of the article, this topic will only be mentioned in relation to the Polish Constitutional Court and its "integration perspective".

2. EUROPEANISATION OF LAW

By way of a theoretical and historical introduction to the considerations regarding the process of Europeanisation of Polish law, it should be emphasised that the history of influences of the system of Union law – particularly in the pre-accession period (i.e. between 1993 and 2004) – was a subject of intense scientific or, even more often, philosophical disputes. They were of a political and ideological, scientific and sometimes pseudo-scientific nature. Before Polish legal practitioners and courts became accustomed to the notion of Europeanisation, which was related to a certain process of maturation and getting used to new legal realities, this term had often been associated with the idea of immaturity and inferiority of Polish law to Union law. As a result, other terms were sought such as, for instance, assimilation, transmission, implementation or, most neutrally, influence. This process is still ongoing – economic and social changes are taking place. As a consequence, the more elaborate the organisation of the state and society, the more complex the process of reception of legal solutions or, in other words, the more complex and less visible process of "Europeanisation".

[1] As Stanisław Biernat, vice-president of the Polish Constitutional Court, put it in the foreword to a book edited by S. Biernat, S. Dudzik, M. Niedźwiedź (eds.), *Przystąpienie Polski do Unii Europejskiej. Traktat akcesyjny i jego skutki*, Kraków 2003, pp. 9–12, here p. 9.

[2] Article 90(1) of the Polish Constitution from 1997.

[3] More on this subject in R. Grzeszczak, *Władza wykonawcza w systemie Unii Europejskiej*, Warszawa 2011, p. 79 *et seq.*

2.1. EUROPEANISATION OF POLISH LAW – COPYING EU STANDARDS

Europeanisation of Polish law relied first on copying EU standards and on partial borrowings from EU law. To a certain extent, this has not changed up until today. However, as Poland's membership of the EU continued, the process of Europeanisation has become visible also in increasingly complex discussions and in the creation of own legal solutions. What is meant here is the development of legal awareness in society as a result of the process of communicating the law. Legal awareness has moved on significantly in Poland, which is demonstrated by the judgments of ordinary, administrative courts, and the Polish Constitutional Court. As a rule, legal awareness consists of four elements: knowledge about law, assessment of law, attitude towards law and demands for changes and reforms for the future (the so called *de lege ferenda*). Legal awareness covers issues such as prestige of law, legal culture, moral attitudes as well as views and opinions concerning what law should look like. It is a kind of a "legal feeling"[4].

It needs to be emphasised that since 1st May 2004 the Polish legal order consists of – from the perspective of the legislature – the system of European Union law and the system of Polish law. In the first case, the legislator is very specific. It is a group of diverse entities: EU institutions and state institutions or rather representatives of the governments who form the Council (EU). As a result of Poland's accession to the European Union, the former classic structure based on the co-existence – in different configurations – of rules of international and national law was supplemented by a new, though built on foundations of international law, legal system of the Union. As a result, a European legal area has been created, which is understood as a set of standards of EU primary and secondary law, unwritten general principles and national standards issued in order to meet the legal commitments of the Community. The system of European Union law is of paramount importance for the citizens of the Community, and in particular for entrepreneurs, service providers, consumers and, finally, employees. It is of course important also for other social groups such as pensioners and students.

2.2. EUROPEANISATION OF POLISH LAW – THE IMPLEMENTATION OF EU POLICIES AND LAW

National law covers substantive law, political law and procedural law. Europeanisation within the meaning defined above refers mostly to substantive law and, to a lesser extent, also political and procedural law. This is related to the principle of procedural autonomy of the Member States, which retain their autonomous procedural systems. In other words, states retain the competence to shape

[4] R. Grzeszczak, *Charakter i rozwój procesu europeizacji prawa polskiego*, "Prawo Europejskie w Praktyce" 2016, issue 3, p. 12 *et seq.*

their own civil, administrative and criminal proceedings as well as any related proceedings. However, it goes without saying that this autonomy has limits which are set in particular by the principles of efficiency and effectiveness of Union law. In the article, the sources of law are understood in the traditional sense – as sources of application of law in a formal meaning, i.e. facts regarded as law-shaping in a given system. It is all these facts that create a legal system[5]. What should be emphasised in relation to Poland's membership of the European Union is the law-making character of the case law of the Court of Justice of the European Union (CJEU) which has a far-reaching impact on all the fundamental areas of Polish law, be it employment law, agricultural law or banking law.

In practice, the major influence of the European Union on the Member States results from the implementation of EU policies and law. In the literature, this process is called Europeanisation[6]. It is a short and relatively universal definition of a phenomenon which, in practice, is much more complex. Functioning of a state within the European Union entails certain obligations which, as a rule, are the same for all the Member States. They consist mostly in a commitment to implement Community standards (i.e. directives which need to be implemented into national law) as well as to apply and enforce standards which are directly applicable, i.e. primary law and in particular the Treaties on which the European Union is founded, as well as regulations and decisions that can have direct effect as against individuals. The European legal order has become part of domestic law, and (national) courts have a particular role to play here. What is more, the obligation to implement specific legal standards by the Member States arises not only from the Treaties but also from national constitutions.

2.3. EUROPEANISATION OF POLISH LAW – PRIVATE LAW

Europeanisation of law is usually associated, and quite rightly so, with phenomena taking place in the area of private law. Yet, Europeanisation manifests itself also in an impact on the legal and political systems of the Member States, and it exerts significant influence on public law, in particular constitutional

[5] M. Pichlak, *Zamknięty system źródeł prawa. Studium instytucjonalizacji dyskursu prawniczego*, Wrocław 2013, p. 19.

[6] The processes of Europeanisation of law have been long researched in Poland and abroad, *cf.* e.g. P. Graziono, M. P. Vink (eds.), *Europeanization. New Research Agendas*, New York 2007; C. Mik (ed.), *Europeizacja prawa krajowego. Wpływ integracji europejskiej na klasyczne dziedziny prawa krajowego*, Toruń 2000; I. Rzucidło (ed.), *Europeizacja polskiego prawa administracyjnego*, Lublin 2011; R. Grzeszczak, *The European transformation of the legislative*, *executive and judicial power in Poland*, (in:) I. Karolewski, M. Sus (eds.), *The Transformative Power of Europe*, Baden-Baden 2015, pp. 19–36.

law[7]. On the one hand, this process is a natural consequence of the membership of a given state of the European Union and the resulting obligation of "effective membership". On the other hand, a question arises as to the freedom of the national legislature as to shaping the constitution[8]. EU law also modifies theoretical legal constructs, for instance with respect to the rights of individuals and the forms of action of state authorities[9].

Europeanisation also affects the institutional system of a state, especially its administrative bodies and the judiciary. However, the scope of this article does not allow for an analysis of this issue. Since it is courts that – in addition to public administration bodies – constitute a filter through which the society directly "experiences the law", this process has significant repercussions for individuals. Namely, the courts protect the rights and freedoms of individuals and other entities. As a consequence, the influence of EU law in this regard cannot be overstated. Just to touch upon this issue – what should be taken into account here is the impact of rights, freedoms and principles under the Charter of Fundamental Rights (for instance, the right to good administration, the EU standard of the right to a fair trial or the principle of non-discrimination) on cases handled by national administration bodies and courts, the freedoms of the internal market (shaped as rights of individuals) and, finally, ever stronger and increasingly numerous rights arising from the status of EU citizenship or the application and the intensity of application of the principle of proportionality in courts.

3. THE SCALE OF EUROPEANISATION

Somewhat simplified, the part of law which is EU law as well as national provisions that originate from EU law (this concerns mostly the national laws which implement directives) are based on specific principles referring to EU law and its relation to purely national (i.e. not European) law. Standards that can be applied directly (that is the standards which aim at empowering individuals, are clear and do not entail adoption of implementing acts) have direct effect and become a basis for judicial and administrative decisions. In terms of functionality, the transforming power of the EU (in other words, the scale of Europeanisation) manifests itself

[7] J. Galster, D. Lis-Staranowicz, *O zjawisku europeizacji polskiego prawa konstytucyjnego*, "Przegląd Sejmowy" 2010, issue 2, pp. 29–51.

[8] Z. Brodecki, O. Hołub-Śniadach, *Prawo państw członkowskich en block*, (in:) S. Dudzik, N. Półtorak (eds.), *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich*, Warszawa 2013, p. 21.

[9] S. Biernat, *Wpływ prawa Unii Europejskiej na źródła prawa administracyjnego i procedurę prawodawczą*, (in:) R. Hauser, A. Wróbel, Z. Niewiadomski, *System Prawa Administracyjnego. Tom 3. Europeizacja prawa administracyjnego*, Warszawa 2014, § 38.

in the process of implementation of EU law into the Polish legal system. One of the flagship examples of the power which transforms the law is the process of shaping the European perspective of the "ideology" of fundamental rights (the role of the Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms is irreplaceable here) and the related constitutionalisation of legal systems[10].

"Inserting" the concept of protection of fundamental rights into the axiology of public and private law has been therefore stimulated deliberately and, as a result, is part of the Europeanisation process[11]. In addition, if there is an irremovable conflict of laws, fundamental rights take priority and – if they are breached by state authorities – it is possible for an individual to claim damages from the state for the consequences of that breach in court. It is therefore very important to validate a legal provision, its origin and anchoring. Ideally, this should be done *ex officio* with due diligence and due discernment by courts and public administration bodies. This would fully reflect the idea of democracy and the rule of law. In practice, however, this area leaves a lot of room for improvement[12].

In other words, Union law may be applied in the Member States directly or indirectly. As Stanisław Biernat indicates, direct application means that the tasks and competencies of institutions, bodies, offices or agencies of the Union and authorities of the Member States as well as the rights and obligations of individuals and entities are laid down directly under Union law. In the case of indirect implementation, the rules of EU law are introduced into the national legislation of the Member States by way of legal acts enacted by the competent national authorities with legislative powers. In the latter case, the rights and obligations arising from Union law are laid down by way of rules of national law. The influence may consist in new categories of sources of law in the Polish legal system which are not mentioned in the Constitution and in modifications of the existing sources of law. From a scholarly point of view, to be more precise, EU law may hypothetically bring about a change in the hierarchy of sources of law or in the interdependence of individual categories and forms – in the legal bases of individual categories of sources of law or, for instance, in legislative procedures.

EU law certainly influences (Europeanises) legislative activities in various ways, depending on the previous stage of development of the national law. As indicated by Stanisław Biernat, who has already been quoted above, EU law may give rise to an obligation to adopt laws regarding areas which are not covered by national law. The process of Europeanisation may become more dynamic and

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[15] G. de Búrca, *The ECJ and the international legal order: a re-evaluation*, (in:) G. de Búrca, J. H. H. Weiler (eds.), *The Worlds of European Constitutionalism*, Cambridge 2012, p. 120.

[16] For more, see R. Grzeszczak, *Pojęcie europeizacji prawa*, (in:) R. Grzeszczak, A. Szczerba-Zawada (eds.), *Prawo administracyjne Unii Europejskiej*, Warszawa 2016, p. 295 *et seq.*

[17] R. Grzeszczak, *Charakter i rozwój procesu*..., p. 15; R. Grzeszczak, *The European transformation of the legislative*..., p. 22.

extensive if a need (or an obligation) arises to introduce changes to existing laws in order to bring them into conformity with EU law. Such situations are of course much more frequent, which results from the dynamics of EU law and the development of its regulations. As a consequence, in many cases, the freedom of the national parliament as regards the fundamental legislative function, i.e. shaping the wording of laws, has been significantly reduced or even removed, which means that the act plays an executive role towards EU law[13]. This has significant implications for the traditional separation of powers and the system of law, which is described in the context of integration as multicentric law.

Without entering into detail – given the fact that the European Union has only the competences conferred upon it in the Treaties on which the EU is founded (the principle of conferred powers), its legislative activities are dictated by these competences. As a consequence, when the Treaties confer on the EU exclusive competence, the Member States may legislate only if so empowered by the Union or with a view to implementing Union acts. The situation is different in the case of shared competence where the EU and the Member States may compete in legislative activities. However, if Union bodies effectively adopt an act, the area it covers becomes the EU's exclusive competence.

In principle, it has to be recognised that legal acts, to the extent not covered by Union competence, are as before part of the Polish constitutional system only and are not influenced by EU law. Yet, this is a simplified conclusion. National acts, also the ones outside the remit of EU competences and, as such, pertaining to "purely internal situations", are not completely independent. In most general terms, such acts must not run counter to the general principles of EU law and its values (Article 2 TEU). In fact, the scope of purely internal areas in the legal systems of the Member States becomes more and more narrow. This means that also in the areas which are outside EU competence parliaments of the Member States cannot make full use of law-making discretion. Certain standards of Union law are of a horizontal nature and as such they impact the entire body of law of the Member States. For instance, irrespective of the subject matter of an act, it must not contain provisions which are in breach of, in particular, the EU principles of non-discrimination, hinder the freedoms of the internal market or the rights linked to Union citizenship or make them less attractive[14].

[18] S. Biernat, *Wpływ prawa Unii Europejskiej*..., § 39 *et seq*.; *cf.* also S. Brouard, O. Costa, T. König (eds.), *The Europeanization of Domestic Legislatures The Empirical Implications of the Delors' Myth in Nine Countries*, Berlin 2012.

[19] R. Grzeszczak, *Charakter i rozwój procesu*..., p. 17.

4. IS THE EUROPEANISATION PROCESS OF THE POLISH LAW UNIQUE?

It might be asked whether the process of Europeanisation of Polish law is particuliar and different from the experiences of other Member States. The answer depends on the perspective taken. Taking into account the historical experience mentioned at the beginning of the article, it can be stated that in Poland the process of Europeanisation is characteristic. As a consequence, given the low level of development of certain areas of Polish law and the intensity of EU legislation in other fields, the scope of Europeanisation has mostly affected intellectual property rights, environmental protection law, agricultural law, anti-discrimination law and competition law. It can be said that regulations in these fields do not stem from the national legal system but are part of the shared European heritage and are introduced by EU institutions.

Nevertheless, the majority of changes are similar or even the same in all the EU Member States. This results from the fundamental principles of EU law which have been mentioned above – the unity of application of Union law in the national legal systems and the systemic effectiveness of EU law. However, the paths to observing these principles have been and still are different. This is underpinned and guaranteed by the principle of procedural autonomy of the Member States. It allows the states to retain autonomy of legal procedures and systemic solutions, among others, in the bureaucratic system or in the territorial structure of the states, provided that the effectiveness of Community law is ensured. The right to procedural and institutional autonomy of the Member States serves to define the distribution of legislative powers between the EU and the Member States in the area of procedural law. The principle implies that it is for the Member States to put in place the national procedural measures and to designate the national authorities competent to enforce the rights conferred on individuals by the EU legislature, on the condition that the latter has not adopted an EU procedural regulation in the area concerned[15].

The procedural and institutional autonomy is the logical consequence of the structure of the EU, which, with few exceptions, does not provide for the existence of a separate structure of supranational bodies in charge of implementing and protecting EU law. It is the Member States that necessarily assume these tasks through their own authorities, using procedures laid down in national legislation. As a consequence, the EU – as has been pointed out – directly influences changes in substantive law and has indirect impact on procedural law.

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[20] See the judgments of the CJEU: Case 33-76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, and Case 45-76 *Comet BV v Produktschap voor Siergewassen*.

The transforming power of the EU in the area of legislation stems from the principle of effectiveness of Union law mentioned above[16]. It is understood, *inter alia*, as an obligation to implement EU law into the national legal system, a prohibition on making the exercise of the rights granted by EU law excessively difficult or impossible or as an interpretative guideline as regards the system as such. It constitutes an obligation to put in place national measures providing for protection from Union law violations. In this latter sense, the principle of effectiveness may be considered equivalent to the principle of effective judicial protection[17]. In addition, the principle of effectiveness constitutes a requirement for national legislatures and law enforcement bodies to create and interpret law in a way that does not make it excessively difficult or impossible to exercise the rights granted by the EU legislature[18].

5. CONCLUSION

The scope of the processes driving the impact of Union law on the legal and political system of a given state is influenced not only by historical, but also economic and social developments. The more elaborate the organisation of the state and society, the more complex the process of reception of legal solutions.

The experience of the Polish membership of the European Union, its systemic dimension and changes in the national legal system (Europeanisation) do not differ significantly than in the case of other Member States. Poland faces similar issues such as poor legitimation of integration processes, supremacy of the government over the parliament, passivity of parliamentary committees in controlling the government and EU institutions in the decision making process, as well as dilution of responsibility for decisions taken within the EU.

The process of Europeanisation relies mostly on direct application of the standards of EU law in the national legal system, implementation of directives into national law and harmonisation or standardisation of national legal solutions so that they comply with the EU framework. It is also the reception of a common, European (Union) axiology. In Poland, the process of Europeanisation started with the creation of new law and amendments to the existing one to make it compatible with the rules and standards of Union law. This process is still ongoing and encompasses law-making as well as application and implementation of law.

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[21] For more, see J. E. Murkens, *The Future of Staatsrecht: Dominance*, *Demise or Demystification?*, "Modern Law Review" 2007, Vol. 70, issue 5, pp. 731–758.

[22] R. Grzeszczak, *The European transformation of the legislative*..., p. 22 *et seq.*

[23] A. von Bogdandy, J. Bast (eds.), *Principles of European Constitutional Law*, Oxford 2009, p. 29.

EUROPEANISATION OF POLISH LAW FOLLOWING POLAND'S ACCESSION TO THE EUROPEAN UNION

Summary

The article concerns primarily the effects of the membership of the European Union on national (Polish) law and, to a limited extent, on the political system of a state. The conclusions presented in the article are of universal value. Although the article deals with Polish affairs, the principles, tendencies and consequences identified are typical of the relationship state – the EU, both before and after accession, regardless of the state concerned. It should be, however, noted that the path to membership and the membership itself are different in each case. The practice of the Polish membership of the European Union, its systemic dimension and the changes in the national legal system (Europeanisation) do not differ significantly than in the case of other Member States.

Europeanisation of Polish law, politics, economy, culture and society has been in progress since the 1990s. One can differentiate between two stages of Europeanisation: before and after Poland's EU accession, each characterised by different conditions. Over time, this process, on the whole, has been undergoing numerous changes but it has never weakened in importance. Poland faces issues such as poor legitimation of integration processes, supremacy of the government over the parliament, passivity of parliamentary committees in controlling the government and EU institutions in the decision making process, as well as dilution of responsibility for decisions taken within the EU. The process of Europeanisation relies mostly on direct application of the standards of EU law in the national legal system, implementation of directives into national law and harmonisation or standardisation of national legal solutions so that they comply with the EU framework. It is also reception of a common, European (Union) axiology.

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European Union, Polish law, European law, Europeanisation, multicentric law

SŁOWA KLUCZOWE

Unia Europejska, prawo polskie, prawo europejskie, europeizacja, prawo multicentryczne

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THE DANGER OF SO-CALLED REGULATORY 'GOLD-PLATING' IN TRANSPOSITION OF EU LAW – LESSONS FROM POLAND

1. INTRODUCTORY REMARKS

Ukraine, just like Poland over thirteen years ago, is on its route to integration with the European Union. One of the most crucial aspects of accession is adjustment of the domestic law to the EU law, which is a long and arduous process. Moreover, it could transform, as the Polish experience shows, into some interesting phenomenon, particularly taking into consideration that this is a process of connection of different legal systems, each with a particular tradition, concepts and hierarchy of legal acts[1]. Part of EU legislation is enacted in the form of directives[2] which do not have direct application in domestic legal systems and need to be implemented by way of legislation introduced in the Member States in accordance with constitutional rules related to the types of legislative acts and their hierarchy[3].

Important questions return again and again – how deep should implementation of EU directives be, its requisite level of precision and whether domestic law should just be a strict "copy-paste" of provisions of an EU directive. Generally, it is a matter to be decided by the EU legislator – as implementation of EU law could have several different types. First of all, the notion of 'implementation' should be explained. There is no legal definition of 'implementation' but, as stated in the doctrine, implementation of EU law is understood as taking all necessary measures in order to establish conditions that guarantee application and super-

[1] See: A. Ramalho, *The Competence of the European Union in Copyright Lawmaking. A Normative Perspective of EU Powers for Copyright Harmonization*, Springer 2016, pp. 133–135.

[2] In 2016 – 16 directives, see http://eur-lex.europa.eu/statistics/2016/legislative-acts-statistics.html (accessed 28 May 2017).

[3] See e.g.: M. Kaeding, *Active Transposition of EU legislation*, "Eipascope" 2007, No. 3, http://www.eipa.eu/files/repository/eipascope/20080304110310_MKA_SCOPE2007-3_Internet-4.pdf (accessed 28 May 2017).

vision of EU law obedience in domestic jurisdictions[4]. This does not necessarily mean that implementation of EU law requires legislation – in fact, sometimes a hange of administrative or judiciary practice or other non-legislative measures constitutes implementation[5]. Moreover, in some circumstances such practical implementation is in fact required in order to effectively implement EU law into a domestic system of law[6]. Of course, implementation via legislation is a typical way of application of EU directives – so called 'transposition' (a narrower concept which lays within the scope of the notion of 'implementation'), which is also connected with the so-called indirect law-making process[7]. Directives determine an end goal that is intended to be achieved but the selection of measures is, generally, a matter for the domestic legislator. A typical feature of EU directives is to harmonize legislations of the Member States, especially as regards the common market, social and economic or tax issues. In this respect, the notion of 'approximation' of laws is also used[8].

For the purpose of this article only law-making implementation measures will be analysed. This is because the subject of the article – the issue of 'gold-plating' – relates mostly to regulatory activity of the Member States, being a consequence of harmonization of national laws[9]. However, it cannot be excluded that in some circumstances 'gold-plating' could also cover other issues, such as interpretation of laws in jurisprudence (see further below). Importantly, implementation of EU law could be a consequence of "minimum" or "total" harmonization[10]. Minimum harmonization means that only a part of the rules enacted at the EU level within a regulated area are being implemented verbatim, which is different from total harmonization where no derogation is allowed[11]. It could relate to the scope of harmonization (for instance, EU law could regulate some aspects of production and turnover of certain goods, however the rest of legislation in that respect remains in the hands of domestic legislators).

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[4] See T. Capeta, *Report "Harmonisation of national legislation with the acquis communautaire"*, Venice Commission, 1 July 2010, pp. 8–9.

[5] *Ibidem*.

[6] See: A. Trubalski, *Wybrane aspekty implementacji dyrektyw Unii Europejskiej do systemu prawnego Rzeczypospolitej Polskiej*, "Przegląd Prawa Konstytucyjnego" 2013, Vol. 1, issue 13, p. 178; see also B. Kurcz, *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego*, Kraków 2004, pp. 39–40.

[7] See A. Trubalski, *Wybrane*..., p. 177.

[8] R. Tokarczyk, *Problemy harmonizacji polskiej kultury prawnej z kulturą prawną Unii Europejskiej*, "Studia Europejskie" 2004, issue 3, p. 70.

[9] Regarding the notion of harmonisation, see: E. J. Lohse, *The Meaning of Harmonisation in the Context of European Community Law – a Process in Need of Definition*, (in:) M. Andenas, C. B. Andersen (eds.), *Theory and practice of harmonisation*, Cheltenham 2012, p. 282.

[10] R. de la Feria, *The EU VAT system and the internal market*, Amsterdam 2006, p. 38.

[11] E. Zielińska, *Implementacja do polskiego porządku prawnego dyrektyw Unii Europejskiej. Wybrane zagadnienia*, Warszawa 2012, pp. 5–6.

However, the notions presented could also be viewed in a separate context of intensity of harmonization[12]. It is strictly connected to the issue of the Member States' leeway as regards the implementation of EU law. Total harmonization forces the Member States to adopt legislation which is word-by-word the same as provisions of the relevant EU directive. The domestic legislator cannot choose from a variety of possible legislative solutions but should implement provisions of the directive verbatim[13] (of course adjusting them according to the technical rules of legislating which are usually different in each Member State[14]). The main consequence of such an approach could be that implementation of an EU directive is, in many cases, based on a strict translation (a verbatim copy) of the provisions thereof[15]. As stated in the jurisprudence of the CJEU, a Member State cannot, in case of total (complete) harmonization, choose to impose a higher degree of obligations on the addressees of the regulation than that prescribed in the directive (even if it guarantees higher protection of the values which are the *ratio* of the directive)[16].

An opposite type of harmonization is so-called partial harmonization[17] (sometimes also referred to as minimal harmonization *sensu largo*). However, there are several categories of partial harmonization mentioned in the doctrine of EU law, e.g. minimal harmonization *sensu stricte*, optional, partial and alternative harmonization[18]. In case of minimal harmonization *sensu stricte*, a national legislator

[12] A clear distinction between the notions of scope and intensity of harmonisation is made in doctrine of EU law. See i.a. R. Schütze, *European Union Law*, Cambridge 2015, p. 550.

[13] There are three main aspects of total harmonization of EU law related to manufacturing and turnover of goods: regulation of a product standard on EU level, obligations imposed on the Member States to permit free trade of products which conform with common standards and obligations to prohibit manufacturing and sale of products non-conforming with the regulated standard. See *ibid.*

[14] See judgment of CJEU of 25 April 2002 in Case C-52/00 *Commission of the European Communities v French Republic:* "the margin of discretion available to the Member States in order to make provision for product liability is entirely determined by the Directive itself and must be inferred from its wording, purpose and structure".

[15] See E. Zielińska, *Implementacja*..., p. 5.

[16] See the judgment of CJEU of 10 January 2006 in Case C-402/03 *Skov and Bilka*: "Since the Directive, as pointed out in paragraph 23 above, seeks to achieve complete harmonisation in the matters regulated by it, its determination in Articles 1 and 3 of the class of persons liable must be regarded as exhaustive"; also, see judgment of CJEU of 5 April 1979 in Case C-148/78 *Ratti*, para. 27.

[17] See E. Zielińska, *Implementacja*..., p. 5.

[18] See: B. Kurcz, *Dyrektywy*..., p. 82; There are many, slightly different, categorizations of harmonization and partial harmonization. *Cf.* P. J. Slot, *Harmonisation*, "European Law Review" 1996, issue 5, p. 382, quoted after A. Kunkiel-Kryńska, *Metody harmonizacji prawa konsumenckiego w Unii Europejskiej i ich wpływ na procesy implementacyjne w państwach członkowskich*, Warszawa 2013, p. 64; C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki*, Warszawa 2000, p. 595; R. Schütze, *European Union Law*..., p. 550.

could choose to adopt a stricter standard than that prescribed in an EU directive[19]. On the other hand, what is specific to optional harmonization is that domestic regulations could differ from the EU law standard and the addressees of the law could opt for either the EU or the domestic standard[20] – for different purposes (e.g. trade on the common or merely the domestic market). Slightly differently, the alternative harmonization method enables the Member State (not the final addressee of the provisions of the law) to opt for more than one method of regulation[21].

The issue of gold-plating must be then considered in the context of the above-mentioned different types of harmonization under EU law.

2. THE MEANING OF SO-CALLED 'GOLD-PLATING'

'Gold-plating' appears in many EU documents and is usually described as regulations or legislation that go beyond the requirements set forth in EU law[22], which make implementation of EU law more costly for the addressees of the regulations. In consequence, gold-plating increases the administrative burden[23]. It is also often mentioned in the context of so-called 'cutting red tape' initiatives[24] and reduction of the regulatory burden on the EU market[25]. That said, 'gold-plating' is commonly viewed as having negative and unwelcome impact on the regulatory environment. It is measured that implementing of EU law in a manner as efficient as in the most efficient Member State and without gold-plating could reduce the cost of the administrative burden by up to EUR 40 billion per annum[26]. It is also pointed out that 32% of the administrative burden has its origin in gold-plating and inefficient implementation of EU requirements[27].

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[19] R. Schütze, *European Union Law*, p. 551.

[20] A. Kunkiel-Kryńska, *Metody harmonizacji prawa konsumenckiego*..., p. 65.

[21] See: D. Mavromati, *The Law of Payment Services in the EU. The EC Directive on Payment Services in the Internal Market*, Alphen aan den Rijn 2008, p. 88.

[22] *Cutting Red Tape in Europe. Legacy and Outlook*, Brussels 2014, p. 6; see also *Better Regulation for Growth and Jobs in the European Union*, COM(2005) 97 final, Brussels 2005, where 'gold-plating' is defined as "the introduction of requirements or procedures in the course of the transposition of EU legislation which are not required by that legislation".

[23] See e.g. *Research for REGI Committee – Gold-plating in the European Structural and Investment Funds*, p. 16.

[24] Regarding 'cutting red tape' see, *inter alia*, *Cutting Red Tape in Europe. Legacy and Outlook*, Brussels 2014; *Cutting red tape: National Strategies*, OECD 2007.

[25] Which is a part of the Smart Regulation programme, see *Smart Regulation in the European Union*, COM(2010) 543 final, Brussels 2010.

[26] *Cutting Red Tape in*..., p. 20.

[27] *Ibidem*, p. 35.

Of course, the "gold-plating" issue relates exclusively to regulatory and administrative measures that are somehow touched by EU legislation[28]. Thus, it should not be connected to imposing administrative burdens that have no link to EU requirements. In such a case it is proper to speak about simple bureaucratic burdens rather than gold-plating. In this context, gold-plating should be viewed as 'over-transposition' of EU law and not a bureaucratic approach by itself.

'Gold-plating', however, has many faces. First of all, a distinction between active and passive gold-plating should be made. In case of active gold-plating, a national legislator adopts legislation that imposes a higher degree of requirements on the addressees than could be implied from EU directives which are implemented by such a measure. On the other hand, passive gold-plating relates to the situation where the national legislator just fails to repeal higher standards that existed before implementing EU law[29]. Moreover, several origins of gold-plating of EU law could be indicated:

– simple over-transposition of EU law, i.e. adopting law that goes beyond the requirements set forth in EU legislation;

– there are significant differences between legislations (in the context of implementation of EU law), which result in a lack of coherence between legislations in view of the common market and, thus, an unnecessary regulatory burden;

– national legislators or authorities fail to use exemptions allowed by EU law (which results in a stricter regulation);

– despite the fact that obligations adopted by a Member State do not go beyond EU standards, domestic legislation establishes sanctions, procedures or a burden of proof that are not required by EU law or whose level is not proportional[30].

Admissibility of gold-plating is, however, also a complex issue. It should be stated that a different approach should apply to total harmonization and partial harmonization. In case of total harmonization, additional regulatory burdens must be viewed as simply an improper implementation of EU law. In such a situation inconsistencies between EU and domestic legislation is a more crucial issue; in fact, the question of gold-plating falls into the background. In my opinion, gold-plating should be related to cases where national legislation is formally in compliance with EU law but establishes requirements that lead to higher regulatory burdens. That said, in case of hard, strict, total harmonization the problem of gold-plating usually would not arise.

A different situation arises with regard to partial harmonization. In such a case some parts of a subject of regulation (e.g. procedure, sanctions, some technical requirements) could be outside of the scope of EU secondary legislation or,

[28] In view of the "occupy the filed pre-emption" doctrine, M. Szwarc-Kuczer, *Kompetencje Unii Europejskiej w dziedzinie harmonizacji prawa karnego materialnego*, Warszawa 2011, p. 26; see also R. Schütze, *European Union Law*, p. 550.

[29] *Research for REGI Committee – Gold-plating*..., p. 16.

[30] *Ibidem*, p. 16.

in case of so-called minimal harmonization, EU law simply leaves to the national legislator an opportunity to introduce higher standards than those prescribed in an EU directive (sometimes the ceiling of potential requirements is also indicated by EU law[31]). In both cases any additional burdens should viewed as, generally, being in compliance with EU law – as EU law does not preclude them and leaves to the national legislator some leeway in this respect. Of course, this does not mean that such burdens are always legal. Particularly, they could be contrary to the domestic constitution (e.g. in case of an inadmissible restriction of business activity) but it does not lead automatically to inconsistency with EU law. However, it is also possible (in particular cases) that restrictions imposed by the national legislator (despite the fact that they formally lay within the margin of discretion afforded by an EU directive) are too excessive in such a way that relations on the common market are interfered with contrary to the Treaties[32]. For the sake of clarity, both situations shall be viewed as gold-plating for the purpose of this article. In other words, gold-plating shall be understood as imposing administrative burdens, obligations or restrictions which are not required by EU directives and/or are more burdensome than other implementative provisions, albeit formally admissible considering the level of discretion accorded to the national legislator by virtue of a given EU directive (e.g. in case of partial, minimal, etc. harmonization).

3. EXPERIENCE WITH GOLD-PLATING IN POLAND

I would like to briefly present some examples of gold-plating in Polish law within the last 13 years (i.e. since the accession to the EU).

3.1. END-OF-LIFE VEHICLES DIRECTIVE'S IMPLEMENTATION

The EU Parliament and the Council have issued Directive 2000/53/EC of 18 September 2000 on end-of-life vehicles ("the ELV Directive"). The purpose of the ELV Directive was, *inter alia*, to harmonize national measures in order to minimize the negative impact of end-of-life vehicles on the environment and to avoid disruptions of the common market. The Directive called upon the Member States to ensure "that economic operators set up systems for the collection, treatment and recovery of end-of life vehicles. (…) Member States should ensure that the last holder and/or owner can deliver the end-of life vehicle to an authorised treatment

[31] E. Zielińska, *Implementacja*..., p. 6.
[32] E.g. are against rule of proportionality.

facility without any cost as a result of the vehicle having no or a negative, market value"[33]. The same obligation was set forth in Article 5(1) of the ELV Directive.

The ELV Directive was based on the "polluter pays" principle ("Member States should ensure that producers meet all, or a significant part of, the costs of the implementation of these measures; the normal functioning of market forces should not be hindered"[34]). As a consequence, it should be expected that national legislators would have imposed on so-called economic operators (producers, distributors, collectors, motor vehicle insurance companies, dismantlers, shredders, recoverers, recyclers and other treatment operators of end-of life vehicles, including their components and materials[35]) obligations regarding the establishment of a system of collection of end-of-life vehicles and/or an obligation to participate in the costs of the system.

This is what, in general, the Polish legislator did in 2005 by enacting the Act on the Recycling of End-of-Life Vehicles[36] ("the ELV Act"). However, the Polish way of implementing the ELV Directive was very peculiar. Producers and importers of vehicles were obliged to guarantee that an end-of-life vehicles collection net ("collection net") is available[37]. As the ELV Act stated, the collection net had to cover the whole territory of Poland in such a way that the distance from the place of residence or seat of each holder of an end-of-life vehicle to a collecting place should not be longer than 50 km. In other words, the collecting net should have consisted of a multitude of circles with a 50 km radius each, covering the whole territory of Poland. Of course, this is not in fact possible in 100% as some parts of the territory of Poland are hard to reach (peninsulas, mountains, lakes, rivers) and, additionally, it was not always necessary to have a collecting place in 50 km from home (sometimes it was closer to reach a collecting place that was situated theoretically beyond that limit than a collecting place that was less than 50 km in straight line – e.g. in case of natural obstacles such as rivers with no bridge).

As we can see, the regulation prescribed by the Polish legislator is much stricter than the obligations required by the ELV Directive (the latter requires merely "the adequate availability of collection facilities within their territory"[38]). Thus, it could be argued that the 50 km radius requirement is more burdensome than any other available measures of "adequate availability"[39]. That is, the obligations imposed by the Polish legislator in this respect are an example of 'gold-plating'.

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[33] Paras 6–7 of the preamble to the ELV Directive.

[34] Para 7 of the preamble to the ELV Directive.

[35] Article 2(10) of the ELV Directive.

[36] Polish Official Journal of Laws of 2005, No. 25, item 202.

[37] Article 11 of the ELV Act.

[38] Article 5(1). tiret No. 2 of the ELV Act.

[39] Legislations of other Member States prescribed obligations based on "adequate distance" or "adequate/appropriate availability", see the Finnish Government Decree on End-of-life Vehicles No. 581/2004 (Section 4(2)) in conjunction with Section 6 (10-11) and Section 7 of the Waste Act No. 1072/1993; British Statutory Instrument (the End-of-Life Vehicles (Producer Responsibility)

Besides the above, the Polish legislator decided also to impose a significant penalty (so-called "fee") on producers and importers that failed to provide the holders of end-of-life vehicles with the abovementioned collecting net covering 100% of the territory of Poland[40]. As practice shows, it was impossible to meet the mentioned standards so in 2006 nearly all of the entity addressees of the ELV Act were penalised with the imposing fee. Some of the entities paid the fee promptly and, further, initiated proceedings aimed at obtaining a reimbursement of the fees. Other entities refused to pay and waited for the decision of the General Inspector for Environment Protection[41]) – this, as it transpired, made a difference later on. It was peculiar that almost all producers and importers fulfilled the "collecting net" obligation in nearly 100%, however it was still too little to avoid the penalty (the penalty remained the same for those who fulfilled the obligation in 99% and for those who did not fulfil it at all or, for instance, in 2%).

The Polish legislator noticed the irrationality of the described regulations (one of the arguments against the law was that it was a clear example of gold-plating, as the ELV Directive did not require such a level of obligations to be imposed on producers and importers of vehicles) and changed the law in 2007[42]. The new regulation prescribed that an entity providing a collection net that covers at least of 95% of the territory of Poland is exempted from the penalty. Moreover, the penalty proportionately decreases if the collection net exceeds certain levels of coverage (85%, 90%). Unfortunately, the new rules were applied (a literal construction) only to penalties that were charged since 2007. As a result, it did not apply to fees levied in 2006, so the strict old law still harmed producers and importers of vehicles.

Most producers and importers challenged decisions on imposing fees in 2006 before administrative courts. In one of the cases, an administrative court[43] made a reference to the Constitutional Court in order to ask a question regarding the constitutionality of the ELV Act and its 2007 amendment[44]. The Polish Constitutional Court decided that the challenged provisions are consistent with the Polish

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Regulations 2005) No. 263, Article 11(1): "Each producer shall ensure that, as regards vehicles for which he has declared responsibility for placing on the market under regulation 7, or for which the Secretary of State has ascribed responsibility to him under regulation 8, his system for collection as referred to in regulation 10 **is reasonably accessible** to any person who wishes to deliver to it an end-of-life vehicle for which that producer is responsible" (emphasis – M. J.). See also: *Transposition of the ELV Directive in other EU Member States*, November 2004, Perchards; N. Kim, *Exploring determinant factors for effective end-of-life vehicle policy: experiences from European end-of-life vehicle systems*, IIIEE Reports 2002:7.

[40] Article 14 of the ELV Act.

[41] PL: Główny Inspektor Ochrony Środowiska, GIOŚ.

[42] See the Act of 29 June 2007 on Amending the ELV Act.

[43] Decision of the Voivodship Administrative Court in Warsaw of 16 November 2009, ref. number IV SA/Wa 1383/09.

[44] Polish Official Journal of Laws of 2007, No. 176, item 1236.

Constitution[45], however the question referred by the lower court was of a very narrow scope. At a later stage the Supreme Administrative Court ("SAC") issued several judgments[46] stating that provisions of the Act on Amending the ELV Act, which confined the new law merely to fees calculated since 2007, should be interpreted consistently with the Constitution, so the new law should apply also to fees calculated in 2006 provided that the fees were imposed by virtue of administrative decisions[47].

The discussed case is an example of a situation where the negative impact of gold-plating was partially cured by the activity of the courts and by a new law enacted by the parliament *ex post*.

3.2. IMPLEMENTATION OF THE TOBACCO PRODUCTS DIRECTIVE

Another example of gold-plating in Polish legislation is definitely the implementation of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC ("the TPD Directive"). It is important to underline that Poland had an important political and economic problem with the implementation of the TPD directive. The discussed Act prescribed new restrictions on the tobacco products market which may have adversely impacted the production and sale thereof. On the other hand, Poland plays an important role on the tobacco products market. In view of the statistics:

– there are approx. 12.5 thousands of individual plantations of tobacco in Poland;

– approx. 60 thousands of people are working in the tobacco agriculture;

– 35 thousand tons of tobacco per annum are manufactured and sold by the tobacco agriculture in Poland;

– 6 thousand people are working in the tobacco products' industry with gross income of PLN 400 mln (approx. EUR 100 mln);

– 150 billion cigarettes are manufactured in Poland per annum and 63% are exported abroad;

– the tobacco industry provides the state budget with approx. 10% of total tax income;

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[45] Judgment of the Polish Constitutional Court of 9 July 2012, ref. number P 8/10.

[46] See the judgment of the Supreme Administrative Court of 17 May 2016, ref. number II OSK 3070/15; judgment of the Supreme Administrative Court of 18 December 2012, ref. number II OSK 2370/12; judgment of the Supreme Administrative Court of 5 December 2012, ref. number II OSK 2377/12.

[47] As a result, entities that calculated fees on their own cannot benefit from the new approach as against the judiciary.

– it is measured that the implementation of the TPD Directive could result in a decrease of the tax income by a sum of approx. PLN 8.85 bln (approx. EUR 2.2 bln);

– it was also foreseen that the black market of tobacco products would have increased by 100–300%[48].

In view of the above, the Polish government was much against the TPD Directive which prescribes restrictions, *inter alia*, on the manufacture and sale of electronic cigarettes, flavoured cigarettes and on distance sale of tobacco products. For example, it should be noted that the electronic cigarettes industry in Poland employs approx. 12 thousand people[49]. Particularly, prohibition of sale of flavoured tobacco products (Article 7(1) of the TPD Directive) was difficult to be accepted by Poland as it implies the end of the manufacture and sale of menthol cigarettes which constitutes an important commodity on the Polish tobacco market[50]. Thus, Poland filed a complaint (supported also by Romania) against the validity of the TPD Directive with the CJEU, claiming that the prohibition of menthol cigarettes "does not contribute to improving the functioning of the internal market but, on the contrary, results in the creation of obstacles which did not exist before the Directive was adopted" and "is not an appropriate means for attaining the objectives pursued by the Directive. Furthermore, this prohibition runs counter to the requirement that measures taken must be necessary for attaining the objectives pursued"[51]. The complaint was unsuccessful as the CJEU held that the TPD Directive is valid, thus dismissing the Polish pleas against it[52].

The level of determination of the Polish government in challenging of the TPD Directive has not corresponded, however, with the manner of implementation thereof. Surprisingly, the Polish law implementing the TPD Directive imposes harsher restrictions on the tobacco market than the TPD Directive itself – in the Act of 22 July 2016 on Amending the Act on the Protection of Health Against the Ramifications of Using Tobacco and Tobacco Products (hereinafter referred to as "the New Tobacco Law"[53]). The main important changes relate, *inter alia*,

[48] See R. Gwiazdowski, A. Barna, M. Wepa, R. Marchewka, *Skutki wdrożenia dyrektywy tytoniowej. Raport Centrum im. Adama Smitha o ekonomicznych skutkach wdrożenia rewizji dyrektywy 2001/37/WE Parlamentu Europejskiego i Rady Europy z 5 czerwca 2001 roku*, Warszawa 2013, pp. 6–7.

[49] See *Wpływ implementacji dyrektywy tytoniowej na polską branżę elektronicznych papierosów*, Związek Przedsiębiorców i Pracodawców, 5 February 2016, p. 3.

[50] Approx. 18% of the cigarettes market in Poland, as stated in http://forsal.pl/artykuly/941076,polska-nie-obronila-papierosow-mentolowych-zobacz-co-to-oznacza-dla-naszej-gospodarki.html (accessed 27 May 2017).

[51] See http://curia.europa.eu/juris/document/document.jsf?text=&docid=156981&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=946116 (accessed 27 May 2017).

[52] See http://curia.europa.eu/juris/document/document.jsf?docid=177721&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=946116 (accessed 28 May 2017).

[53] Consolidated text is available at Polish Official Journal of Laws of 2017, item 957.

to the prohibition of sale of tobacco for oral use and the prohibition of distance sale of tobacco products. Further explanation is necessary as the TPD Directive also includes provisions that restrict the mentioned types of sale (Articles 17–18).

First of all, Article 7(1) of the New Tobacco Law prohibits manufacturing and placing tobacco for oral use on the market. *Prima facie* it corresponds with Article 17 of the TPD Directive. However, the latter allows for derogations from the prohibition ("without prejudice to Article 151 of the Act of Accession of Austria, Finland and Sweden") for the benefit of the mentioned three EU members. This is because consumption of tobacco for oral use is a tradition in those countries. Moreover, Article 17 clearly prohibits only "placing on the market of tobacco for oral use", therefore, *a contrario*, manufacturing of tobacco for oral use is not subject to the TPD Directive's regulations. In practice, it means that the EU Member States are not obliged to prohibit manufacturing of tobacco for oral use but merely to prohibit placing such products on the market within their territory. Manufactured products could, however, be exported abroad (outside of the EU) or to Austria, Finland or Sweden, where placing such products on the market is legal[54]. Thus, Poland has added to the TPD Directive restrictions which are not required by EU law. As a result, many Polish entrepreneurs that could manufacture and export tobacco for oral use, e.g. to Sweden, have been deprived of such an opportunity.

Article 7f of the New Tobacco Law corresponds with Article 18(1) of the TPD Directive which concerns cross-border distance sale of tobacco products. According to the provision, the EU Member States may prohibit cross-border distance sale of tobacco products to consumers. However, the prohibition is not mandatory and each state is able to accept cross-border sale on its territory provided that some additional requirements for entrepreneurs involved in such sale are introduced (including a registration duty). On the other hand, the Polish New Tobacco Law prescribes (Article 7f) that: "Distance sale of: 1) tobacco products and 2) electronic cigarettes and refill containers and parts thereof, shall be prohibited".

This short provision is an example of a regulation that gold-plates the TPD Directive in three ways. First of all, as previously stated, the TPD Directive does not oblige the Member States to prohibit cross-border distance sale of tobacco products but merely leaves such an option which is not mandatory. Secondly, Article 18 of the TPD Directive does not relate to internal, domestic distance sale of tobacco products but only to cross-border sale so the Polish law establishes an additional obstacle for Polish entrepreneurs in this respect. Thirdly, the TPD Directive relates only to distance sale to consumers but Article 7f of the New

[54] K. Piernik-Wierzbowska, *Czy ustawodawca nie potraktował rodzimej branży tytoniowej zbyt restrykcyjnie?*, www.krotoski-adwokaci.pl (accessed 28 May 2017).

Tobacco Law is not precise in this matter[55], which could lead to an interpretation that Polish law prohibits every kind of distance sale of tobacco products and electronic cigarettes no matter whether it is targeted at consumers or entrepreneurs (fortunately, there are strong arguments against such an interpretation, however it cannot be excluded).

The regulations presented above show that the Polish implementation of the TPD Directive went far beyond the obligations prescribed therein, thus causing significant harm to Polish entrepreneurs (and, to a certain extent, it puts Polish entrepreneurs in a worse position than their competitors from other EU Member States). Such an approach has been strongly criticized in Poland[56]. Nevertheless, there are other examples of gold-plating as regards the implementation of the TPD Directive. For the New Tobacco Law introduced a prohibition on using electronic cigarettes in many public places (Article 5), something not required by the TPD Directive. Moreover, the New Tobacco Law includes a prohibition on informing regarding tobacco products in retail outlets which is, as was the case with the previous examples, outside of the scope of the TPD Directive.

3.3. DISTANCE SALE OF MEDICINAL PRODUCTS

Another example of gold-plating in Polish law relates to one of the most important milestones for the development of EU Treaties' economic freedoms and the common market – the *DocMorris* judgment[57]. To remind ourselves, the CJEU held that: "A national prohibition on the sale by mail order of medicinal products the sale of which is restricted to pharmacies in the Member State concerned is in that regard a measure having an effect equivalent to a quantitative restriction where the prohibition has a greater impact on pharmacies established outside the national territory and could impede access to the market for products from other Member States more than it impedes access for domestic products. Article 30 EC may, however, be relied on to justify such a national prohibition on the sale by mail order of medicinal products in so far as the prohibition covers medicinal products subject to prescription. (…) However, Article 30 EC cannot be relied on to justify an absolute prohibition on the sale by mail order of medicinal products which are not subject to prescription in the Member State concerned".

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[55] Only the definition of cross-border distance sale (Article 2 (35) of the New Tobacco Law) relates to sale to consumers; however, the notion of distance sale, which could be viewed as wider, is not defined in the New Tobacco Law.

[56] See the letter of the President of Association of Entrepreneurs and Employers Mr. Cezary Kaźmierczak to the Minister of Health Konstanty Radziwiłł of 3 December 2015, http://zpp.net.pl/files/manager/file-2041fb9f98823c751080ed29c6071fbc.pdf (accessed 28 May 2017).

[57] See judgment of the CJEU of 11 December 2003, ref. number C-322/01 *Deutscher Apothekerverband eV v 0800 DocMorris NV*, *Jacques Waterval*.

A practical consequence of *DocMorris* was the conclusion that national provisions that prohibit distance sale of medicinal products available without a doctor's prescription (so-called OTC medicines) do not comply with EU law. On the other hand, the CJEU stated also that, generally, distance sale of medicines available only with doctor's prescription (so-called Rx medicines) could be prohibited by national legislation provided that it is justified by objective reasons in accordance with the EU Treaty[58]. However, importantly, *DocMorris* does not oblige the Member States to prohibit distance sale of Rx medicines. In fact, some EU Member States, as a result of *DocMorris*, repealed restrictions for distance sale of OTC and Rx medicines alike (e.g. the UK and Germany)[59].

In the context of the above, prohibition of distance sale of Rx medicines should be viewed only as an option for the national legislator, and any decision to institute such restrictions must be considered as going beyond the EU requirements. Polish pharmaceutical law prescribes (in Article 68(3)) that distance sale of OTC medicines is admissible, hence, *a contrario*, Polish law does not accept distance sale of Rx medicines – the Polish legislator has chosen to prohibit it despite the fact that it was not mandatory under EU law[60]. Moreover, the provision is interpreted as prescribing a prohibition of distance sale of veterinary medicinal products (both OTC and Rx)[61], which is also not required by EU law[62].

3.4. POLISH EXPERIENCE – INITIAL CONCLUSIONS

The examples of gold-plating of EU law in Polish legislation discussed above are, of course, only few among many other, similar acts of the Polish legislator that went beyond the obligations imposed by EU law but, on the other hand, are somehow presented, defectively, as implementation of EU law (or even as necessary measures in order to guarantee compliance with EU law). A close analysis of examples of gold-plating in Poland shows that this negative phenomenon is a consequence of a lack of a domestic implementation policy which results in implementing EU law without an analysis of different opportunities available.

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[58] See: A. Zimmermann, L. Wengler, *Wysyłkowa sprzedaż produktów leczniczych*, "Prawo w Farmacji" 2009, Vol. 65, issue 5, pp. 342–347.

[59] Z. Więckowski, *Sprzedaż leków na odległość – regulacje krajowe*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2016, Vol. 8, issue 5, p. 56.

[60] See: M. Paluch, *"Ochrona pacjenta" kosztem przedsiębiorcy, czyli absurdy sprzedaży leków przez internet*, http://www.bankier.pl/wiadomosc/Ochrona-pacjenta-kosztem-przedsiebiorcy-czyli-absurdy-sprzedazy-lekow-przez-internet-2270808.html (accessed 28 May 2017).

[61] See e.g. the judgment of the Voivodship Administrative Court in Warsaw of 25 March 2013, ref. number VI SA/Wa 126/13.

[62] See: M. Bąkowska, *Ograniczenia w sprzedaży przez internet produktów leczniczych weterynaryjnych dostępnych bez recepty*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2016, Vol. 5, issue 8, pp. 104–110.

Secondly, misunderstandings regarding what EU law requires from a Member State could be also pointed to. In many cases the burdens that EU regulations require relate only to cross-border sale and may be waived by national legislators in relation to the internal market – unfortunately, it is not always taken into consideration in the Polish legislative process. Finally – and it could be viewed as the darker side of EU law implementation in Poland – gold-plating is sometimes a result of lobbying by regulatory authorities which fight for greater administrative powers[63].

4. FACING THE GOLD-PLATING PLAGUE – REMEDIES AVAILABLE

Gold-plating as a negative legislative phenomenon is a risk factor associated with every EU law implementation process and its potential restriction could be viewed as an important step on the road to making legislation simpler and friendlier to entrepreneurs and citizens. It is worth noticing, in this context, several examples of anti-gold-plating policies introduced in some EU Member States.

The United Kingdom is one of the most advanced countries as regards developing steered anti-gold-plating policies. The UK government declared clearly in 2010 that its intention is to avoid any gold-plating which could harm the interests of British entrepreneurs and presented a duly considered strategy in this respect[64]. First of all, implementation of EU law in the UK is based on the following principles:

– "Work on the implementation of an EU directive should start immediately after agreement is reached in Brussels. By starting implementation work early, businesses will have more chance to influence the approach, ensuring greater certainty and early warning about its impact;

– Early transposition of EU regulations will be avoided except where there are compelling reasons for early implementation. (…)

– European directives will normally be directly copied into UK legislation, except where it would adversely affect UK interests e.g. by putting UK businesses at a competitive disadvantage.

– A statutory duty will be placed on ministers to conduct a review of domestic legislation implementing a European directive every five years (…)"[65].

[63] About governmental interest groups see: A. M. Cammisa, *Governments as interest groups: intergovernmental lobbying and the federal system*, Westport 1995, p. 25.

[64] See: https://www.gov.uk/government/news/government-ends-gold-plating-of-european-regulations (accessed 28 May 2017).

[65] *Ibidem*.

The British approach in this respect is, of course, focused on the British national interest (of which Brexit is a major consequence). However, such an approach is interesting also for countries which are not planning to leave or even for countries which are going to access to the EU. It is not a mystery that EU law on occasion imposes significant burdens on domestic entrepreneurs, so – from national interests' point of view – there is no reason to introduce such burdens into domestic legislation too early before the deadline. It could also be viewed as unnecessary gold-plating. What is interesting is that the British government tried to adopt a "no national-toppings" policy and just copy-paste EU regulations except the situation where a lack of "additions" would be against the interests of British business. Any "additional" regulations need to be justified and reasoned before instituted.

Further analysis conducted by the UK government has led to additional recommendations[66]. For example, when implementing EU law it is better to seek non-legislative measures (such as soft law) and not resort to hard legislation. It is also crucial not to put domestic entrepreneurs at a competitive disadvantage compared with their EU competitors (avoidance of reverse-discriminatory legislation; always opting for implementing measures that do not impose on domestic business burdens and standards which are not required from EU businesses by EU law nor by manufacturers and traders based in other Member States)[67]. A comprehensive strategy and legislative policy (called the "new transposition framework"), which is supplemented by a wider 'one-in, two-out' programme[68], has led to certain effects. The UK is viewed as one of the EU leaders in least burdensome implementation of EU law[69].

Some other EU Member States fight with gold-plating through institutional measures. This is the case, *inter alia*, in Germany, where the National Regulatory Control Council (the *Normenkontrollrat*) exists. The Council is competent to assess whether new regulations constitute gold-plating of EU law. Every new legislative proposal that goes beyond the requirements of EU law needs to include an explanation why it is necessary and the explanation is subject to an analysis by the Council[70]. Similar authorities have been established in Sweden (*Regelrådet*[71])

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[66] See: *Gold-plating Review. The Operation of the Transposition Principles in the Government's Guiding Principles for EU Legislation*, March 2013, http://mbsportal.bl.uk/secure/subjareas/mgmt/bis/14583013_683_gold_plating.pdf (accessed 28 May 2017).

[67] *Ibidem*.

[68] https://www.gov.uk/government/publications/2010-to-2015-government-policy-business-regulation/2010-to-2015-government-policy-business-regulation#appendix-4-operating-a-one-in-two-out-rule-for-business-regulation (accessed 28 May 2017).

[69] See: *Europe can do better. Report on best practice in Member States to implement EU legislation in the least burdensome way*, High Level Group of Independent Stakeholders on Administrative Burdens, Warsaw, 15 November 2011.

[70] *Ibidem*, p. 34.

[71] *Ibidem*, p. 28–29.

and in the Czech Republic (Regulatory Impact Assessment Board[72]). Moreover, the EU itself emphasizes the need to reduce gold-plating, suggesting that every gold-plating legislative proposal has to be publicly transparent and it should be always explained why the legislation goes beyond EU requirements[73].

The Polish government also made an attempt to fight against unnecessary administrative burdens (including gold-plating) by introducing the Resolution of the Council of Ministers No. 13/2013 of 22 January 2013: '*Lepsze regulacje 2015*' (English: Better regulations 2015)[74]. Planned measures included preparation of a regulatory test which would be applied to the EU legislative process and, further, to the transposition process in Poland in order to identify every possible example of gold-plating. Identified examples of gold-plating should be then presented by the Secretary for European Matters before the European Matters Committee and the Committee would then decide on the introduction thereof. Unfortunately, there is no sufficient data that shows the effectiveness of the programme against gold-plating – on the other hand, there is ample evidence that the Polish legislator in fact ignores it (*vide* the implementation of the TPD Directive).

Examples from the Member States show that the fight against gold-plating, albeit difficult, is possible and necessary. This approach should be consistently applied in Poland and, I believe, also in the countries that aspire to EU membership (thus, also in Ukraine). It has to be remembered that the road to accession to the EU is also a process of making domestic law compliant with EU law – so the risk of gold-plating is not foreign to Ukraine. Some conclusions regarding best practices could be made:

First of all, a well-considered policy of implementation of EU law should be prepared. The government has to consider what it wants to achieve by way of implementation of EU law and what the available options are.

Secondly, an overall analysis of legislation is required in order to identify administrative burdens that are not a result of EU legislation but existed before the accession/implementation of EU law.

Thirdly, an independent governmental authority focusing on good legislative practices and which pays attention to each case of gold-plating should exist and should be a part of the legislative process.

Fourthly, an honest and detailed regulatory impact assessment needs to be prepared, including an explanation why a given legislative goes beyond the relevant EU law requirement. It should also be compared with implementing measures chosen by other EU Member States.

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[72] See: http://www.oecd.org/czech/regulatoryimpactassessmentriaintheczechrepublicandothercountries.htm (accessed 28 May 2017).

[73] *Cutting Red Tape in…*, p. 57.

[74] https://www.premier.gov.pl/wydarzenia/decyzje-rzadu/uchwala-w-sprawie-przyjecia-programu-lepsze-regulacje-2015-przedlozona.html (accessed 28 May 2017).

Last but not least, potential addressees of implemented EU law (stakeholders – domestic entrepreneurs and non-governmental organizations) have to be included in the implementation process as early as possible.

THE DANGER OF SO-CALLED REGULATORY 'GOLD-PLATING' IN TRANSPOSITION OF EU LAW – LESSONS FROM POLAND

Summary

Ukraine, just like Poland over thirteen years ago, is on its route to integration with the EU, which would also require a transposition of EU law into the domestic legal system. In fact, the experience of Poland and other Member States shows that transposition of EU law gives rise to several issues. One interesting aspect concerns so-called gold-plating – that is domestic legislation than goes beyond the requirements set forth in EU law. Usually, it results in a greater regulatory burden imposed on entrepreneurs. The paper discusses three examples of such gold-plating regulations in Polish law – being a consequence of implementation of the EU law. Generally speaking, gold-plating is a negative and unwelcome phenomenon. There exists extensive research that shows the cost of gold-plating for the Member States' economies. Some of the Member States have introduced regulatory policies in order to avoid gold-plating. The analysis shows that there are several actions that need to be performed to restrict the incidence of gold-plating.

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TRUST AND SOLIDARITY AT A TIME OF TRANSFORMATION. THE PROBLEM OF SO-CALLED BUG RIVER PROPERTY CLAIMS IN THE CASE LAW OF THE POLISH CONSTITUTIONAL TRIBUNAL AND THE EUROPEAN COURT OF HUMAN RIGHTS

1. THE GENESIS OF THE ZABUŻANIE PEOPLE'S[1] CLAIMS

1. World War II brought about considerable geopolitical changes. Numerous nations had to pay the price of losing their sovereignty and succumbing to compulsory revisions of state borders. Central Eastern Europe – the main arena of war between two competing political blocs – arguably experienced the most drastic territorial transformations, which occurred without the consent of the interested nations. Consequently, these changes resulted in mass and, in most cases, involuntary migration waves of people[2].

These processes affected Poles in a special way. By virtue of the agreements between the Big Three (the United Kingdom, the United States and the Soviet Union) post-war Poland gained lands in the West (formerly German territories located to the East of Oder and Lusatian Neisse) at the expense, however, of territories to the East of the so-called Curzon Line, delineated to a large extent by the Bug River.

One consequence of territorial revisions at the eastern frontier of Poland was mass relocation of Polish citizens from the lands incorporated into the Soviet Union. It is estimated that in the period between 1933–1952 approx. 2 million people from the Eastern Borderlands (also known as Kresy) had to leave their homes (hereinafter: the Zabużanie people). Whilst in the literature they are often referred to as repatriates, the term "displaced persons" seems more adequate[3].

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[1] The Polish term "Zabużanie" literally means "people from the lands beyond the Bug river".

[2] More on this: C. Kuti, *Post-Communist Restitution and the Rule of Law*, Budapest 2009, pp. 98–100.

[3] K. Michniewicz-Wanik, *Mienie zabużańskie. Prawne podstawy realizacji roszczeń*, Wrocław 2008, p. 17.

For they were most often relocated from native areas that formed part of Poland before World War II onto lands they had no connection with, ones which were ceded as a result of bargains between three great powers.

2. Forced at a time of political turmoil, migrations were a serious endeavour in organizational terms, of importance for the formation of Polish statehood following World War II. Mass displacements were the subject of agreements concluded between the Polish Committee of National Liberation (a self-proclaimed, temporary executive authority operating under the auspices of the Soviet Union from 21 July 1944 on the territories "liberated" from German occupation; hereinafter: PKWN, from Polish: *Polski Komitet Wyzwolenia Narodowego*) and the governments of the Byelorussian, Ukrainian and Lithuanian Soviet Socialist Republics[4]. These documents, often termed the Republican Accords, regulated the evacuation of Ukrainian, Belarusian and Lithuanian populations from the new Polish territory as well as Polish citizens who found themselves in the above Soviet Republics. Their provisions were complemented by an agreement of 6 July 1945 between the Provisional Government of National Unity of the Republic of Poland (in Polish: *Tymczasowy Rząd Jedności Narodowej*, recognized from 6 July by the major powers, hereinafter: PGNU) and the Soviet Union on the right to change the Soviet citizenship of Polish and Jewish nationals living in the USSR, their relocation to Poland, and the right to change the Polish citizenship of Russian, Ukrainian, Belarusian, Ruthenian and Lithuanian nationals living in Poland and their relocation to the USSR (hereinafter: the 1945 Repatriation Agreement).

The final migration wave of the Zabużanie people occurred pursuant to the provisions of the territorial exchange agreement of 15 February 1951 between the Republic of Poland and the Soviet Union[5]. On the international plane, repatriation ended 6 years later by force of the agreement of 25 March 1957 between the Polish People's Republic and the Soviet Union on the timeframe and procedure of further repatriation from the Soviet Union of Polish nationals[6] (hereinafter: the 1957 Repatriation Agreement).

The repatriation policies specified in the Republican Accords formally embraced the so-called right of option, which left the Zabużanie people with an

[4] These were the following agreements: 1) of 9 September 1944 between the Polish Committee of National Liberation and the Government of the Byelorussian Soviet Socialist Republic pertaining to the evacuation of Polish citizens from the territory of the BSSR; 2) of 9 September 1944 between the Polish Committee of National Liberation and the Government of the Ukrainian Soviet Socialist Republic pertaining to the evacuation of Polish citizens from the territory of the UkrSSR and of the Ukrainian population from the territory of Poland; 3) of 22 September 1944 between the Polish Committee of National Liberation and the Government of the Lithuanian Soviet Socialist Republic pertaining to the evacuation of Polish citizens from the territory of the LSSR and of the Lithuanian population from the territory of Poland.

[5] Polish Official Journal of Laws of 1952, No. 11, item 63.

[6] Polish Official Journal of Laws of 1957, No. 47, item 222.

option to independently decide on participating in the relocation process. Notwithstanding, considering the political circumstances surrounding the operation (with the areas affected having been in fact annexed by the Soviet Union), freedom of residence granted, in the words of the parties to the repatriation agreements, was at most ostensible. Meanwhile, relocations gave rise to severe property and non-property losses on the part of the Zabużanie people, and brought about radical changes to their professional and personal lives, including the necessity of leaving behind all the assets they had amassed before moving. It must be born in mind that the first phase of relocations occurred when the war was still ongoing (1944–1945).

The Republican Accords regulated a number of questions related to property and estate, however they merely contained vague promises of future compensation rather than concrete principles governing settlements in respect of the assets left behind. This must have amplified the sense of uncertainty among the displaced as to their material wellbeing. Under the Accords, relocated farmers were to receive land of a size to be determined in a future agriculture bill, whilst peasants – as the Accords proclaimed, "even if they do not possess land at the time of relocation, they will receive, upon their wish, an allotment of land under general rules".

At the same time, the Accords imposed upon the migrants precise limits as to their freedom as regards managing their assets. They could take personal items (clothes, shoes etc.), food, home and farm equipment as well as livestock and items necessary to pursue an occupation. However, the Accords prohibited exporting any items of considerable financial value, including money, securities, gold and platinum, precious stones and works of art. These goods, following an inventory by proxies and representatives of the parties to the Accords, were to be put "under the care" of the state.

2. THE NATURE OF THE OBLIGATIONS ARISING FROM THE REPUBLICAN ACCORDS IN THE LIGHT OF INTERNATIONAL AND DOMESTIC LAW

1. Legal consequences of the above political events were far-reaching. Obligations as against the relocated citizens meant it was necessary to undertake certain actions with a view to providing them with compensation for the assets they were deprived of. Since neither directly after World War II nor during the Communist period in Poland was the problem of the Zabużanie people's property solved, the problem rose to prominence after 1989, at a time of rampant political transformations, becoming a momentous element of the constitutional discourse in the Third

Polish Republic. A critical role was played by the constitutional case law as well as the European system of human rights.

2. The Polish Constitutional Tribunal adjudicated three times in cases concerning the Zabużanie people, every time providing an impulse for the legislature to attempt to furnish a comprehensive package of reforms to redress the claims.

The first judgment – prompted by a request of the Ombudsman – of 19 December 2002[7] tackled the fundamental controversy of the legal status of the Republican Accords and claims stemming therefrom. Serious doubts had been triggered by the fact that it was problematic to consider the provisions of the Accords to have binding force domestically. Particularly, it was contentious whether the Accords should have been ratified and if so, whether such ratifications took place. Second, there was the problem of their publication[8]. However, these formal improprieties only served as a background to the critical constitutional problem, i.e. the degree to which, if at all, the legislator of the Third Polish Republic fulfilled its obligations against the Zabużanie people created by the communist regime back in 1944[9].

To scrutinize the effectiveness of the regulations governing compensation, the Tribunal tracked a number of statutes. Exclusion of certain assets (agricultural land belonging to the State Treasury and the Military Property Agency) made it impossible for the people entitled to refunds of the value of assets left outside of the territory of Poland to offset it against the sale price of land or fees for perpetual use in respect of land located within the contemporary boundaries of the country. This is why the Tribunal held those laws to be unconstitutional.

Less than two years later the Tribunal considered a provision which the legislator envisaged as a comprehensive solution of the Zabużanie people's property problem. A number of Members of Parliament challenged before the Tribunal the compatibility of the entirety of the Act of 12 December 2003 on Offsetting the Value of Property Abandoned Abroad Against the Sale Price or Fees for Perpetual Use of State Treasury's Land[10] (hereinafter: the Act on Offsetting) with Articles 2, 21, 31(3), 32, 52(1), 64(1) and 64(2) of the Constitution. The case culminated in

[7] Ref. Number K 33/02; OTK ZU No. 7A/2002, item 97.

[8] The Republican Accords were neither ratified nor published. They stipulated that they do not require ratification, but they enter into force merely by means of their signing (Article 22) and that they are not subject to publication in the Journal of Laws, but should only be made publicly available (Article 20).

[9] This perspective appears justified considering the view, dominant in the doctrine, that mere ratification and publication of the agreements did not constitute a circumstance that could have nullified their effectiveness under international law (see.: K. Michniewicz-Wanik, *Mienie*..., p. 30) nor did it nullify or otherwise restrict, in any way, the right of the Zabużanie persons to compensation pursuant to the laws of the Third Polish Republic. See: M. Masternak-Kubiak, *Glosa do postanowienia Naczelnego Sądu Administracyjnego z dnia 16 września 2004 r. (sygn. akt OSK 250/04)*, "Przegląd Sejmowy" 2005, issue 1, p. 156.

[10] Polish Official Journal of Laws of 2004, No. 6, item 39.

the judgment of 15 December 2004[11], where some of the complainants' arguments were accepted, however merely several provisions were struck down as unconstitutional.

The final judgment in the Zabużanie people's case law was the judgment of 23 October 2012[12], handed down in response to a constitutional complaint filed by an heir of a repatriate who questioned one of the requirements in respect of acquiring the right to compensation, namely the necessity of residing within the former territory of Poland as of 1 September 1939. This requirement was introduced by means of another regulation in the area, i.e. the Act of 8 July 2005 on the Execution of the Right to Compensation by Virtue of Leaving Land Outside of the Current Borders of the Republic of Poland[13].

3. Looking back at the legal characterization of the claims of the Zabużanie people, it must be noted that the Republican Accords were concluded at a unique time in the history of Polish statehood. In H. Kelsen's terms, it could be named a period of transition for the basic norm of the legal system, where legalism must have succumbed to the brute force of political and military facts. The then-existing normative order was nominally (the Communists claimed they were reverting to the system under the March Constitution of 1921) and factually (by exercising real political power since 1945 recognized – as the Provisional Government of National Unity on the international plane) challenged.

The Communist government, which attempted to forcefully impose a new regime, patently lacked legitimacy. The Constitutional Tribunal has noted this fact, arguing that the PKWN cannot be considered a constitutional authority of a sovereign state, with democratic legitimacy and actual independence. Neither is it feasible to impute equivalence into the Republican Accords as in fact they constituted a one-sided obligation of the PKWN towards the Zabużanie people. Nevertheless, as noted by the Tribunal in another case, "lack of legitimacy of such bodies as the PKWN, the State National Council, the PGNU, as well as doubtful legitimacy of their successors, cannot detract from the fact that they exercised factual state power"[14]. Therefore, already in its first judgment on the matter, the Tribunal held that these historical circumstances may not, in and of themselves, cause the claims based upon the Republican Accords to be invalid[15]. This impor-

[11] Ref. number K 33/02; OTK ZU 11A/2004, item 117.

[12] Ref. number SK 11/12; OTK ZU 9A/2012, item 107.

[13] Consolidated text: Polish Official Journal of Laws of 2016, item 2042, as amended.

[14] Procedural decision of the Polish Constitutional Tribunal of 28 November 2001, ref. number SK 5/01 (OTK ZU No. 8/2001, item 266). The view corresponds with the, commonly accepted in the literature, description of the PKWN as a "*de facto* government". See: P. Łaski, *Refleksje na temat żądań odszkodowawczych zabużan z tytułu utraty mienia na Kresach Wschodnich w świetle prawa międzynarodowego i prawa polskiego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2002, issue 4, p. 42.

[15] From an international perspective, it is noted that a legal defect in the Republican Accords (brought about by a lack of legal legitimacy of the PKWN) was convalidated under post-war Po-

tant inference gave an inspiration as to the overall direction of interpretation of a number of specific issues concerning the Zabużanie people's claims.

With the entering into force of the agreement of 21 July 1952 between the Republic of Poland and the USSR, the UkrSSR, the BSSR and the LSRR on mutual settlements resultant from repatriations and the delimitation of the Polish-Soviet border the Republican Accords were held to have been executed *inter partes* and its international significance was reduced to merely historical. Notwithstanding, the legislator, the Constitutional Tribunal and the doctrine continued to treat the Accords as a relevant point of reference as regards assessing the fulfilment of Poland's compensatory obligations[16]. Although – as confirmed by the Constitutional Tribunal – the Accords could not be the direct basis of the Zabużanie people's claims (the right to compensation)[17], yet they could ground a "legitimate expectation" that they would be helped.

As the Tribunal explained in its judgment of 15 December 2004, in respect of "historical agreements where the balance between the parties is heavily distorted to the severe detriment of the Polish side, coupled with the PKWN's doubtful legitimacy, this governmental body undertook a public obligation that land losses sustained by Polish citizens relocating of their own accord or relocated from the territories of the Byelorussian SRR, Lithuanian SRR and Ukrainian SRR would be compensated by the Polish state to those Polish citizens who would find themselves within the contemporary boundaries of Poland. Realization of assurances contained in the Republican Accords necessitated taking appropriate domestic legislative and administrative action".

In these words the Tribunal recognized that the claims under the Republican accords have their source in international law, at the same time ruling decisively that the essence of the constitutional problem triggered thereby pertains to obligations that the state has committed to in accordance with its law towards its citizens. This gave rise, on the part of the legislator, to a duty to introduce into the domestic system laws aimed at redressing any claims owners of land formerly within the bounds of Poland may have. Under the condition of constitutional

land-Soviet Union treaty relations through a confirmation by the PGNU, an authority commonly recognized and authorized to represent Poland on the international plane. See: R. Kwiecień, *Charakter prawny i znaczenie umów repatriacyjnych z 9 i 22 września 1944 roku*, "Przegląd Sejmowy" 2005, issue 4, pp. 11–13.

[16] R. Kwiecień, *Charakter prawny*..., pp. 20–21; K. Michniewicz-Wanik, *Mienie*..., pp. 59–60.

[17] The same inference was drawn by the Tribunal under the Constitution of the Polish People's Republic by reference to the legal construction of the Accords as "their provisions pertain, first and foremost, to the mode and timeline of evacuation of the people outlined therein and the rules governing the keeping of records of the assets abandoned by those people outside of the Polish territory. These agreements do not contain more detailed regulations concerning the rules and mode of granting compensation for immovable property left outside of the Polish borders" (judgment of the Constitutional Tribunal of 10 June 1987, ref. number P 1/87, OTK ZU 1987, item 1).

transformation in 1989 another circumstance should be noted, that is the dilemma to what extent and in what form the new democratic state should be responsible for non-performance or improper performance of the obligations of the Polish People's Republic.

On account of the above considerations, the Zabużanie peoples' problem detaches itself slightly from classic restitutive justice which constitutes, in and of itself, one of the most significant and difficult elements of transitional justice[18]. Naturally, the problem reflects, to a certain extent, traditional dilemmas related to attempts to deal with the past through the use of legal instruments. It bears testimony to the tension between justice and legal certainty. Nonetheless, the peculiarity of obligations generated by the Republican Accords, the historical context of their inception and, above all, the reality of their later recognition at a time of constitutional transformation gifted it with another dimension.

Consequently, it appears warranted to surmise that the essence of the constitutional dispute around the Zabużanie people's property comes down to determining the meaning of performance of these obligations for legitimacy of the new democratic order. For the legislature of the Third Polish Republic unilaterally adopted a number of assurances from the Republican Accords, affirming the continuity of state obligations. In this context it is key to identify those constitutional values which should serve as the foundation for assessment of state actions towards the Zabużanie people.

3. REALISATION OF ZABUŻANIE PEOPLE'S CLAIMS

1. As noted above, the Republican Accords virtually brushed aside the property (or financial) issues related to repatriation, merely mentioning them in general terms. The Accords with Belarus and Ukraine envisaged that "the value of properties left after evacuation" is to be refunded to the relocated pursuant to an "insurance assessment" under the laws in force at the time in Poland and the interested republics, and where no such laws existed – "assets are to be assessed by the proxies and representatives of the parties". It must be stressed that the Republican Accord with Lithuania reserved explicitly that these principles applied merely to movables, to the exclusion of "land" abandoned due to evacuation. All the Accords contained a declaration of the PKWN to the effect that the relocated farmers "will receive land of a size prescribed in the Act on

[18] R. G. Teitel, *Transitional Justice*, New York–Oxford 2002; A. Czarnota, M. Krygier, *Po postkomunizmie – następny etap? Rozważania nad rolą i miejscem prawa*, "Studia Socjologiczne" 2007, issue 2, p. 185.

the Agricultural Reform" and "peasants who relocate to Poland, even if they do not possess land at the time of relocation, they will receive, upon their wish, an allotment of land under general rules". In addition, the Zabużanie people were to benefit from empty "houses in towns and country neighbourhoods" following the relocation of Germans.

These and other representations and assurances made in the Republican Accords compelled the Constitutional Tribunal to establish that compensation promised therein "had the character, first and foremost, of "aid", predominantly of social nature (and not only indemnificatory) which provided Polish citizens with a new starting point in life after they lost all the assets they left behind outside of the newly found boundaries of the state. Compensation, in accordance with the Accords, was to be allocated only to citizens of the Republic of Poland (under the law as it stood on 1 September 1939) of Polish and Jewish nationality who – by deciding to migrate to the territory of Poland within its boundaries post-World War II – thereby manifested their bond with the Polish state and nation".

Already in its first judgment of 19 December 2002 the Tribunal, which scrutinized various specific institutional arrangements governing the performance of the promised benefits, acknowledged both the scale of obligations undertaken by the Polish state by means of the Republican Accords and the bleak economic post-war reality, all of which made it so that "the process of providing compensation to repatriates declared in the agreements concluded with the USSR and the Soviet Republics had to be moderate and staggered over time". Considering the difficult economic situation of the state and all social groups, the Tribunal conceded that under such conditions it could not be determined in advance that "partial compensation, limited in time or of a special character, was by its nature inconsistent with the principle of justice. This inference applies also to mechanisms which dictated merely partial compensation for losses sustained due to warfare activities and territorial revisions".

It was the opinion of the Tribunal that the nature of the obligations under the Republican Accords moves towards a wide margin of discretion of the legislator in determining the rules of compensation. However, evidently, the exact legislative structure of the manner and scope of compensation was determined – alongside the provisions of the Republican Accords themselves – by solutions that had been adopted in the field in the past.

2. Before 1989, a number of legislative acts regulated the acquisition of state assets as an equivalent for assets left behind in the Eastern Borderlands. The enactments availed themselves of the notion of the so-called right of offsetting which granted the Zabużanie people the right to offset the value of land abandoned outside of the eastern border of Poland against the value of land received

in Poland (usually the sale price or fees for perpetual usufruct)[19]. The mechanism has been retained after 1989[20].

It was not until the Compensation Act of 2005 that provided for an option for the Zabużanie people to obtain compensation in pecuniary form. As a result, an entitled person – depending on their choice – could either offset the value of land abandoned outside of the eastern border of Poland against the sale price of land owned by the State Treasury, the sale price of perpetual usufruct belonging to the State Treasury, fees for perpetual usufruct over the State Treasury's land and the sale price of buildings thereon and other equipment or premises, fees for transformation of perpetual usufruct into freehold ownership of land belonging to the State Treasury, or opt for a payment from the Compensation Fund. Both modes of compensation were capped at 20% of the value of the abandoned land.

[19] Such a mechanism was prescribed in: Article 23(1) of the Decree of 6 September 1946 on the Agricultural System and Settlement in the Recovered Territories and the Former Free City of Gdańsk (Polish Official Journal of Laws, No. 49, item 279, as amended); Article 9 of the Decree of 6 December 1946 on the Transfer by the State of Non-Agricultural Land in the Recovered Territories and the Former Free City of Gdańsk (Polish Official Journal of Laws, No. 71, item 389, as amended); Article 14 of the Decree of 10 December 1952 on the Grant by the State of Immovable Non-Agricultural Property for Construction of Housing Estates and Detached Family Houses (Polish Official Journal of Laws, No. 49, item 326); Article 12 of the Decree 18 April 1955 on the Emancipation and Regulation of Other Matters Related to the Agricultural Reform and Agricultural Settlement (Polish Official Journal of Laws, No. 18, item 107, as amended) – offsetting under this law took place "without settlement or estimation"; Article 8 of the Act of 28 May 1957 on the Sale by the State of Housing Premises and Building Plots (Polish Official Journal of Laws, No. 31, item 132, as amended); Article 17b of the Act of 14 July 1961 on the Management of Land in Towns and Neighbourhoods (Polish Official Journal of Laws, No. 32, item 159, as amended), added to the Act on 25 April 1969; Article 88 (Article 81 since 10 April 1991) of the Act of 29 April 1985 on the Management of Land and Expropriation (Polish Official Journal of Laws, No. 22, item 99, as amended).

[20] It has been envisaged in the following: Article 16 of the Act of 10 June 1994 on the Management of State Treasury's Property Took Over from the Military of the Russian Federation (Polish Official Journal of Laws, No. 79, item 363, as amended); Article 212 of the Act of 21 August 1997 on the Management of Property (Polish Official Journal of Laws, No. 115, item 741, as amended); Article 6 of the Act of 4 September 1997 on the Transformation of the Right of Perpetual Usufruct Belonging to Natural Persons into the Right of Ownership i (Polish Official Journal of Laws, No. 123, item 781, as amended); Article 3 of the Act of 12 December 2003 on Offsetting the Value of Property Abandoned Abroad Against the Sale Price or Fees for Perpetual Use of State Treasury's Land (Polish Official Journal of Laws, No. 6, item 39, as amended; hereinafter: the Act on Offsetting).

4. THE CONSTITUTIONAL STATUS OF THE RIGHT OF OFFSETTING AND THE ADMISSIBILITY OF ITS STATUTORY LIMITATIONS

1. In later judgments the Tribunal consistently upheld its original view on the nature of the obligations under the Republican Accords. However, its final pronouncement on the matter significantly titled the balance between the social and compensatory aspects of compensation. The first judgment in the series (ref. number K 33/02) qualified the right of offsetting as a self-contained public property right of a special character subject to – as a peculiar surrogate of the right of ownership – protection under Articles 64(1) and 64(2) of the Constitution and Article 1 of Protocol 1 to the European Convention of Human Rights (hereinafter: the ECHR).

The Tribunal also reserved, at the outset of its reasoning, that it is not for a constitutional court to assess "the degree to which an enforceable right of offsetting could eliminate the harm sustained by a loss of property in the Eastern Borderlands. A solution to this problem must be crafted by the legislator as it concerns the general problem of evening losses born by different groups of people as a result of decades-long territorial changes throughout history and ownership transformations having occurred several tens of years ago. What may be assessed, however, is the manner of protection of the property right accorded to citizens by the legislator. For it generated a fully legitimate expectation on the part of the Zabużanie people to the extent that the state recognizes an autonomous compensatory obligation of the state".

In subsequent judgments the Tribunal set out to verify specific limitations, both objective and subjective, of the mentioned right by singling out those elements that, in its estimation, step markedly beyond the margin of discretion left to the legislature.

2. In respect of the first group of limitations of the right of offsetting, the Tribunal admitted the lawfulness of moderating the amount of compensation for reasons related to public interest and the principle of common good (Article 1 of the Constitution), stating that one of its permanent elements is, *inter alia*, preservation of the ability of the state to perform its fundamental obligations. It is necessary to take into account the limited financial capabilities of the state when moderating compensation for morally justified claims of the displaced. The Tribunal's declarations on its willingness to also consider – for the purposes of solving the issue of offsetting – issues of an economic nature exposed it to critical remarks and accusations of diminishing the importance of justice in dealing with the past at the expense of the financial condition of the state[21].

[21] A. Młynarska-Sobaczewska, *Odpowiedzialność państwa polskiego za mienie zabużańskie*, "Państwo i Prawo" 2010, Vol. 2, p. 64.

Notwithstanding, it appears that the Tribunal's restraint in assessing the scope of compensation due should generally be viewed positively. Setting aside the indisputable difficulties with evaluating the economic capabilities and efficiency of the state as regards performing such obligations[22], this restraint is justified by considerations of the strictly political nature of disputes around economic consequences of restitutive justice. It is inconceivable to avoid questions about who is going to bear the cost of restitutive justice, particularly at a time of constitutional and economic transformation. As uniquely political matter, this issue is reserved primarily for a democratically elected legislator. No Central Eastern state has successfully grappled with it, and research shows that neither utilitarian nor arguments from justice and equity can outweigh the fiscal realities, largely due to political divisions set against the background of limited financial capabilities and a myriad of entangled and often conflicting interests[23]. More generally, one could see the limited utility of law as an exclusive instrument of dealing with the past, one which, in such circumstances as the above, must reconcile the requirements of ideal justice and political realism[24].

What deserves to be emphasized is the specificity of the Zabużanie people's property problem in a far broader context of restitutive policy. In the case of reprivatisation, it is the state that is responsible for compensation as it was a beneficiary of the performed expropriation. The legal context of the Republican Accords was different. The Polish state did not benefit from ownership transformations occurring at the time, but it undertook a one-sided obligation to assist those citizens who lost their assets in the Eastern Borderlands to the benefit of third states.

The Tribunal clearly distinguished between the historic and legal circumstances of the Zabużanie people and the victims of post-war nationalization. Whilst the former "did not have their property rights or management of assets compulsorily seized by either the Polish state or its institutions (…) There are no grounds for holding that the revision of territorial borders, which ended up harming the Zabużanie people, was contributed to in any way by the Polish state. These assets landed in the hands of the Byelorussian SSR, Lithuanian SRR and Ukrainian SRR, respectively (and state successors thereof). The character of the compensation for the value of the abandoned assets by the Polish state has never been, and is still not, that of an indemnification (in civil terms) for assets expropriated *de facto* (or without a legal basis), but constitutes *sui generis* financial assistance

[22] This was noted by the Tribunal in its judgment of 15 December 2004, in which it admitted that "there are no means nor tools to attempt an establishment of a scale of justified restrictions. It requires a meticulous and reasonable decision of the legislator to opt for a relevant determinant and 'balance' between protection of the rights of the Zabużanie people and capabilities of the state as well as protected constitutional values".

[23] W. R. Youngblood, *Poland's Struggle for a Restitution Policy in the 1990s*, "Emory International Law Review" 1995, issue 9, pp. 676–677.

[24] R. Teitel, *Transitional Justice*, New York, Oxford 2002, p. 213.

for Polish citizens who happened to have been relocated onto the current territory of Poland" (ref. number K 2/04).

This distinction is reflected in the character of state obligations towards these groups, and hence, *eo ipso*, in the margin of discretion to be accorded to the legislator as regards determining the principles of compensation. Ultimately – as the Tribunal stated in its final judgment on the matter (ref. number SK 11/12) – the scope of obligations of the state "towards Polish citizens disadvantaged in this way is much smaller than that applicable to persons who were expropriated by virtue of legal pronouncements enacted by the Polish State following World War II".

This is not to say, however, that the Tribunal declined to examine the constitutionality of the offsetting mechanism. Criticism was levelled against the uniform cap on all pay-outs set at 50,000 PLN[25]. These restrictions were held to be excessive and socially unjust, and, in particular, inconsistent with the principles of protection of vested rights and trust of citizens towards the state. What was decisive to reach that conclusion was the fact that the legislator failed to indicate the factors it guided itself by in exerting such a clear interference with the right of offsetting. The Tribunal in its judgment of 15 December 2004 (ref. number K 2/04) deemed the amount limits "not sufficiently justified and too arbitrary, and therefore – falling short of the requirements in Articles 2, 31(3) as well as Article 64(2) of the Constitution". Moreover, the Tribunal held that the institution of a uniform amount limit of 50,000 PLN led to unequal treatment of the entitled persons (Article 32) and to equal protection of their property rights (in breach of Article 64(2)) since "those entitled to compensation, in case of whom the value of abandoned assets surpasses 50,000 PLN, could obtain full repayment (in relation to the entirety of the abandoned property), whilst those with the right of offsetting amounting to a larger sum – only partial repayment (or even merely fractional)". It was significant for the Tribunal that all the regulations concerning compensation hitherto had not envisaged such limitations.

In the same judgment the Tribunal negatively assessed the deprivation by the legislator of the right of offsetting in relation to people who, pursuant to other provisions of the law, obtained ownership or perpetual usufruct of a property which value was lower than that of the right of offsetting (thus only partially executing their right of offsetting)[26]. Held to be in contravention of the constitutional principle of equal protection of property rights (Article 64(2) of the Constitution), it introduced a hardly definable, vague criterion of limitation (falling foul of Article 64(1)). This in turn, led to discrimination of those who, before the entering into force of the 2003 Act, took steps aimed at executing their right of offsetting.

[25] The Tribunal examined Article 3(2) of the Act on Offsetting and Article 53(3) on the Act of 30 August 1996 on Commercialization and Privatization (Polish Official Journal of Laws of 2002, No. 171, item 139, as amended).

[26] This was regulated by Article 2(4) of the Act on Offsetting.

Ramifications of this arrangement must have been, in the eyes of the Tribunal, socially unjust and undermining of the principle of trust of citizens towards the state, which was all the more deplorable as the legislator had in the past attempted to provide an incentive to the Zabużanie people to pursue claims for offsetting under the threat of losing that right if not raised within a specified time period.

Remarkably, in the K 33/02 judgment the Tribunal examined not only the formal structure of the provisions governing the right of offsetting, but also their normative context which allowed it to fully appreciate and distil the meaning of rights to be derived therefrom. As the Tribunal pointed out the forms of compensation prescribed by the legislator may vary, however they must be tangible and proportionate.

"Functional antinomy" is a term the Tribunal used to describe the state of the currently existing legislation on the matter. Relevant was the practical functioning of the key laws (their context and the circumstances of executing the right of offsetting in practice). Critique was aimed at the parliament's practice of excluding new types of property from the ambit of the right (assets belonging to the Treasury Agricultural Property Stock and the Military Property Agency). That practice, compared to a situation where a debtor disposes of their property, had been an object of intense criticism of academic writers[27].

In the face of a lack of a real possibility of using the right of offsetting, it became, as the Tribunal put it, an "empty obligation" (*nudum ius*). Availability of the right was evaluated "not only by reference to exclusions of certain properties from its ambit for any reason, but the real chances of executing the right as well as its economic value. The Acts of Parliament which decreased the availability of the State Treasury's land to the Zabużanie people have, in essence, led to their expropriation as they are not, and will not, be able to benefit from their right". Whereas "an assessment of the possibility to execute this right is the more significant as the legislator – accepting as a rule the existence of obligations towards the Zabużanie people by virtue of international agreements – at the same time did not execute any alternative compensatory mechanisms. The right of offsetting was, for decades, the sole (*de lege lata*) solution at the disposal of the Zabużanie people to obtain compensation for material loss they sustained as a result of territorial revisions in the 1940s".

3. Of significance in the Tribunal's case law have been considerations about legislative limitations of the scope of recipients entitled to benefit from compensation (subjective limitations). First, scrutiny was lent to the requirement that the Zabużanie people or their successors, to execute their right of offsetting, had to permanently reside within the territory of Poland as of 30 January 2004 (the date

[27] P. Łaski, *Refleksje*..., p. 49.

the Act on Offsetting entered into force), 60 years after the Republic Accords were signed[28]. It was held to be unreasonable and arbitrary in the K 3/04 judgment.

The Tribunal stressed that no previous regulation concerning compensation envisaged such a restriction. The provision, consequently, breached the principle of proportionality (due to limitation of the right to offsetting for reasons other than those specified in Article 31(3) of Constitution), as well as Article 32 (unequal treatment of potential recipients due to their residence inside or outside the territory of Poland) and Article 64(2) (excessive distinctions as regards protection of property rights of the Zabużanie people).

The domicile requirement, i.e. that the displaced must have lived within the territory of Poland as of 1 September 1939 (present in both the Act on Offsetting and the Compensation Act of 2005), was also negatively assessed[29]. The prerequisite was examined as part of proceedings commenced upon a claim of one of the Zabużanie people's heir. In the SK 11/12 judgment the Tribunal denied that the domicile requirement appeared in the Republican Accords, which referred to people "resident" in the Eastern Borderlands, and no specific date was indicated therein. Institution of the domicile requirement in subsequent enactments "constitutes an unwarranted limitation of the rights of the Zabużanie land owners to compensation for abandoned assets – both by reference to the Compensation Act and the legal situation between 1955–2003".

The Tribunal contended that the domicile requirement "serves to tailor the Zabużanie people's compensation to the budgetary capabilities of the state which is – on account of the source of the obligations in question – constitutionally impermissible". The judgment referred to historical arguments to interpret the legal context of repatriation processes. In Interwar Poland, it was stated, the scope of protection of land ownership did not depend on one's place of residence and that – according to interwar provisions in force till the sixties of the 20th century – having more than one place of residence was permitted. The Tribunal did not avoid calling upon the reality of the time at which the Zabużanie people's displacements occurred. The Tribunal recognized the fact that before the Second World War, many workers travelled to the place of business of their employer, as well as the fact that workers' migration waves were connected with sizable state investments undertaken at the time. It was extremely unjust to predicate the availability of compensation upon the residence requirement where it was the state itself whose actions prompted citizens to move, often large distances. The Tribunal's reasoning also drew upon the principles of reasonableness and life experience, in line with which "in most cases a change of place of residence without selling the previous property manifested that the person concerned intended to return to the Eastern Borderlands".

[28] This requirement was instituted by Article 2(1)(3) of the Act on Offsetting.

[29] As per Article 2(1)(1) of the Act on Offsetting and Article 2 point 1 of the Compensation Act of 2005.

The requirement, in conclusion, was struck down by the Tribunal as excessive, falling in contravention of Article 61(2) in conjunction with Article 31(3) of the Constitution. Interestingly, the Tribunal considered the principle of social justice fit to constitute a lens through which the challenged provisions should be assessed, as well as the principles of trust towards the state and the law enacted thereby, even though the complainant did not argue those principles in their written case.

5. TIME FACTOR IN THE CONTEXT OF THE LEGISLATIVE DISCRETIONARY POWER

1. Judging by the reasoning and outcomes of the Constitutional Tribunal's pronouncements analysed above, two significant tendencies are discernible. As for both, it appears, the time factor holds considerable weight.

First, the Tribunal moved away from emphasizing the social character of compensation towards a more indemnification-centred analysis. In the final judgment it was affirmed that compensation for the assets abandoned in the Eastern Borderlands is not to be understood as compensation for expropriation under Article 21(2) of the Constitution. For "the right to that benefit is "derivative" from the lost right to Kresy property only in the sense that possession of a legal title to the abandoned assets is one condition for obtaining compensation". With regard to the indemnificatory element, the Tribunal noted its distinction from compensation envisaged in Article 21(2), holding that "both functions of compensation in issue in this case shall be assessed by reference to the time that has passed since the Zabużanie people were deprived of their property".

In the aforementioned final judgment the Tribunal accorded more weight to the indemnificatory character of the compensation. First, it was noted that the structure of compensation prescribed in the Compensation Act of 2005 was far from that of a welfare benefit. "The challenged act (as well as its predecessors) (…) does not grant 'any settling-in assistance' to the victims of expropriation who did not own property in the Eastern Borderlands, but only lived there all their lives on leased, rented or otherwise licensed premises and were at all times in a worse economic situation than those entitled to compensation (…). Compensation (and, previously, the right of offsetting) were always granted to all Zabużanie people under equal rules, regardless of how big of a percentage of their overall assets the abandoned land constituted". The Tribunal buttressed this line of reasoning with the fact that the amount of compensation is calculated with respect to the value of the abandoned assets, whilst social benefits normally represent a lump sum. Also, the right to have one's entitlement to compensation is sub-

ject to succession. In the assessment of the Tribunal "the challenged legislation permitted granting compensation in cash should be assessed rather as the sign of strengthening the compensatory role of these rights, but not their social character. Exercise of the right of offsetting 'necessitated' that the compensation be, at least temporarily, directed to obtaining a right of ownership or perpetual usufruct over land as a primary good"[30].

Second, I wish to draw attention to the Tribunal's perspective on the margin of discretion accorded to the parliament when it comes to regulating compensation. Initially, the Tribunal declared restraint in this issue, stating that balance must be struck between numerous factors surrounding restitution disputes (i.e. justice and legal certainty). With time, however, as evinced especially in the final judgment, the Tribunal resorted to more formalized means of examining the legislator's discretion. Calling upon L. Fuller's principle of internal morality of the law, the Tribunal applied a more rigorous construction of the domicile requirement, thus stressing that instrumental effectiveness of law should not overshadow its legitimacy in a democratic state.

Subsequent judgments of the Tribunal have tended to show that as time passes and the foundations of the democratic state strengthen, the legislator's margin of discretion as regards the Zabużanie people's property issue shrinks. Particularly, the shortcomings of the challenged legislation were said, in the final judgment on the matter, to deserve "distinctly strong criticism also because the law attaches to a certain, constantly diminishing, group of people whose age and state of health may impede them in executing their rights".

6. THE SIGNIFICANCE OF THE BRONIOWSKI V. POLAND CASE BEFORE EUROPEAN COURT OF HUMAN RIGHTS

1. The international context played a critical role in solving the Zabużanie people's problem in the Third Polish Republic. Of particular importance were

[30] A clear shift towards accepting the indemnificatory character of compensation signifies a turn in the position of the Constitutional Tribunal in this respect and as such it failed to win unanimous approval among the members of the adjudicating panel. For an analysis of the preparatory works on the legislation does not yield support to the opinion that the legislator changed its outlook on the issue. It appears that rather it was intended to expedite the process of execution of the Zabużanie people's claims by introducing a direct manner of compensation in the form of money payments. Judge Z. Cieślak in his dissenting opinion stressed that to say that compensation is to indemnify the entitled families for difficult financial conditions they had to suffer in the past constitutes "a departure from internationally established and accepted legal foundations of the provisions in question and unwarrantedly distorts the purpose and function of the law, encroaching upon the margin of discretion of the legislator".

Poland's obligations given rise to due to the adoption of the ECHR. Once the jurisdiction of the European Court of Human Rights (ECtHR) has been recognized, Zabużanie people's claims could be assessed through the prism of applicable international standards. The culminating point was the case of *Broniowski v Poland* (Application No. 31443/06), the judgment in which was issued on 19 December 2002[31].

It shall be stressed that as the jurisdiction of the ECtHR is limited, a broader, moral-political approach to the legal problem before it was barely feasible. Already at the outset of the judgment the Court asserted that it was not its task to consider any legal, moral, social, financial or other obligations of the Polish state stemming from the fact that the Zabużanie people were deprived of their assets by the Soviet Union after World War II and forced to migrate.

The Court felt it was in its right to consider only whether Article 1 of Protocol 1 (the right to property) was violated as a result of the actions and omissions of the Polish government as against the execution of the right of the complainant to compensation he was entitled to under Polish legislation in force at the time Protocol 1 was enacted. The Court – by reference to the findings of the Polish Constitutional Tribunal and domestic common courts – held that the complainant's rights were of a sufficiently property character to come within the ambit of Article 1 of Protocol 1.

Legality and efficiency of the pertinent Polish regulations were examined, particularly as to there being a balance between the interests of an individual, whose rights have been violated, and the general interest, for the benefit of which given restrictions were instituted. The Court opined that a state undergoing a political and economic transformation has a wide margin of appreciation when it comes to shaping the law and introducing restrictions and limitations as regards its citizens' property rights. Among the aims pursued by the challenged legislation, which impeded the complainant's claim, were: reintroduction of a system of local government (it resulted in a communalization of land that could potentially be included in compensation), restructuring of the agricultural sector and acquisition of financial means to modernize military institutions, something lying in the interest of the general public. This, however, in the opinion of the Court, could not justify the reality that the Zabużanie people were not entitled to an equivalent despite binding domestic legislation providing them with that right. Compensation awarded to the complainant in the *Broniowski* case amounted to just 2% of the value of the property left behind, which is way out of balance. The principles which underpin the ECHR, particularly the rule of law and legality, require states not only to obey, respect and apply domestic legislation in a predict-

[31] For more on this, see: M. Krzyżanowska-Mierzewska, *Sprawa mienia zabużańskiego przed ETPCzP*, "Europejski Przegląd Sądowy" 2008, issue 12; P. Leach, *Beyond the Bug River – A New Dawn for Redress Before the European Court of Human Rights*, "European Human Rights Law Review" 2005, issue 2.

able and coherent manner, but also to ensure proper legal and factual conditions for its execution.

2. The judgment in *Broniowski* is relevant not only to the Zabużanie people's question, but, more broadly, to the development of an international system of protection of human rights in Europe. For in the case the Court resorted, for the first time, to a procedural device since dubbed a "pilot judgment"[32]. It was stated that at the root of every violation of an individual right lies a systemic problem whose source is the content of the law, hence it is the case that not only the complainant, but a wider group of people is affected by the violation.

The pilot judgment procedure was aimed at identifying structural problems that could give rise to recurrent violations of rights guaranteed by the ECHR. The judgment in *Broniowski* was, without a doubt, an impulse for the Polish legislator (acted upon in the form of the enactment of the Act on Offsetting in 2003) to adopt new legislative norms that the Court considered effective. As a consequence, subsequent analogous cases were dismissed by the ECtHR[33]. As evinced by the Constitutional Tribunal's judgment of 15 December 2004, however, the Act on Offsetting was defective and was held to be partially in defiance of the Constitution.

Judgments in cases concerning the Zabużanie people could serve as a model example of judicial dialogue. The question was considered almost simultaneously by the Polish Constitutional Tribunal and the ECtHR, which availed themselves of each other's reasoning to buttress their arguments. Judgments of both courts prompted the legislator to enact new laws. Also, the synergy conduced to entrenching the legitimacy of both courts[34]. *Broniowski* and other pilot judgments (e.g. *Hutten Czapska v Poland*) marked an important step in the development of the European system of human rights. Beforehand, what lay at the core of the ECtHR's control mechanism was an individual complaint, which caused the institution to be perceived as a superior court to which complainants resorted only after they exhaust all domestic avenues of appeal. Adoption of a broader, more systemic approach to the Court's determinations moved it closer to a European

[32] For more on this, see: E. Lambert-Abdelgawad, *La Cour européenne au secours du Comité des Ministres pour une meilleure exécution des arrêts "pilotes" (en marge de l'arrêt Broniowski)*, "Revue trimestrielle des droits de l'homme" 2005, issue 61, pp. 203–224; L. Garlicki, *Broniowski and after: on dual nature of pilot judgments*, (in:) S. Breitenmoser, B. Ehrenzeller, M. Sassoli, W. Stoffel, B. Wagner Pfeifer (eds.), *Human rights*, *democracy and the rule of law: liber amicorum Luzius Wildhaber*, Zürich 2007, pp. 177–192.

[33] It was in this way that application of a pilot procedure eased the burden on the system of protection established in the Convention, thus preventing an institutional paralysis of the ECtHR.

[34] W. Sadurski, *Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights*, *the Accession of Central and East European States to the Council of Europe*, *and the Idea of Pilot Judgments*, "EUI Working Papers LAW" 2008, No. 33, pp. 35–36.

constitutional court, endowing its judgments with a more generally applicable dimension[35].

7. TRUST AS THE FOUNDATION AND SYMBOL OF CONSTITUTIONAL TRANSFORMATION

1. The case law of the Strasbourg court, although it did provide an impulse for *ad hoc* activity of the legislator, could not replace it in an inevitable attempt to solve a complicated moral and social dilemma that compensation for the Zabużanie people's property represents. The Constitutional Tribunal must have limited its inquiry to the constitutional boundaries of the legislator's discretion. In other words, the judiciary could not substitute for the legislature in resolving this pressing and complex moral, political and economic conundrum.

Already in its first judgment (ref. number K 33/02), the Constitutional Tribunal explicitly noted that, in constitutional terms, the issue of compensation for the Zabużanie people cannot be "boiled down to redressing the injustice sustained by those people under a totalitarian regime". The political and constitutional problem at stake could be broken down to a question about the scope of responsibility of a contemporary democratic state that is the Third Polish Republic for actions and obligations undertaken by a non-democratic regime operating without proper legitimacy[36]. Aside from other specific constitutional minutiae, the Tribunal stressed time and time again that the Zabużanie people's claims should be examined in the context of the principle of trust of citizens towards the state and the law enacted thereby.

This perspective should not be surprising as the above judgments touched upon the problem of symbolic and legal continuity of a state during a time of constitutional transformation[37], which had an unprecedented impact upon the

[35] J. L. Jackson, B*roniowski v. Poland: a recipe for increased legitimacy of the European Court of Human Rights as a supranational Constitutional Court*, "Connecticut Law Review" 2006, Vol. 39, issue 2, pp. 759–806; W. Sadurski, *Partnering*..., pp. 43–46.

[36] *Cf.* A. Młynarska-Sobaczewska, *Odpowiedzialność*..., p. 57; P. Łaski, *Refleksje*..., p. 42.

[37] It was already in the K 33/02 judgment that the Tribunal added the so-called discontinuation principle to the group of relevant exceptions and for anyone to successfully call upon it would require a clear declaration of the legislature. This view is lent support to by academic writers who have argued that pre-1989 legislation was, post transformation, adopted with reservations, which does not equate granting legitimacy to the 1944–1989 regime, but merely recognizes the effects of then-enacted legislation (including obligations the Polish People's Republic undertook towards its citizens), except those irreconcilable with the rule of law. It has been observed that "[in] the area of public law, giving effect to legal relations should depend upon whether they were intended to serve the common good or an equitable individual interest worthy of protection, or whether they constituted an element of an institutionalized system of repression or state dominance", so writes:

legitimacy of the new political-legal order. For the legislator of the Third Polish Republic affirmed the availability of the right of offsetting against the value of acquired ownership or perpetual usufruct rights, thus formally taking over (inheriting) previous obligations owed to this particular group of citizens. In this way the principle of trust actualized as a social value and an object of legal protection, rightly described by sociologists as "the missing link of the Polish transformation"[38]. For the Zabużanie people trust connoted a particular reaction both towards the state, undergoing a radical constitutional transformation, and the law as an instrument of social change.

The citizens' sense of belonging and identification with a wider polity is an inextricable element of the value of trust towards the state. Corresponding with it is the duty of public authorities to protect the polity's members. Although, from a legal standpoint, they are, most of the time, obligations of the *ex gratia* type, they play a pivotal role in the trust-building process[39]. It must be remembered that any legislative attempts aimed at redressing harms deeply entrenched in history must not only balance all the relevant interests in a reasonable manner[40], but also manifest respect for all those affected by injustice. There is hardly a better test of trust than keeping a promise made to the victims. Trust is not attained by enacting irrational, dysfunctional, "emptied out of content" or even ostensible regulations. This may be a reason why the Tribunal has applied an increasingly more rigorous standard of assessment of the relevant legislation.

The stringency of the Tribunal's interpretation could be explained by the fact that the Zabużanie people's issue was a litmus test to the entire restitutive policy of the Third Polish Republic. For the Tribunal had no point of reference to rely on in its determination – the legislator had failed to institute any systemic laws regarding reprivatisation. Hence some have alleged that, paradoxically, the Zabużanie people were privileged by the parliament.

The Tribunal accepted that, notwithstanding the above reservations, the obligations undertaken in the Republican Accords have the character of public promise, which was said to have justified the "references" to the Accords in legislation establishing the right to compensation. The Tribunal also pointed to specific constituent elements of the rule of law which impose certain restrictions on the legislator's discretion. Primarily, it held that it was necessary to "estimate, in a complex and diligent manner, the possibility of there occurring a real, comprehensive and, as far as possible, final redress of any and all claims arising by virtue of the right of offsetting, as well as whether it is possible

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K. Zaradkiewicz, *O obowiązku zadośćuczynienia zabużanom*, *czyli o problemie lojalności państwa i obywatela*, (in:) M. Zubik (ed.), *Prawo a polityka*, Warszawa 2007, p. 256.

[38] P. Sztompka, *Zaufanie: brakujące ogniwo polskiej transformacji*, "Odra" 2009, Vol. XLIX, issue 3.

[39] K. Zaradkiewicz, *O obowiązku*..., pp. 254, 257.

[40] Z. Ziembiński, *O pojmowaniu sprawiedliwości*, Lublin 1992, pp. 183–184.

to enact constitutionally compliant statutory provisions which would eliminate any obstacles and improprieties in the actions of public authorities" (ref. number K 2/04).

It is a natural element of building trust to a new order that all laws prone to being classified as arbitrary (if only due to insufficient justifications for their existence) are repealed. The sentiment found its strongest expression in the SK 11/12 judgment, where the Constitutional Tribunal opined: "If the parliament decides to introduce benefits that are not absolutely required by the Constitution, it must reasonably and cautiously determine all the conditions governing their inclusivity and exclusivity. In particular, it is impermissible to resort to such access criteria that are arbitrary and detached from the purpose of a given regulation, albeit easy to apply and verify". These declarations of the Tribunal, it is submitted, shall be read chiefly as a protest against the practice of instrumentalisation of law, so characteristic of the previous political regime.

8. SOLIDARITY AS A MISSING LINK OF SYSTEM TRANSFORMATION

1. The fact that the Constitutional Tribunal clearly accentuated the principle of citizens' trust towards the state and the law enacted thereby may be interpreted as a step towards a far-reaching and long-term goal of building stable foundations of the rule of law which recognizes "inherited" obligations and performs them diligently and with respect for the victims. It was an aspiration for the post-Communist Poland to settle with the past obligations which, in turn, would prove the authenticity of the constitutional transformation[41].

Whereas the Tribunal's reasoning heavily featured the principles of common good (to justify the moderation of claims) and formal requirements of the rule of law (to assess the margin of discretion of the legislature), what appears to have been missing from the debate around the Zabużanie people's property is the constitutional principle of solidarity[42].

[41] A. Młynarska-Sobaczewska notes in this context that the type of responsibility stemming from Bug River property claims may be referred to as liability *ab initio*. See: A. Młynarska-Sobaczewska, *Odpowiedzialność*..., p. 69.

[42] Solidarity as a value is featured both in the preamble to the Polish Constitution of 1997, where "the obligation of solidarity with others" is imposed upon those who apply the Constitution, and in Article 20, as an element of the principle of social market economy.

Solidarity connotes an imperative context for determining complex problems straddling the border between politics and law[43]. It is hardly disputable that it lays at the core of the state's initial obligation undertaken towards the Zabużanie people – the goal was to include this group of citizens in the newly born polity. At a time of political transformation solidarity's relevance gained more value. By referring to solidarity the integrating function of law, crucial at a time of systemic changes, could have been bolstered strengthening the spirit of the community in confrontation with its difficult past. In this way, the idea of solidarity could be an axiological foundation for policy of transitional justice.

In practice, however, fragmentary, forced and often inept legislative attempts resulted in reducing the complex issue of the Zabużanie people, within the constitutional discourse, to protection of individual property rights. Subsequent legislative solutions were adopted as a reaction to domestic and international courts' objections. Whereas, the legislator had no comprehensive plan for solving this issue. The adopted approach, acceptable in the context of resolving conflicts of constitutional rights in established democracies, seriously hampered any efforts to bring the problem within the scope of transitionary justice. Neither did it release the community-building potential residing in a reflection on the ways of surmounting the issue.

It is pertinent to note at this point that the lack of conscious restitutive policy based upon solid theoretical foundations was a general feature of transformation in all Central Eastern European states. It was the liberal understanding of the right to property that underpinned the transition[44]. In the case of the Zabużanie people, due to the dearth of arguments drawing upon other important constitutional values and principles, on which the state restitutive policy could be based, the argument from the right to property must have gained the most prominence. This is probably why there was an observable shift in the approach of the Constitutional Tribunal towards a more indemnificatory character of the Zabużanie people's compensation. The limited jurisdiction of the ECtHR contributed to this narrow approach.

Conversely, it is submitted that, in the context of a political transformation, solidarity could yield a wider axiological foundation for a budding legal order than protection of property rights, in practice accorded not to the directly affected but to their successors. The Constitutional Tribunal, however, did not tackle this

[43] It must be stressed that this argument has been prominent is the constitutional discourse of West Germany where, in line with the so-called principle of nationwide solidarity, the entire society was burdened with the responsibility for rebuilding the state and compensating people who were relocated from lands that, as a result of World War II, ended up beyond the boundaries of the democratic German state. In the Polish doctrine, direct references to the principle of solidarity were rather rare. Solidarity has been referred to by K. Zaradkiewicz in a peculiar context – as a normative sources for moderating the amount of compensation. See: K. Zaradkiewicz, *O obowiązku*..., pp. 248–249, 253.

[44] C. Kuti, *Post-Communist*…, pp. 285–287.

argument in a meaningful way. This restraint cannot be explained by the complaint-based character of proceedings before the Constitutional Tribunal. For it had the option of referring to the mentioned argument indirectly, if only by signalling it in passing, as it did with the principles of common good, as well as trust of citizens towards the state and the law enacted thereby.

In defence, however, it is true that the systemic context of Poland's transformation has imposed certain obstacles. For a successful reference to social solidarity would necessitate broadly addressing the issue of reprivatisation, one of the largest neglects of the Polish transformation. Paradoxically, solidarity, which used to underlie the undertaking of obligations towards repatriates in the first place, could be used nowadays to justify moderating and cutting down on granting compensation or putting the Zabużanie people in a wider context of other harms which redress has become a duty of the new state. This obstacle, admittedly, is strictly political and as such cannot justify giving up on arguing for the normative value of the principle of solidarity.

Finally, it must be noted that such political determinations belong to the legislature. Even the most activist constitutional court, functioning within the paradigm of a "negative legislator", could never substitute for a legislative power with the widest democratic legitimacy. The international system of human rights contains a similar functional limitation. Constitutional case law in cases concerning the Zabużanie people could, however, be an impulse to set off a discussion on this important dimension of social and constitutional transformation.

It would be a functional solution to draw upon the idea of solidarity to resolve complex issues of the past. In this way the uncontroversial axiological justification for historical obligations could be tapped into. Simultaneously, introduction into the constitutional discourse of the argument from solidarity, at an important time for Poland's constitutional identity, would be capable of emphasizing a momentous source of legitimacy for the new order. This could be a chance to reach for a modern instrument of social integration that could be used to build solidarity on the institutional foundation of the rule of law[45].

[45] For more on the subject of the relation between solidarity and the rule of law, see: A. Czarnota, *Prawo a współczesne odmiany solidaryzmu społecznego*, (in:) A. Łabno (ed.), *Idea solidaryzmu we współczesnej filozofii prawa i polityki*, Warszawa 2012, pp. 72–73. More on this: K. J. Kaleta, *Dialektyka solidarności a państwo prawa*, "Filozofia Publiczna i Edukacja Demokratyczna" 2016, Vol. V, issue 1 pp. 37–62.

TRUST AND SOLIDARITY AT A TIME OF TRANSFORMATION. THE PROBLEM OF SO-CALLED BUG RIVER PROPERTY CLAIMS IN THE CASE LAW OF THE POLISH CONSTITUTIONAL TRIBUNAL AND THE EUROPEAN COURT OF HUMAN RIGHTS

Summary

The article deals with the issue of the Zabużanie people's claims. The Zabużanie people were persons who lost their assets as a result of relocation from the Eastern Borderlands (also known as Kresy) of the Second Republic of Poland caused by a revision of territorial borders after the Second World War. The Author describes the genesis and legal nature of the so-called Republican Accords regulating the principles of assistance for displaced persons and forms of realisation of the Zabużanie people's claims in the statutory law of the Third Republic of Poland. Then, the author discusses the case law of the Constitution Tribunal and the European Court of Human Rights related to that legislation. He indicates a shift in the case law with reference to the scope of discretion accorded to the legislator in respect of adopting compensatory mechanisms. The author underlines the special role that was played by the principle of trust of citizens towards the state and the law enacted thereby in the Tribunal's assessment of the adopted legislative solutions. At the same time, the author indicates that the potential of the constitutional idea of solidarity was not fully used when solving the issue of the Zabużanie people's claims. In the opinion of the author, the idea of solidarity could be an axiological foundation for a policy of transitional justice.

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SŁOWA KLUCZOWE

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BANK LOANS DENOMINATED AND INDEXED TO FOREIGN CURRENCY – A POLISH, UKRAINIAN OR EUROPE-WIDE PROBLEM?

1. POPULARITY OF LOANS DENOMINATED IN AND INDEXED TO FOREIGN CURRENCY

The institution of a bank mortgage denominated/indexed to foreign currency (referred to generally and not very precisely as a "foreign currency loan" or a "loan adjusted to foreign currency") is an instrument commonly used by a broad group of citizens of European states for acquiring capital with a view to purchasing a housing unit. Until recently, such loans were popular not only in Poland and other countries belonging to the so-called "New Union" (those whose accession took place within the last decade or so: Czech Republic, Slovakia, Romania, Hungary and Croatia), Austria, Spain, Italy, Portugal, but also outside of the borders of the Union: in Russia, Serbia and Ukraine (however, one difference was the currency in which obligations were evaluated – whilst EU countries were dominated by the Swiss Franc, Ukrainian lendees more frequently relied upon loans "adjusted" to the U.S. dollar). Regardless of differences persisting in legislative regimes, peculiarities of national legal systems and local economic and social conditions, in all those countries doubts have arisen whether a drastic change in currency rate (which results in an obligation to pay off a loan on conditions much less attractive than beforehand) constitutes a legally relevant circumstance that could permit one to release oneself from having to perform one's contractual duties or, at least, facilitate granting some relief in fulfilling increasingly more onerous obligations towards banks. In other words, a doubt that cut across national borders was as follows: how far should a legal order[1] go in protecting lendees who entered with a bank into an agreement for a loan denominated or indexed to foreign currency

[1] In the literature it is rightly noted that the notion of a "legal order" is broader than that of a "legal system". Whilst a legal system is an "appropriately structured group of legal norms", by a legal order one should understand "a complex of authorities and institutions designated by the currently binding legal norms, procedures used to decide particular cases, and pre-determined

in a situation where – subsequent upon unpredicted changes in currency rates – the rate increased significantly?

A striking majority of Polish foreign currency lendees took out a loan denominated in the Swiss franc ("CHF lendees"). The policy of the Swiss National Bank was for this segment of the population of particular interest. On 15 January 2015 ("Black Thursday") the Bank decided to discontinue its policy of maintaining a minimal exchange rate of euros into francs (so-called "release of the franc rate"), which caused a steep appreciation of the franc as against other currencies. To put it simply: whilst daily currency rate changes normally do not exceed 2–3%, the franc rose by 20–30% on "Black Thursday"[2]. For Polish investors and consumers who repaid their loans in francs this meant that "the franc, which cost 3.54 PLN at the beginning of the day, skyrocketed to 5.19 PLN at the day's peak"[3]. Although the rate stabilized slightly (landing, after a few days, at the level of 4.2–4.3 PLN), lendees (it is estimated that around 500–700 thousand lendees were affected as well as their family members) still had to face the obligation to repay instalments much larger than they expected at the time when they signed their contracts (where the relation of PLN to CHF was attractive).

"Black Thursday" was a wake-up call for some lendees that currency fluctuations are not merely a dire warning written "on paper" or a hypothetical scenario contemplated merely by theoretical economists, but a real threat that looms over their heads every day. A radical change in a currency rate may not only bring about difficulties with performing one's obligations, but even ruin one's finances and take away a house so desired. Loans denominated in foreign currency, taken out to buy immovable property, normally had a multi-year term and were subject to a security, for instance a mortgage or an obligation to enter into a high LTV (loan-to-value) insurance contract where the lendee's own contribution was insignificant. Furthermore, case law suggests that it is very difficult for a lendee to release himself from the repayment obligation, and the necessity of repaying instalments often much higher than the ones originally negotiated sometimes becomes an unbearable burden for a lendee's household. The risk of other "Black Thursdays" occurring has risen exponentially due to the long-term nature of the foreign currency loan. Sociologists have noted that Poles, as a relatively less mobile society – who undertook a loan obligation for a number of years thinking the property bought will be "home till the end of life" – were unique among other Europeans[4].

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norms of behaviour of agents, considered in relation to the actions of other persons and institutions". See: S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa*, Poznań 2001, p. 195.

[2] *Analitycy: uwolnienie kursu franka to ryzykowna decyzja*, https://www.pb.pl/analitycy-uwolnienie-kursu-franka-to-ryzykowna-decyzja-780454 (accessed 2 March 2017).

[3] *Dramatyczny wzrost kursu franka szwajcarskiego*, http://www.kalkulator.pl/dramatyczny-wzrost-kursu-franka-szwajcarskiego/ (accessed 3 March 2017).

[4] D. Kalinowska, *Portret polskich frankowiczów: Oszukani przez system bankowy, a może sami są sobie winni?*, http://serwisy.gazetaprawna.pl/finanse-osobiste/artykuly/848524,kredyty-we-frankach-kim-sa-polscy-frankowicze-czemu-brali-kredyty.html (accessed 6 March 2017).

In Poland, "rampant growth of foreign currency loans, specially denominated in the franc and indexed thereto, occurred between 2005–2008 due to the favourable economic situation that subsisted between 2004–2008, and an observed tendency of the Polish zloty to appreciate as well as a boom on the housing market. These phenomena generated optimism among lendees and analysts as to the prospects for development in the future, however they also resulted in underestimating the attendant risks, and therefore in an easing of the credit policy. During the credit boom between 2005–2008 there was a considerable gap between the interest rate applicable to loans in PLN and those in foreign currencies. As a consequence, lendees typically opted for the latter, thanks to which they could obtain larger amounts whilst keeping the handling costs low"[5]. In practice, this meant that repayment of foreign currency loans was more beneficial and less expensive for consumers, which is evinced in official documents of the Polish Financial Ombudsman: "an effect of the above was a difference in the instalment amount. A monthly instalment in case of a 300,000 PLN loan was around 2,100 PLN, whilst it stood at 1,400 PLN for a loan denominated in or indexed to Swiss francs"[6].

Furthermore, as displayed in the economic analyses available, despite negative adjustments of currency rates and popular calls proclaiming "fraud by the banking lobby" and "being ruined by the banking mafia"[7], CHF lendees' current situation is better than that of lendees who did not denominate their credits in a foreign currency ("PLN lendees"). A 2015 report on the situation of banks by the Financial Supervision Authority shows that foreign currency lendees do not

[5] Report by the Financial Ombudsman: *Analiza prawna wybranych postanowień umownych stosowanych przez banki w umowach kredytów indeksowanych do waluty obcej lub denominowanych w walucie obcej zawieranych z konsumentami* (English: *A legal analysis of selected contractual conditions used by banks in contracts for loans indexed to or denominated in foreign currency concluded with consumers*), Warszawa, June 2016, p. 3.

[6] *Ibidem*.

[7] To discuss the permissibility and legal aspects of foreign currency loan contracts is complicated not only from the juridical point of view, but is also of interest to society, politics and economics. Still, the problem attracts strong emotions, particularly among lendees who took out a foreign currency loan and now feel deceived due to a change of the currency rate. Many of them have lodged claims before the courts in an attempt to put pressure on politicians, formulate radical opinions and even resort to aggression towards other participants in the discussion on foreign currency loans, banks and their proxies, judges and other public authorities that insufficiently – according to that group of lendees – protect their rights. All this has given birth to such code words as "fraudulent loan", "bankgate" and "rule of banksters" and calls to "punish the banks", "taking fraudsters to task" and "administering justice to the guilty".

Moreover, the discussion has become a source of a societal conflict. Polling indicates that there is a rift between the lendees – PLN lendees cannot rely on any governmental assistance, whilst foreign currency lendees have, at least partially, themselves to blame. Active support on the part of the government could be interpreted as a policy for the benefit of a narrow group with its own particular interests, something impermissible and falling foul of the constitutional principles of the common good, equality before the law, as well as stability of the banking system and the interests of other bank clients.

fare badly in comparison with PLN lendees. In a simulation based upon a number of mutual conditions for foreign and domestic currency lendees[8]: not only was the first repayment instalment of a foreign currency lower than in the case of a domestic currency loan, but the projected overall cost of such a loan was considerably lower (from around 30% to as much as 200%). The lower cost results, clearly, from the risk of currency fluctuations, and its practical ramification was that "PLN lendees, guided by the security of their own families, decided to take out 'more expensive' loans in PLN, which caused many, especially less affluent families, to fulfil their housing needs to a lesser extent or at a lower level, through buying smaller and cheaper homes which would have been within their reach if they had opted for a loan in CHF"[9].

The circumstances discussed prompt a plethora of questions, both legal and ethical. For instance: is it justifiable to defend a group that – with a view to saving on the costs of a loan or selecting a more luxurious home – "took a risk" in a situation where PLN lendees were more prudent in their choices and now must bear the burden of their foresight by repaying larger instalments? This discussion is ongoing not only in Poland, but also abroad – the problem is Europe-wide as a debate as to the legal aspects of loans denominated in or indexed to foreign currencies is unfolding in, *inter alia*, Greece[10], Hungary, Croatia, Serbia, Romania, Spain, Austria (it is estimated that around 150,000 Austrian households are affected by foreign currency fluctuations)[11] and Russia (the rate of the ruble slumped due to such additional factors as: a long-term economic downturn, plummeting of oil prices in the second half of 2014, and economic sanctions imposed by Western Europe and the United States)[12].

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[8] The simulation was predicated upon the following assumptions: the amount of the loan: 300,000 PLN; identical terms of the loan (15, 20, 25, 30, 35 and 40 years' terms were considered); the loan was repaid in equal instalments in line with the original plan (omitting any excess paid, late payments, changes in the financing period etc.); the margin on all generations of loans in PLN and CHF was the same and stood at 2,00% (in reality, some lendees were subject to a lower or higher margin); for loans in CHF it was assumed that the loan was recounted into CHF at the so-called buying rate which was 3% lower than the average rate of the National Bank of Poland (NBP); repayment of the loan was made at the so-called selling rate which was 3% higher than the average rate of the NBP; for the sake of simplicity it was accepted that the loan was paid out in its entirety in one day.

[9] Report of the Financial Supervision Authority: *Raport o sytuacji banków w 2015 r.*, Warszawa 2016, p. 80.

[10] A. Skordas, *'Black Thursday' for 60,000 Greek Borrowers of Swiss Banks*, http://greece.greekreporter.com/2015/01/15/black-thursday-for-60000-greek-borrowers-of-swiss-banks/#st-hash.CXYfp1o1.dpuf (accessed 1 March 2017).

[11] J. Ramotowski, *Frank zaraża bilanse banków nie tylko w środkowej Europie*, https://www.obserwatorfinansowy.pl/tematyka/bankowosc/frank-zaraza-bilanse-bankow-nie-tylko-w-srodkowej-europie/ (accessed 3 March 2017).

[13] M. Domańska, *Rosyjski sektor bankowy: rok w kryzysie*, https://www.osw.waw.pl/pl/publikacje/komentarze-osw/2016-03-29/rosyjski-sektor-bankowy-rok-w-kryzysie (accessed 3 March 2017).

It should be noted that an analogous debate is in progress in Ukraine where it has been popular to denominate loans in US dollars (which experienced a radical currency rate swerve in 2008). Besides conceivable doubts of the economic and legal nature of denominated loans, they have prompted a constitutional controversy in the country, or perhaps even a constitutional precedent. For they were the subject of a conflict between central public authorities (opposition from the central bank and several ministers and support from the parliament), as a result of which a number of MPs ceased to support the relevant Act of Parliament a day after it was passed[13].

2. LEGAL-POLITICAL DEBATE: ARGUMENTS IN FAVOUR AND AGAINST

Is it sensible to consider the multi-faceted, both in legal and economic terms, problem of foreign currency loans detached from concrete, currently binding regulations? Even though the laws in the European states where the problem has manifested itself differ greatly, the key arguments present in the debate (and considerations pertaining to the juridical validity and effectiveness of contracts entered into with banks) are like, which is mostly a product of mutual intellectual roots of the European legal culture. Differences in domestic normative determinations notwithstanding (as well as differences in the scale of problems related to foreign currency loans, the social profile of lendees, varying contractual models, consequences for the economy etc.), the ongoing discussion in many a European state follows the familiar scenario: analogous principles, values and legal institutions are called upon.

In the centre of the conflict are questions fundamental from the point of view of the law, namely: on the one hand, private "liberty-driven" principles of contract law (freedom of contract, *pacta sunt servanda*, *volenti non fit iniuria*, and associated principles of sustainability of the contractual obligation, prohibition on excessive interference in the legal relation, *lex retro non agit*, certainty of the law and legal security, autonomy of the parties, market economy and the right to incorporate indexation into contracts), on the other, however, the necessity of protecting the weaker side of the contractual relation (provisions of the consumer and banking laws, ceasing to exist of the basis of the transaction). Although these topics do not exhaust the entire scope of the conflict around denominated/

[14] *Ukraiński parlament przewalutowuje kredyty walutowe. Ministerstwo finansów oburzone*, http://wyborcza.pl/1,155287,18294865,Ukrainski_parlament_przewalutowuje_kredyty_walutowe_.html (accessed 2 March 2017); *Poroshenko returns bill on restructuring currency credits to parliament*, http://en.interfax.com.ua/news/economic/312715.html (accessed 10 March 2017).

indexed loans (others include, *inter alia*, the permissibility of charging spread by the banks or the requirement for the lendee to insure his low own contribution), two basic positions are: (1) proving that "a contract binds the lendee as he himself agreed to it" and, *a contrario*, (2) that "indexed loans attack the legally protected interests of consumers therefore the strict application of the *pacta sunt servanda* principle may be warrantedly undermined".

Commentators who accept that lendees, whose economic interests suffered unreasonably due to currency rate fluctuations, deserve assistance, look for institutions and principles that justify interference with the content of a previously created legal relation. In doing so, they search beyond the solutions adopted in consumer laws, whose provisions are capable of rendering certain contractual clauses ineffective (so-called abusive clauses). A possibility and a rationale for modifying an established legal relation is embedded in the principle of *rebus sic stantibus*, which, operating independently of specific banking or consumer laws, allows for changing the content of a contractual obligation where an extraordinary change of circumstances arises. It is rightly noted by academic writers that the principle cannot be reduced to merely a concrete provision of contract law (in Poland, Article 357[1] of the Civil Code[14], pursuant to which "If, owing to an extraordinary change of circumstances, the performance of an obligation would entail excessive difficulties or would threaten one of the parties with a glaring loss, which the parties did not predict at the moment of the conclusion of the contract, a court of law may, having weighed the parties' interests, according to the principles of community coexistence, determine the manner of the obligation's performance, the amount of the obligation or it may even rule on termination of the contract. When terminating the contract, a court of law may, where necessary, rule on the settlements between the parties, bearing the principles set out in the preceding sentence in mind"), but should be understood more broadly, as any and all binding provisions and projected provisions. Radwański refers to *rebus sic stantibus* "whenever we have to do with a conception or determination that provides for modifying an obligation on account of an unexpected change of social relations"[15].

Without prejudice to Article 357[1] of the Civil Code, the *rebus sic stantibus* principle may manifest itself in a number of ways, also through the legislator's interference with the use of emergency measures enacted in connection with acts of war. These may be decisions of the courts (in particular in Germany and Austria, where in the past appropriate regulations were instituted)[16]. In other words, "the *rebus sic stantibus* clause is recognized and honoured both by international

[15] The Civil Code of 23 April 1964 (Polish Official Journal of Laws of 2017, item 459 as amended).

[16] Z. Radwański, *Zobowiązania – część ogólna*, Warszawa 1997, p. 233.

[17] M. Bieniak, *Klauzula rebus sic stantibus – możliwości jej aktualnego zastosowania (uwagi na tle art. 357[1] KC)*, "Monitor Prawniczy" 2009, issue 12, p. 639.

public law (Article 62 of the Vienna Convention on the Law of Treaties) and private law, in the form of the principles of good faith and fair dealing. The Civil Code adopts a general principle of the law that is positioned as an exception from *pacta sunt servanda* or its acceptable limitation and complementation. The extraordinary character of the circumstances is pertinent to both concepts. In law, *rebus sic stantibus* acts as a myriad of valorisation mechanisms whose shared goal is to restore a shaken balance of performances due between the parties. They differ, however, as to the scope, application requirements and ways of operation"[17].

Therefore, it is unsurprising that many European legislatures in states affected by the problem of foreign currency loans have resorted to normative intervention into the content of contractual relations[18] due to an extraordinary change of circumstances. Even so, in others, including Poland, drafts of laws going in the same direction have been proposed and discussed[19]. The economic and legal ramifications of such "hard" interventions varied – it was argued, one the one hand, that support for foreign currency lendees happened at the expense of other citizens, whilst still being unsatisfactory for the beneficiaries. On the other hand, in many cases it was, in fact, merely an extension and exacerbation of the conflict around the legality of foreign currency loans as well as legal permissibility of a legislative intervention into a legal relation. Recently, the Romanian Constitutional Court struck down as unconstitutional a law that permitted CHF lendees to denominate their loans at a rate from before the currency's appreciation[20].

3. A EUROPE-WIDE PROBLEM – CASE LAW OF THE CJEU

As shown above, regardless of what one's legal or political opinion is on the justifiability of lendees' claims, European consumers of all citizenships, functioning under local bank systems and specific procedures governing the pursuing of claims before the courts, bear the consequences of currency fluctuations on

[18] L. Bosek, B. Lackoroński, *Ustawowa waloryzacja zobowiązań. Uwagi na tle ustawy z dnia 5 sierpnia 2015 r. o pomocy tzw. frankowiczom*, "Forum Prawnicze" 2015, Vol. 6, issue 32, p. 27 *et seq.*

[19] Legislative provisions which interfered with the legal relations created by loans indexed to foreign currency were enacted in, *inter alia*, Hungary, Croatia, Serbia and Romania.

[20] By way of example: the draft bill of 5 August 2015 on the precise principles of restructuring of foreign currency mortgage loans in relation to the change of foreign currency rates as against the Polish currency and on amending numerous acts (Sejm paper No. 3660, VII term) or the draft bill on the principles governing the return of some receivables by virtue of credit and loan contracts (Sejm paper No. 811 of 1 August 2016).

[20] B. Wawryszuk, *Rumuński Trybunał zakwestionował ustawę dotyczącą kredytów we frankach*, http://www.money.pl/gospodarka/unia-europejska/wiadomosci/artykul/kredyty-w-chf-trybunal-konstytucyjny-rumunia,15,0,2258959.html (accessed 10 March 2017).

the global market. It is therefore unsurprising to see a growing interest in loans indexed to foreign currencies on the part of supranational and European institutions[21]. Conversely, the lendees themselves and their organizations often expect involvement, particularly from EU bodies, where, in their estimation, domestic authorities have failed or "succumbed to the banking lobby"[22]. Some Polish lendees have gone even further, by declaring willingness to put their claims before the European Court of Human Rights in the event that no legislative remedies are instituted and their domestic lawsuits are decided against them[23].

Having observed the course of events over the last several years, one may surmise that the low number of judgments in cases concerning denominated bank loans, and especially the sceptical approach of the Court of Justice, have generated a lot of disappointment. It must be said, however, that expectations of lendees and journalistic prognoses that all loan contracts will be "invalidated"[24] were unrealistic and legally baseless. The CJEU, adjudicating in the prejudicial mode (under Article 267 TFEU, which states: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against

[21] It is pertinent to recall comments by Jonathan Hill, the European Commissioner for Financial Stability, Financial Services and Capital Markets Union, on the negative consequences of a legislatively imposed "denomination" of loans or the European Parliament debate on 12 May 2016.

[22] See an article with a telling title: "*Afera frankowa: Kredyty we frankach to nie wewnętrzna sprawa Polski*, *lecz kwestia wiarygodności Unii Europejskiej!*" (English: *The francgate: franc loans is not an internal Polish problem*, *but a matter of trustworthiness of the European Union*). J. Bielewicz, *Afera frankowa: Kredyty we frankach to nie wewnętrzna sprawa Polski*, *lecz kwestia wiarygodności Unii Europejskiej!*, http://wgospodarce.pl/opinie/20115-afera-frankowa-kredyty-we-frankach-to-nie-wewnetrzna-sprawa-polski-lecz-kwestia-wiarygodnosci-unii-europejskiej (accessed 11 March 2017).

[23] Although not a common practice, there have been calls for lodging claims before the European Court of Human Rights (notably by the leader of one of the most active organizations of CHF lendees, whose claims were rejected by domestic courts at all instances). It is, however, difficult to treat such acts as a serious court strategy capable of changing the Polish legal system and the domestic case law on foreign currency loans. *Cf.* M. Bednarek, *Najbardziej znany polski "frankowicz" chce zaskarżyć Polskę do Trybunału w Strasburgu*, http://wyborcza.biz/biznes/1,100896,21173461,frankowicz-chce-zaskarzyc-polske-do-trybunalu-w-strasburgu.html (accessed 2 March 2017); A. Popiołek, *Frankowicze straszą prezydenta: Pójdziemy do Europejskiego Trybunału Praw Człowieka*, http://wyborcza.biz/biznes/1,147582,20691254,frankowicze-straszą-prezydenta-pojdziemy-do-europejskiego-trybunalu.html (accessed 3 March 2017).

[24] *Trybunał unieważni wszystkie kredyty frankowe?*, http://www.polskatimes.pl/strefa-biznesu/pieniadze/a/trybunal-uniewazni-wszystkie-kredyty-frankowe,10185536/ (accessed 2 March 2017).

whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court (…)"), does not scrutinize concrete contractual models utilized by the banks functioning in the territory of Poland, does not examine violations of the law as against Polish consumers nor the propriety of the domestic proceedings. Prejudicial questions do not serve to grant either individual or group protection, but they should conduce to ensuring coherence and development of the EU legal system[25]. The role of the CJEU is to cooperate with domestic courts "in a way that preserves the competences of both. The CJEU cannot assume jurisdiction in any case. Also, it is barred from imposing upon the domestic court the determination to be made and conducting an autonomous interpretation of the domestic law"[26]. Nor can it replace other public authorities of a Member State (e.g. the Office of Competition and Consumer Protection or the Financial Supervision Authority).

Second, the CJEU's assessment is not related to the construction of domestic law (in the case of Poland that would be provisions of the Civil Code[27], the Banking Law[28] and the Act of 16 February 2007 on Competition and Consumer Protection[29]), but merely to a few regulations of EU law that govern the relations between businesses and consumers – particularly Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[30] (Directive 93/13) and Directive 2004/39/EC (Directive 2004/39) of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC. Due to the legal status of directives their provisions are of a relatively general nature[31], and their implementation is left

[25] J. Michalska, *Pytania prejudycjalne sądów do TS UE*, (in:) M. Jabłoński, S. Jarosz-Żukowska (eds.), *Zasada pierwszeństwa prawa Unii Europejskiej w praktyce działania organów władzy publicznej RP*, Wrocław 2015, p. 253; I. Skomerska-Muchowska, *Pytania prejudycjalne sądów krajowych*, (in:) A. Wyrozumska (ed.), *System ochrony prawnej w Unii Europejskiej*, Warszawa 2010, p. V-306.

[26] M. Szpunar, *Komentarz do art. 267*, (in:) A. Wróbel (ed.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom. III*, Lex 2012.

[27] The Civil Code of 23 April 1964 (Polish Official Journal of Laws of 2017, item 459 as amended).

[28] Act of 29 August 1997 – Banking Law (Polish Official Journal of Laws of 2016, item 1988 as amended).

[29] *Ibidem*.

[30] Official Journal of the European Union, L 95, 21.4.1993, p. 29.

[31] By way of example, pursuant to Article 3(1) of Directive 93/13/EEC: "1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer", whilst under Article 5: "In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2)".

to the member States[32]. As a consequence, the CJEU's determinations produce merely some basic guidelines as to the direction in which judgments in particular cases considered by domestic courts should go. In addition, the Court usually renders judgments in response to references (or prejudicial questions) from domestic courts by reference to the facts of the particular case. Therefore, one will not find in them answers to questions such as whether it is permissible for a bank X and a Polish trader Y to enter into a loan denominated in/indexed to foreign currency, or for a bank to use valorisation clauses in a contractual model Z, or to charge spread (the difference between the selling and buying rates of a currency – collected by banks when realizing loan contracts with consumers) in a strictly defined amount. A few pertinent judgments should be discussed in this connection.

First, I turn to *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*. Mr and Mrs Kásler, Hungarian nationals, took out a foreign currency loan with a bank, as a result of which they obtained capital in the amount of 14.4 million forints. It was stipulated that the lent amount was to be denominated in the Swiss franc at the buying rate as of the day when the bank started financing under the contract. Mr and Mrs Kásler questioned before a Hungarian court – as unfair and in violation of their consumer rights – the condition that the amount of monthly instalments (expressed in forints) was calculated by reference to the selling rate of the Swiss franc as of the day preceding the maturity date of the instalment. Thus, in relation to repayments the mechanism adopted imposed a different rate than that applicable when the loan was granted. The Hungarian Supreme Court referred three questions to the CJEU:

– may the condition governing the exchange rates used for the purposes of repaying a loan denominated in a foreign currency be classified as the main object of the agreement or one that pertains to the relation between the quality and price of goods or services?

– may the questioned condition be considered as expressed in plain and intelligible language?

– is the domestic court empowered to amend or supplement a contractual condition held to be unfair, if the contract could not exist without it?

The Court held that: "the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for

[32] This is how the provisions of Directive 93/13/EEC are transposed into the Polish legal system in Article 385[1] of the Civil Code.

him which derive from it (…) before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier (…) The requirement of transparency of contractual terms laid down by Directive 93/13 cannot therefore be reduced merely to their being formally and grammatically intelligible (…) the system of protection introduced by Directive 93/13 being based on the idea that the consumer is in a position of weakness vis-à-vis the seller or supplier, in particular as regards his level of knowledge, the requirement of transparency must be understood in a broad sense (…) it is for the referring court to determine whether, having regard to all the relevant information, including the promotional material and information provided by the lender in the negotiation of the loan agreement, the average consumer, who is reasonably well informed and reasonably observant and circumspect, would not only be aware of the existence of the difference, generally observed on the securities market, between the selling rate of exchange and the buying rate of exchange of a foreign currency, but also be able to assess the potentially significant economic consequences for him resulting from the application of the selling rate of exchange for the calculation of the repayments for which he would ultimately be liable and, therefore, the total cost of the sum borrowed (…) If it were open to the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect for sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be adjusted, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers (…) replacing an unfair term with such a provision which, as is clear from the thirteenth recital in the preamble to Directive 93/13, is presumed not to contain unfair terms, in that it leads to the result that the contract may continue in existence in spite of the fact that Clause III/2 has been deleted and continues to be binding for the parties, is fully justified in the light of the purpose of Directive 93/13 (…) The substitution of an unfair term for a supplementary provision of national law is consistent with the objective of Article 6(1) of Directive 93/13, since, according to settled case-law, that provision is intended to substitute for the formal balance established by the contract between the rights and obligations of the parties real balance re-establishing equality between them, not to annul all contracts containing unfair terms (…) if, in a situation such as that at issue in the main proceedings, it was not permissible to replace an unfair term with a supplementary provision, requiring the court to annul the contract in its entirety, the consumer might be exposed to particularly unfavourable conse-

quences, so that the dissuasive effect resulting from the annulment of the contract could well be jeopardised (…) In general, the consequence of an annulment is that the outstanding balance of the loan becomes due forthwith, which is likely to be in excess of the consumer's financial capacities and, as a result, tends to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting such terms in its contracts. Having regard to all those considerations, the answer to the third question is that Article 6(1) of Directive 93/13 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted, that provision does not preclude a rule of national law enabling the national court to cure the invalidity of that term by substituting for it a supplementary provision of national law"[33].

In summary, the CJEU, on the one hand, averred that whilst it is one of the requirements of European consumer protection law that lendees who take out loans in foreign currencies must be given an opportunity to estimate the economic consequences possibly stemming from the use by the bank of different exchange rates in respect of granting and repayment of the loan[34], but even so, the final determination of the nature of the contractual relation between the parties is left to the domestic court. It was the Hungarian court that was exclusively competent to adjudicate upon the propriety or defectiveness of the contract in dispute and potential sanctions (ineffectiveness or invalidity). At first sight it seems that this reasoning is attractive for foreign currency lendees, and the duty imposed upon businesses to ensure maximum transparency and clarity of the consumer's situation could signal that lendees' claims should be allowed. Nonetheless, the CJEU's statements are sufficiently general and are confined to the provisions of the relevant directives (hence they do not apply to the domestic law which is, in every case, the legal basis point of reference upon which the domestic court bases its determinations). In sum, it is hardly conceivable that domestic courts of the Member States begin to apply the EU legislation without reference to the relevant domestic regulations and the concrete facts of the case before them. In other words, a judgment of the CJEU does provide some interpretative guidelines that should be taken into account by domestic judges when adjudicating, however

[33] Judgment of the Court of Justice of the European Union of 30 April 2014 in Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt.*, paras 70–85.

[34] D. Gajos-Kaniewska, *Konsumenci, którzy zaciągają kredyt w walucie obcej muszą mieć możliwość oszacowania konsekwencji ekonomicznych wynikających z zastosowania przez bank innego kursu waluty przy spłacie, a innego przy uruchomieniu kredytu*, http://www.rp.pl/artykul/1106343-Trybunal-Sprawiedliwosci-o-kredytach-walutowych--konsument-musi-byc-swiadom-ryzyka.html#ap-1 (accessed 2 March 2017).

it is not clear and precise enough to build upon it a new, unambiguous legal norm or judicial directive in complex cases involving denominated/indexed loans[35].

Also, one cannot overlook the CJEU's important remark concerning the legal consequences of holding a contractual clause to be impermissible (which, according to the Court, does not automatically result in the invalidity of the loan contract, i.e. nullification of the legal relation between the bank and the consumer). It was held that the place of abusive clauses is taken by domestic laws which in this way fill a "void" in the content of the legal relation and sustain the underlying obligation. The Court underscored the dangers associated with such a state of affairs, something perhaps not fully realized by lendees who might hope to get released from their duties as against their creditors. Where a contract were to be held invalid, those consumers who would be unable to immediately repay the funds in the full amount received from the bank would be the most vulnerable[36].

Árpád Kásler is merely one in a string of judgments where the Court mandated that domestic laws be taken into account where the permissibility of application of concrete contractual clauses between a business and a consumer is considered.

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[35] The problem is extraordinarily complex legally – bank loans are regulated by provisions scattered in a plethora of statutes (of both public and private law nature). Proper regulation requires balancing constitutional principles and values (for example, freedom of contract and consumer protection, group and individual interests, freedom and security), and within the confines of a court trial it necessitates examining many contractual conditions contained within various models used by banks. In addition, a violation of the law by the defendant in one case (e.g. an omission to perform one's information duties) does not automatically result in an implication that errors were made in all other cases. Differing personal statuses (intellectual, professional, financial) could also be a factor. As there was no one contractual model as regards foreign currency loans, there cannot be one uniform way of resolving disputes stemming therefrom.

[36] On a side note, the judgment in *Árpád Kásler*, *Hajnalka Káslerné Rábai przeciwko OTP Jelzálogbank Zrt* serves on occasion – as is the case of other important judgments concerning foreign currency loans – as a mechanism to extrapolate, oversimplify and draw far-reaching conclusions, many of which are unwarranted by reference to the judgment. In this vein is a comment supposing that apparently: "In the judgment in *Kasler* (C-26/13) the CJEU practically burdened banks with the entire risk associated with currency rate changes (…) where a conversion clause is abusive, the domestic court would be obliged to declare the invalidity of the entire contract, and this implies absolute invalidity (…) And if, domestically, exclusion from a contract of indexation clauses held to be impermissible does not result in invalidity of the entire contract, so that it can still subsist, then the whole amount of debt and particular instalments is not subject to indexation, and other conditions, including those governing interest (relatively low as for loans in francs or other currencies), remain intact. In short, where merely the conversion clause is found to be invalid, the franc loan would be denominated at the rate as of the day of granting the loan". R. Bujalski, *Wywiad z W. Gontarskim: Kredyty we frankach: prawo UE stoi po stronie kredytobiorców*, http://www.lex.pl/czytaj/-/artykul/kredyty-we-frankach-prawo-ue-stoi-po-stronie-kredytobiorcow (accessed 2 March 2017).

Bujalski appears to think that also *Banif Plus Bank* (C-312/14) is beneficial for lendees of foreign currency loans (*sic!*). W. Gontarski, *Frankowicze bez szans na sukces przed polskimi sądami. Jedyna ich nadzieja w ustawie*, http://www.lex.pl/czytaj/-/artykul/frankowicze-bez-szans-na-sukces-przed-polskimi-sadami-jedyna-ich-nadzieja-w-ustawie (accessed 2 March 2017).

In *Mohamed Aziz v Caixa d'Estalvis de Catalunya*, *Tarragona i Manresa (Catalunyacaixa)* (Case C-415/11, 14 March 2013) the CJEU emphasized that "Article 3(1) of Directive 93/13 must be interpreted as meaning that the concept of 'significant imbalance' to the detriment of the consumer must be assessed in the light of an analysis of the rules of national law applicable in the absence of any agreement between the parties, in order to determine whether, and if so to what extent, the contract places the consumer in a less favourable legal situation than that provided for by the national law in force. To that end, an assessment of the legal situation of that consumer having regard to the means at his disposal, under national law, to prevent continued use of unfair terms, should also be carried out"[37].

To determine whether there has arisen a significant imbalance to the detriment of the consumer (which, pursuant to Article 3(1) of Directive 93/13, may beget holding terms which were not individually negotiated to be unfair) always necessitates an analysis of domestic laws which apply in case of a lack of agreement between the parties. The goal is to assess whether and, if so, to what extent the examined contractual terms put the consumer in a less favourable situation than the default one envisaged by the legislator. The CJEU is not, therefore, competent to replace the domestic court in this regard. Nonetheless, it does underscore the duty to consider domestic provisions, while confirming that it would be an overreach to issue a general, universal judgment, applicable to all consumers and businesses finding themselves in an analogous situation in all the Member States, which would hold a concrete contractual model, clause or term to be impermissible.

Large expectations were associated with the CJEU's judgment in *Banif Plus Bank Zrt. v Márton Lantos*, *Mártonné Lantos*[38] (Case C-312/14). The proceedings came down to determining the nature of foreign currency loans – do they constitute a financial instrument that must (in the light of the corrent laws) be subject to special protection for investors? The Court held that foreign currency loans are not to be classified as investment products, and that they are offered by banks does not make them an investment service within the meaning of Directive 2004/39. So as to avoid misunderstandings, I will quote from the judgment: "The question arises in the present case as to whether the transactions effected by a credit institution, consisting in converting amounts expressed in a foreign currency into the domestic currency for the purpose of calculating the amount of a loan and repayment instalments in accordance with clauses on exchange rates contained in a loan agreement, may be classified as 'investment services or activities' within the meaning of Article 4(1)(2) of Directive 2004/39 (…) Transactions such as this serve no other function than to be the manner of performing the fundamental pay-

[37] Judgment of the Court of Justice of the European Union of 14 March 2013 in Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya*, *Tarragona i Manresa (Catalunyacaixa)*, para 2.

[38] Judgment of the Court of Justice of the European Union of 3 December 2015 in Case C-312/14 *Banif Plus Bank Zrt. v Márton Lantos*, *Mártonné Lantos*.

ment obligations under the loan agreement, consisting in the lender's making the capital available and the borrower's repayment of the capital together with interest. Those transactions do not have as their purpose the completion of an investment, as the consumer is seeking only to secure funds with a view to purchasing a consumer good or a service, not, for example, to manage a foreign exchange risk or speculate on a currency's exchange rate (…) In fact, these types of foreign exchange transactions serve merely to secure the granting and repayment of the loan (…) The foreign exchange transactions at issue in the main proceedings are not linked to an investment service within the meaning of Article 4(1)(2) of Directive 2004/39, but rather to a transaction which itself does not constitute a financial instrument as defined in Article 4(1)(17) of that directive (…) cannot be regarded as investment services, with the result that that institution *inter alia* is not subject to any obligations to assess the suitability or appropriateness of the service to be provided as laid down in Article 19 of Directive 2004/39"[39]. Also, the Court indirectly greenlighted the permissibility of contractual terms that stipulate that "the value of the currencies to be taken into account for the calculation of the repayments is not fixed in advance because it is determined on the basis of the sale price of those currencies on the due date of each monthly instalment"[40].

Banif Plus Bank defied, at least to a certain extent, the view of lendees that it was the banks who exploited unaware consumers by offering them a complex and risky financial instrument, devised for professional investors, and was denounced as a "disappointment"[41], "another blow dealt against the lendees by the Court"[42]. This judicial position may feed the frustration of people affected by the consequences of foreign currency fluctuations and even disapproval of academic writers who would like the Court – in the name of coherence and factual effectiveness of Union law – to take on difficult consumer claims.

Marek Safjan has expressed regret that Polish courts, when considering abusive clauses and the legal effectiveness of foreign currency loans, are "passive" and choose not to direct references to the CJEU: "the case law of the CJEU is worthy of attention where a common feature is the need to determine the criteria based upon which the court seized of the matter may assess the existence of an abusive clause under Directive 93/13. Traditionally, the Court has refused to unreservedly classify a disputed clause in one way or another, leaving this matter to the domestic court even if the reasoning in the CJEU judgment clearly dictates the determination by the domestic judicial panel. One must wonder the

[39] *Ibidem*, paras 53, 57, 61, 67, 75.

[40] *Ibidem*, para 74.

[41] J. Czabański, *Kredyt frankowy nie jest instrumentem finansowym*, http://pomocfrankowiczom.pl/?p=392 (accessed 5 March 2017).

[42] M. Samcik, *Europejski Trybunał zadaje frankowiczom kolejny cios. Zamknięta droga do roszczeń?*, http://samcik.blox.pl/2015/12/Europejski-Trybunal-zadaje-frankowiczom-kolejny.html (accessed 5 March 2017).

extent to which references continue to constitute an indispensable condition of the construction of European law. It appears that the Łódź Appellate Court, in a captivating judgment, did not capitalize on the opportunity to receive relevant interpretative guidelines from the CJEU (judgment of the Łódź Appellate Court of 30 April 2014, ref. number I Aca 1209/13 and judgment of the same court of 30 April 2014, ref. number I AcZ 1414/13). The case concerned a loan denominated in Swiss francs (…) bearing in mind the restraint of Polish courts, it is worth noting that on the same day that the Łódź Appellate Court handed down its judgments, the CJEU rendered its own in the case of *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*. Here, the Court defined the mentioned criteria in the light of the provisions of EU law. The case centered around a similar issue that arose against the background of the notion of transparency of a CHF loan contract's terms'[43]. Safjan appears to think that the CJEU is not paid enough deference by domestic courts which, at the same time, are reluctant to send references to the European Court in the first place.

Notwithstanding, it is warranted to risk saying that it will be long before EU authorities "fix" the complicated legal conundrum of bank loans indexed to foreign currencies. Currently, it goes beyond their competence, and to intervene would amount to a transgression onto the jurisdiction of domestic courts. One may not rule out the option that – on account of legal complexity and the differences in situations among lendees – it would not be advisable to render an unequivocal and authoritative judgment on the permissibility of denomination/indexation, legality of charging spread, or the consequences of potential abusiveness of contractual terms. To do so would create a precedent whereby various factual constellations would be "equated". This, in turn, could be read as a "political" statement by the Court, i.e. a determination that should be left to political decision makers and one that constitutes a divisive and controversial element of social discourse. A CJEU judgment would bring about a triumph of one side of the dispute, excessively generalize a complex legal problem and could brush aside a number of legally relevant circumstances considered on the facts of every case (such as, for instance, the principles of sanctity and freedom of contract, ignorance of the risk of currency rate fluctuations, prohibition on unwarranted interference with the contractual relation by the courts). Finally, the judgments of the CJEU handed down hitherto in the realm of foreign currency loans, where the standard of protection of consumer rights is higher than in domestic law, may not be justified.

[43] M. Safjan, *Pytania prejudycjalne polskich sądów powszechnych*, "Prawo w Działaniu" 2014, issue 20, p. 23.

BANK LOANS DENOMINATED AND INDEXED TO FOREIGN CURRENCY – A POLISH, UKRAINIAN OR EUROPE-WIDE PROBLEM?

Summary

The institution of a bank mortgage denominated/indexed to foreign currency (referred to generally and not very precisely as "foreign currency loan" or "loan adjusted to foreign currency") is an instrument commonly used by a broad group of citizens of European states for acquiring capital with a view to purchasing a housing unit. Until recently, such loans were popular not only in Poland and other countries belonging to the so-called "New Union" (those whose accession took place within the last decade or so: Czech Republic, Slovakia, Romania, Hungary and Croatia), Austria, Spain, Italy, Portugal, but also outside of the borders of the Union: in Russia, Serbia and Ukraine (however, one difference was the currency in which obligations were evaluated – whilst loans in EU countries were dominated by the Swiss Franc, Ukrainian lendees more frequently relied upon loans "adjusted" to the U.S. dollar). Regardless of differences persisting in legislative regimes, peculiarities of national legal systems and local economic and social conditions, in all those countries doubts have arisen whether a drastic change in currency rate (which results in an obligation to pay off a loan on conditions much less attractive than beforehand) constitutes a legally relevant circumstance that could permit one to release oneself from having to perform one's contractual duties or, at least, facilitate granting some relief in fulfilling increasingly more onerous obligations towards banks.

To discuss the permissibility and legal aspects of foreign currency loan contracts is complicated not only from the juridical point of view, but is also of interest to society, politics and economics. Still, the problem attracts strong emotions, particularly among lendees who took out a foreign currency loan and now feel deceived due to a change of the currency rate.

The lendees and their organizations often expect involvement, particularly from EU bodies, where, in their estimation, domestic authorities have failed or "succumbed to the banking lobby". Unfortunately, having observed the course of events over the last several years, one may surmise that the low number of judgments in cases concerning denominated bank loans, and especially the sceptical approach of the Court of Justice, have generated a lot of disappointment.

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THE IMPACT OF EUROPEAN LAW UPON REGULATIONS GOVERNING RIGHTS RELATED TO PARENTHOOD IN POLISH LABOUR LAW

1. INTRODUCTORY REMARKS

The process of adjusting Polish law to European Union standards began in 1996 which saw the signing of an association agreement mandating Poland to harmonize its laws with EU law. Poland acceded to the EU on 1 May 2004 and has ever since been obliged to enact laws in accordance with the EU benchmark. The adjustment obligation, as maintained in the literature, is permanent and dynamic, namely that the domestic legislator is bound to ensure that conformity with EU law subsists in its legal system at every moment, by adjusting domestic laws to the European standard on an ongoing basis[1]. As parenthood is an area of intensive legislative activity of the European legislator, it has also come within the ambit of the adjustment obligation. Relevant here are, first and foremost, Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding[2] and Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC[3]. The latter replaced Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC[4]. It is clear at first glance, however, that domestic adjustments in the area were not revolutionary as Poland has boasted a high level of protection afforded to pregnancy and motherhood by cause of its ratification of the 1952 Maternity Protection Convention (C103) of the Interna-

[1] L. Mitrus, *Wpływ regulacji wspólnotowych na polskie prawo pracy*, Warszawa 2006, p. 115.
[2] Official Journal of the European Union, L 348, 28.11.1992, pp. 1–7.
[3] Official Journal of the European Union, L 68, 18.3.2010, pp. 13–20.
[4] Official Journal of the European Union, L 145, 19.6.1996, pp. 4–9.

tional Organization and the fundamental rationales underpinning the socialist legislative philosophy.

2. HEALTH PROTECTION OF PREGNANT AND BREASTFEEDING WOMEN

One of the aims of the European legislator as pronounced in Directive 92/85 is to protect pregnant women from harmful effects of the working environment. To that end, employers are burdened with an obligation to assess the impact of the working environment on pregnancy and breastfeeding and to take steps to neutralize dangers resulting from the working environment for pregnant and breastfeeding women. Employers must inform of the results of these assessments and to take preventative measures consisting in altering working hours or conditions with a view to eliminating a given danger, transfer an affected pregnant or breastfeeding worker to another work or, if that is implausible, release her of the obligation to provide work. In addition, the European legislator obliged the Member States to ensure that pregnant women have access to time off work to perform necessary medical checks and that pregnant and breastfeeding women are not obliged to provide night work.

The Polish Labour Code has, since its enactment in 1974, included a wide variety of instruments of protection of pregnant women from harmful effects of the working environment. Article 176 provides that pregnant and breastfeeding women cannot perform arduous, hazardous, or detrimental-to-health works that may have an adverse impact on their health, the pregnancy, or breastfeeding. Subsection 2 of the Article gave grounds for a Council of Ministers' Regulation that specified a list of such detrimental and harmful works. Pregnant women cannot be compelled to perform overtime work (Article 178) nor employed in systems of work where working time exceeds 8 hours per day (Article 148). As we can see, the level of health protection of pregnant women had been high even before the process of harmonization began. Therefore, adjustment to EU standards relied more on specifying and particularizing the existing scope of protection rather than introducing entirely new mechanisms into Polish legislation. Chiefly, employers' obligations regarding the prohibited employment of pregnant and breastfeeding women were recast in more detail. Before it was brought in line with the EU standard, Article 179 of the Labour Code had mandated the employer to transfer an affected woman to another work. On the contrary, Directive 92/85 envisions a far wider array of remedies: the employer should, first and foremost, shall take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided (Article 5). If such adjustment proves technically

or objectively impossible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job. If a transfer, in turn, is not technically or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health. The Polish parliament adjusted the domestic provisions by differentiating the employer's obligations depending on the detrimental factor in question. The types of factors considered detrimental or otherwise harmful to health, existence of which rules the possibility of employing pregnant and breastfeeding women, are indicated in a regulation enacted on the basis of Article 176 § 2 of the Labour Code. Until recently it was the Regulation of the Council of Ministers of 10 September 1996 on the List of Particularly Arduous and Detrimental-to-Health Works for Women[5], which now has been replaced by the Regulation of 3 April 2017 on the List of Detrimental, Hazardous and Arduous Works for the Health of Pregnant and Breastfeeding Women[6]. By reference to the list employers concretize, in internal rules of work, the works pregnant and breastfeeding women cannot be required to do. Prohibited works include works pregnant women cannot perform due to the intensity of the prohibited factor, i.e. absolute prohibition (e.g. sewage works, work in caissons), and those in respect of which prohibition comes in where a given maximum intensity of a prohibited factor is surpassed. Where pregnant or breastfeeding workers perform absolutely prohibited work, their employer must transfer them to another work or, if that would be impossible or ungrounded, release the worker from her obligation to work whilst retaining her pay. Where pregnant or breastfeeding workers perform work prohibited only at a certain intensity, the employer must, first, alter the conditions of work or its timeframe so that the impact of the prohibited factor is eradicated. Only if this proves impossible is the employer obliged to transfer the affected worker to another work or, if that would be impossible or ungrounded, release the worker from the obligation to perform work for as long as may be required, whilst retaining her pay.

Adjustment of Polish labour law to the requirements stemming from Directive 92/85 encompassed rules governing night work of pregnant women. It must be noted that the Labour Code since its inception contained an appropriate prohibition, however it did not determine the obligations resting on the employer by reason of employing a pregnant women at night. Article 178 § 1 envisaged merely that the employer may not employ a pregnant woman at night time. On the contrary, Article 7 of Directive 92/85 stipulates that women shall not be obliged to perform night work during their pregnancy and for a period following childbirth,

[5] Consolidated text: Polish Official Journal of Laws of 2016, item 2057.

[6] Polish Official Journal of Laws of 2017, item 796.

and the employer must transfer her to day work or provide her with leave. To promulgate those regulations in Polish law, Article 178[1] was introduced into the Labour Code, pursuant to which the employer shall modify a pregnant woman's working time pattern for the period of her pregnancy, so that work is not performed at night time as far as possible, and if this is impossible or ungrounded – the pregnant worker shall be employed in another position where night work is not required. In turn, if no such transfer is possible, the employer shall release the worker from the obligation to perform work for as long as may be required, whilst retaining her pay. One should note that the prohibition on night work and employers' obligations resulting therefrom (Articles 178 § 1 178[1] of the Labour Code) attach only to women in pregnancy, whereas the scope of the prohibition in Directive 92/85 also covers breastfeeding women. It follows that, *de lege lata*, there is no labour law in Poland that would prohibit employing breastfeeding women at night time. It is a matter of dispute whether EU regulations were transposed correctly into Polish labour law in this respect. Perhaps to ensure effective implementation of the Directive the already existing ban on employing at night time, without their consent, workers caring for children under the age of four is sufficient. Even if that is the case, however, Polish law does not prescribe any consequences or obligations for employers who do resort to such employment, whilst the Directive does envisage legal ramifications in respect of employment of breastfeeding women at night time. It appears, therefore, that there is no full correspondence between domestic and EU law here and Articles 178 § 1, 178[1] of the Labour Code should be expanded so as to include breastfeeding women.

The legislator need not have embarked on any legislative activity to transpose Article 9 of the Directive on the duty of employers to grant their pregnant workers time off for ante-natal examinations. Such a stipulation had existed in Polish labour law long beforehand – an employer shall grant time off work (fully paid) to a pregnant worker for the purpose of undergoing medical examinations according to doctor's orders in connection with the pregnancy (Article 185 of the Labour Code).

3. LEAVE RELATED TO PARENTHOOD

EU Member States are obliged, under Directive 92/85, to grant women the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement (or peripartum), and render the compulsory nature of maternity leave of at least two weeks. Also in this case Poland's laws before the accession allowed female workers in pregnancy and confinement the right to maternity leave for a period of 16 weeks in respect of the first child, and 18 weeks for every subsequent child. The worker could choose to use 2 weeks of that time before giv-

ing birth. These regulations already met the requirements subsequently laid down in Article 8 of Directive 92/85. Nowadays, a woman has a right to 20 weeks' leave if she gives birth to one child, and the number increases should more children be born out of one birth. The upper threshold is 37 weeks for five children or more born out of one birth. A woman may use up to 6 weeks of the leave she is entitled to before the birth. Throughout her leave, she is entitled to a maternity allowance in the amount of 100% of her pay, in line with Article 11 of Directive 92/85. The provisions concerning maternity leave did not require alterations in the light of the Directive. The mere difference between the respective regulations of the Labour Code and the Directive is the obligatory character of maternity leave. For European law states that only 2 weeks before or after birth are compulsory, whilst under Polish law this applies, in principle, to the entire duration of the leave[7]. In some circumstance the leave may be taken out by a child's father or a close relative, but if neither of those persons chooses to do it, the mother must, in principle, use it up in full. A woman cannot waive her right to maternity leave. *Prima facie* there is no incompatibility between Polish law and the Directive in this respect, as the latter allows for the introduction of more beneficial solutions. Even so, one may wonder whether an obligation to be subjected to leave on a full-time basis with no possibility of derogation is indeed more beneficial than the appropriate provision in the Directive. Without a doubt it helps a woman re-energise and replenish after birth and assists in providing care to a newborn. On account of the long duration of maternity leave (20 weeks), women's right of self-determination is thereby drastically impeded. Whilst the duty to go on leave for 8 weeks does not trigger any major doubts – it is a so-called peripartum break that serves a woman to regenerate and return to full health following childbirth – the obligatory character of the remainder of the leave appears gratuitous and unnecessary. In the literature it is even argued that it is a violation of EU law to take away from a female worker her freedom to decide to (partially) waive her right to maternity leave[8].

Contrary to the above, family leave was subject to more far-reaching adjustment measures. Under Polish law, family leave is considered the equivalent of parental leave; the latter phrasing is favoured in EU law as prescribed in Directives 96/34 and 2010/18. The adjustment process went through several stages and it progressed together with the evolution of the appropriate EU standards (2010 saw the enactment of a new directive on parental leave). Member States must rgant an individual right to parental leave of at least four months, one of which must be non-transferable and must be taken up by a given parent. The leave may be taken until the child reaches a certain age as regulated in national law, yet no higher than 8 years.

[7] A. Sobczyk, *Prawo dziecka do opieki rodziców jako uzasadnienie dla urlopu i zasiłku macierzyńskiego*, "Praca i Zabezpieczenie Społeczne" 2015, issue 9.

[8] L. Mitrus, *Wpływ regulacji*..., p. 254.

Unpaid leave given to take care of a small child was introduced in Polish law as early as 1968[9]. It was subsequently named "family leave". Relevantly in the context of EU law, since its beginnings it was separate from the entitlement to maternity leave (the right to maternity leave was in no way a prerequisite for taking family leave). It was also optional and could be used up until the child reached a certain age – in this respect it was in line with the Directives' requirements. To qualify for the leave one must have at least 6 months of employment, well within the limit under Directive 2010/18 (up to one year). Also in accordance with the Directive, the right to family leave is accorded regardless of one's type of contract. Distinctly, the length of the leave has always been significant – originally 3 years (currently 36 months), which is many times more than the lower threshold imposed by the Directives (initially 3, now 4 months). That was all for similarities, however. Initially, family leave could only be taken up by women. The first manifestation of adjustment activity, therefore, consisted in extending the right to family leave to cover men[10]. Yet even after the enactment of the Regulation of the Council of Ministers of 28 May 1996 on Leave and Parental Allowance it was impossible for both parents to go on the leave simultaneously, whilst Directive 2010/18 lays down that leave is an individual right of each of the parents. The Polish legislator gradually proceeded to relax the domestic requirement by deciding to allow both parents to take up leave simultaneously for a specified time period – first it was 3 months, then 4. Not until the 2015 amendment of the Labour Code[11] was the right to family leave formulated as a joint right of both parents or custodians of the child so that parents may use the leave at the same time (thereby full correspondence with Directive 2010/18 was achieved).

Controversies were sparked by the duty, imposed by Directive 2010/18, to accord at least one month of family leave inalienably to each parent. By opting for this instrument the European legislator intended – as admitted in the preamble to the Directive – to encourage fathers to more actively engage in childcare and improve the deteriorating demographic situation. Adjustment of Polish law in this respect met with some opposition from domestic social partners. Trade unions voiced concerns that in practice this will reduce the amount of leave taken up by mothers, and pushed for extending the duration of family leave by one month. This, in turn, was vehemently protested by employers' associations that argued that the current amount of leave is long, the longest in Europe. Consequently, the

[9] By means of the Regulation of the Council of Ministers of 29 November 1975 on Unpaid Leave for Mothers in Work Caring for Small Children (Polish Official Journal of Laws of 1975, No. 43, item 219).

[10] This change was enacted by the Regulation of the Council of Ministers of 28 May 1996 on Leave and Parental Allowance (Polish Official Journal of Laws of 1996, No. 60, item 277 as amended).

[11] Act of 4 November 2014 on Amending the Labour Code and Numerous Other Acts (Polish Official Journal of Laws of 2014, item 1502).

legislator decided to take out from the entire duration of the leave (36 months) one month for each parent and made those inalienable. Thereby the minimal requirements of Directive 2010/18 were met, and it was left to those interested which parent (custodian) should use rest of the leave[12]. The 2015 amendment is compatible, as shown, with the EU requirements yet, in substantive terms, is quite unsatisfactory. In comparison to the long duration of the entire leave, 36 months, one month is very short – it is difficult to expect that the aims pursued by the European legislator will be thus attained. On the other hand, one should remember that family leave is unpaid whereas men in Poland are still better remunerated than women[13]. Inalienability of a larger part of family leave could discourage, for financial reasons, fathers from taking it at all, thereby producing an opposite result to that initially envisaged. It is submitted that there is no societal pressure or need to effect more far-reaching changes in this regard.

Entitlement to family leave applies for each child. The legislator did not predict a situation, however, where a woman gives birth to more than one child at a time. The Supreme Court has held that in such a case one family leave is due[14]. This position is questionable, also from the perspective of compatibility with EU law. Although EU legislation does not explicitly necessitate according "double" family leave in such cases, however the CJEU's case law stands for the proposition that extraordinary circumstances of the parents shall be taken into account. In its judgment of 16 September 2010 in Case C-149/10 *Zoi Chatzi v Ypurgos Oikonomikon* the Court held that the Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC cannot be interpreted in a way that in the event that twins are born, parents are automatically entitled to two periods of leave. Nonetheless, under Article 2 of Directive 2010/18it appears that, interpreted through the prism of the of equal treatment, the national legislator must enact such regulations pertaining to family leave that ensure that parents of twins are appropriately treated in a way that pays due respect to their specific needs. It is for a national court to verify whether national laws comply with this requirement and, if necessary, to interpret them so that they correspond, to the greatest possible extent, with EU law. It is difficult to pinpoint any Polish provisions that would – in line with the judgment – take into account the needs of parents of twins. An exception relates to a benefit added on top of parental allowance by virtue of childcare belonging to a person on parental leave who takes care of more than one child (Article 10 of the Act of 28 November 2003 on

[12] For more on this, see: M. Latos-Miłkowska, *Dylematy związane z dostosowaniem polskiej regulacji urlopu wychowawczego do wymogów dyrektywy 2010/18*, "Monitor Prawa Pracy" 2012, issue 9.

[13] *Cf.* the report of the Central Statistics Office of Poland, *Kobiety i mężczyźni na rynku pracy*, Warszawa 2016.

[14] Judgment of the Supreme Court of 28 November 2002, II UK 94/02 (OSNP 2004, No. 6, item 106).

Family Benefits, consolidated text: Polish Official Journal Of laws of 2016, item 1518). Parents of more than one child (provided they were born together) are entitled to that benefit for a period of 36 months (as opposed to 24 months in all other cases), however the amount of the allowance does not change[15]. It is worth considering, therefore, whether the Polish standard lives up to the ideal envisioned by the CJEU with reference to the duty to account for extraordinary needs and circumstances of workers where more than one child is born at once.

Under Article 5 of Directive 2010/18, use of family leave should not deprive a worker of rights they accrued beforehand – this provision prompted the Polish legislator to amend the laws regulating annual leave. Under former law, taking up family leave for more than one month resulted in a proportionate reduction of the amount of annual leave due. Adjustments consisted in an elimination of the family leave from the catalogue of circumstances giving rise to a reduction of annual leave in Article 155^2 § 2 of the Labour Code. Currently, if a worker takes up family leave during a year in which they accrued a right to annual leave, no reduction in the amount of annual leave due will eventuate.

4. WORK-LIFE BALANCE ARRANGEMENTS

Directive 2010/18 puts a never-before-seen emphasis on instruments that facilitate reconciliation of professional life with childcare. Work-life balance is perceived by the European legislator as an expression of equality on the labour market and a vital element of the concept of *flexicurity* (recital 8 of the preamble). Under Article 3 of the Directive, a Member State decide whether parental leave is granted on a full-time or part-time basis, in a piecemeal way or in the form of a time-credit system, taking into account the needs of both employers and workers. Furthermore, in order to promote better reconciliation Member States and/or social partners shall take the necessary measures to ensure that workers, when returning from parental leave, may request changes to their working hours and/or patterns for a set period of time. Employers shall consider and respond to such requests, taking into account both employers' and workers' needs. It appears that it is possible, under Polish labour law, to grant family leave on a part-time basis. For during family leave, a worker may perform work against payment for the current or any other employer (Article 186^2 of the Labour Code). Whilst the legislator did not explicitly referred to a part-time basis, a purposive construction leads clearly in this direction as the undertaking of work on a fulltime basis equals the end of the family leave. Consequently, the idea of Article 186^2 implies

[15] *Cf.* judgment of the Voivodeship Administrative Court in Wrocław of 16 January 2016, IV SA/Wr 454/13.

to be that, if employed during family leave, a worker is using its family leave on a part-time basis[16]. Independently, a worker entitled to family leave may apply to the employer in writing for a reduction of their working time (Article 186^7). It is an alternative right as against the right to family leave, and the reduction cannot exceed half of the worker's full working time, whilst the employer is under an obligation to accept the request. The right to have one's working time reduced is connected with the right to family leave so that one must be entitled to the latter to be eligible to apply for the former. The reduction may be benefited from without using up one's family leave; it is also available following a worker's return from her family leave provided that she still has a right to that leave. It is not possible, however, to take advantage of the reduction after one's right to family leave has expired (or where it has been fully used up). It is difficult and complex to assess the compatibility of Article 186^7 with EU law. On the one hand, the Polish legislator treats using of the right to reduction as separate from the using of family leave, therefore it is not the case (which, on a side note, would still be in line with the Directive) that workers by choosing to exercise their right to reduction thereby take up their family leave on a part-time basis. However, the right to reduction does not fully correspond to the right in Article 6 of the Directive as it is not tied to a worker's return from family leave. This is not to say that the Polish regulation breaches the Eu standard. One must consider the sheer length of the leave and that for full 36 months a worker is able to freely choose between family leave and reduced working time. Even so, J. Skoczyński has noted that Articles 186^2 and 186^7 of the Labour Code treat workers entitled to family leave inconsistently, which is liable to fall in breach of the constitutional principle of equality before the law. One way to remove the incompatibility would be to assume that a worker entitle to family leave, who chooses to reduce their working time, is thereby a worker benefitting from family leave in the form of a reduction of their working hours[17].

5. SPECIAL PROTECTION OF STABILITY OF THE EMPLOYMENT RELATIONSHIP

Both Directives – 92/85 and 2010/18 – compel the Member States to institute instruments aimed at protecting workers from termination of employment contract on account of taking up maternity or parental leave. Polish has for long now guaranteed high standards of protection for women on maternity

[16] Some doubts in this respect are voiced in: J. Skoczyński, (in:) L. Florek (ed.), *Kodeks pracy. Komentarz*, Warszawa 2011, p. 930.

[17] *Ibidem*.

leave (Article 177 of the Labour Code) and workers who apply for and use family leave (Article 186[1]) by preserving the stability of the employment relationship through prohibitions on giving notice on and terminating employment contracts. No adjustment was necessary here as this standard went beyond what the European legislator required. These protections are complemented by, in line with Directive 2010/18, a guarantee of safe return to work following maternity and family leave – the employer must permit the worker to work in the post as beforehand or, if this is impracticable – in an equivalent position or one that corresponds with the person's qualifications.

6. PROTECTION AGAINST DISCRIMINATION

European law puts strong emphasis upon protection from discrimination and less favourable treatment by virtue of the use of maternity and family leave. Clause 4(4) of Directive 2010/18 stipulates that to guarantee the possibility of taking up family leave to workers, the Member States and social partners take, in accordance with national law, collective agreements and commercial practice, every essential step to establish legal means of shielding workers from less favourable treatment or redundancies in the event that they apply for such leave. The Polish legislator transposed the EU prohibition on discrimination into Polish law in Article 18[3a] *et seq.* of the Labour Code. It appears, however, that as those provisions do not single out parenthood as a standalone basis for discrimination, they fall short of living up to the EU standard[18]. A prohibition on less favourable treatment on account of sex is not sufficient where family, parental and, in some cases, maternity leave may be taken up by men and women alike. Workers of both sexes cannot be susceptible to less favourable treatment when they wish to benefit from such leave[19]. Whilst some progress has been made thanks to the activity of the courts, the legislator, I submit, should institute into Part VIII of the Labour Code a provision prohibiting less favourable treatment by virtue of all the characteristics laid out in the Directive, as it did in relation to teleworking[20]. Optionally,

[18] This is made especially clear in the Polish Supreme Court's construction, according to which discrimination connotes merely less favourable treatment of workers by reason of the characteristics listed in Article 183a of the Labour Code. *Cf.* judgment of the Supreme Court of 9 January 2007, II PK 180/06, OSNP 2008, No. 3–4, item 36; similarly the judgment of the Supreme Court of 28 May 2008, I PK 259/07, M.P.Pr. 2008, No. 10, item 532.

[19] Practice shows that discrimination for those reasons may apply to men to a greater degree than women. Whilst it is socially acceptable for a woman to benefit from her parental rights, instances where men use their entitlements are considered by many employers as a kind of a "fantasy".

[20] Article 67[15] of the Labour Code.

parenthood may be added to the catalogue of characteristics which are capable of giving rise to discrimination, listed in Article 18^{3a} of the Labour Code.

7. CONCLUSIONS

Adjustment of Polish laws to the EU standard of rights related to parenthood has not been of a revolutionary magnitude and scale. Primarily, it relied on supplementing or specifying solutions that had already been the law. The most major changes affected family leave, considered the equivalent of parental leave regulated in Directive 2010/18. It is worth noting, however, that EU provisions in this respect have been amended several times, which has prompted the Polish legislator to review domestic law on an ongoing basis. Notwithstanding that 12 years have passed since Poland's accession to the EU, some issues are still controversial, particularly lack of a clear domestic prohibition on employment of breastfeeding women at night time. Protections against less favourable treatment on account of one's use of rights related to parenthood also appear insufficient, and part-time family leave needs urgent reconsideration.

THE IMPACT OF EUROPEAN LAW UPON REGULATIONS GOVERNING RIGHTS RELATED TO PARENTHOOD IN POLISH LABOUR LAW

Summary

Membership in the European Union has created for the Polish legislator the duty to adjust Polish law to European standards. As parenthood is an area of intensive legislative activity of the European legislator, it has also come within the ambit of the adjustment obligation. Relevant here are, first and foremost, Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding and Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave. Adjustment of Polish laws to the EU standard of rights related to parenthood has not been of a revolutionary magnitude and scale. Primarily, it relied on supplementing or specifying solutions that had already been the law. The most major changes affected family leave, considered the equivalent of parental leave regulated in Directive 2010/18. It is worth noting, however, that EU

provisions in this respect have been amended several times, which has prompted the Polish legislator to review domestic law on an ongoing basis. In some fields, like the ban of night work of breastfeeding women compliance with EU standards still has not been obtained.

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urlop macierzyński, urlop wychowawczy, zdrowie, ochrona, równowaga między życiem zawodowym a osobistym

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FREE CAPITAL MOVEMENT PRINCIPLE AND ITS EFFECT ON AGRICULTURAL LANDS TURNOVER IN UKRAINE

1. LIMITATIONS ON AGRICULTURAL LANDS TURNOVER IN UKRAINE

The legislation of Ukraine on agricultural lands turnover is one of the most conservative in the world. §§ 14, 15 of the Chapter X "Transitional Provisions" of the Land Code of Ukraine[1] (hereinafter – "LCU") prohibit (with minor exceptions) alienation of most types of agricultural lands, affecting approximately 7 million private land owners. Thus, the regime of agricultural lands turnover in Ukraine is more conservative even compared with such countries as China and Viet Nam, where alienation of agricultural lands is *de jure* prohibited, but *de facto* exists in some hidden forms (as alienation of tenancy titles to agricultural lands[2]), which is not possible or at least very difficult in Ukraine.

The prohibition to alienate agricultural lands in Ukraine, initially established in 2001 as a temporary measure, has been extended 7 times. Currently LCU stipulates that the prohibition (commonly called "moratorium") will exist till the enactment of a law on agricultural lands turnover (which has not been adopted yet).

Although since the very introduction of the moratorium back in 2001 its existence has been explained by the need to create some special rules on agricultural land turnover, in the course of 16 years which have passed since then there has been no consensus on exactly what rules should be established.

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[1] *Земельний кодекс України* від 25 жовтня 2001 року № 2768-III. Available at: http://zakon4.rada.gov.ua/laws/show/2768-14 (accessed 10 May 2017).

[2] Чау Тхи Хань Ван. *Земельное законодательство Социалистической Республики Вьетнам и Украины: сравнительно-правовой анализ.* – Дис. … к. ю. н. … 12.00.06. – Х.: Национальная юридическая академия имени Ярослава Мудрого, 2007. – С. 25, 27; Льовочкіна В. М. *Правове регулювання обігу земель за законодавством КНР та України: порівняльно-правовий аналіз.* – Автореф. … к.ю.н. … 12.00.06. – К.: Київський національний університет імені Тараса Шевченка. – P. 3, 4, 10.

Currently, the chances of lifting the moratorium are, in my opinion, as high as never before.

First of all, in the current situation of an undeclared war with the Russian Federation, a heavily indebted Ukraine simply does not have the luxury to keep such unreasonable restrictions on market turnover as a moratorium on agricultural lands alienation. Luckily, a significant change in public opinion is evident[3], and a reasonable (in my view) approach starts to outweigh the voices of populists, who are exploiting the issue of the moratorium, and of the powerful agricultural lobby which greatly benefits from the moratorium as it significantly reduces the level of lease payments (most productive agricultural land plots in Ukraine with the average size of 4 ha are leased by their owners, mostly elderly people, to agricultural enterprises, which sometimes accumulate hundreds of thousands of hectares in their hands[4]).

The pressure towards lifting the moratorium is reinforced by purely legal factors.

In my opinion, the moratorium, which deprived most private owners of all or most economic benefits from their ownership without any compensation, contradicts both the provisions of the Constitution of Ukraine[5] (Article 22(3) and Article 41(5)) and the guarantees set by § 1, Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms[6]. Although this opinion has been expressed many times in the past[7], only recently has the prospect of chal-

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[3] See, among many other sources, Заблоцький М. *Нас тримають за ідіотів: Рада «продовжила» безстроковий мораторій* // Українська правда. Блоги. 7 жовтня 2016. – Available at: http://blogs.pravda.com.ua/authors/zablodsky/57f75a664c428/ (accessed 10 May 2017); *Альтернативи продажу землі немає – Міклош.* Економічна правда, четвер, 6 жовтня 2016 року. Available at: http://www.epravda.com.ua/news/2016/10/6/607561/ (accessed 10 May 2017); *Кулинич П.: «Я сторонник постепенной отмены моратория».* // Мой город. – Available at: http://sever.lg.ua/2015-05-20-pavel-kulinich-ya-storonnik-postepennoi-otmeny-moratoriya (accessed 10 May 2017); *Вакарчук – про мораторій на продаж землі: «Всі партії заражені черв'яком популізму».* 7 жовтня 2016 року Available at: https://tsn.ua/politika/vakarchuk-pro-moratoriy-na-prodazh-zemli-vsi-partiyi-zarazheni-cherv-yakom-populizmu-782043.html (accessed 10 May 2017).

[4] *Топ 100 латифундистов Украины.* Available at: www.latifundist.com/rating/top100#136 (accessed 10 May 2017).

[5] *Конституція України від 26.06.1996 року.* Офіційний веб-портал Верховної Ради України. Available at: http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80 (accessed 10 May 2017).

[6] *Convention for the Protection of Human Rights and Fundamental Freedoms.* Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 10 May 2017).

[7] See, *inter alia*, Мірошниченко А. М., Юрченко А. Д. *Соціально-економічні та правові аспекти мораторію на відчуження приватних земель сільськогосподарського призначення.* Бюлетень Міністерства юстиції України. 2006. № 12. P. 59–75; Мірошниченко А. *Земельне право України:* Підручник. – К.: Алерта, 2013. – P. 151; Мірошниченко А. М. *Європейський суд з прав людини як важіль для зміни вітчизняного земельного законодавства.* Право та управління. 2012. № 2. P. 509–517.

lenging the moratorium within formal legal procedures become real. In May 2016 the European Court of Human Rights handed down a communication on 5 applications based on the alleged violation of Article 1 Protocol 1 by the moratorium[8], and in February 2017 55 members of Ukrainian Parliament applied to the Constitutional Court with a motion to render the provision of the LCU on the moratorium unconstitutional[9].

Although the prospect of lifting the moratorium becomes more and more real, a discussion within Ukrainian society and legal doctrine still exists whether there is a need to impose limitations of agricultural lands turnover.

Possible limitations (some of which are already provided for in national legislation) include various pre-emption rights (in favour of the state, municipalities, lessees, neighbours etc), limitations of the area available for ownership and tenure of one person, increased taxation in case of land alienation etc. And of course, a lot of participants in the public discussion (including, for instance, the current Prime Minister Volodymyr Groysman[10]), even if they support lifting the moratorium, argue in favour of limitations in respect of persons who can own land. The idea to prohibit the possibility of acquiring agricultural lands for foreigners has particularly strong support.

The most liberal (so far) version of the draft law "On agricultural land turnover" (registration # 5535), initiated by parliament member Mr Olexiy Mushak[11], provides for the possibility for foreigners and stateless persons of acquiring agricultural land only after 1 January 2030 (§ 3 of Chapter IV "Final and Transitional Provisions"), and totally denies such a possibility to foreign legal entities. It must be noted that Mr Mushak represents the most liberal wing of the Ukrainian Parliament. It was Mr Mushak who initiated the application to the Constitutional Court of Ukraine in relation to the constitutionality of the moratorium, as mentioned above. So the fact that his draft law is that conservative in relation to the ownership of foreigners of agricultural land is very illustrative.

It would be very helpful to consider the idea of closing the agricultural lands market for foreigners in the light of the provisions of the EU law on free capital movement.

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[8] *Svintsitska v Ukraine*. Application No. 71082/12. ECtHR. Available at: http://hudoc.echr.coe.int/eng?i=001-163364 (accessed 10 May 2017).

[9] *Депутати звернулися до КС щодо скасування мораторію на продаж земель сільгосппризначення.* Інтерфакс-Україна. Інформаційне агентство. Available at: www.interfax.com.ua/news/plitical/403890.html (accessed 10 May 2017).

[10] *Гройсман: Жоден сантиметр української землі не дістанеться іноземцям.* Цензор.нет. Available at: http://ua.censor.net.ua/news/435839/groyisman_jodensantymetr_ukrayinskoyi_zemli_ne_distanetsya_inozemtsyam (accessed 10 May 2017).

[11] *Проект закону України про обіг земель сільськогосподарського призначення*. Р.н. № 535. Офіційний веб-портал Верховної Ради України. Available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=60724 (accessed 10 May 2017).

2. THE PRINCIPLE OF FREE CAPITAL MOVEMENT

The free movement of capital is one of the "4 freedoms" (in addition to the free movement of people, goods and services) of the EU[12]. It is established in Chapter 4 "Capital and Payment" (Articles 63, 64, 65 and 66) of the Treaty on the Functioning of the EU. As provided for by Article 63[13], all restrictions on the movement of capitals and payments "between Member States and between Member States and third countries shall be prohibited". This principle extends to the purchase of immovable property.

Although some limitations of this principle are permitted, the Treaty is very cautious in this relation. It permits preservation of older limitations existing in the Member States, and establishes at the same time that "only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries" (Article 64(3)[14]).

The relevant provisions of the Treaty show that the principle of free capital movement is considered by the EU law to be of great value, which can be sacrificed only in exceptional circumstances with a very good reason.

There is an understanding that free capital movement contributes to the economic development of all countries involved. The possibility to invest generally facilitates mutual development and benefits. In short, the free movement of capital is one of the axioms of modern global capitalism[15].

[12] EUR-lex. Access to EU law. Summary of EU legislation. *Purchasing property in other EU countries*. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV-%3Al24404 (accessed 10 May 2017).

[13] Consolidated version of the Treaty on the Functioning of the European Union. Part Three. Union Policies and Internal Actions. Title IV – The free movement of Persons, Services and Capital. Chapter 4 – Capital and Payments. Article 63 (ex Article 56 TEC). Available at: http://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=celex:12016E063 (accessed 10 May 2017).

[14] Consolidated version of the Treaty on the Functioning of the European Union. Part Three. Union Policies and Internal Actions. Title IV – The free movement of Persons, Services and Capital. Chapter 4 – Capital and Payments. Article 64 (ex Article 57 TEC). Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12016E064 (accessed 10 May 2017).

[15] W. Münchau. *Free capital flows can put economies in a bind*. 10 January 2016. "Financial Times". Available at: https://www.ft.com/content/162f2056-b62e-11e5-8358-9a82b43f6b2f (accessed 10 May 2017).

3. EXPERIENCE OF EU COUNTRIES

Although (in my personal opinion) the reasoning for limiting the freedom of capital movement in relation to investment in real estate lies in pure populism, such limitations have existed in many EU countries.

At the time of accession of new EU countries certain transitional periods and exceptions were negotiated for the purchase of property and agricultural and forest land in some countries. These exceptions are set out in a number of protocols to the Treaty on the Functioning of the EU and in the Acts of Accession of EU countries[16]. As an example, Annex V of the 2011 Act of Accession of Croatia[17] can be named, which permits Croatia (with some exceptions and limitations, and the possibility to shorten the transitional period as well) to maintain restrictions on the acquisition of agricultural land by EU and European Economic Area nationals for 7 years from the date of accession, with a possibility of a 3-year extension.

In most countries, limitations of the free capital movement principle in relation to the purchase of real estate were explained by the desire to prevent "disturbances of the agricultural land market", protect some social groups (e.g. individual farmers), preserve ethnical or national identity, prevent land grabbing etc. In my opinion, in most (if not all) such situations the aim professed was rather dubious, and the means to achieve it were manifestly inadequate. What can be said for sure is that any serious restriction on the possibility to invest in land has been adversely affecting the national economy.

As shown in a recent study of the experience of 60 countries performed by the Easy Business Foundation[18], the restrictions of the agricultural lands market for foreign individuals and legal entities, introduced by some countries with the

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[16] EUR-lex. Access to EU law. Summary of EU legislation. *Purchasing property in other EU countries*. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al24404 (accessed 10 May 2017).

[17] Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union. Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community. ANNEX V. List referred to in Article 18 of the Act of Accession: transitional measures. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2012.112.01.0006.01.ENG#L_2012112EN.01006701 (accessed 10 May 2017).

[18] *Створення вільного ринку землі с/г призначення в Україні. Детальний аналіз міжнародного досвіду та аналіз соціально-економічного ефекту.* – Easy Business. – Київ,

aim of protecting local farmers, were later lifted, which positively affected land prices and the quantity of transactions, as well as the productivity and intensity of agricultural production.

The results of this special study intended to review the impact of transitional measures allowing new Member States of the EU (Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland and Slovakia) to maintain existing national provisions restricting the acquisition of agricultural land or forests by foreigners are much the same. The study shows that restrictions on foreign ownership have adversely affected the efficiency of land exchanges and land allocation, as well as productivity growth[19].

4. OBLIGATION TO HARMONIZE LEGISLATION UNDER THE PARTNERSHIP AND COOPERATION AGREEMENT

Accession to the EU is a long term goal of Ukraine, one which has a strong support from the society. The intention of the authorities to impede the attainment of this strategic goal was the cause which instigated the beginning of the Revolution of Dignity in 2013.

Following the signing of the Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine on 14 June 1994[20], Ukraine undertook an obligation to ensure harmonization (gradual approximation) of its legislation with the EU law. The obligation extended to the priority spheres set in Article 51 of the Agreement. Ownership of land does not fall directly within these spheres, but Article 52(2) of the Agreement establishes that the "[p]olicies and other measures will be designed to bring about economic and social reforms and restructuring of the economic system in Ukraine …", and Article 52(3) – that the "… cooperation will concentrate on … investment promotion and protection, … agriculture and agro-industrial sector ...".

In my opinion, these provisions (notwithstanding their general and abstract nature) required Ukraine to remove unreasonable obstacles to investments, in

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квітень 2016. – P. 208. Available at: https://drive.google.com/file/d/0B-mccHFurzQKRzQtbU56U1ZoLWs/view?usp=drive_web (accessed 10 May 2017).

[19] J. F. M. Swinnen, L. Vranken. *Review of the Transitional Restrictins Maintained by New Member States on the Acquisition f Agricultural Real Estate*. Final Report. Center for European Policy Studies (CEPS) & Centre for Institutional and Economic Performance (LICOS) University of Leuven (KUL). Submitted to the European Comission Directorate-General for Internal Market & Services. Available at: http://ec.europa.eu/internal_market/capital/docs/study_en.pdf (accessed 10 May 2017).

[20] Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine. Available at: http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=659 (accessed 10 May 2017).

other words, to ensure the free capital movement in the form of a prohibition on EU nationals from owning agricultural land in Ukraine. Moreover, the free capital movement principle also required lifting these restrictions for other foreigners.

Despite this, nothing has been done to lift or to soften restrictions on foreign ownership of agricultural (and other) land in the recent years.

5. ASSOCIATION AGREEMENT

On 27 June 2014 the Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine was replaced with the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part[21] (ratified simultaneously by the Verkhovna Rada and the European Parliament on 16 September 2014).

According to Article 145(1) of the Agreement, "With regard to transactions on the capital and financial account of balance of payments, from the entry into force of this Agreement, the Parties shall ensure the the free movement of capital relating to direct investments (1) made in accordance with the laws of the host country, to investments made in accordance with the provisions of Chapter 6 (Establishment, Trade in Services and Electronic Commerce) of Title IV of this Agreement and to the liquidation or repatriation of such invested capitals and of any profit stemming therefrom".

A footnote (marked "(1)") to this provision explaining the term "direct investments" specifically emphasises that the term extends to "the acquisition of real estate related to direct investment".

Thus, by signing and ratifying the Association Agreement Ukraine undertook a clear and unconditional obligation to remove obstacles to free capital movement pertain to acquisition of any real estate, including agricultural lands. Now such investment "in accordance with the laws of the host country" is not possible due to the existence of the moratorium; but if the moratorium is lifted, there should be no restrictions for foreigners (originating either from the EU or third countries) on acquiring agricultural lands. Any relevant limitations set in Articles 22, 81 and 82 LCU should be abolished. The Association agreement leaves Ukraine no choice in this relation.

In case Ukraine fails to introduce the necessary amendments by the moment the moratorium is lifted, the provisions of Article 145 of the Association Agree-

[21] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part. Available at: http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=16021 (accessed 10 May 2017).

ment should be applied directly and prevail over national legislation due to the principle of primacy of international law recognized in Ukraine (see, *inter alia*, the provision of Article 19(3) of the Law on International Treaties of Ukraine[22]). It must be noted that this conclusion is also reinforced by the fact that EU law, according to the principles developed by the European Court of Justice, is capable of having direct effect[23] and has supremacy over national law[24].

6. CONCLUSIONS

By virtue of Article 145 of the Association Agreement between Ukraine and the European Communities, Ukraine has a duty to implement the principle of free capital movement, in particular by abolishing restrictions on acquisition of land by foreign citizens and companies (Articles 22, 81, 82 of the Land Code of Ukraine).

In case Ukraine fails to introduce the necessary amendments, the provisions of Article 145 of the Association Agreement should be applied directly due to the principle of international law supremacy recognized in Ukraine (see, *inter alia*, the provision of Article 19 of the Law on International Treaties of Ukraine).

The formal unconditional obligation of our country to remove the said obstacles for free capital movement serves its best interests. Today, turnover of agricultural lands in Ukraine should be very dynamic, and it should be governed by general rules applicable to immovable property.

FREE CAPITAL MOVEMENT PRINCIPLE AND ITS EFFECT ON AGRICULTURAL LANDS TURNOVER IN UKRAINE

Summary

The legislation of Ukraine on agricultural lands turnover is one of the most conservative in the world, prohibiting alienation of most types of agricultural lands. This

[22] *Закон України «Про міжнародні договори України» від 29.06.2004 № 1906-IV* // Офіційний веб-портал Верховної Ради України. Available at: http://zakon3.rada.gov.ua/laws/show/1906-15 (accessed 10 May 2017).

[23] EUR-lex. Access to EU law. Summary of EU legislation. *The direct effect of European Law*. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uiserv%3Al14547 (accessed 10 May 2017).

[24] P. Craig, G. de Búrca, *EU Law: Test*, *Cases and Materials*, ed. 6, Oxford 2015, p. 266.

prohibition is likely to be lifted soon, but there are intense debates whether foreigners should be allowed to purchase agricultural lands.

By virtue of Article 145 of the Association Agreement between Ukraine and the European Communities Ukraine has a duty to implement the principle of free capital movement, in particular by abolishing restrictions on acquisition of land by foreign citizens and companies (Articles 22, 81, 82 of the Land Code of Ukraine).

In case Ukraine fails to introduce the necessary amendments, the provisions of Article 145 of the Association Agreement should be applied directly.

The formal unconditional obligation of our country to remove the said obstacles to free capital movement serves its best interests. Today, turnover of agricultural lands in Ukraine should be very dynamic, and it should be governed by general rules applicable to immovable property.

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KEYWORDS

free capital movement, agricultural lands market, Ukraine–European Union Association Agreement, acquisition of immovable property by foreigners

SŁOWA KLUCZOWE

swobodny przepływ kapitału, rynek gruntów rolnych, umowa stowarzyszeniowa Ukrainy i UE, nabycie nieruchomości przez cudzoziemców

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PRINCIPLES OF EUROPEAN TORT LAW (PETL) AND THEIR IMPACT ON APPROXIMATION OF UKRAINIAN TORT LAW TO EUROPEAN STANDARDS

1. GENERAL PROVISIONS GOVERNING THE UKRAINIAN ROAD TO THE EU

The year 2014 was a serious milestone in Ukrainian history. Ukraine made its choice and started moving towards Europe. Nowadays, this means that Ukraine has to confirm its belonging to Europe, acknowledgeand accept European values, principles and concepts in all spheres of life in general and in the legal sphere in particular.

In law, "Europeanization" means approximation and harmonization of Ukrainian and European legislation in all fields of legal regulation. Ukraine has to systemically transform its legal regulation by moving from the Soviet past to the European future.

The first Concept of the adaptation of Ukrainian legislation to EU legislation was approved by the Regulation of the Cabinet of Ministers of 16 August 1999. The Concept defines adaptation of Ukrainian legislation to EU legislation as a process of approximation and gradual bringing of Ukrainian legislation into accordance with EU legislation. In 2011 Ukraine adopted the National Program on Approximation of Ukrainian Laws to EU laws. The Program determines the main legislative areas which should be harmonized: economic activity, customs, banking, accounting, intellectual property, financial services, competition law, public procurement, standardization and technical regulations, energy industry.

The Ukraine–European Union Association Agreement, signed in 2014, established a political and economic association between the parties. This is the most significant international treaty in Ukrainian modern history. The parties committed to cooperate and converge economic policy, legislation, and regulation across a broad range of areas, including equal rights for workers, steps towards visa-the free movement of people, exchange of information and staff in the area of justice,

modernization of Ukraine's energy infrastructure, and access to the European Investment Bank[1].

The Association Agreement also commits to the convergence of Ukrainian legislation with EU law in all spheres of social life. To perform this task the Cabinet of Ministers of Ukraine adopted a Regulation on the Implementation of the Association Agreement between Ukraine on the one part and the European Union, Euroatom and Their Member States on the other part on 17 September 2014. After that the Cabinet of Ministers of Ukraine adopted 33 regulations and 129 plans for the implementation of 179 EU legal acts in the spheres of medicine, infrastructure, justice, agriculture, education, social issues etc.[2] A lot of monographs and research papers are devoted to the problems of approximation of Ukrainian laws to EU laws. Experts in international law and in different fields of law which are going to be approximated have made research into the existing situation in Ukrainian legislation and the need for harmonization[3].

The above shows that the priority spheres for approximation are the spheres of public law because the EU *Acquis Communaitaire* focuses mostly on the regulation of public relationships.

2. APPROXIMATION OF TORT LAW

Even so, private law shall not stand aside from the harmonization process. Equal private rules are one of the main conditions of Ukraine – EU cooperation. One of the functions of private law is to provide effective remedies in cases of human rights' infringement. Private law has a successful mechanism, proven for millennia – in the form of tort law. Tort or an obligation to compensate for non-contractual damage has been known since Ancient Rome. And nowadays, both in Ukraine and in Europe, tort law provides instruments for human rights protection in cases of causing damage to life, health, property or other rights.

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[1] https://en.wikipedia.org/wiki/Ukraine–European_Union_Association_Agreement (accessed 3 May 2017).

[2] Харитонов Є. О. *Україна – Європа: проблеми адаптації у галузі приватного права*: монографія. – Одеса: «Фенікс», 2017. – с. 6.

[3] Муравйов В. *Гармонізація законодавства України з правом Європейського Союзу в рамках Угоди про асоціацію між Україною та ЄС* / В. Муравйов, Н. Мушак // Віче. – № 8. – 2013. – С. 12–18; *Європейський проект та Україна*: монографія / А. В. Єрмолаєв, Б. О. Парахонський, Г. М. Яворська, О. О. Резнікова [та ін.]. – К.: НІСД, 2012. – 192 с.; Ващенко Ю. В. *Адміністративно-правовий статус енергетичного регулятора в Україні: сучасний стан та перспективи реформування у контексті європейської інтеграції*: Монографія. – К.: Юрінком Інтер, 2015. – 288 с.

Therefore having similar regulation of torts is of high importance for productive cooperation between Ukraine and the EU.

The main problem in this field is that the European Union does not have a unified tort law, similar in each Member State. There are some EU legal acts targeting specific torts, such as the Directive 2014/104/EU on antitrust damages actions; Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products etc. as well as Regulation (EC) No 864/2007 – the law applicable to non-contractual obligations (Rome II). But all of them deal with either international private law issues or specific torts.

In general, there are three main tort law systems in Europe: French, German and Common Law. The French system or the system of "general delict" is based on the provisions of the French Civil Code (Code of Napoleon). The German system (which is used in Ukraine as well) is based on the BGB (German Civil Code) and has both general tort rules and rules of special delicts. And the Common Law system (used in England and Wales, Cyprus and Malta) does not know of general delict and deals mostly with the consequences of specific acts of wrongdoing.

There have been several attempts to unify tort law in Europe. One of the most significant was the creation of the Principles of European Tort Law (PETL).

3. PRINCIPLES OF EUROPEAN TORT LAW AS AN INSTRUMENT FOR APPROXIMATION

The Principles of European Tort Law (PETL) were drafted by the European Group on Tort Law or, as it is called, the "Tilburg Group"[4]. The Group exists till today and meets regularly to discuss fundamental issues of tort law liability as well as recent developments and future directions of the law of tort. The European Group on Tort Law aims to contribute to the enhancement and harmonization of tort law in Europe through the framework provided in the PETL and its related, ongoing research, and in particular to provide a principled basis for rationalization and innovation at national and EU levels[5].

The Group has drafted a collection of the Principles of European Tort Law (PETL) similar to the Principles of European Contract Law drafted by the European Contract Law Commission ("Lando Commission"). In preparation for the actual drafting of the Principles the core topics of tort law were examined in separate projects. For each of these topics a questionnaire which had already

[4] The name of the group comes from the working place of its leader – Jaap Spier – who was a professor at the University of Tilburg at the time.

[5] http://www.egtl.org (accessed 30 May 2017).

been discussed in advance with all members was distributed. In response to these questionnaires, members or guests of the Group produced country reports. These reports became the basis of comparative reports drafted by the respective project leaders[6]. In 2002 a comprehensive set of Principles was formed by the Drafting Committee. The full text of the Principles, together with commentaries given by the members of the European Group on Tort Law, was published. The official language of the PETL is English. Principles were translated into other languages of the EU and some other widely used languages. But in case of a different use of some rule in English and in another language, the English text prevails[7].

The PETL is an example of so-called "soft law" whose classical definition has been given by F. Snyder, who describes soft law as rules of conduct that are not legally binding but may have a practical implication[8]. Scholars outline the primary purpose of the Principles as a presentation of a common framework both for further development of national laws and for uniform European legislation [9].

When evaluating the Principles of European Tort law as a document which could help approximate Ukrainian tort law to European standards we need to outline some differences in the understanding of the term "principles" in Ukrainian legal doctrine and in the PETL. In Ukrainian jurisprudence, principles of law are defined as core ideas of law, the existence of which expresses the most important patterns and foundations of the exact type of the state and law, which are in accordance with the essence of law, characterized by universality, the highest imperativeness and general significance, and which match the objective necessity of exact social formation building and reinforcing[10]. To simplify, principles of law in Ukraine are recognized as core ideas, the most general statements which characterize the essence of law in society. Principles are written as legal norms and are legally binding. On the other hand, the Principles of European Tort Law is a set of rules which are not binding on any country. They are guidelines for developing national legislation in the field of torts as well as joint European rules.

As a guideline, the PETL could be used for the developing of tort law of Ukraine and its approximation with the European tort practice. There are some rules which are similar in the tort law of Ukraine and in the PETL. Both the Civil

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[6] B. A. Koch, *The "European Group on Tort Law" and Its "Principles of European Tort Law"*, "The American Journal of Comparative Law" 2005, Vol. 53, issue 1, pp. 189–205.

[7] Whilst preparing this paper we found errors in the translation of the PETL into Russian. In the English version para 3 of Article 2:102 says that extensive protection is granted to property rights, including those in intangible property. But in the Russian translation property and personal non-property rights are widely protected.

[8] F. Snyder, *Soft Law and Institutional Practice in the European Community*, (in:) S. Martin (ed.), *The Construction of Europe: Essays in Honor of Emile Noel*, Dordrecht 1994, pp. 197–225.

[9] B. A. Koch, *The "European Group on Tort Law"...*

[10] Колодій А. М. *Принципи права України*: монографія / А. М. Колодій. – К.: Юрінком Інтер, 1998. – С. 27.

Code of Ukraine and the PETL recognize damage caused as a general condition of tort liability. No damage – no tort. Damage includes material or immaterial harm to legally protected interests (Articles 1166–1167 of the Civil Code of Ukraine, Article 2:101 of the PETL). Besides damage, there are other requirements of tort liability: wrongful conduct, causation and fault – which are necessary in general but could not be considered in specific tort cases (strict liability, product liability etc.).

But the general understanding of each requirement differs greatly in the Ukrainian legal doctrine and in the PETL. The Ukrainian doctrine since the middle 1950s has been based on the concept of the "compound of civil wrong". One of the founders of the concept was the well-known Soviet academic Olympiad Ioffe. He pointed out that a civil wrong is a complex but unified act which includes several subjective and objective elements[11].

The "compound of civil wrong" concept was expounded in detail by Professor Gennadiy Matveev. He proposed that the "compound of civil wrong" was a legal fact which generated relationships between a wrongdoer and a victim[12]. He made an analogy to the "compound of crime" concept which was and is recognized as the basis of criminal liability. "Compound of crime" consists of four elements: object, objective side, subject, subjective side. All elements are important and necessary for the qualification of an act as a crime.

The "Compound of civil wrong" concept similarly consists of four elements: wrongful conduct, damage, causation (a causal link between the wrongful conduct and the damage) and fault. The first three elements are characterized as objective ones and exist in the objective world. Fault is a subjective element and denotes a subjective relation of the person to his or her behavior and its consequences.

The concept of the "compound of civil wrong" is criticized by some scholars[13]. But it is still recognized officially and used in judgments.

The European approach of the PETL does not recognize the notion of "compound". And to our mind such an approach is more correct for tort law. The term "compound" suggests an indissoluble combination of elements where an absence of one element destroys the compound. The "compound of crime" has such a meaning. In criminal law textbooks it is defined as a combination of objective and subjective attributes which allow for qualifying an action as a specific

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[11] Иоффе О. С. *Избранные труды*: в 4 т. / О. С. Иоффе. – СпБ.: Юридический центр Пресс, 2004. – Т. 3: Обязательственное право. – с. 150.

[12] Матвеев Г. К. *Основания гражданско-правовой ответственности* / Г. К. Матвеев. – М.: Юридическая литература, 1970. – с. 5.

[13] Брагинский М. И., Витрянский В. В. *Договорное право. Общие положения*. – М.: Статут, 1997. – с. 569–570; Отраднова О. О. *Проблеми вдосконалення механізму цивільно-правового регулювання деліктних зобов'язань*. Монографія. – К.: Юрінком Інтер, 2014. – с. 104.

crime[14]. The presence of all elements of the "compound of crime" are necessary for qualification.

As for civil torts, an analysis of legislation and cases shows that tort liability sometimes arises where damage is caused by legal conduct or in spite of fault. So we can hardly talk about any "compound".

The only condition of tort liability is damage (Title II of the PETL). Damage may be pecuniary or non-pecuniary. Pecuniary damage is defined as a diminution of the victim's patrimony caused by the damaging event (Article 10:201 PETL). In the case of personal injury, which includes injury to bodily health and to mental health, pecuniary damage includes loss of income, impairment of earning capacity and reasonable expenses, such as the cost of medical care. In the case of death, persons such as family members whom the deceased maintained or would have maintained if death had not occurred are treated as having suffered recoverable damage to the extent of the loss of that support (Article 10:202 PETL). Non-pecuniary damage is not clearly defined by the PETL. Article 10:301 merely mentions that considering the scope of its protection (Article 2:102), violation of an interest may justify compensation of non-pecuniary damage. This is the case in particular where the victim has suffered personal injury or injury to human dignity, liberty or other personality rights. Non-pecuniary damage can also be the subject of compensation for persons having a close relationship with a victim suffering a fatal or very serious non-fatal injury.

Other prerequisites of tort liability, such as wrongful conduct, causation and fault, also display some differences in Ukrainian tort law and in the PETL. And if the differences in wrongfulness mostly concern the victim's conduct, causation and fault have an extremely different meaning in Ukrainian legal practice and in the PETL.

As regards causation we should mention that it is not a legal category and the Ukrainian legislator rarely appeals to it. Ukrainian legal doctrine knows different concepts of causation, including the theory of "necessary and random causation" (prof. I. Novitsky, prof. L. Lunts, prof. G. Matveev)[15], the theory of "possibility and reality" (prof. O. Ioffe[16]) etc.

Legal practice tends to refer to so-called "direct causation". A plenum of the Supreme Court of Ukraine in the Resolution Re N 6 of 27 March 1992 on court practice in claims for compensation for damage stated that "when considering claims for damages the courts shall keep in mind that (…) damage, caused to the

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[14] Чернишова Н. В., Володько М. В., Хазін М. А. *Кримінальне право України*. – К.: Наукова думка, 1995. – с. 37.

[15] Новицкий И. Б., Лунц Л. А. *Общее учение об обязательстве*. – М.: Юридическая литература, 1950 – 300–319; Матвеев Г. К. *Основания гражданско-правовой ответственности* - М., 1970. – с. 97–102.

[16] Иоффе О. С. *Избранные труды*: в 4 томах. Том 3 Обязательственное право. – СПб, 2004. – с. 161.

personality or property of a human being as well as damage caused to the property of a legal entity shall be compensated by the person who caused the damage in case that his or her conduct was illegal and there was direct causation between the conduct and the damage".

The term "direct causation" means that there is no intermediary between the action and the resultant damage. This can be fittingly analysed where one tortfeasor performs one isolable act. But in case of several actions of multiple tortfeasors the idea of direct causation fails. Neither Ukrainian legislation nor legal doctrine provide any official recommendations. The High Commercial Court of Ukraine in the Elucidation N 02-5/215 from 01.04.1994 on some questions concerning the practice of deciding claims for compensation for damage advised to judge every case individually and to analyse causation considering all facts of the case.

The approach of the PETL could be helpful for Ukrainian legal practice in terms of conducting analyses of causation. The main concept of causation used in the PETL is "Conditio sine qua non". Article 3:101 states that "an activity or conduct (hereafter: activity) is a cause of the victim's damage if, in the absence of the activity, the damage would not have occurred". Subsequent articles of the PETL provide recommendations for cases of multiple activities of several tortfeasors. There are provisions about concurrent causes, alternative causes, potential causes and uncertain partial causation in the PETL.

Concurrent causes mean that in case of multiple activities, where each of them alone would have caused damage at the same time, each activity is regarded as a cause of the victim's damage. Alternative causes take place in case of multiple activities, where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it. In this case each activity is regarded as a cause to the extent corresponding to the likelihood that it may have actually caused the victim's damage. Potential causes is a rule applicable where an activity has definitely and irreversibly led the victim to suffer damage, and it would appear that a subsequent activity which alone would have caused the same damage is to be disregarded. That subsequent activity is nevertheless taken into consideration if it has led to additional or aggravated damage. And in the case of multiple activities, when it is certain that none of them caused the entire damage or any determinable part thereof, those that are likely to have minimally contributed to the damage are presumed to have caused equal shares thereof (uncertain partial causation).

One more aspect the prerequisites of tort liability are understood differently in Ukrainian law and in the PETL concerns fault. Traditionally, Ukrainian tort law has understood fault as a psychological relation of a tortfeasor to his tortuous conduct and damage caused. When a tortfeasor realizes the danger of his or her conduct and desires to cause damage or envisages its possibility, fault is qualified as intent. Negligence is a type of fault when the tortfeasor does not have an intention to act illegally and to cause damage. Despite criticism, the psychological

concept of fault remains the leading concept in Ukrainian legal doctrine. The psychological relation is analysed both in cases of a natural person tortfeasor and a legal entity tortfeasor. The final part of judicial reasoning involves analysing the psychological relation between the direct tortfeasor (employee or constructor) and the legal entity that takes responsibility for them (vicarious liability).

The Principles of European Tort Law provide a different meaning of fault based on an objective standard. Fault means not a psychological (internal) relation but a breach of the "required standard of conduct". Article. 4:102 of the PETL states that the required standard of conduct is that of a reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of damage, the relationship of proximity or special reliance between those involved, as well as availability and the costs of precautionary or alternative methods.

The understanding of fault via the required standard of conduct suits civil law better than the subjective concept. Civil law, unlike criminal law, is devoid of a mechanism to prove fault as a psychological, internal relation. So judges in civil cases may operate merely upon objective facts and standards.

As a conclusion, we could state that the PETL, as any other soft law instrument, does not pretend to be an ideal regulator of any relationships of a particular kind. But the document provides some general rules, based on the sum of European experience, both current and past. Therefore, the PETL ought to be taken into consideration by both the EU Member States and the Associated Countries, including Ukraine.

Obviously, it should be noted that approximation of Ukrainian laws to the EU laws is not a goal in itself. This is a process that, in fact, defines the priorities and competence of the government and executive bodies to create prerequisites required for the full membership of Ukraine in the EU and ensure an internal integration process.

PRINCIPLES OF EUROPEAN TORT LAW (PETL) AND THEIR IMPACT ON APPROXIMATION OF UKRAINIAN TORT LAW TO EUROPEAN STANDARDS

Summary

Ukraine has chosen its way of development towards Europe, European values and respect for human dignity and human rights. The signing of the Association Agreement

in 2014 obliged Ukraine to harmonize its legislation in priority spheres of life with the legislation of the European Union. But legislative approximation should touch not only upon the fields of public law, but private law too and, in particular, tort law. The main problem of tort law approximation is that there are no joint tort rules in the EU. All attempts to harmonize tort law stopped at the creation of acts of "soft law" – general non-binding rules and principles. One of the most significant examples is the PETL – the Principles of European Tort Law. The PETL show a modern understanding of torts, spell out the conditions of tort liability, as well as other relevant requirements. Ukrainian rules of tort law do provide protection of a victim's violated rights, however some recommendations of the PETL, such as provisions governing the conditions of tort liability, the understanding of causation and fault should be taken into account when Ukrainian tort law is modernised.

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KEYWORDS

Ukrainian law, tort law, approximation, principles, European tort law, damage, causation, fault

SŁOWA KLUCZOWE

prawo ukraińskie, prawo czynów niedozwolonych, zbliżanie prawa, zasady, europejskie prawo czynów niedozwolonych, szkoda, związek przyczynowo-skutkowy, wina

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PERMISSIBILITY OF A POWER OF ATTORNEY IN THE EVENT OF A LACK OF CAPACITY TO CONSENT

1. INTRODUCTORY REMARKS

Power of attorney is an instrument that enables the granting of so-called "*pro futuro* declarations", that is patients' expressions of will made in the event of an inability to assess reality and make a decision unassisted[1]. "Medical powers of attorney"[2] are referred to, alongside living wills, trusted persons and advance directives for incapacity (*declarations anticipées*) as *pro futuro* declarations of the IV generation[3]. It allows a proxy to make decisions related to medical treatment where the represented person is not capable of deciding for themselves. Suitable legal devices exist in, *inter alia*, England and Wales (lasting powers of attorney) pursuant to the Mental Capacity Act 2005[4], and Switzerland, under the Swiss Civil Code[5]. Most U.S. states have also adopted it in one way or another. Whilst in some, e.g. Massachusetts, Michigan and New York, merely healthcare proxies are available, in others, except Alaska, a patient may leave a living will and issue a power of attorney[6].

The paper discusses the regulations of the Council of Europe concerning medical powers of attorney. Permissibility of such powers of attorney under Polish law will also be considered. It is worth pondering whether a medical power

[1] M. Safjan, *Prawo i medycyna: ochrona praw jednostki a dylematy współczesnej medycyny*, Warszawa 1998, p. 44; P. Sobolewski, *Zgoda na zabieg medyczny*, Warszawa 2009, unpublished, available at the Library of the Faculty of Law and Administration, University of Warsaw, p. 186; M. Syska, *Medyczne oświadczenia pro futuro na tle prawnoporównawczym*, Warszawa 2013, p. 33; M. Świderska, *Zgoda pacjenta na zabieg medyczny*, Toruń 2007, p. 209.

[2] For the purposes of the paper, the terms "proxy" and "power of attorney" are used interchangeably.

[3] C. Y. Hong, L. G. Goh, H. P. Lee, *The advance directive – a review*, "Singapore Medical Journal" 1996, Vol. 37, p. 414, citing after M. Syska, *Medyczne oświadczenia pro futuro*..., p. 37.

[4] http://www.legislation.gov.uk/ukpga/2005/9/contents (accessed 1 May 2017).

[5] https://www.admin.ch/opc/de/classified-compilation/21.html#21 (accessed 1 May 2017).

[6] M. Szeroczyńska, *Eutanazja i wspomagane samobójstwo na świecie. Studium prawnoporównawcze*, Kraków 2004, p. 301.

of attorney is capable of functioning within the boundaries laid down under the current regulatory regime or whether new agency provisions are necessary.

2. THE COUNCIL OF EUROPE STANDARD

The European system of human rights, subsisting primarily under the auspices of the Council of Europe, is one of the most developed in the world. A bioethical debate has escalated within the organization along with the dramatic advancement of medicine.

The European Convention of Human Rights does not explicitly refer to *pro futuro* declarations. However, it does include a number of provisions from which support for such manifestations of individual autonomy may be derived. Several rights resident within the Convention are of significance to bioethical questions: the right to life, prohibition on inhuman treatment, the right to freedom and personal safety and the right to respect for private and family life. These stipulations have formed the foundation for the case law of the European Court of Human Rights on the rights of patients[7]. Judgments in cases such as *Herczegfalvy v Austria*[8], *Y.F. v Turkey*[9], *Glass v United Kingdom*[10] and *Nevmerzhitsky v Ukraine*[11] prove that domestic regulations pertaining to patient consent may be the subject of the Court's scrutiny.

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine[12] is by far the most important legal enactment of the Council of Europe on the subject. It has a framework character and as such may be supplemented with additional protocols. Its ambit covers regulations on the classic question of patient consent, but also encompasses some specific medical interventions (like transplantation) and medical research.

The European Bioethics Convention marked the first time an act of international law demanded that *pro futuro* declarations with regard to medical interventions be taken into account[13]. Article 9 of the Oviedo Convention stipulates that any previously expressed wishes relating to a medical intervention by a patient

[7] J. Bujny, *Prawa pacjenta*, *między autonomią a paternalizmem*, Warszawa 2007, p. 52: M. Grzymkowska, *Standardy bioetyczne w prawie europejskim*, Warszawa 2009, p. 162.

[8] Application No. 10533/83, judgment of 24 September 1992.

[9] Application No. 24209/94, judgment of 22 July 2003.

[10] Application No. 61827/00, judgment of 9 March 2004.

[11] Application No. 54825/00, judgment of 5 April 2005.

[12] Also known as the European Bioethics Convention or the Oviedo Convention.

[13] M. Śliwka, *Testament życia i inne oświadczenia pro futuro – przyczynek do dyskusji*, Polish Bioethics Association: Debate: Around the Living Will, text in Polish available at http://www.ptb.

who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account.

A previously expressed wish in respect of a medical intervention may constitute consent or its refusal.

The phrasing "shall be taken into account" holds tremendous weight as regards establishing the true consequences of this provision of the Oviedo Convention and, potentially, giving it absolute effect. L. Kubicki has noted that "shall be taken into account" connotes an obligation to honour a pertinent declaration of will and not that it should merely be considered[14].

The Explanatory Report to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine expressed a sentiment that previously expressed wishes need not be binding for doctors, for example where there is a significant time lapse between a declaration of will and a given medical intervention. It is possible that in the intervening time medicine has progressed so that it is reasonable to suppose the patient could have made a different decision had he been aware of it. The doctor should, at any time, if possible, make sure the patient's wishes relate to their current situation and that they still hold[15].

M. Safjan and K. Zaradkiewicz believe that patient wishes and preferences are not binding for doctors and that they constitute an indicator of the desirability of a medical intervention[16]. This view is shared by L. Bosek and P. Sobolewski[17].

It should be noted that Article 9 of the Oviedo Convention is, in general, quite moderate in its wording. It does not express a preference towards any of the constituents of the IV generation of *pro futuro* declarations. Therefore, consistent therewith are the French model (which introduces the institution of a trusted person), the English regulation (lasting powers of attorney) or the Belgian system with its *declarations anticipées*.

In addition, I should mention the Recommendation of the Committee of Ministers of the Council of Europe of 9 December 2009 (CM/Rec(2009)11) which describes the principles concerning continuing powers of attorney and advance directives for incapacity. The document recommends wider usage of *pro futuro* declarations, however it leaves all detailed and specific issues to domestic reg-

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org.pl/pdf/sliwka_testament_1.pdf (accessed 19 May 2017); M. Syska, *Medyczne oświadczenia pro futuro*..., p. 68.

[14] L. Kubicki, *Sumienie lekarza jako kategoria prawna*, "Prawo i Medycyna" 1999, issue 4, p. 10.

[15] https://rm.coe.int/16800ccde5 (accessed 5 May 2017).

[16] M. Safjan, K. Zaradkiewicz, *Zgoda na interwencję medyczną w świetle konwencji Rady Europy o prawach człowieka i biomedycynie*, (in:) A. Dębiński, W. Bar, P. Stanisz (eds.), *Divina et humana. Księga jubileuszowa w 65 rocznicę urodzin księdza profesora Henryka Misztala*, Lublin 2001, p. 216.

[17] L. Bosek, P. Sobolewski, *Oświadczenia na wypadek utraty zdolności do wyrażenia zgody na zabieg medyczny*, "Studia Prawa Prywatnego" 2015, issues 3 and 4, p. 9.

ulation. States should determine the extent to which *pro futuro* declarations are binding and create legal solutions applicable in the event that a significant change of circumstances occurs between the expression of a wish and the undertaking of a medical intervention. A healthcare proxy shall act in consonance with the terms of their power of attorney, taking into account any wishes of the granter expressed beforehand, and should be guided by the best interests of the patient. Also, a controlling mechanism was proposed in the form of, for instance, a supervisor appointed by the granter to oversee the conduct of the proxy, or according appropriate rights to the state.

An analysis of *pro futuro* declarations within the Council of Europe legal system would not be complete without mentioning another instrument of soft law, i.e. Resolution 1859 (2012) of the Parliamentary Assembly of the Council of Europe of 25 January 2012 on protecting human rights and dignity by taking into account previously expressed wishes of patients. Therein it was stated that Article 9 of the Oviedo Convention may be given effect in a number of ways: by instituting a proxy, completing a living will or expressing advance directives for incapacity.

3. PERMISSIBILITY OF GRANTING A POWER OF ATTORNEY TO CONSENT TO A MEDICAL INTERVENTION UNDER POLISH LAW

As there is no specialized regulation of *pro futuro* declarations in Polish law, it may be asked whether the existing provisions concerning representation are capable of accommodating this peculiar legal category.

Polish law, just as Ukrainian law, does not recognize the *common law* principle under which a power of attorney expires once the granter loses their capacity to make autonomous decisions[18].

Whilst the concept of a power of attorney granted by a person capable of consenting to a medical intervention has not been examined in the Polish literature, some academic ink has been spilt on the issue of medical powers of attorney as one type of declarations made in the event of a loss of capacity to consent. The issue is commonly located within the "*pro futuro* declarations" discussion and is a rather novel one in the circle of Polish legal academics. However, the power of attorney as one instrument for effecting such declarations has not been the subject of much attention, with most writers merely mentioning

[18] R. Citowicz, *Spory wokół testamentu życia*, "Państwo i Prawo" 2007, issue 1, p. 43.

it in passing, in the context of describing declarations in the event of a loss of capacity to consent[19].

R. Citowicz has argued that Polish civil law does not pose any obstacles to granting such powers of attorney, emphasizing that it "would not expire by virtue of law should the granter lose their capacity to make decisions or even become incapacitated (Article 101 § 2 of the Civil Code *a contrario*)[20]. L. Bosek and P. Sobolewski hold that granting a power of attorney to decide on medical treatment in the event of the granter's loss of capacity to consent is impermissible *de lege lata* as Polish law does not envisage the possibility of issuing such powers of attorney[21]. M. Syska has echoed the conclusion, pointing out the wholeness of the legislation governing the medical profession[22]. According to J. Haberko, the fact that civil law empowers agents to grant powers of attorney cannot be transposed without adjustments and modifications onto the relations between a medical professional and a patient[23].

The crux of the debate is the correct interpretation of Article 95 § 1 of the Civil Code, under which, subject to exceptions provided for by statute or resulting from the nature of a juridical act, a juridical act may be carried out through a representative.

One such exception is issuance and revocation of a will (Article 944 § 2 of the Code).

To reach comprehensive corollaries an analysis of the exact breadth of Article 95 § 1 of the Civil Code must be undertaken.

Accordingly, B. Walaszek argued that it is impossible to issue a declaration of paternity through a representative[24]; the same applies to consent to adoption[25], whilst one could use a representative to accept or reject the duties of a testamentary executor[26].

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[19] T. Wiwatowski, U. Chmielewska, A. Karnas, *Prawo wyboru metody leczenia – stanowisko świadków Jehowy w sprawie transfuzji krwi*, "Prawo i Medycyna" 1999, issue 8; P. Sobolewski, *Zgoda na zabieg medyczny*...; M. Syska, *Medyczne oświadczenia pro futuro*...; L. Bosek P. Sobolewski, *Oświadczenia na wypadek*...; R. Citowicz, *Spory*...

[20] R. Citowicz, *Spory*..., p. 43.

[21] L. Bosek P. Sobolewski, *Oświadczenia na wypadek*..., pp. 8–9.

[22] M. Syska, *Medyczne oświadczenia pro futuro*..., pp. 275–276.

[23] J. Haberko, (in:) L. Kondratiew-Bryzik, K. Sękowska-Kozłowska (eds.), *Prawa człowieka wobec rozwoju biotechnologii*, Warszawa 2013, p. 144.

[24] B. Walaszek, *Uznanie dziecka w polskim prawie rodzinnym*, Kraków 1958, pp. 56–57.

[25] B. Walaszek, *Przysposobienie w polskim prawie rodzinnym oraz polskim prawie międzynarodowym i procesowym*, Warszawa 1966, p. 152.

[26] B. Walaszek, *Stanowisko prawne wykonawcy testamentu*, "Nowe Prawo" 1959, issue 4, p. 440.

M. Pazdan accepts proxies as regards partners of a civil law partnership[27] but rejects them in cases of clemency[28]. Expressions of emotions, he has stated, cannot form the object of a power of attorney[29].

M. Gocłowski has asserted that a representative may, on behalf of their principal, make a declaration on escaping the legal consequences of an error being a defect in consent[30].

E. Mazur believes a declaration on instituting a foundation may be effectively made by a representative[31].

A representative cannot acknowledge paternity nor perform any of the acts prescribed in Articles 899 § 1, 930 and 1010 § 1 of the Code, writes J. Strzebinczyk[32].

P. Sobolewski, in turn, has insisted that clemency cannot be granted by a representative so long as it is agreed that it constitutes a legal act[33]. The view is shared by W. Robaczyński[34] and J. Mucha-Kujawa[35].

S. Rudnicki has commented more broadly that it must be impermissible to use a representative to make declarations of will in family status cases: annulment of an acknowledgement of paternity, denial of paternity, entering into and annulment of marriage (subject to Article 6 of the Family and Guardianship Code)[36]. K. Kopaczyńska-Pieczniak agrees with this perspective[37].

The Polish Supreme Court in its resolution of 13 May 2015 (ref. number III CZP 19/15) opined that the legal representative of a minor may grant a power

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[27] M. Pazdan, *Pełnomocnik wspólnika lub wspólników spółki cywilnej*, (in:) *Księga pamiątkowa dla uczczenia pracy naukowej Profesora Kazimierza Kruczalaka*, "Gdańskie Studia Prawnicze" 1999, Vol. V, p. 327; to the same effect: judgment of the Supreme Court of 29 June 2000, ref. number V CKN 552/00, Lex No. 52492.

[28] M. Pazdan, (in:) K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz do art. 1–449[10]*, Warszawa 2011, p. 459.

[29] *Ibidem*.

[30] M. Gocłowski, *Pełnomocnictwo – przegląd orzecznictwa Sądu Najwyższego za lata 1989–2003*, "Przegląd Prawa Handlowego" 2003, issue, 11, p. 42; to the same effect: judgment of the Supreme Court of 24 April 2002, ref. number IV CKN 998/00, Lex No. 55495.

[31] E. Mazur, *Fundacja*, "Palestra" 1991, issue 5–7, p. 47; to the same effect: resolution of the Supreme Court of 8 December 1992, ref. number I CRN 182/92, Lex No. 3886.

[32] J. Strzebinczyk, (in:) E. Gniewek, P. Machnikowski (eds.), *Kodeks cywilny. Komentarz*, Warszawa 2014, p. 246.

[33] P. Sobolewski, (in:) K. Osajda (ed.), *Kodeks cywilny. Komentarz. Tom 1. Przepisy wprowadzające. Część ogólna. Własność i inne prawa rzeczowe*, Warszawa 2013, p. 787.

[34] W. Robaczyński, (in:) M. Pyziak-Szafnicka, P. Księżak (eds.), *Kodeks cywilny. Część ogólna*, Warszawa 2014, p. 1086.

[35] J. Mucha-Kujawa, *Teoretycznoprawne aspekty przedstawicielstwa podmiotów prywatnych*, "Studia Prawnicze" 2013, Vol. 4, issue 196, p. 82.

[36] S. Rudnicki, (in:) J. Gudowski (ed.), *Kodeks cywilny. Komentarz. Część ogólna*, t. I, Warszawa 2014, p. 723.

[37] K. Kopaczyńska-Pieczniak, (in:) A. Kidyba (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2012, p. 599.

of attorney to consent to a serious medical intervention under Article 34(3) of the Act of 5 December 1996 on Medical and Dentist Professions[38].

In the judgment of 29 June 2000 (ref. number V CKN 52/00) the Court held that "each partner of a civil law partnership may institute a proxy, whose powers, however, cannot exceed his own".

Further, the Court has proclaimed that "a declaration on escaping the legal consequences of a declaration of will made to another under an error may be issued by a representative. No prohibition in this respect is prescribed by statute, nor does it stem from the nature of the legal act of escaping the legal consequences of a declaration of will" (judgment of 24 April 2002, ref. number IV CKN 998/00).

One cannot consent to adoption nor demand adoption through a representative[39]. In the resolution of the Supreme Court of 17 June 1983 (ref. number IV CR 245/83) it was held that "consent to adoption is shaped in the Family and Guardianship Code as a personal right of the parents".

The Warsaw Appellate Court in the resolution of 17 October 2000 (ref. number I Aca 119/00) held that issuance of a declaration pertaining to the establishment of an association does not require personal action. The Court went on to say that "the provisions of the Act of 7 April 1989 – Law of Associations, applicable in the immediate case, do not envisage any of the exceptions featured in Article 95 of the Civil Code. It is also not correct to say a declaration on the establishment of an association, by virtue of the nature of the legal act, may not be issued by a representative, i.e. that it is of a strictly personal character, as it is the case with family status cases where certain exceptions do apply".

I have not found any academic comments on the permissibility of proxies as regards the exercise of parenthood rights, of which custody of a child is an important aspect.

Acts that cannot be performed by a representative are referred to by academic writers as personal[40] or strictly personal[41].

Several commentators have attacked the concept of "nature of a legal act". M. Smyk has proposed dispensing with the term altogether when assessing the permissibility of acting through an attorney. He also advocates repealing Article

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[38] Case comments: Z. Jancewicz, *Glosa do uchwały Sądu Najwyższego z dnia 13 maja 2015 r.*, *III CZP 19/15*, "Roczniki Nauk Prawnych" 2015, Vol. XXV, issue 4, pp. 187–197; B. Janiszewska, *Pełnomocnictwo do wyrażenia zgody na udzielenie świadczenia zdrowotnego*, "Monitor Prawniczy" 2015, issue 15, pp. 819–822; A. Kallaus, *Glosa do uchwały Sądu Najwyższego z dnia 13.05.2015 r.*, *sygn. III CZP 19/15*, "Prawo i Medycyna" 2015, issue 4, pp. 124–131, notes; L. L. Bosek P. Sobolewski, *Oświadczenia na wypadek*..., p. 8.

[39] Resolution of the Supreme Court of 17 June 1983, ref. number IV CR 245/83, OSNC 1984, No. 5, item 73.

[40] K. Kopaczyńska-Pieczniak, (in:) A. Kidyba (ed.), *Kodeks cywilny*..., p. 599; J. Strzebinczyk, (in:) E. Gniewek, P. Machnikowski (eds.), *Kodeks cywilny*…, p. 246.

[41] S. Rudnicki, (in:) J. Gudowski (ed.), *Kodeks cywilny*..., p. 723.

95 § 1 of the Civil Code, arguing that it is superfluous considering the applicable statutory limitations[42]. It is difficult to agree with this view as a rational legislator never furnishes concepts whose meaning is empty.

It is submitted that if the personal character of a legal act is constitutive thereof, the act cannot be performed by a representative. The position of the majority of academic writers and the courts appears to be that, to put it more broadly, legal acts of a personal character are not directly predicated upon the economic interest of the granter of a power of attorney. They belong to the group of non-property rights.

The provenance of the concept of power of attorney is of a property character[43].

Doubtless, application of laws concerning power of attorney to non-property relations is problematic. I wish to draw upon the following examples: difficulties with relating "ordinary management" to personal matters, lack of control over a representative's declarations, a possibility of instituting several proxies with identical powers (Article 107), substitute powers of attorney (Article 106), no requirement for a representative to have full capacity to enter into legal relations (Article 100), the right of a representative to conduct a legal act with themselves (Article 108 of the Civil Code).

Article 6 of the Family and Guardianship Code (*matrimonium per procura*) gives rise to similar dilemmas[44].

Consent to a medical intervention clearly belongs to non-property rights by virtue of its character and consequence in the form of a legalization of a violation of personal rights, ones most momentous for a person from the perspective of the legal system. Consequently, I submit that it should not be permissible to grant consent to a medical intervention through a representative.

4. PERMISSIBILITY OF GRANTING A POWER OF ATTORNEY TO CONSENT TO A MEDICAL INTERVENTION UNDER UKRAINIAN LAW – A MENTION

Similarly, the Ukrainian legislator has stopped short of instituting *pro futuro* declarations in any form in domestic law. Representation is regulated in Title XVII of the Ukrainian Civil Code. At the root of a power of attorney lies a trans-

[42] M. Smyk, *Pełnomocnictwo według kodeksu cywilnego*, Warszawa 2010, p. 265.

[43] W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2009, pp. 141–143.

[44] G. Jędrejek, *Kodeks rodzinny i opiekuńczy. Małżeństwo. Komentarz do art. 1–61⁶*, Warszawa 2013, p. 65; W. Borysiak, (in:) J. Wierciński (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2014, pp. 75–77.

action or a legal act (Article 237 § 1 – a representative has the right to conclude a transaction on behalf of another whom they represent). This is also evident by reference to the systematics of the Code which regulates legal acts and representation in the same chapter. Further, the Code distinctly states that an indirect representative (i.e. one who, despite acting in the interests of another, conducts a legal act or transaction in their own name) is not a representative within its meaning.

Under the Ukrainian Civil Code, representation may arise on the grounds of a contract, the law, and acts of a body of a legal person. Under Polish law, only the first two bases are present.

Article 238 envisages three circumstances where a representative is not authorized to act. First, a representative may be authorized to conclude only those transactions that the person who they represent has the right to conclude. Second, acting through a representative is permissible where the sheer content of the legal act in question points to such a conclusion. Whilst this is foreign to Polish law, it is a concept well documented in the German doctrine (so-called *gewillkürte Höchstpersönlichkeit*)[45]. Third, a representative may not conduct a legal act in the name of the represented person in their own interest or in the interest of another person they simultaneously represent.

Article 239 specifies that a transaction concluded by a representative shall establish, change or terminate civil rights and obligations of the person whom they represent. No comparable provision exists in Polish law, however this appears to stem from the essence of representation.

Ukrainian regulations of representation are not suited to performing non-property legal acts. The Polish and Ukrainian provisions share the same source and are entrenched in the European legal tradition.

Direct representation did not develop in Roman law as most economic transactions were conducted by *alieni iuris* persons or slaves[46]. No one could act in the name of another (*nemo alieno onmine agree potest*)[47]. It was not until *ius gentium* that exceptions arose[48]. Initially, direct representation by a permanently appointed manager was permitted (*procurator omnium bonorum*). Subsequently, guardians were instituted[49]. Direct representation did not materialize before the Code of Justinian which envisaged ad hoc managers (*procurator unius rei*)[50]. T. Osuchowski has noted that in late Roman law it was permissible to conduct the following acts

[45] W. Flume, *Allgemeiner Teil des Bürgerlichen Rechts, Vol. II, Das Rechtsgeschäft*, Berlin–Hildelberg–New York 1979, p. 762; K. H. Schramm, (in:) *Münchener Kommentar zum Burgerlichen Gesetzbuch, Vol. I, Allgemeiner Teil*, Stuttgart–Berlin–Köln–Mainz 1967, p. 1398.

[46] A. Dębiński, *Rzymskie prawo prywatne. Kompendium*, Warszawa 2011, p. 162; M. Kuryłowicz, A. Wiliński, *Rzymskie prawo prywatne. Zarys wykładu*, Warszawa 2016, p. 121; K. Kolańczyk, *Prawo rzymskie*, Warszawa 2000, p. 219.

[47] W. Osuchowski, *Zarys rzymskiego prawa prywatnego*, Warszawa 1967, p. 271.

[48] R. Taubenschlag, *Prawo rzymskie na tle praw antycznych*, Warszawa 1955, p. 101.

[49] *Ibidem*.

[50] *Ibidem*.

through a representative: claiming possession of inheritance (*bonorum possessio*), running an enterprise (*institor*), claiming responsibility by ship operators (*receptum nautarum*)[51]. K. Kolańczyk has written about procurators who managed assets[52]. Further development of representation was confined to property rights[53].

In the light of the above, it appears that representation was born and evolved around property (or material) relations, therefore regulations pertaining thereto are not capable of accommodating non-property legal acts, including consent to medical treatment. Basing the healthcare power of attorney upon the general laws of representation is insufficient to guarantee adequate protection of values important for patients and ensure that they are provided with an appropriate level of care.

PERMISSIBILITY OF A POWER OF ATTORNEY IN THE EVENT OF A LACK OF CAPACITY TO CONSENT

Summary

The paper describes the regulations of the Council of Europe concerning medical powers of attorney and permissibility of such powers of attorney under Polish law. The author tries to consider whether a medical power of attorney is capable of functioning within the boundaries laid down under the current regulatory regime or whether new agency provisions are necessary. The paper discusses the interpretation of Article 95 § 1 of the Civil Code and the notion of "nature of a legal act". At the end of the article a reference is made to the European legal tradition as a common ground for Polish and Ukrainian law.

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[51] T. Osuchowski, *Rzymskie prawo prywatne. Zarys wykładu*, Warszawa 1981, pp. 209–210.

[52] K. Kolańczyk, *Prawo*...

[53] T. Giaro, (in:) W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie*..., pp. 141–143.

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KEYWORDS

power of attorney, medical law, medical consent, non-property rights, nature of a legal act

SŁOWA KLUCZOWE

pełnomocnictwo, prawo medyczne, zgoda na zabieg medyczny, prawa niemajątkowe, natura czynności prawnej

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INFLUENCE OF EU LAW ON COLLECTIVE LABOUR LAW IN POLAND (INSTITUTIONS AT THE NATIONAL LEVEL)

1. INTRODUCTORY REMARKS

Since the 1970s, the European Community (later the European Union) has developed various standards in the area of labour and social security law. Initial social action was undertaken as a response to the economic crisis of the early 1970s (protection of workers in case of employer redundancies, transfer of undertaking, collective redundancies)[1]. It became obvious that the achievement of Community objectives was impossible without an intervention in the social sphere. Protection concerned both individual employment standards as well as collective relations. The 1990s and the 2000s brought further development of European standards concerning collective labour law (first of all, a general framework for information and consultation)[2]. Finally, some collective freedoms and rights have been recognized by the Charter of Fundamental Rights of the European Union[3] while spe-

[1] R. Blanpain, *European Labour Law*, Alphen aan den Rijn 2013, p. 823. See Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies replaced by Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, hereinafter referred to as "Directive 98/59", and Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses replaced by Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, hereinafter referred to as "Directive 2001/23".

[2] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community. Some collective procedures were introduced also in other legal acts (e.g. Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, hereinafter referred to as "Directive 2008/104") and agreements concluded by European social partners (e.g. Framework Agreement of 16 July 2002 on Telework, hereinafter referred to as "Framework Agreement on Telework").

[3] Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom stipulates that the Charter does not extend the ability of the

cific legal mechanisms assuming the involvement of social partners are provided for by the Treaty on the Functioning of the European Union. At the same time, some aspects of collective relations are excluded from the legislative competence of the European Union (*inter alia* the right of association, the right to strike or the right to impose lock-outs). Nonetheless, collective labour law standards constitute an important element of *acquis communautaire*, which plays an increasing role in shaping a common legal area. They can be particularly important in countries of Central and Eastern Europe where industrial relations could not develop in a natural way for almost 50 years[4].

In Poland, the process of harmonization in the area of collective labour law began before the accession to the European Community. The first symptoms of convergence could already be seen at the beginning of the transformation (the Act on Collective Redundancies from December 1989). A planned implementation action was launched after the Association Treaty was signed. In some areas the transposition led to significant changes of the whole system of collective representation. The implementation has not been limited to directives only, however. An example of a broader approach is the implementation of the Framework Agreement on Telework. At the same time, adjustment to the European standards encountered in Poland a number of peculiar obstacles. They arose from some specific features of the Polish social dialogue such as the lack of sectoral negotiations, an absence of stable non-trade union representation as well as tension between social partners[5]. As a result, the implementation in the field of European collective labour law, however completed, provokes a number of questions and comments concerning, *inter alia*, the consistency of domestic law with the requirements set up by the European Community (European Union).

Institutions of collective labour law shaped by the European standards are located at various levels: national as well as supra-national (European). In the latter case, employee involvement in the functioning of transnational entities is pro-

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Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms (Art. 1.1). In particular, and for the avoidance of doubt, nothing in Title IV of the Charter (Solidarity) creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law (Art. 1.2). See more Z. Hajn, L. Mitrus, (in:) *Poland*, (in:) R. Blanpain (ed.), *International Encyclopaedia of Laws: Labour Law and Industrial Relations*, Alphen aan den Rijn 2016, p. 58. The legal importance of the Protocol is, to a certain extent, disputable.

[4] See e.g. M. Seweryński, *Polish Labour Law from Communism to Democracy*, Warszawa 1999; L. Florek, *Labour Law*, (in:) S. Frankowski (ed.), *Introduction to Polish Law*, Kraków–Alphen aan den Rijn 2005, pp. 275–276; Z. Hajn, L. Mitrus, (in:) *Poland*, (in:) R. Blanpain (ed.), *International*..., p. 31 *et seq.*; M. Wujczyk, (in:) K. W. Baran (ed.), *Outline of Polish Labour Law System*, Warszawa 2016, p. 77.

[5] The social dialogue in Poland undergoes a deep crisis. About its real situation see e.g. L. Mitrus, (in:) Z. Hajn, L. Mitrus, *Poland*, (in:) R. Blanpain (ed.), *International*..., p. 44.

vided for and promoted[6]. The paper concentrates on institutions of a domestic dimension, and sets out to describe changes occurring in the sphere that had been regulated (at least partially) before the accession took place. The text analyzes changes caused by the transposition and attempts to evaluate national regulations from the perspective of European standards.

2. EMPLOYEE REPRESENTATIVES

Collective instruments provided for by EU law must be carried out by bodies representing workers. In its initial period, the Polish transformation led to the creation of a single-channel representation system with a dominant role of trade unions. At the same time, trade unions experienced serious problems including a significant decrease in the number of members. In many establishments employees were not represented by any trade union[7]. Moreover, the question arose whether some collective rights (e.g. to information and consultation) can be carried out by trade unions. Taking into account the decrease in unionization, an appropriate implementation of the European standards would not have been guaranteed. As a result, the Act of 6 April 2006 on Information and Consultation with Employees[8], that transposed to the Polish legal system the provisions of Directive 2002/14, established new elected bodies representing worker interests: employee councils. However, their establishment triggered the opposition of both employers and trade unions, which caused a delay in the implementation process. In theory, employee councils constitute a general form of representation of employees' interests that are set up at workplaces with more than 50 employees which carry out economic activity (with some lesser exceptions)[9].

[6] The most important example is Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. See more R. Blanpain, *European*..., p. 914 *et seq.*

[7] Polish law provides for a specific system of trade union representation. To carry out its functions in a given establishment a trade union has to establish a formal structure (company-level organization) uniting at least 10 members who are employees engaged by the employer. See more K. W. Baran, (in:) K. W. Baran (ed.), *Outline of Polish Labour Law System*, Warszawa 2016, pp. 400–401. Z. Hajn, (in:) Z. Hajn, L. Mitrus, (in:) *Poland*, (in:) R. Blanpain (ed.), *International*..., pp. 243–244.

[8] Polish Official Journal of Laws of 2006, No. 79, item 550, as amended (English translation abridged from www.mpips.gov.pl (Ministry for Family, Labour and Social Policy, accessed 25 May 2017).

[25] The law does not apply to: 1) state-owned enterprises where an employee self-government has been established; 2) mixed enterprises employing at least 50 employees; 3) state-owned film institutions.

However, the legislator weakened this result significantly. First, the law in its initial version guaranteed the main (representative) trade unions the right to pick the members of employee councils. This solution was challenged before the Constitutional Court[10]. As a result, employee councils became (at least formally) separated from trade unions. Second, a significant threat for the functioning of the second channel of representation is the procedure of its creation. Establishment of a council requires an application of 10% of employees employed by a given employer. Unfortunately, applications are submitted rather rarely. This can be caused by various reasons: the negative approach of employers, employees' concerns and, last but not least, the lack of interest in being involved in company issues. Consequently, employee councils have been established only in few companies. In other companies collective rights to information and consultation cannot be exercised. This raises fundamental doubts as regards the effectiveness of the implementation process.

As regards the structure of employee councils, the number of their members depends on the employer's staff levels. It amounts to 3 members (from 50 to 250 employees), 5 members (from 251 to 500 employees) and 7 members if the employer employs more than 500 employees[11]. After a judgment of the Constitutional Court[12] candidates are indicated by a group of employees (10 or 20 depending on the employment level) and elected by the whole workforce. Legislation guarantees council members a relatively high level of protection. The employer may not terminate the employment contract and change unilaterally any terms and conditions of work or pay to the detriment of an employee who is a member of an employee council unless a works council consents thereto. Moreover, an employee who is a member of an employee council is entitled to time off to carry out such duties, which cannot be carried out outside of working hours. The employee retains the right to remuneration. The above-mentioned guarantees are, as a rule, sufficient to meet the requirements arising from Directive 2002/14 (protection of employee representatives).

Finally, an alternative way of employee representation has been accepted. The law regulating the establishment of employee councils does not apply to employers which were parties to an agreement concerning information and consultation of employees, one that had been binding prior to the date of entry into force of the discussed legislation. However, the agreement must provide for a framework for information and consultation which is no less favourable than the one established by statute.

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[26] Judgment of the Polish Constitutional Court of 1 July 2008, OTK-A 2008, No. 6, item 100.

[27] Polish legislation does not require temporary workers to be calculated as employees in the user undertaking (such a possibility is provided for by Article 7(2) of Directive 2008/104).

[28] Judgment of the Constitutional Court of 1 July 2008, OTK-A 2008, No. 6, item 100.

Another problem is employee representation in negotiating collective agreements provided for by EU law[13] where there are no trade unions[14]. Employee councils, as bodies involved in information and consultation procedures, are not entitled to negotiate with the employer (unless they obtain a separate mandate). As a result, in the absence of trade unions, employees elect their representatives according to the rules adopted at a given workplace (*ad hoc* representation).

The main problem is the position of *ad hoc* bodies versus their rights. For they can agree to worsen the working conditions and to make provision of work more flexible. At the same time, the law does not provide for any elements of the election procedure. The only reference points are supranational standards determined e.g. by the International Labour Organization[15]. Moreover, *ad hoc* representatives are not directly protected against repressive measures on the part of the employer (e.g. dismissal). They can only rely on general anti-discrimination provisions which makes their situation much weaker than the situation of other employee representatives (including trade unionists). Such a position of employee representatives does not guarantee an equilibrium during the bargaining process. Therefore, it can be disputed from the perspective of EU law that accepts some exceptions from protective standards on the condition that they are introduced by means of collective agreements. The above-mentioned mechanism can be understood in the way that exceptions are acceptable if they are agreed with employee representation which has an equal position to that of the employer (such a construction is considered to safeguard th workplace equilibrium). Otherwise, the exceptions based on collective agreements could not be justified. *De lege ferenda*, to eliminate any arising doubts it is necessary to establish stable representation that can be treated as a real partner for the employer.

The Polish legislator has not decided to establish a system of guarantees for employee representation in case of a transfer of undertaking. Such guarantees are provided for by Article 6 of Directive 2001/23. As a result, employee representatives are protected under the general rules of collective labour law and their pro-European interpretation. Taking into account the current practice and emerging doubts this is not sufficient to satisfy the European standards.

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[29] An important example are agreements concluded to extend the reference periods of working time. According to Article 18 of Directive 2003/88 of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, hereinafter referred to as "Directive 2003/88", such an extension may be introduced by means of collective agreements.

[30] Trade unions have priority in negotiating the agreements.

[31] Article 3 of the Workers' Representatives Convention, 1971 (No. 135) refers to representatives who are freely elected by the workers of the undertaking. See also A. Sobczyk, *Non-Union Forms of Representation within the Collective Employee Representation System – Current Situation and Trends*, "Studia Iuridica" 2015, Vol. LX, p. 218. See also Z. Hajn, (in:) Z. Hajn, L. Mitrus, *Poland*, (in:) R. Blanpain (ed.), *International*..., p. 261.

3. INFORMATION AND CONSULTATION

Polish law provides for a general information and consultation procedure which was established to satisfy the requirements set up by Directive 2002/14[16]. Workers are represented by employee councils unless there is another (equivalent) form of representation in existence.

The employer is obliged to provide the employee council with information on: 1) recent and probable development of the employer's activities and economic situation; 2) the situation, structure and probable development of employment, and on any measures envisaged with a view to maintaining current staff levels; 3) measures likely to lead to substantial changes in work organisation or in contractual relations. The information must be provided if any changes are anticipated or action is planned or upon a written request by the works council. The employer provides the information at such time, in such mode and with such content as appropriate to enable the members of the works council to acquaint themselves with the subject matter, analyze the information and (if consultation is required) prepare for consultation. In response to the employer's information the employee council may submit its opinion. Each member of the works council may also present to the employer their dissenting opinion.

The scope of consultation, compared to information, has been limited. A consultation with an employee council shall encompass 1) the situation, structure and probable development of employment, and any measures envisaged with a view to maintaining current staff levels; 2) measures likely to lead to substantial changes in work organization or in contractual relations. The consultation shall take place at such time, in such fashion and with such content as appropriate to enable the employer to take action in the subject matter of the consultation. The consultation is to take place at a relevant level of management and representation, depending on the subject under discussion. The starting point for a consultation is information supplied by the employer as well as the opinion formulated by the works council and dissenting opinions of council members. The council must be able to meet with the employer and obtain a response, as well as reasons for that response, to any opinion it might formulate. A consultation should be conducted with a view to reaching an agreement between the works council and the employer. Both parties, the employer and the employee council, should act in good faith. While carrying out its tasks, the works council may be assisted by persons having specialist knowledge.

A general information and consultation procedure in such a form had not existed before the implementation of Directive 2002/14. Impact of EU law in this field is, thus, evident. Moreover, domestic standards of information and consulta-

[32] See more *ibid*, p. 301 *et seq.*

tion mirror the provisions of the Directive. On the one hand, this may guarantee consistency with EU standards. On the other hand, the regulation is very general and abstract as an opportunity was lost to specify the conditions and content of the procedure which could improve the standards of employee engagement. Such formal implementation may even represent an obstacle in the development of collective relations as these are often found ambiguous and constitute a source of interpretation problems.

As regards protection of data delivered by the employer, the employee council and its experts must not disclose any information, obtained in connection with the carrying out of their tasks, that constitutes a business secret and has expressly been provided to them by the employer in confidence. The confidentiality obligation in respect of the information obtained shall continue to apply even after the expiry of the council members' term of office, but not longer than for a period of 3 years. In specific cases, the employer shall not be obliged to communicate information to the works council when the nature of that information is such that, according to objective criteria, a disclosure would seriously harm the functioning of the undertaking or establishment, or would be seriously prejudicial thereto. If the works council challenges the confidentiality of information or a refusal to disclose, it may apply to the court to exempt the employer from the confidentiality obligation or to order it to disclose the information or undertake a requisite consultation[17]. The procedure described above can be considered consistent with the standards laid down by Article 6 of Directive 2002/14.

Information duties towards collective bodies representing workers have also been provided for in special situations such as collective redundancies and transfer of undertaking. Moreover, within these procedures social partners are required to negotiate with a view to reaching an agreement that can be considered a stronger form of employee involvement than simple consultation[18]. The procedure of collective redundancies was established first in 1989 at the beginning of the post-Communist transformation. A reconstruction of the procedure occurred in 2003 just before the accession to the European Union[19]. The transfer of undertaking collective procedure, introduced in 2001, was clearly intended to adjust Polish law to the requirements set up by Directive 2001/23.

The procedure accompanying collective redundancies is intended to avoid or reduce the number of dismissals. If that proves impossible, social partners are to

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[1] See more Z. Hajn, (in:) Z. Hajn, L. Mitrus, *Poland*, (in:) R. Blanpain (ed.), *International*..., p. 303.

[18] Compare C. Barnard, *EC Employment Law*, Oxford 2006, p. 682: "the reference to 'consultation' with a view to reaching an 'agreement' blurs the distinction between consultation and collective bargaining".

[19] The Act of 13 March 2003 on Special Rules for Terminating Employment Relationships with Employees for Reasons not Related to the Employees (Polish Official Journal of Laws of 2016, item 1474, as amended, English translation abridged from Lex, www.sip.lex.pl, accessed 26 May 2017).

mitigate the consequences of redundancies. In the collective redundancies procedure employees are represented either by trade unions or by representatives elected *ad hoc* (according to rules adopted by a given employer). The elected representatives are only informed and consulted. They do not negotiate the ultimate agreement.

An obligation to commence the procedure arises where the employer is contemplating collective redundancies[20]. First, the employer shall provide employee representatives with key information relating to envisaged dismissals[21]. They should be informed in advance to be able to prepare themselves for the next stages of the procedure. Further information should be delivered upon request of an employee representative as far as the information is important to conduct the negotiations. Where employees are represented by trade unions, it is social partners that negotiate collective agreements. If an agreement has not been concluded, the employer unilaterally issues rules governing the projected redundancies. If no trade unions come into play, regulations are issued after a consultation with employee representatives elected according to the rules adopted by a given employer. The procedure itself reflects the standards arising from the Directive. Problematic is, however, the differentiation based on the type of employee representation. Lack of negotiations aimed at the conclusion of a collective agreement (even if the conclusion is not obligatory) weakens the protection of workers. As a result, the objectives of Directive 98/59 cannot be entirely achieved. There are no reasons to exclude elected representatives who are entitled to conclude agreements leading, in effect, to a deterioration of working conditions, from negotiations concerning an agreement protecting workers in case of collective redundancies.

Finally, there are some problems as regards the application scope of the procedure of collective redundancies. The Polish definition of collective redundancy follows one of the options provided for by Directive 98/59[22]. However, some of the detailed solutions adopted are debatable from the perspective of EU standards. First, thresholds are related to the employer and not to the establishment. Where the employer owns a number of establishments it can be easier to avoid the appli-

[20] Compare the judgments of the Court of 27 January 2005 in Case C-188/03 *Irmtraud Junk*, and of 10 September 2009 in Case C-44/08 *Akavan Erityisalojen Keskusliitto AEK and Others*.

[21] The information covers at least the reasons for the proposed collective redundancy; the number of employees and professional groups to which they belong; the professional groups affected; the period over which the redundancy is to take place; the criteria proposed for the selection of employees to be made redundant; the order in which employees are to be made redundant; employees' issues connected with the intended collective dismissals and also (where these include any employee benefits to be paid in cash) the method for calculating such payments.

[22] Redundancy is treated as collective if over a period of 30 days it affects at least: 1) 10 employees, where the employer employs less than 100 employees, 2) 10 per cent of employees, where the employer employs at least 100 but less than 300 employees, 3) 30 employees, where the employer employs 300 employees or more.

cation of the procedure[23]. Second, according to Polish law, mutual agreements terminating employment contracts are included into collective redundancies provided that there are at least 5 such agreements. Directive 98/59 includes mutual agreements if there are at least 5 redundancies. As a result, some situations covered by EU law will not be treated as collective redundancies under Polish law. Third, it is not clear how to treat a unilateral change of working conditions by the employer which may lead, in case of an employee refusal, to a termination of employment contracts[24]. The Supreme Court has held that it is not necessary to follow the collective redundancies procedure where an employer worsens the conditions of work and pay because a container collective agreement has been changed or terminated[25]. It may lead to a contradiction with the position of the CJEU which has declared that the fact that an employer, unilaterally and to the detriment of an employee, makes significant changes to the essential elements of their employment contract for reasons not related to the individual employee concerned, falls within the definition of "redundancy" for the purpose of Directive 98/59[26].

In case of a transfer of undertaking or its part, the information and consultation procedure involves trade unions only. The transferor and the transferee are obliged to inform trade unions about the transfer date, its reasons and consequences for affected employees. The information must be delivered at least 30 days before the transfer is supposed to occur. Both employers have to inform only those unions that are active in their companies. As a result, trade unions active in a transferred entity may be deprived of the information that is available for the transferee. Moreover, when there are no trade unions in play employers shall inform individually all the employees. The individual mode of providing information may weaken the protective dimension of the regulation. When the employers engaged in a transfer envisage measures in relation to their employees, they shall consult trade unions on such measures with a view to reaching an agreement. An agreement should be concluded within 30 days since the information has been passed. Once again, the transferor and the transferee are obliged to consult those trade unions which exist in their establishments before the transfer date. As a result, there is no requirement for the transferee to consult trade unions existing in the transferred entity, which significantly limits the protection afforded to workers. The adopted solution does not entirely reflect the assump-

[23] However, the concept of establishment is treated as a European one. See the judgments of the CJEU of 7 December 1995 in Case C-449/93 *Rockfon A/S*; of 15 February 2007 in Case C-270/05 *Athinaïki Chartopoïïa AE*; of 13 May 2015 in Case C-392/13 *Lyttle and Others*.

[24] See more in: Z. Góral, (in:) K.W. Baran (ed.), *Outline of Polish Labour Law System*, Warszawa 2016, p. 152 *et seq.*

[25] To modify individual conditions of work and pay the employer must issue individual declarations of will towards employees. See judgment of the Supreme Court of 30 September 2011, III PK 14/11, Lex No. 1106746.

[26] Judgment of the CJEU of 11 November 2015 in Case C-422/14 *Pujante Rivera*.

tions of the Directive which stipulates that information must be provided and consultations take place in good time before an ownership change takes place (the most important relationship exists between the transferee and employee representatives in the transferred entity). The risk of a potential inconsistency is mitigated by case law which allows for negotiations between the transferee and trade unions representing the employees which are going to be taken over. The agreement that they can conclude is treated as a source of labour law[27].

Some information and consultation duties are also connected with the engagement of temporary workers. A user undertaking is to inform representative trade unions about employing temporary workers. If the period of temporary employment is longer than 6 months, the employer should attempt to agree any decision with the representative trade unions. Moreover, these trade unions must be informed of basic conditions of the employment of workers. There is no alternative way of informing employee representatives when there are no (representative) trade unions. As a result, the protective goal of Article 8 of Directive 2008/14 is achieved only partially.

Finally, engagement of employee representatives is provided for where introduction of telework is concerned. Conditions of telework are to be determined in an agreement with trade unions (if such an agreement has not been achieved unilaterally by the employer taking into account any arrangements with trade unions). If there are no trade unions in existence, the employer issues rules governing telework after consultations with employee representatives elected according to rules adopted in a given establishment. The abovementioned procedure may be considered sufficient to meet the requirement to inform and to consult employee representatives on the introduction of telework (Article 11 of the Framework Agreement on Telework). There are also other areas (e.g. health and safety) where various forms of involvement of employee representatives are provided for[28].

4. COLLECTIVE BARGAINING

Although freedom of association has been excluded from the legislative competence of the EU, some European standards may influence domestic regulations concerning collective negotiations and agreements.

An important example are negotiations concerning working time flexibilization. Since 2013, social partners have been empowered to introduce longer calculation periods of working time. According to Article 18 of Directive 2003/88, such

[27] See: judgment of the Supreme Court of 23 May 2006, III PZP 2/06, OSNP 2007, No. 3–4, item. 38.

[28] See: Z. Hajn, (in:) Z. Hajn, L. Mitrus, *Poland*, (in:) R. Blanpain (ed.), *International*..., p. 300.

an extension can be applied (subject to some special instances) by means of collective agreements. The Polish legislator has capitalized on this possibility. Social partners may extend the reference periods to up to 12 months. However, various procedures have been provided for. First, an extension may be introduced by typical collective agreements concluded with trade unions (at the establishment as well as the multi-establishment level). Second, the employer and company trade unions may conclude an atypical collective agreement. The negotiation procedure applicable is less complicated compared to the ordinary one. An agreement does not require any registration either[29]. The employer negotiates with all trade union organizations. If they cannot reach a compromise, an agreement may be concluded merely with the biggest (most representative) organizations. Third, if there are no trade unions, an extension may be applied by means of an agreement concluded with employee representatives elected according to the rules adopted by a given employer (*ad hoc* representation). In the latter case it is disputable if the adopted mechanism ensures the level of protection guaranteed by Directive 2003/88.

Interesting problems appear when it comes to the consequences of a transfer of undertaking in the field of collective agreements. According to Article 3(3) of Directive 2001/23, following a transfer the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. In fact, the Directive guarantees coverage by a collective agreement. The content of employee rights is not, however, safeguarded[30]. If the transferee is bound by another collective agreement, a transfer may lead to an instant change in working conditions. In some respects Polish law provides for a higher level of protection of employee-acquired rights than the pertinent EU standard as, for instance, the transferee cannot, within 1 year from the transfer date, worsen the conditions of work and pay arising from the collective agreement binding on the transferor. As a result, the content of the employment relationship is maintained. After 1 year working conditions can be altered either by means of a mutual agreement of the parties to the employment relationship or unilaterally by the employer[31]. Such a solution could be challenged in the light of the Directive, which, according to the Court of Justice of the European Union, does

[29] As a result, atypical collective agreements are treated as a more flexible instrument of social dialogue (Z. Hajn, (in:) Z. Hajn, L. Mitrus, *Poland*, (in:) R. Blanpain (ed.), *International*..., pp. 273–274).

[30] This result has been, to an extent, mitigated by the Court. See: judgment of 6 September 2011 in Case C-108/10 *Scatollon*.

[31] Polish law offers the employer the possibility to change the conditions of work and pay with a period of notice. The provisions concerning employment contract termination are applied accordingly. If the employee refuses an employer's proposal the employment contract expires with a period of notice.

not aim solely to safeguard the interests of employees, but seeks to ensure a fair balance between their interests, on the one hand, and those of the transferee, on the other (a balance between employee protection and economic freedoms). Consequently, the transferee must be in a position to make adjustments and changes necessary to carry on with its operations (to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to securing the company's future economic activity)[32]. The foregoing protections afforded to employees, which stabilize collective agreements they are party to, deprive the employer (for a period of 1 year) of the power to adjust working conditions to the current situation of the company (a balance of objectives and values would have to be carried out).

5. CONCLUSIONS

Although the competences of the EU in the field of industrial relations are limited, European standards concerning collective labour law have significantly affected domestic legal systems, including Polish law. In countries of Central and Eastern Europe the impact is even more visible due to a lack of certain institutions in the past. First, EU legislation forced a reconstruction of a model of collective representation of employee interests. Polish law shifted from single- to double-channel representation with trade unions and employee councils (involved in information and consultation procedures). An unexpected phenomenon of recent years (partially connected with the implementation of European standards) is the increasing role of *ad-hoc* representatives. In the absence of trade unions they are involved in the process of negotiating some working conditions provided for by European directives. However, it is disputable whether their position guarantees an equilibrium which is necessary to work out balanced solutions acceptable for both management and workers. Second, under the influence of EU law the Polish legislator has established a number of collective procedures aimed at the protection of employee interests (e.g. collective redundancies, transfer of undertaking). As a rule, they reflect basic protective standards determined at the European level. There are, however, some lesser problems that weaken the effect intended by EU legislation. Nonetheless, implementation of European standards has contributed to the development of industrial relations and protection of workers.

[32] Judgment of 18 July 2013, *Alemo-Herron and Others*, C-426/11, EU:C:2013:521, paras 25 and 33.

INFLUENCE OF EU LAW ON COLLECTIVE LABOUR LAW IN POLAND (INSTITUTIONS AT THE NATIONAL LEVEL)

Summary

Although the competences of the EU in the field of industrial relations are limited, European standards concerning collective labour law have significantly affected domestic legal systems, including Polish law. EU legislation forced a reconstruction of a model of collective representation of employee interests. Polish law shifted from single- to double-channel representation with trade unions and employee councils (involved in information and consultation procedures). Under the influence of EU law the Polish legislator has established a number of collective procedures aimed at the protection of employee interests (e.g. collective redundancies, transfer of undertaking). As a rule, they reflect basic protective standards determined at the European level. There are, however, some lesser problems that weaken the effect intended by EU legislation. Nonetheless, implementation of European standards has contributed to the development of industrial relations and protection of workers.

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KEYWORDS

trade unions, employee representatives, collective labour law, collective agreements

SŁOWA KLUCZOWE

związki zawodowe, przedstawiciele pracowników, zbiorowe prawo pracy, układ zbiorowy pracy

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PUBLIC ADMINISTRATION REFORM IN UKRAINE IN THE FACE OF EUROPEAN INTEGRATION

The success of Ukraine is key element to the long-term political and economic stability of Europe...[1]

1. INTRODUCTION

The period of the last twenty five years (between 1991 and now) is crucial for many Eastern European countries in terms of their transition from socialist practices to new standards of governance. Ukraine has managed to form the majority of its public administration bodies and other institutions in subordination to a political government, one that ensures the implementation of EU law and exercises other public and administration functions.

Proper public administration is the basis for economic development and human rights defence. That is why it is urgently needed to take effective measures for public administration development in Ukraine in line with the grounding democratic principles: rule of law, predictability, impartiality and consistency. However, the current public administration in Ukraine does not meet the strategic policy of Ukraine aiming at democracy and European standards of good governance, since it remains inefficient, internally controversial, excessively centralized, cumbrous and detached from the problems of an average citizen. As a result, it has become a hindrance to social, economic and political reforms.

The main reasons for the above include the following:

1) incomplete transformation of the Cabinet of Ministers of Ukraine into a body of political management: unclear separation of policy development functions between two centres: the President and the Government; the government's

[1] Z. Brzezinski, *The Topic of Ukraine*, (in:) J. Kloczowski, H. Laszkiewicz (eds.), *East-Central Europe in European History. Themes and Debates*, Lublin 2009, p. 53.

limited levers to influence certain central executive authorities; lack of strategic planning in the operation of the Cabinet of Ministers of Ukraine;

2) inefficient organization of operation of ministries: ministers and ministries are overburdened with administrative issues; political and administrative leadership has not yet been fully separated; political and administrative functions in ministries are not separated; excessive organizational dependence of government bodies on ministries;

3) an unpractical system of central executive authorities: unreasonably high number of central executive authorities of the similar status; low level of horizontal coordination between ministries; excessive centralization of executive powers;

4) inefficient organization of public authorities at regional and local levels: inefficient mechanisms of the Government's influence on local state administrations; high level of concentration of public administration powers and functions in the state system;

5) inefficient local self-governments and unpractical administrative and territorial system: financial incapability of the basic local self-government unit in rural areas; lack of a clear division of powers and responsibilities between local self-governance levels, bodies and officials; lack of full-fledged local self-governance in rajons; tangible disproportions in the size of raion territories and the population; disproportions in the development of raions and regions;

6) an inefficient system of the civil and municipal service: high staff turnover and low professional level of the staff; subjectivism in the administration of the civil service; vulnerability of civil servants in the face of political influences; low salaries and lack of labour remuneration transparency;

7) lack of parity principles in the relations between individuals and public administration: improper legal regulation of relations between individuals and public administration; actual prevalence of bureaucrat rights and interests, formalism, bureaucracy, and corruption; improper promulgation of public information and problems of access to information; inefficient procedure set for the appeal of decisions, actions and omissions by the public administration[2].

The above not only proves that the Ukrainian public administration system needs to be reformed, but also suggests priorities for such a reform.

2. CURRENT STATE OF AFFAIRS IN UKRAINIAN PUBLIC ADMINISTRATION

As prof. V. Averjanov has noted, in the domestic legal doctrine we need to use a definition of administrative law of Ukraine as a system of broad social relations

[2] *Concept of public administration reform in Ukraine*. Developed by the Centre for Political and Legal Reforms. The draft is as of 23.12.2005, Kyiv 2005, pp. 3–11.

between public administration and the objects of public management, which arise in the sphere of authoritative and administrative activity, rendering of administrative services, with the purpose of public guaranteeing of rights and liberties of the individual and the citizen as well as normal functioning of civil society and the state. This would provide opportunities for applying measures of administrative compulsion against disturbers of regulations[3]. Some Ukrainian scholars (I. Hrycenko, V. Bevzenko, R. Melnyk, A. Pukhtetska etc.) propose including within public administration (as it has no legal definition in current Ukrainian legislation) bodies of executive power, bodies of local self-government, integration of citizens or enterprises during the realization of delegated state functions, and officials of any of the mentioned collective subjects of public administration[4].

Currently, the system of state bodies of executive power in Ukraine is three-tiered, according to the provisions of the Constitution of Ukraine[5]. This system consists of the Cabinet of Ministers of Ukraine (the highest body in the system of bodies of executive power), ministries and other central bodies of executive power (which represent the central level of the system), as well as local bodies of executive power.

It should be mentioned that the central level of the system of bodies of executive power would face the strongest political influence during all stages of a public administration reform in Ukraine. One of the possible reasons is that the Constitution of Ukraine does not stipulate any suitable list of organizational-legal forms of central bodies of executive power. Instead, it uses the general term of "ministries and other central bodies of executive power". This formulation leads to problems in the process of organization and functioning of the system of central bodies of executive power[6].

On the other hand, the system of local self-government in Ukraine includes the following elements: local community; village, settlement, city council; village, township, city mayor; district and regional councils that represent the common interests of territorial communities of villages, cities; executive bodies of village, township, city council; bodies of self-organization of the population[7]. In particular, there are executive public authorities and executive bodies of local self-government in villages, settlements, and towns/cities, within which civil service officials function.

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[3] *Administratyvne pravo Ukrai'ny*, za red. V. Aver'janova, Kyiv 2004, Vol. I, p. 73.

[4] I. Hrycenko, R. Melnyk, A. Pukhtetska, N. Zadyraka, V. Bevzenko, Y. Vashchenko, O. Radyshevska and others, *Zagalne administratyvne pravo*, Kyiv 2015, p. 120.

[5] *Konstytucija Ukrai'ny* vid 28 chervnja 1996 r. № 254k/96-VR, Vidomosti Verhovnoi' Rady Ukrai'ny 1996, № 30, p. 141.

[22] Y. Vashchenko *Legal issues of the public administration in Ukraine in the context of constitutional and public administration reforms*, "Jurisprudence" 2014, Vol. 21(4), p. 1188.

[23] *Pro misceve samovrjaduvannja v Ukrai'ni*, zakon Ukrai'ny vid 21 travnja 1997 r. № 280/97-VR, Vidomosti Verhovnoi' Rady Ukrai'ny 1997, № 24, p. 170.

Nevertheless, the public administration system of Ukraine does not correspond to the country's needs for comprehensive reforms in various areas of public policy and to its European choice, as well as European standards of good public governance.

At present, the official bodies of Ukraine declare the intention to reform the public administration system and harmonize it with the best modern practices and standards of the EU, making provision for a professional and effective civil service. Recently, some steps pertaining to the issue have been taken, in particular: new Laws of Ukraine were adopted: on Public Service[8], on Administrative Services[9], on Access to Public Information[10], on Central Executive Authorities[11], on Service in Local Self-government[12], on Voluntary Unification of Territorial Communities[13], on the National Anticorruption Bureau of Ukraine[14], on Prevention of Corruption[15], but other required regulations are still considered.

However, these efforts made by the President of Ukraine, the Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine have not led to significant improvements yet. Moreover, in some cases and sectors they have even given rise to negative tendencies[16]. In fact, until 2016 public administration reforms had resulted in a reorganization of public authorities and certain reductions in the number of civil servants, and there were no conditions for the building of an oriented public management system. Also, there is no public policies evaluation system inherent to the public administration system; activities of certain ministries, central authorities, particular budget programs are also not evaluated. Thus, citizens do not have an opportunity to obtain comprehensive and trustworthy information on public policies implementation and the use of taxpayers' funds.

It is worth mentioning that Ukraine occupies low positions in global competitiveness rankings related to public governance. According to the Global Competitiveness Index of the World Economic Forum (2016–2017), Ukraine holds general rank 85 out of 138 countries, rank 129 regarding government effectiveness; rank 99 regarding transparency of government policy making, rank 74 regarding the

[24] Official Journal of Ukraine, 2016, No. 4, art. 43. Even though new legislation on civil service envisages certain improvements, it, unfortunately, contains a series of provisions that do not correspond to the proper European and international standards, SIGMA experts recommendations.

[25] Official Journal of Ukraine, 2013, No. 32, art. 409.

[26] Official Journal of Ukraine, 2011, No. 32, art. 314.

[27] Official Journal of Ukraine, 2011, No. 38, art. 385.

[28] Official Journal of Ukraine, 2001, No. 33, art. 175 (with amendments by 1 of May 2017).

[29] Official Journal of Ukraine, 2015, No. 13, art. 91. Ukraine included the 12 principles of "The Strategy for Innovation and Good Governance at Local Level" in domestic practice on local level.

[30] Official Journal of Ukraine, 2014, No. 47, art. 2051.

[31] Official Journal of Ukraine, 2014, No. 49, art. 2056.

[32] Read more: *Statement of Ukrainian National Platform of Eastern Partnership Civil Society Forum Concerning Reforms of Public Administration in Ukraine*. Prepared by the sub-group «Reforms of public administration and local self-governance», Work group No. 1, Kyiv 2016, p. 1.

burden of government regulation, rank 104 regarding reliability of police services, rank 126 regarding efficiency of the legal framework in challenging regulations[17]. In the World Bank Doing Business 2017 Ukraine does somewhat better – its overall rank in 2017 is 80 compared to 83 in 2016. But there has been significant improvement in the field of starting a business in Ukraine – from 70 in 2015 to 30 in 2016 and 20 in 2017[18].

3. THE EUROPEAN INTEGRATION PROCESS IN UKRAINE: PERSPECTIVES AND CHALLENGES FOR PUBLIC ADMINISTRATION

From the Ukrainian point of view, the European integration process has two dimensions. One is mainly political in character and represents a return to democratic principles, the rule of law, human rights protection, good governance etc. The most important Ukrainian step in this direction was joining the Council of Europe in 1999, active participation in its work, and ratification of many European conventions, e.g. the European Convention for the Human Rights and Fundamental Freedoms of 1950, the European Charter of Local Self-Government of 1985, and many others.

Another dimension of European integration is related to preparations of Ukraine to access the European Union. Ukraine's desire to join the European institutions dates back to 1994 when the government declared that integration with the EU is the main foreign policy objective. As a result, the political part of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (hereinafter – the Association Agreement) was signed on 21 March 2014 by the Prime Minister and the economic part was signed on 27 June 2014 by the President of Ukraine[19]. Mr Petro Poroshenko described this as Ukraine's "first but most decisive step" towards EU membership[20].

One of the most important conditions of Ukraine's membership in the European Union is adjustment of the law. Ukraine has to adopt *acquis communautaire* (hereinafter – *EU acquis*). That does not only require the translation of many legal

[17] K. Schwab, X. Sala-i-Martin, *Competitiveness Index of the World Economic Forum (2016–2017)*, Geneva 2016, p. 351.

[18] *Doing Business 2017. Equal opportunities for all. Economy profile. Ukraine.* International Bank for Reconstruction and Development, The World Bank 2017, p. 11.

[19] *The Association Agreement between the European Union and the European Atomic Energy Community and their Member States*, *on the one part*, *and Ukraine*, *on the other part*, Official Journal L 161, 29.05.2014, p. 3–2137.

[20] *Ukraine ratifies EU association agreement*, *Deutsche* Welle, published 16.09.2014.

acts and their implementation, but also securing their observance. It is emphasized both in accession negotiations and in the subject's literature that the last issue may pose the biggest problem, since it must be connected with a change of public administration and the functioning of other state authorities.

The connection between the public administration reform and European integration has been frequently stressed in the context of the enlargement of the European Union in 2004[21]. Although this link is rather indirect, given that there is no *EU acquis* in the area of public administration, its significance has been often emphasised, as "*soft acqui*" in the area of administrative capacities has developed[22].

Thus, the European integration process concerns Ukraine more and more directly. It poses many new challenges to Ukrainian public administration. On the one hand, they are new opportunities to broaden the scope of its activities without limitations resulting from functioning in one state; on the other hand, it implies the necessity of adjusting to European standards of administration. As of this time, a thorough assessment of the state of the Ukrainian public administration system has not been carried out according to the Principles of Public Administration (SIGMA)[23].

European standards of good administration have been articulated in a SIGMA document, "Principles of Public Administration", that contains an assessment framework for public administrations. This structure of the Ukrainian Strategy of Public Administration Reform follows the Principles of Public Administration developed by SIGMA in close cooperation with the European Commission. They define what good governance entails in practice, and outline the main requirements for a well-functioning administration. The Principles are derived from international standards and requirements as well as good practices in the EU Member States and/or countries of the Organization for Economic Cooperation and Development (OECD). They are recognized as a set of standards and an assessment framework for reforms of public administration in a number of countries. The Principles of Public Administration define the following reform areas:

– public policy development and coordination (strategic planning of government policies, quality of regulation and public policies in general, including requirements for evidence-based policy making and public participation);

– modernization of public service and human resources management;

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[21] T. Verheijen, *The Management of EU Affairs in Candidate Member States: Inventory of the Current State of Affairs*, (in:) "Preparing Public Administration for the European Administrative Space", OECD/SIGMA 1998, Vol. 23, p. 29.

[22] J. J. Hesse, *Rebuilding the State: Administrative Reform in Central and Eastern Europe*, OECD/SIGMA 1998, Vol. 23, p. 179; Nunberg B., *Ready for Europe. Public Administration Reform and European Union Accession in Central and Easter Europe*, "World Bank Technical Paper" May 2000, Vol. 466, pp. 21, 208, 211, 215, 257.

[23] *European Principles for Public Administration*, OECD/SIGMA 1999, Vol. 27.

– ensuring accountability of public administration (transparency of work, free access to public information, transparent organization of public administration with clear lines of accountability, possibility of judicial review);

– service delivery (delivery standards and safeguards of administrative procedures, quality of administrative services, e-government);

– public financial management (administration of taxes, preparation of state budget, execution of state budget, public procurement system, internal audit, accounting and reporting, and external audit)[24].

4. THE LEGAL FRAMEWORK OF A PUBLIC ADMINISTRATION REFORM IN UKRAINE

A public administration reform (hereinafter – PAR) is one of the key reforms for a country in transition pursuing comprehensive reforms in various policy areas. Hence, it is one of the main processes in the transition from a communist regime to a functioning free-market democracy – it is a reform of the entire government system. In Europe, these reforms have usually been evolving simultaneously with the international and European integration of former communist states[25].

A reform of public administration aims at the establishment of an efficient system of public administration able to provide high quality public services. To achieve the aim of the reform it is important to implement the ideology of "serving the society" as the operating principle of public administration.

It is worth mentioning here that the central purpose of administrative law is to promote good administration of a country. For example, administrative bodies should act efficiently and honestly to promote the public good, they should listen to individuals likely to be affected by their decisions, taking their views into account, and they should operate in a fair, transparent, and unbiased fashion, seeking always to serve the public interest while, at the same time, respecting the rights of individuals[26].

Positive changes in Ukrainian administrative legislation have appeared with the Strategy of Public Administration Reform in Ukraine for 2016–2020 (here-

[24] *European Principles for Public Administration…*; *Strategia reformuvannia derzhavnogo upravlinnia Ukrai`ny na 2016–2020 rik*, rozporjadzhennja Kabinetu Ministriv Ukrai'ny vid 24.06.2016, № 474-p.

[25] M. Mihajlovic, *Public administration reform and European integration process: on the same or parallel tracks? (Case study of the Republic of Serbia).* Paper presented at 14th NISPAcee Anual Conference, Slovenia 11–13 May 2006, p. 2.

[26] J. Beatson, M. Elliot, M. Matthews, *Administrative Law. Text and Materials*, Oxford 2011, p. 1.

inafter – Strategy) approved by the Order of the Cabinet of Ministers of Ukraine of 24 June 2016, No. 474-p)[27].

The Strategy is a uniform umbrella strategic document of the Government of Ukraine which includes development guidelines for the next five years. The purpose of this Strategy was to improve the system of public administration and thus improve the country's competitiveness. Bearing in mind the European choice and perspective of Ukraine, this Strategy tries to follow, as regards the transformation of public administration, the European standards of good administration.

According to the Association Agreement, the Strategy is based on common values, namely respect for democratic principles, the rule of law, and good governance. Article 3 stipulates ***good governance*** as one of the principles central to enhancing the relationship between the parties[28].

Furthermore, Ukraine committed to continuing the ushering in of political, socio-economic, legal and institutional reforms necessary to effectively implement the Association Agreement. In view of the importance of the public administration reform in Ukraine, a wide range of stakeholders was engaged in the development of this Strategy (about 20 public authorities).

Nevertheless, the scope of the Strategy does not include the following spheres:

1) issues of a local self-government reform that is undertaken according to the *Concept for reform of the local self-government and territorial organization of government in Ukraine*, approved by the Order of the Cabinet of Ministers of Ukraine of 1 April 2014, No. 333[29], *State strategy of regional development for up to 2020* approved by the Order of the Cabinet of Ministers of Ukraine of 6 August 2014, No. 385[30] and the *Action Plan for 2015–2017 on implementation of State strategy of regional development* approved by the Order of the Cabinet of Ministers of Ukraine of 7 October 2015, No. 821[31].

2) issues of judicial oversight and review of decisions of public administration, as the reform of administrative justice constitutes an integral part of a comprehensive judicial reform. *The Justice Sector Reform Strategy for 2015–2020* was agreed by the Judicial Reform Council and approved by the Decree of the President of Ukraine of 20 May 2015, No. 276[32].

3) issues of public financial management. Goals and objectives of the reform are defined in *the Public Finance Management Strategy for 2017–2021*,

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[27] *Strategia reformuvannia derzhavnogo upravlinnia Ukrai'ny na 2016–2020 r.*, rozporjadzhennja Kabinetu Ministriv Ukrai'ny vid 24.06.2016, № 474-p.

[28] *The Association Agreement between the European Union and the European Atomic Energy Community and their Member States*, *on the one part*, *and Ukraine*, *on the other part*, Official Journal L 161, 29.05.2014, p. 3–2137.

[29] Official Journal of Ukraine, 2014, No. 30, art. 831.

[30] Official Journal of Ukraine, 2014, No. 70, art. 1966.

[31] Official Journal of Ukraine, 2015, No. 83, art. 2752.

[32] Official Journal of Ukraine, 2015, No. 11, art. 2207.

approved by the Order of the Cabinet of Ministers of Ukraine of 8 February 2017, No. 142-p.[33]

At the same time, the Strategy is aligned with the following strategic documents of Ukrainian official authorities:

1. The *Ukraine – 2020 Sustainable Development Strategy*, adopted by the Decree of the President of Ukraine of 12 January 2015, No. 5[34]. In Chapter 3 entitled "A Road Map and Top Priorities of Strategy Implementation", one of the top-priority reforms is a public administration reform aimed at building a transparent system of public administration, creating a professional civil service and ensuring its effectiveness. The reform should result in setting up an effective, transparent, open and flexible structure of public administration with the application of advanced information communication technologies (e-governance) to ensure development and implementation of a coherent public policy aimed towards sustainable development of the society and adequate response to internal and external challenges;

2. *The Strategy for Public Financial Management Development*, approved by the Order of the Cabinet of Ministers of Ukraine of 1 August 2013, No. 774[35], specifically Section III, "Mid-term budget forecasting and conceptual principles of mid-term budget planning, performance-based method, strategic planning on the level of ministries and other key budget holders", in which the outlined tasks stipulate the introduction of a strategic planning system at the level of ministries and other key budget holders that would be oriented towards ensuring inter-relatedness between activity planning and budget planning; effective and transparent use of public funds;

3. *The Strategy for Civil Service Reform and Reform of Service in Local Self-Government in Ukraine for the period up to 2017*, approved by the Order of the Cabinet of Ministers of Ukraine of 18 March 2015, No. 227[36], specifically the provisions regarding separation of political positions and civil service positions, ensuring equal access to civil service for citizens through open competition-based recruitment to vacant positions, building an effective human resource management system within the civil service, establishing a transparent remuneration model;

4. *The State Programme on implementation of the framework for the state anti-corruption policy of Ukraine (the Anti-Corruption Strategy) for 2015–2017*, approved by the Resolution of the Cabinet of Ministers of Ukraine of 29 April 2015, No. 265[37], containing provisions that stipulate measures to improve the procedure ensuring access of citizens to public information;

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[33] Official Journal of Ukraine, 2017, No. 14, art. 3052.

[34] Official Journal of Ukraine, 2015, No. 7, art. 1987.

[35] Official Journal of Ukraine, 2013, No. 82, art. 3052.

[36] Official Journal of Ukraine, 2015, No. 24, art. 680.

[37] Official Journal of Ukraine, 2015, No. 38, art. 1146.

5. The *Action Plan on deregulation of economic activities*, approved by the Resolution of the Cabinet of Ministers of Ukraine of 18 March 2015, No. 357[38] and the *Action Plan on implementation of best practices of quality and effective regulation reflected in the World Bank Group methodology "Doing Business" for 2016*, approved by the Order of the Cabinet of Ministers of Ukraine of 16 December 2015, No. 1406[39].

As we may notice, all the mentioned strategies in the public administration sphere necessitate a thorough baseline assessment of the state of the public administration. A political commitment to reforms and leadership is crucial for the successful planning and implementation of PAR. PAR is a cross-sectoral, whole-of-government reform, impossible to achieve without strong political leadership with sufficient authority and support of the Prime Minister of Ukraine (from 2016 – Mr Volodymyr Groysman). Therefore, the Deputy Prime Minister of Ukraine for European and Euro-Atlantic Integration (from 2016 – Mrs Ivanna Klympush-Tsintsadze) has been assigned to be responsible for the coordination of the public administration reform. Within the Secretariat of the Cabinet of Ministers of Ukraine, a leading structural unit on public administration reform is envisaged to ensure support for the reform.

5. CONCLUSIONS

An efficient public administration is one of the main factors of competitiveness of a country. Effective activity of the official authorities of Ukraine within public policy development in various areas is possible with a professional, accountable, efficient and effective system of government agencies and civil servants.

Reducing the administrative burden of government regulation; improving quality of delivery of administrative services; ensuring legality and predictability of administrative actions; forming a stable and efficient organization and functioning of executive authorities; organizing a professional, politically neutral and open public civil service (the service in executive and local self-governance bodies); decentralizing powers and financial resources; establishing a system of capable local self-governance; strengthening the status of citizens in their relations with the public administration; adopting the Administrative Procedure Codex of Ukraine and other laws and by-laws within the European Administrative Space; implementing effectiveness evaluation of public policies and activities of certain public agencies in order to ensure European principles of good governance are observed (openness, transparency, accountability, efficiency, effectiveness); ensuring executive power

[38] Official Journal of Ukraine, 2015, No. 30, art. 987.

[39] Official Journal of Ukraine, 2015, No. 43, art. 1307.

operation in Ukraine in line with EU principles of good governance (participation, openness, accountability, effectiveness, coherence) – attainment of this goals would improve the Ukrainian position in global competitiveness rankings. Effective public administration is also one of the main prerequisites of democratic governance based on the principles of the rule of law. Reform of the public administration is the fulfilment of a social order for efficient, responsible and open executive power and territorial self-governance institutions, which means proper governance.

In the light of our analysis to this point, it appears that Ukrainian law and Ukraine's public administration system has not been brought fully in line with the Principles of Public Administration (SIGMA). But adopting the Strategy of Public Administration Reform in Ukraine for 2016–2020 and other laws and by-laws is the first and very important step to expand the domestic legal doctrine of administrative law and current legislation of Ukraine with the help of the experience of European standards of public administration, providing modern tools for implementation of good governance and good administration practices.

PUBLIC ADMINISTRATION REFORM IN UKRAINE IN THE FACE OF EUROPEAN INTEGRATION

Summary

The purpose of this study is to present selected aspects of complex issues of transformations in the public administration system of Ukraine, and changes of administrative law in the context of the European integration process. The author, on the one hand, points to new possible duties of public administration bodies created by the European integration process, and, on the other hand, raises attention to new challenges facing the public administration reform, in particular in the candidate states to the European Union, such as Ukraine. The author establishes strong links between the public administration reform and the European integration process. It is of great importance if an aspiring EU member is to prepare its administration well for the challenges of EU membership.

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KEYWORDS

administrative law, public administration, reform, European integration, good government, European Administrative Space

SŁOWA KLUCZOWE

prawo administracyjne, administracja publiczna, reforma, integracja europejska, dobra administracja, europejska przestrzeń administracyjna

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REMARKS REGARDING THE INFLUENCE OF EUROPEAN LEGISLATION UPON CODIFICATION OF CIVIL LAW

To say that the Polish legal system remains subjected to a significant amount of influence coming from European legislation is, by all means, a cliché, repeated almost *ad nauseam* by practicing lawyers, scholars and members of the public alike. Such a high status of this proposition implicates, evidently, its prevalence within society as well as, presumably, its pervasiveness among all people who use laws professionally. However, this does not mean that the subject is not worth further studying and analysing. Conversely, a phenomenon of such importance and magnitude should never avoid scrutiny and interest of scholars. More than that – even if the subject were to become, at some point, mundanely tiring, it is practically impossible to escape therefrom. For Europeanisation is present in almost any topic worthy of consideration within jurisprudence. Decodification of civil law is no exception.

The notion of decodification, introduced to scholarly discourse by Italian academic Natalino Irti almost 40 years ago[1], triggers some emotional reactions to this day. This should not surprise because the idea disguises a theory in line with which the role of codes as the principal source of civil law shall be diminished or, as the title of Irti's book itself suggested, the sheer concept of codification should be abandoned and the era of the codex in the history of law shall come to an end. Meanwhile, the civil code, an expression of the grand, Enlightenment idea of European legislation, remains to this day a kind of, as it were, a myth of legal positivism[2], still being the central point of reference for the traditional way of perceiving continental private law. For the purposes of this paper it shall be accepted, however, that the theory first put forward by Irti is correct, and the process of decodification – understood as a reduction in influence of the civil code as the principal source of private law – has been an observable fact for decades. As a result of this process, codification of the civil law loses its two main

[1] N. Irti, *L'età della decodificazione*, Milano 1979.

[2] T. Giaro, *Prawo i historia prawa w dobie globalizacji. Nowe rozdanie kart*, (in:) T. Giaro (ed.), *Prawo w dobie globalizacji*, Warszawa 2011, p. 75.

characteristics, namely wholeness and axiological coherence[3]. That the theory is right is not accepted by the author, as it were, *a priori*, but is a result of studies of the problems of codification and decodification[4], and such a conclusion relies primarily upon the views of a number of legal scholars from Poland, other European countries and the world[5]. In addition, one example discussed in this piece may, without a doubt, serve as evidence that decodification of civil law is an active process at least in contemporary Poland, as well as, to some extent, in other countries that represent the tradition of civil law and are members of the European Union[6].

1. REGULATIONS AND DIRECTIVES IN THE CONTEXT OF DECODIFICATION

There is a plethora of factors which bolster decodification and it would be pointless to discuss or even single them all out especially because one may well

[3] In line with a commonly accepted view, a code, within the meaning accorded thereto by the European Enlightenment, shall be an act that has, within its scope, an entire branch of the law, and is characterized by its wholeness, coherence, consistency and terminological uniformity. See e.g: R. Zimmermann, *Codification: history and present significance of an idea. À propos the recodification of private law in the Czech Republic*, "European Review of Private Law" 1995, issue 3, pp. 96–97, 103–104; T. Giaro, (in:) W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2014, p. 87; R. Longchamps de Bérier, *Wstęp do nauki prawa cywilnego*, Lublin 1922, p. 15; L. Górnicki, *Kodyfikacja prawa prywatnego*, (in:) M. Safjan (ed.), *System Prawa Prywatnego. Tom 1. Prawo cywilne – część ogólna*, Warszawa 2012, p. 78.

[4] Effects of those studies hitherto include, in particular, the following publications: J. Rudnicki, *Gdzie szukać rzeczy niczyich*, *czyli do czego służy kodeks cywilny*, "Forum Prawnicze" 2014, Vol. 5, issue 25, pp. 16–27; J. Rudnicki, *Dekodyfikacja prawa cywilnego doby PRL – między ideologią a wymogami obrotu*, (in:) T. Giaro (ed.), *Źródła prawa. Teoria i praktyka*, Warszawa 2016, pp. 75–89; J. Rudnicki, *Posiadacz i posiadanie w dobie dekodyfikacji*, (in:) F. Longchamps de Bérier (ed.), *Dekodyfikacja prawa prywatnego. Szkice do portretu*, Warszawa 2017, pp. 163–179.

[28] See especially: J. H. Merryman, D. S. Clark, J. O. Haley, *The Civil Law Tradition: Europe*, *Latin America and East Asia*, Charlottesville 1994, pp. 1241–1242; M. L. Murillo, *The evolution of codification in the civil law legal system: towards decodification and recodification*, "Journal of Transnational Law and Policy" 2001, Vol. 11, issue 1; S. Genner, *Dekodifikation. Zur Auflösung der kodifikatorischen Einheit im schweizerischen Zivilrecht*, Basel–Genf–München 2006; F. Zoll, *Problem struktury przyszłego polskiego Kodeksu cywilnego*, (in:) M. Kosek, J. Słyk, *W trosce o rodzinę. Księga pamiątkowa ku czci profesor Wandy Stojanowskiej*, Warszawa 2008, p. 648; F. Longchamps de Bérier (ed.), *Dekodyfikacja…*, Warszawa 2017.

[29] It shall be emphasized that alongside the civil law tradition the Anglo-Saxon legal tradition functions parallelly within the European Union. The notion of codification (particularly in the sphere referred to as private law on the continent) is completely foreign to the latter. Examples thereof include, needless to say, the United Kingdom (however, Scotland is typically termed a so-called mixed jurisdiction) and Ireland, as well as former British territories: Malta and Cyprus. Recent events give rise to an interesting question, that is how the position of *common law* within the European Union will be affected by Brexit.

have recourse to a significant, established body of literature on the subject. One example is Europeanization, albeit the spectrum of its consequences is far greater. Our discussion of private law should be started by stating the obvious, namely that European legislation affects it substantially, mainly within the spheres that are crucial for the functioning of the internal market. One such sphere is consumer protection which is, one could say, one of the most favourite areas of activity of the Brussels legislator. Both legislative methods employed in the EU are observable here, namely regulations and directives. Effects of decodification in the context of regulations are clear at first sight. For by enacting a regulation – so long as it concerns a private law problem – provisions are created which are by their nature outside of the code. In addition, due to their transnational provenience and character, they are not coherent with any codification functioning in any of the EU Member States.

A fitting example in this connection is Regulation 261/2004[7] which introduced principles of protection of a special type of consumer, namely an air passenger. The Regulation governs several cases a private lawyer would file under improper performance of a contract of carriage by an air carrier. Therefore, it is a civil matter, yet the Regulation casts it in terms that are utterly foreign to European codifications by introducing, in principle, objective compensatory liability of air carriers that is also detached from the presence of any harm on the part of a passenger and is strictly expressed in numbers. Admittedly, such a legislative device is a throwback to archaic legal principles that extricates itself from the entire legacy of civil in the field of contractual liability, on which provisions of all, it is submitted, civil codes are based. However, the ease of pursuing claims under the Regulation and the attractiveness of compensatory measures stipulated therein makes it so that both national and international laws governing contracts of carriage lose much of their practical significance. The Polish Civil Code, which, in theory, regulates carriage in Articles 774–793, has been pushed to the end of the queue of legal sources to be called upon where, for example, a person is denied boarding or a flight is delayed.

The foregoing remarks do not apply in the same way to directives as it is exclusively up to a Member State and its legislative authorities how a directive's provisions are implemented and ultimately where, within a national legal order, the resultant domestic laws are placed. Consequently, if a given directive aims at harmonizing laws of a civil character, there is no obstacle to its implementation consisting in amending the provisions of a relevant code. This assumption

[30] Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No. 295/91.

was accepted by the erstwhile Civil Law Codification Committee[8], however it is not being realized well in the field of consumer protection. In 2004 J. Pisuliński wrote that "the evolution of Polish consumer law so far discloses the legislator's preference towards issuing separate acts where discrete consumer issues are addressed"[9]. This view – despite intensified recodification in respect of consumer sale – is also accurate today, and proof is yielded by an analysis of the evolution of the Polish regulation of the right known in Polish legal jargon under the English term timeshare or timesharing.

2. IMPLEMENTATION OF DIRECTIVES PERTAINING TO *TIMESHARE* IN POLAND

Timeshare is a relatively novel institution of civil law that formed in the commercial practice of Western European states in the second half of the twentieth century. It appeared in Polish law at the pre-accession stage when domestic laws were being adjusted to European standards. The 1994 Directive[10] on the protection of purchasers in respect of timeshare contracts was implemented in Poland by means of the Act of 13 July 2000[11]. The Act did not avail itself of the English expression "timeshare", however, instead of coining a succinct Polish term of art, it merely referred to "a right to use a building or a room at a designated time every year".

The Act merely regulated the issue of protection of rights of one party to a special contract whose object was an immovable property, therefore there is no doubt that the entire scope of the Act belonged to civil law. Nevertheless, the only mark the new institution left on the Civil Code was by means of introducing a new Article 270[1], which was no more than a blanket provision. It linked the rights accrued through a timesharing contract with usufruct (governed by the Code) and contained a reference to the 2000 Act. Only § 2 of the Article represented some

[8] Z. Radwański (ed.), *Zielona Księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej*, Warszawa 2006, pp. 111–112.

[9] J. Pisuliński, *Prawo konsumenckie w systemie prawa cywilnego*, (in:) M. Sawczuk (ed.), *Czterdzieści lat kodeksu cywilnego. Materiały z ogólnopolskiego zjazdu cywilistów w Rzeszowie (8–10 października 2004 r.)*, Kraków 2006, p. 179.

[10] Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.

[11] Act of 13 July 2000 on the Protection of Acquirers of the Right to Use a Building or a Room at a Designated Time Every Year and on Amending the Civil Code, the Petty Offences Code and the Act on Land and Mortgage Registers and Mortgages (Polish Official Journal of Laws of 2000, No. 74, item 855).

normative value in that it introduced a time limit for the existence of the right of usufruct given rise to by a timesharing contract. It meant that almost all laws pertaining to timesharing fell outside of the civil code, which referred to a specific act merely pro forma, as is the case in many instances already discussed and many more to come. Since the very beginning, therefore, a new civil law instrument was completely decodified, whilst Article 2701 itself may be considered a mere fig leaf, as it were, which ostensibly obscured the sad (from the perspective of the idea of codification) truth that the legislator neglected, in this case, the idea of wholeness of a civil code.

As early as at the stage of drawing up the Act, J. Preussner-Zamorska and E. Traple wrote that "doubtless, one cannot regulate timesharing by means of amending the Civil Code for obvious reasons, more on which below. Therefore, taking into account the necessity of properly protecting the interests of a consumer – which the directive emphasizes – it does not appear that leaving the regulation of this issue exclusively to the provisions of the Civil Code would be appropriate, even if this were to be a temporary measure. Such provisions could – admittedly – constitute, to a large extent, a normative basis for solving problems to arise in connection with timesharing, what is more, they will have to be properly applied. Nonetheless, to base the entire legal regulation upon a code would require a considerable degree of maturity and knowledge, both from agents involved in such transactions and law enforcement"[12]. Almost a decade later this sentiment was echoed by B. Fuchs: "it appears that – *de lege lata* – the current state of affairs shall be sustained, i.e. timesharing should be regulated outside of the civil code. First, this is apparent when one looks at the progress of the works on a horizontal instrument. (…) When a horizontal instrument is enacted and its shape and legal form are known, inserting timesharing into the civil code could be discussed (…) it will be testimony to the correct tendency of not placing contracts outside of the civil code. Second, considerations of systemic nature point towards locating the regulation of timesharing outside of the civil code. A closer analaysis of the new directive must lead to the conclusion that it contains provisions hard to reconcile with the existing solutions envisaged by the civil code"[13].

The European legislator has not completed his work on a so-called horizontal instrument, whilst regulations governing timeshare are far from ideal. The new 2009 directive[14] exacted such sweeping changes within the principles governing the contract in question that the Polish system had to conceive of an entirely new

[12] J. Preussner-Zamorska, E. Traple, *Timesharing – nowa instytucja prawa polskiego. Uwagi na marginesie projektu ustawy*, "Kwartalnik Prawa Prywatnego" 1998, Vol. 3, issue VII, p. 535.

[13] B. Fuchs, *Timesharing w prawie wspólnotowym – wnioski dla polskiego ustawodawcy*, "Rejent" 2009, Vol. 2, issue 214, p. 30.

[14] Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.

legislative regulation. At the stage of drafting, B. Fuchs remarked again that locating timeshare inside the Polish Civil Code would be reflective of the correct tendency of not placing contracts outside of the civil code[15], however ultimately she opted in favour of the opposite solution. She noted that placing references inside the Code would adversely affect its internal coherence[16]. The legislator followed suit and the new Act on timeshare[17] completely decodifies the institution. Article 270^1 of the Civil Code was repealed and therefore the Code is now void of any provision, even a reference to specific legislation, pertaining to timeshare. Therefore, the fig leaf mentioned above was flagrantly abandoned, resulting in a strictly civil institution being regulated exclusively in a specific piece of legislation dedicated thereto. Article 8 of the Act on Timeshare stipulates that "in matters not governed by the immediate act, provisions of the Civil Code are to be applied respectively".

3. LINGUISTIC SLOPPINESS?

The linguistic aspect of the problem at hand cannot be left without a comment[18]. As stated above, whilst the term proposed by the legislator to refer to timesharing in the 2000 Act was a failure, the device employed in the 2011 Act deserves utmost criticism. For the legislator did not bother to look for an ingenious codification, but instead it availed itself of the English term, copied straight from the title of the directive. The word was not (as opposed to code-regulated leasing which is at least used in all cases) in the least bit adapted to the Polish language, but it functions in its English, single-case version. The laziness of the Polish legislator evidenced here may be compared with the linguistic concern (often bordering on pedantism) displayed by its German counterpart[19]. It is surprising also to consider the lack of concern for the lexis of the law showed by academic writers[20]. Regardless, however, of how one were to subjectively – after all – assess the legislator approach to its native language, the important linguistic problem in question may be analysed through the prism of decodification. The current condition of Polish legislation tends to suggest that decodificaiton of Polish civil

[15] B. Fuchs, *Regulacja timesharingu a Kodeks cywilny*, (in:) M. Jagielska, E. Rott-Pietrzyk, A. Wiewiórkowska-Domagalska (eds.), *Kierunki rozwoju europejskiego prawa prywatnego. Wpływ europejskiego prawa konsumenckiego na prawo krajowe*, Warszawa 2012, p. 160.

[16] *Ibidem*, pp. 161–162.

[17] Act of 16 September 2011 on Timeshare (Journal of Laws of 2011, No. 230, item 1370).

[18] For more on this, see also: J. Rudnicki, *Szekspir i leasing – o anglicyzmach w polskim prawie cywilnym*, "Palestra" 2017, Vol. 62, issue 1–2, pp. 126–132.

[19] In BGB, the institution referred to here is regulated in §§ 481–487 and is called *Teilzeit-Wohnrecht*.

[20] B. Fuchs, *Regulacja timesharingu*..., p. 158.

law has progressed very far, and both the legislator and the doctrine appears to have got used to that state of affairs. The presence in Polish law of such a foreign term as "timeshare" seems to attest to this fact. For the terminology of Polish civil law, formerly shielded from almost any terms of foreign origin, used to represent, decades ago, an ideal of linguistic consistency and order. A sudden permission for "leasing agreements" and "timeshare" to enter the Polish civil law system has disturbed this equilibrium, attacking one of the constitutive elements of internal coherence of private law and, as a result, contributing to its decodification. It is difficult to blame the EU legislator for this effect of the implementation of the timesharing directive as, without a doubt, it does not object to national legislators caring about the purity of their respective languages. The latter, however – as evidenced by the Polish law in question – do not always perform this task appropriately.

4. WHY NOT IN A CODE?

The aforementioned views of eminent scholars, concerning the issue of timesharing's presence in a code or outside of it, deserve further comment. The quotes laid out above speak strongly in terms of the need to implement directives. First, subjecting the Polish legislator to the influence of the European one means that the decision as to whether a given measure pertaining to consumer protection is targeted or transitional belongs *de facto* "to Brussels". Therefore, because of, as it were, the necessity of adding excessively frequent amendments to a code – which by its nature shall be a very stable piece of legislation – it is difficult to amend it as new directives keep coming in. Second, scholars often emphasize that provisions of directives and their axiology are at times problematic to reconcile with a code's internal structures and principles.

It should also be noted that since the Enlightenment the optics of looking at the demand that the law be clear and understandable has changed. It is indisputable that the idea of a code – a condensed, "straight to the point" piece of legislation that enables even a layman to find his way not only to the matters of interest thereto but also navigate around the entire system – was originally a fundamental expression of this very postulate. After two centuries this vision must be considered implausible, and the insistence upon clarity of the law is almost non-existent. One could venture to posit that the core assumptions behind legal clarity were barely alive as far back as 120 years ago when BGB was a highly scientific piece of legislation whose authors did not pretend they endeavoured to create a law understandable to a layman. The Polish Civil Code is based upon the German model and it copies its academic style to a large extent. This is why many claim that inserting a provision into the Code makes it indeed harder for a layman, and

sometimes even for a practising lawyer, to apply. Specific legislation, which mars the idea of a code, aims to, paradoxically, facilitate understanding and applying the law. A consumer, confronted with a problem, should be able to, at least preliminarily, deal with it "on his own", and this is said to be enabled by a law that comprehensively regulates his area of interest – for example, timesharing and special rights stemming therefrom.

J. Pisuliński in his paper on consumer protection within the civil law system cited above, attempted a summary of all "pros" and "cons" of regulating consumer relations in specific legislation[21]. He noted that creating specific legislation is easier and more expeditious, and that it facilitates comprehensive regulation of a given issue (i.e. amalgamating, within one act, its civil, criminal and administrative aspects). Adding new provisions to the Civil Code would be, on the other hand, troublesome because of its systematics, would detrimentally affect its stability, and the casuistry of directives would not fit well the abstract nature of code provisions. Above all, J. Pisuliński stressed that enacting specific legislation reduces the significance of the civil code as the most important legal pronouncement regulating civil relations, undermines transparency and coherence of the system, and it makes the application of the code challenging by incorporating legal constructs which differ markedly from those to be found in the code.

5. UNAVOIDABLE DECODIFICATION

It appears that in the face of the necessity of implementing directives such as those governing, *inter alia*, timeshare, the civil code finds itself between a rock and a hard place. For implementation of a directive via specific legislation reduces the scope of application of code provisions and constitutes an attack on its wholeness. At the same time, subsequent amendments undermine the structure of the code, bringing about internal decomposition. In both cases a crucial feature of the code, recognized since the 18th century, is undercut. One may say, therefore, in slightly fatalistic terms, that the domestic legislator is, as it were, doomed to undermine the position of the code as the fundamental, central and consistent source of private law norms when implementing directives.

When one looks at the mosaic of traditions and solutions that constitutes the world of continental law, one comes to the conclusion that any supranational harmonization of private law must undermine the idea of codification. For it is civil codes that give grounds to and petrify some basic differences between national legal systems due to their dominating position in the process of "national fragmentarization" of private law that, according to some scholars, diminished the

[21] J. Pisuliński, *Prawo konsumenckie*..., pp. 180–183.

pre-Enlightenment uniformity thereof[22]. Implementation of mutual supranational measures must, doubtless, lead us to the opposite trend, namely decodification. This, among many aspects surrounding the Europeanization of the law, deserves attention especially where academics or politicians demand that civil law be thoroughly amended or even recodified. For one may varyingly assess the influence of European legislation upon civil law depending on how much one is accustomed to the notion of a civil code and to what degree one values the rationales behind it as well as the values it should be guided by. However, regardless of what assessment one renders, one cannot detract from the fact that the notion of a civil code has lost its significance also because of expanding Europeanization.

REMARKS REGARDING THE INFLUENCE OF EUROPEAN LEGISLATION UPON CODIFICATION OF CIVIL LAW

Summary

This paper emphasises that Europeanisation of law contributes greatly to the phenomenon of decodification. The impact of European legislation on the position of the civil code as the main source of private law is clearly visible in the case of directly effective regulations. Also, implementation of directives can (and often does) lead to the creation of legislation regulating civil law matters, yet separate from the civil code. The Polish experience with implementation of directives concerning consumers protection makes for a good example. Regulation of timeshare contracts completely outside the civil code is – according to the Polish doctrine – a result of difficulties with integrating this particular provision into the codification of private law. If such difficulties are inevitable, so is also progressing decodification of civil law due to its advancing harmonization on the European level.

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[22] To that effect especially R. Zimmermann, *The New German Law of Obligations. Historical and Comparative Perspectives*, Oxford 2005, pp. 4–5; *Dziedzictwo Savigny'ego. Historia prawa, prawoznawstwo porównawcze i kształtowanie się europejskiej nauki prawa*, "Kwartalnik Prawa Prywatnego" 2005, Vol. 14, issue 1, pp. 13–14 (translated by R. Mańko).

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decodification, civil law, Europeanisation, harmonization, directives, timeshare

SŁOWA KLUCZOWE

dekodyfikacja, prawo cywilne, europeanizacja, harmonizacja, dyrektywy, timeshare

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A QUEST FOR CONSISTENCY IN THE LAW OF COMMERCIAL AGENCY. LOSS OF THE RIGHT TO REMUNERATION IN POLISH AND EUROPEAN LAW

1. INTRODUCTION

On 17 May 2017 the Court of Justice of the European Union handed down its judgment in the case of *ERGO Poist'ovňa, a.s. v Alžbeta Barlíková*[1], where a helpful explanation was provided with regard to the exact meaning of Article 11 of Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC, hereinafter referred to as "the Directive"). The provision specifies circumstances where a commercial agent's right to remuneration[2] may be extinguished. The judgment in *Barlíková* is a valuable addition to the vault of knowledge concerning the applicability of the Directive to long-term, continuing contracts. Notably, it answers the question whether a commercial agent stands to lose his right to commission (or, by analogy, may be compelled to partially refund the amounts already paid to him) where the contract between the principal and the third party client, which the agent helped to negotiate, was only partially executed. Finally, the Court addressed the important issue of the meaning of "blame" in Article 11(1) of the Directive to be taken into account when assessing whether non-execution (complete or partial) was due to the conduct of the principal. Relatedly, the Court had to decide whether "blame" encompasses merely legally qualified acts or perhaps also factual circumstances surrounding the principal's conduct that led to non-execution of the contract with the third party.

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[1] Case C-48/16, full judgment available here: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CJ0048&from=EN (accessed 25 June 2017).

[2] Principally commission, however other contractual arrangements are permissible, e.g. payment of a lump sum, mark-up, liquidated fees etc. For more on this, see: I. Mycko-Katner, *Umowa agencyjna*, Warszawa 2012, pp. 206–208; see also an English case in point, *Mercantile International Group Plc v Chuan Soon Huat Industrial Group Ltd* [2002] EWCA Civ 288.

In the paper I seek to expound upon the critical junctures of the argument of Advocate General Szpunar and the Court in the *Barlíková* case by reference to past CJEU case law on the subject as well as the pertinent provisions of Polish civil law as transposed and relevant judicial and academic analyses. Particularly, I will be looking at ways where Polish law, in the light of this recent development, may benefit in its regulation of commercial agents' loss of the right to remuneration.

2. ENTITLEMENT TO REMUNERATION

The agent's right to remuneration is typically cast in the literature in terms of correspondence (or symmetry) between the rights of the agent and the principal[3]. On the one hand, the agent is obliged, according to the conditions of the underlying agreement between the parties, to undertake certain work[4] for the benefit and on behalf of[5] the principal who, in return, shall provide remuneration. Article 6 of the Directive prescribes three ways in which an agent's remuneration is to be calculated: (1) an amount set by the contract between the parties; (2) remuneration that commercial agents appointed for the goods forming the subject of his agency contract are customarily allowed in the place where he carries on his activities; (3) in the absence of a relevant customary practice – reasonable remuneration taking into account all the aspects of the transaction. The agency contract, it is argued in the literature, is result-oriented, that is commission, as confirmed by Article 10 of the Directive, becomes due once a contract between the agent (or between the principal, if the agent's task was merely to

[3] See, for example: H. N. Bennett, *Principles of the Law of Agency*, Oxford 2013, p. 85 *et seq.* T. Wiśniewski, *Umowa agencyjna według kodeksu cywilnego*, Warszawa 2001, p. 53 *et seq.*; E. Baskind, G. Osborne, L. Roach, *Commercial Law*, Oxford 2016, p. 83 *et seq.*

[4] It has been noted by Polish writers that the precise content of rights accorded to agents under the Directive and the Polish Civil Code differ rather markedly. Whilst the Directive is confined to intermediating in and performing, for the benefit and on behalf of the principal, transactions of sale and purchase of goods, the Polish Civil Code casts agents' rights more broadly, referring them to all types of contracts. *Cf.* E. Rott-Pietrzyk, *Agent handlowy – regulacje polskie i europejskie*, Warszawa 2005, p. 271; P. Mikłaszewicz, *Art. 758*, (in:) K. Osajda (ed.), *Kodeks cywilny. Komentarz. Tom IIIB. Zobowiązania. Część szczegółowa. Ustawa o terminach zapłaty*, Warszawa 2017. See also: E. Wojtaszek-Mik, *Umowa agencji w dyrektywie o przedstawicielach handlowych na tle orzecznictwa Europejskiego Trybunału Sprawiedliwości*, "Europejski Przegląd Sądowy" 2006, issue 1, pp. 4–11.

[5] Under Polish law, it is possible for a purported agent to not enter into legal relations on behalf of the principal, but instead to first come into the possession of a good to then transfer it to an intended third party (indirect representation). This is to be distinguished from a commercial agent within the meaning of the Directive and the corresponding provisions of the Polish Civil Code.

intermediate and not be a proxy) and a client is executed[6], and remuneration may also be contractually said to be predicated upon the occurrence of a given condition[7]. From an economic point of view, "remuneration through commission directly connects the commercial agent's incentive to increase his remuneration with the principal's goal of increasing the volume of his transactions"[8]. Under most jurisdictions, it is for the principal to clearly indicate in the agency contract the amount of commission (by a percentage, flat sum or otherwise, as long it is ascertainable) that is actually due. Courts have held in certain jurisdictions that references to the principal's discretion or phrases like "commission available" or "attainable" or "commission of up to X" did not give an absolute right to remuneration to agents[9]. It is therefore of the highest importance, from the perspective of legal certainty, to ascertain the true content and legal ramifications of contractual stipulations concerning agent remuneration. An agency contract is, by its nature, a contract for a pecuniary interest (remuneration constitutes the *essentialia negotii* of the legal act), therefore academic writers have written that where no remuneration is specified, we have to do with a different type of contract or no contract at all[10].

3. ARTICLE 11 OF DIRECTIVE 86/653

Pursuant to Article 11 of the Directive, an agent's right to commission is extinguished only if and to the extent that it is established that the contract between the third party and the principal will not be executed, and that is due to a reason for which the principal is not to blame. Where no payment has been made, it remains non-payable, and, on the contrary, the agent must make a refund if he received the amount due. No derogations from this rule may be made to the detriment

[6] Although there are caveats to that, see Article 10(1)(b) and 10(2) of the Directive.

[7] N. Ryder, M. Griffiths, L. Singh, *Commercial Law: Principles and Policy*, Cambridge 2012, pp. 44–45.

[8] J. Engelmann, *International Commercial Arbitration and the Commercial Agency Directive: A Perspective from Law and Economics*, Berlin 2017, p. 113.

[9] A. P. Dobson, R. Stokes, *Commercial Law*, London 2012, p. 540.

[10] A. Żygadło, *Wynagrodzenie agenta za wykonywanie czynności outsourcingowych*, "Monitor Prawa Bankowego" 2011, issue 3, p. 80; K. Górny, *Art. 761*, (in:) M. Gutowski (ed.), *Kodeks cywilny. Tom II. Komentarz do art. 450–1088*, Warszawa 2016; K. Kruczalak, E. Rott-Pietrzyk, P. Zapadka, *Rozdział 8*, (in:) S. Włodyka (ed.), *System Prawa Handlowego. Tom 5. Prawo umów handlowych*, Warszawa 2011, side No. 63.

of the agent[11]. The agent has a right to receive information as to commission, and extracts from the principal's books[12].

Article 11 has not been a subject of intense litigation before the CJEU – the only case where it gained some prominence was Case C-19/07 *Heirs of Paul Chevassus-Marche v Groupe Danone*, *Société Kro beer brands SA (BKSA) and Société Évian eaux minérales d'Évian SA (SAEME)*. Here, Article 11 was used to interpret Article 10 of the Directive – the commercial agent's right to commission arises either when the principal has or should have carried out his obligation, or when the third party to the agency contract, that is the customer, has or should have carried out his obligation[13]. Specifically, by calling upon Article 11 the Court wished to underscore the significance of the institution of the principal and the connection between the moment when the right to remuneration arises and the circumstances under which the same right is liable to be extinguished[14]. A principal must, "directly or indirectly"[15], act in the conclusion of the underlying transaction between the agent and the third party client.

It has been surmised that imposing conditions capable of extinguishing an agent's remuneration proportionately to the value of the contract which was not concluded or performed has the aim of preventing agents from obtaining apparent or ostensible clients merely to scam the principal[16]. Since it would be difficult to prove that the agent consciously negotiated or concluded a transaction with an apparent client, remuneration is extinguished if and to the extent that the contract is not concluded due to reasons for which the principal may be deemed at fault[17]. Interestingly, while the Directive itself and the English transposition features the term "blame", the Polish regulation opted for "the circumstances for which the principal is not liable for". It does not seem, however, that the meanings differ as "The reference to 'blame' does not connote that the principal is legally at fault for the non-performance, but merely that the non-performance is attributable to the principal as a factual proposition"[18]. Therefore, a principal need not demonstrate a culpable mental approach or bring about the non-execution of a negotiated

[11] See an interesting argument in *Bowstead & Reynolds on Agency* as to the legal character of Article 11 which highlights the asymmetry between the arising of the right to commission and its extinction. The writers argue that since Articles 7 and 8 are *ius dispositivum*, "it is difficult to see why there should be an unexcludable right to commission in all situations where contracts are not performed bar specific exceptions, while the actual initial entitlement to commission in respect of contracts can itself be modified". *Cf.* P. G. Watts (ed.), *Bowstead & Reynolds on Agency*, London 2016, para 11-035.

[12] Article 761^5 § 2 of the Polish Civil Code.

[13] *Heirs of Paul Chevassus-Marche*, para 19.

[14] *Ibidem*, para 20.

[15] *Ibidem*, para 21.

[16] Judgment of the Poznań Regional Court of 21 November 2016, ref. number IX GC 312/15, Lex.

[17] Judgment of the Kraków Regional Court of 18 March 2014, ref. number IX GC 63/12, Lex.

[18] H. Bennett, *Principles*..., p. 132.

contract by reason of operation of law (e.g. legally relevant mistake, duress etc.). It suffices, it would appear, under all the mentioned regimes, that a constellation of facts materializes, one for which the principal shall bear the burden of responsibility (in more societal than strictly legal terms)[19]. This corollary, importantly, appears all the more evident after *Barlíková*.

4. *ERGO POIST'OVŇA, A.S. V ALŽBETA BARLÍKOVÁ*

The claimant in *ERGO Poist'ovňa*, *a.s. v Alžbeta Barlíková* was an insurance company who contracted with Ms Barlíková, an agent, with a view to carrying out "mediation in the insurance sector" on behalf and for the benefit of the company[20]. The agent's commission was to be paid out once every negotiated contract has been concluded, however "the entitlement to the commission was acquired definitively only if the insurance contract was not terminated before three or five years"[21]. Also, the right to commission was to be extinguished should a client terminate its insurance contract within three months, and a partial reduction of the amount due applied after that period. Ms Barlíková succeeded in bringing a number of clients to the company, however some of them ceased to pay their premiums at various points in time, many of which fell within the territory marked out by the 3 to 5 year period from the signing of an insurance contract. By virtue of Article 801 of the Slovak Civil Code, these contracts, following a failure, on the part of some of the clients, to respond to a written statement demanding payment, sent by ERGO, were automatically terminated. As a result, ERGO demanded that Ms Barlíková repay the advances she received on those contracts. Before a national court she argued that termination of the contracts, brought about by the clients' failure to made continuous premium payments, was a fault of ERGO. The CJEU recorded that it was the claimant's contention that, as evidenced by letters sent by numerous clients to the company, it "had not treated them properly, in particular by asking them to reply to numerous questions, even though the insurance contract had been concluded, and by sending them reminder letters for payment of premiums which had already been settled"[22].

Three questions on the interpretation of Article 11(1) of Directive 86/653 were posed before the Court: (1) whether the phrasing "the contract between the third

[19] See Munday's use of the term "reasons unattributable to the principal". R. Munday, *Agency: Law and Principles*, Oxford 2010, p. 206.

[20] Judgment of the Court of the European Union of 17 May 2017 in Case C-48/16 *ERGO Poist'ovňa*, *a.s. v Alžbeta Barlíková* , para 17.

[21] *Ibidem*, para 18.

[22] *Ibidem*, para 22.

party and the principal will not be executed" in Article 11(1) of the Directive refer merely to complete non-execution or whether allowances should be made for partial non-execution and the agent's right to remuneration reduced proportionately; (2) if the agent has a duty to return a part of their remuneration proportional to the degree of non-execution of a negotiated contract, is this a "derogation to the detriment of the agent", barred by Article 11(3); (3) does the concept of "blame" featured in Article 11(1) denote that merely legal reasons should be considered in assessing whether the contract in issue was not executed due to reasons attributable to the principal, or whether the factual reality of the conduct of the principal in their dealings with the agent should also be examined[23].

In his Opinion, Advocate General Szpunar relied on the "to the extent that" part of Article 11(1) to argue there must be a distinction between partial and complete execution of a negotiated contract. Whilst, as he recognized, there are slight discrepancies in the wording of domestic transpositions of the provision (with the Slovak version in particular omitting the expression at all), he maintained EU law must be given a uniform interpretation to avoid disparate outcomes in cases before national courts[24]. The opinion also marked Szpunar's original reference to recital 2 of the Directive[25] to emphasize that it "aims to coordinate the laws of the Member States with regard to the legal relationship between the parties to a commercial agency contract"[26]. His reasoning drew heavily from the overall scheme as well as the purpose and internal coherence of the Directive. Importantly, he submitted that due to the likeness between the wordings of Article 10(1) and 11(1), the former dealing with the circumstances where commission becomes due, the two shall be constructed in a "parallel" manner[27]. The right to indemnity enshrined in Article 17 of the Directive is, in Szpunar's estimation, "closely linked to the right to commission in that it serves to reward the commercial agent

[23] *Ibidem*, para 25.

[24] Para 27 of Advocate General Szpunar's opinion. The opinion is available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=186708&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=626108 (accessed 26 June 2017).

[25] The recital ("Whereas the differences in national laws concerning commercial representation substantially affect the conditions of competition and the carrying-on of that activity within the Community and are detrimental both to the protection available to commercial agents vis-à-vis their principals and to the security of commercial transactions; whereas moreover those differences are such as to inhibit substantially the conclusion and operation of commercial representation contracts where principal and commercial agent are established in different Member States") was recently cited in Case C-507/15 *Agro Foreign Trade & Agency Ltd v Petersime NV*, where it was held that a Member State may decide to limit the application of the Directive to commercial agents whose principal place of business is in that member State, to the exclusion of situations where the principal is based in the Member State and the agent operates out of a non-Member State (Turkey), even if they explicitly chose to be governed by the law of the Member State.

[26] Para 34 of Advocate General Szpunar's opinion in *Barlíková*.

[27] *Ibidem*, para 31.

for the goodwill he has brought to the principal and continuing financial benefit from the commercial agent's actions"[28].

In regards to question 2, it was logical for Szpunar to state that as long as the requirements laid down in Article 11(1) are met, there is no derogation to the detriment of the agent. This implies there must be "something else", an additional burden levied on the agent, either contractually or otherwise, that makes the position of the agent fall below the standard specified by the Directive. Particularly, an express contractual stipulation of time periods during which the principal may require the agent to return part of their remuneration[29] appeared not to hold much relevance in Szpunar's view. To answer question 3, the Advocate General again made comparisons with the agent's right to an indemnity for any loss he suffers as a result of the termination of his relations with the principal. Article 18, which determines the circumstances where an indemnity is not due, avails itself of the term "default", distinct from "blame" in Article 11. "Default", I submit, points, at least to a greater extent, to the factual circumstances surrounding one's entitlement to a legal instrument (or lack thereof). "Blame" bears more resemblance to legal constructs such as "fault" or "guilt", and indicates a certain deplorable mental attitude to one's actions. Interestingly, one may be in default of one's obligations without necessarily bearing attributes capable of being qualified as "blame" or "guilt" – one's "failure to do something required by law, usually failure to comply with mandatory rules and procedures"[30] may be inadvertent, accidental or forced by an outside third party or other unforeseen circumstances which prohibit a court from ascribing "blame" or "guilt"[31]. Szpunar, however, focused more on the part where a default prompting termination would not create an entitlement to an indemnity or compensation if it were to "justify immediate termination of the agent contract under national law". Having established that "blame" should, on account of a lack of a reference to national law in Article 18, receive a wider meaning than "default" when applied to agents[32], he again called upon the aims

[28] *Ibidem*, para 33.

[29] Both Szpunar and the Court, opined, intimated that the length of those periods is of secondary importance. In the immediate case these were relatively long (3–5 years), however the court did not devote space nor attention to the propriety thereof. This may imply that the prohibition on derogations detrimental to agents applies merely to the substantive content of the agent's obligations (i.e. the duty to return part of remuneration should a negotiated contract not be executed), and not circumstances incidental thereto, such as the period during which remuneration is subject to potential refund. I beg to differ, and my argumentation is elaborated upon, albeit concisely, in the final paragraph of the paper.

[30] The definition of "default" found in: J. Law, E. A. Martin (eds.), *A Dictionary of Law*, Oxford 2013, p. 160.

[31] Szpunar refuses to delve into the linguistic and semantic scope of "default" and "blame" – see para 57 of his Opinion.

[32] I believe Szpunar chose this route for his argument because, under Slovak law, non-payment of premiums on the part of clients (which occurred on the facts of the case) results in an immediate termination of the underlying contract. Such a consumer-friendly provision is absent from many

the Directive intended to pursue. Ultimately, he decided that a "principal is to blame for risks originating within his sphere of influence. This can and should be determined by taking into account all factual elements of the case at issue. In carrying out such an assessment, the national court should take relevant commercial custom into account"[33].

The CJEU agreed with Szpunar in all important respects. It drew direct parallels between the interpretation of provisions regulating a commercial agent's entitlement to commission, specially Articles 7(1) and 10(1), and 11(1) which pertains to the extinguishment of the right. In doing so it followed Szpunar's suggestion. Just as commission becomes payable in the proportion to which negotiated transactions are executed, it is consistent to say that the right to commission is extinguished only to the extent of non-execution of the transactions in question[34]. In relatively strong terms, the Court opined that to interpret Article 11(1) as pertaining solely to cases of complete non-execution of the negotiated contract "would run counter to the purpose of [Articles 3(1), 4(1) and 10(1) of the Directive – author's note] and of [the Directive] in general, if, for long-term contracts, such as the insurance contracts at issue in the main proceedings, the agent were to be guaranteed all his commission from the beginning of the execution of those contracts, without any account being taken of a possible partial non-execution of those contracts"[35]. A reference to Articles 3(1) and 4(1) is worth noting – these provisions mandate that both the principal and the agent act dutifully and in good faith in their mutual dealings. Perhaps to say that granting the agent additional protections in case a contract negotiated thereby is not executed is unwarranted would be reading too much into the judgment, but, as Szpunar asserted in his Opinion, it surely is an expression of the EU law's attempt to strike an adequate balance between the rights of the parties involved[36].

With regard to the agent's duty to refund any commission already received in the event of his right to commission being extinguished (which, in practice, means that a contract the agent negotiated was not executed between the principal and a third party), the court drew a logical conclusion from its interpretation of Article 11(1) of the Directive. Since the right to commission may be extinguished in case of even partial non-execution of the contract, it is clear that the agent shall be obliged to return an appropriate amount he obtained in advance for a contract which eventually did not materialize. However, the court cared to

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a civil codification, and it would be interesting to see whether the Advocate General would be more inclined to follow a more semantics-centered reasoning, as proposed in this paper, in a case where non-payment merely triggered unjust enrichment liability and no immediate cause of action against the commercial agent involved.

[33] Para 60 of Advocate General Szpunar's opinion.

[34] *Barlíková*, para 40.

[35] *Ibidem*, para 43.

[36] Paras 37, 43 of Advocate General Szpunar's opinion.

stress that "the obligation to refund the commission must be strictly proportionate to the extent to which the contract has not been executed"[37]. Provided that this reservation is obeyed, no derogation to the detriment of the commercial agent, in violation of Article 11(3), arises. Importantly, the Court asserted that an opposite derogation, namely to the advantage of the agent, "consisting in requiring the refund of a part of the commission proportionally smaller than the extent of the non-execution of the contract"[38] is conceivably permissible. The judges also reminded, in line with Article 11(1), that the agent's right may be extinguished (be it wholly or partially) only if non-execution of the contract between the principal and the client was caused by no fault of the former[39]. Interestingly, the philosophy adopted here diverges markedly from the freedom of contract-inspired policy on commission applied in common law jurisdictions, predominantly England[40].

Question 3 was answered by the CJEU, predictably, by reference to the broader aim of the Directive, however less attention was paid to balancing the rights and duties of agents and principals. Instead, the Court explicitly stated that the Directive intends to "protect the commercial agent and refers, moreover, to the relations, based on fairness and good faith, between the commercial agent and the principal"[41]. Agreeing with Szpunar's view, the Court took notice of the fact that non-payment of premiums of clients resulted in a termination of the relevant insurance contracts. More generally, whether the principal is to blame is to be assessed by reference to the appropriate national rules governing the termination of contracts and the causes and consequences thereof. The CJEU's answer to the question on the facts of the case, however, is very interesting and may give rise to conceptual difficulties in the future. For the Court stated that situations are conceivable "in which the principal might evade payment of the com-

[37] *Barlíková*, para 49.

[38] *Ibidem*.

[39] Academic writers have noted that whilst Article 11(1) is mandatory, 11(2) is merely a default rule that may be contractually altered by the parties to an agency contract. See: M. W. Hesselink [*et al.*], *Commercial Agency*, *Franchise and Distribution Contracts*, Berlin 2006, p. 187

[40] See the judgment of the House of Lords in *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, where it was held that where the contract between the principal and the client does not proceed (in that case it was due to fraud and misrepresentations on the part of the principal), the agent is not entitled to remuneration if this was not explicitly envisaged in the agency contract. The stringent interpretation in *Cooper* and its effects have been grappled with by English judges ever since. For instance, in *Alpha Trading Ltd. v Dunnshaw-Patten Ltd* [1981] QB 290, the Court of Appeal identified that there was an implied term that an agent would be paid should the principal not proceed with the case. In *John D Wood & Co (Residential & Agricultural) Ltd v Craze* [2007] EWHC 2658 (QB), *Cooper* was distinguished on the grounds that there should be an implied term that the principal not make fraudulent representations such as would render any contract for sale of property unenforceable and thus prevent a sale. Therefore, implied terms have been invented either to ensure remuneration is paid or to prevent the principal from scuppering a negotiated contract.

[41] *Barlíková*, para 56.

mission, when that termination results from his own conduct"[42]. This was, it was asserted, the case in *Barlíková*. The insurance company's clients ceased to pay their premiums which resulted in having their contracts terminated by virtue of the provisions of the Slovak Civil Code. This is why, despite ERGO's alleged inappropriate conduct against their clients, it was difficult for the Court to attribute blame for the termination of those contracts to the company – "[u] nder such legislation the termination of the contract is due to the non-execution of the contractual obligations by the third party who ceases to pay the premiums relating to that contract, without however account being taken of the cause of the termination of payment"[43].

The judgment, on the one hand, broadens the array of reasons that may lead to the conclusion that a negotiated contract did not eventuate due to the principal's fault, however, on the other hand, a new fervently litigious area of private law may have been born. For principals will now be safe in the knowledge that they can return any advances they paid to their agents in the event of the final contract not materializing. It remains to be seen how courts approach this conundrum, particularly where difficulties arise in assessing what part of remuneration already paid to the agent is refundable. It appears clear that commission covering the agent's work on the executed part of the contract is non-recoverable. However, would the agent's effort spent on negotiations, business meetings, organizing, networking and all other incident expenses of both physical and monetary nature be recoverable by the principal if it pertained to a part of the contract that was ultimately non-executed? It appears so. Additional problems are given rise to where commission is expressed as a percentage of the value of the transaction. The Court in *Barlíková* held that among the examples of partial execution are non-compliance with the volume of transactions or the duration envisaged by the contract between the principal and the client[44]. Suppose an agent was paid an advance of 15% of sum X, which was expected to represent the value of the final transaction. It so happened that, after a final period of negotiations between the principal and the client, in the absence of the agent, the value of the transaction was lowered. It is difficult to say that partial non-execution occurred due to any fault of the principal. Engaging in negotiations should not be considered, on its face, liable to give rise to liability (also, it is unclear whether liability in negligence, if at all applicable here, could lead a court to infer there was fault within the meaning of Article 11 of Directive 86/653). The sheer meaning of "volume" of transactions could be challenged to test the Court's adherence to its own principles.

[42] *Ibidem*, para 57.
[43] *Ibidem*, para 58.
[44] *Ibidem*, para 44.

5. TRANSPOSITION OF ARTICLE 11 INTO POLISH LAW

The key provision transposing Article 11 of Directive 86/653 into Polish law is Article 761^4 of the Polish Civil Code which states that: "The agent may not demand the commission where it is obvious that the contract with the client will not be performed due to the circumstances which the principal is not liable for, and where the commission has already been paid to the agent it shall be subject to reimbursement. A provision of the contract of agency less favourable to the agent shall be invalid". The provision institutes an exception from the rule laid down in Article 761^3, under which, once the maturity date of the claims arising from a contractual relationship between a principal and on agent has elapsed, the right to commission obtains, independently of whether either the principal or the client performed their part of the bargain[45].

One may conceive of a number of circumstances which are capable of preventing a negotiated contract from being executed. One writer lists public law restrictions on transport of goods (e.g. a prohibition on driving motor vehicles at a time of an extreme heat wave) or on the movement of people (e.g. in times of an epidemic)[46]. E. Rott-Pietrzyk has maintained that the provision applies exclusively to existing and valid contracts, that is such that are not affected by absolute invalidity by virtue of contractual performance being impossible (Article 387 § 1 of the Civil Code), the contract having been entered into by a person lacking capacity (Article 14 § 1) or defects in consent (see Article 82 *et seq.*)[47]. However, the provision is applicable to ex-post impossibility, economic impossibility and taking advantage of the forced circumstances, infirmity or inexperience of the other party (Article 388 of the Code)[48].

Notwithstanding the discrepancies in the views of eminent Polish academics as to the exact scope of application of Article 761^4, it is an example of an accurate transposition of EU law. Article 761^4 of the Civil Code, in one instance of slight divergence, does not contain an equivalent of "to the extent that". That could suggest that Polish courts may find difficulty with interpreting the provision where the agent's right to remuneration is to be only partially extinguished. However, Polish courts have managed to apply (consciously or unconsciously) a purposive

[45] On a side note, K. Górny has argued that, pursuant to Article 761^3 § 3, the moment when the agent's claim for the payment of commission becomes mature is separate from the moment when the agent acquires a right to commission (K. Górny). Conversely: E. Rott-Pietrzyk, *Agent handlowy*..., p. 329.

[46] P. Mikłaszewicz, *Art. 761⁴*, (in:) K. Osajda (ed.), *Kodeks cywilny. Komentarz. Tom IIIB. Zobowiązania. Część szczegółowa. Ustawa o terminach zapłaty*, Warszawa 2017.

[47] E. Rott-Pietrzyk, (in:) J. Rajski (ed.), *System Prawa Prywatnego. Tom 7. Prawo zobowiązań – część szczegółowa*, Warszawa 2011, pp. 665–683.

[48] J. Jezioro, *Art. 761⁴*, (in:) E. Gniewek (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2016.

construction so that agents have been compelled to refund or waive their right to part of their remuneration entitlement[49].

However, on at least two occasions a highly-ranked Polish court relied on the laws of unjust enrichment rather than on Article 761[4] of the Civil Code to allow recovery of commission paid in advance to agents where ultimately a contract was not concluded[50]. Therefore, this is yet another area of private law where the courts have struggled with the systemic distinction between contract and other liability. Unjust enrichment is generally codified in Article 405 of the Polish Civil Code, and the provisions that follow specify numerous heads of that liability. Pursuant to Article 410 § 2 in conjunction with Article 6 of the Civil Code, the complainant must prove that the defendant obtained a benefit at their expense. Article 410 § 2 deals with a head of unjust enrichment liability couched under Polish law as undue performance. Performance shall be undue if a person who rendered it had not been obliged at all or had not been obliged towards the person to whom he rendered the performance, or if the basis for the performance has ceased to be binding or if an intended purpose of the performance has not been achieved or if a juridical act obliging to perform had been invalid and has not become valid after the performance was rendered.

Such a development is all the more startling because the complainant in a notable case before the Poznań Regional Court had a perfectly valid contractual claim under Article 761[4]. The defendant acted as an insurance agent for the benefit of the claimant. Intermediating was conducted through individual brokers contractually linked with the defendant. By virtue of their work the defendant received commission representing a percentage of premiums due from clients for every year their insurance contract was in force, also where the premiums were paid monthly. The parties gradually increased the amount of commission, first to 105% of the initial number, then to include a discretional bonus contingent upon the financial performance of the defendant between 1 January and 31 December 2014. Between March and June 2014 the claimant started noticing a surge in the number of insurance contracts being terminated by clients before 12 months following signing. The contract between the parties was explicit in holding that the agent's remuneration was subject to a refund "proportionately to every month since the moment premiums stopped being paid, to the moment of termination of the respective insurance contract". The defendant was to acquire their right to commission proportionately, gradually, along with their progress in executing

[49] Judgments which applied this solution or envisaged it include: judgment of the Rzeszów Regional Court of 2 June 2015, ref. number VI Ga 110/15, Lex; judgment of the Poznań Regional Court of 21 November 2016, ref. number IX GC 312/15, Lex; judgment of the Kraków Regional Court of 18 March 2014, ref. number IX GC 63/12, Lex.

[50] Judgment of the Appellate Court for Warsaw of 26 November 2016, ref. number I Aca 335/15; judgment of the Poznań Regional Court of 21 November 2016, ref. number IX GC 312/15, Lex.

the contract by bringing clients into the insurance company. The case is very similar to *Barlíková* and I do not think it was necessary to engage in a discussion on unjust enrichment liability where Article 761^4 (and Article 11 of the Directive) was designed to govern cases of exactly this calibre. Falling squarely within the scope of those provisions, the defendant was liable to refund commission they received as insurance contracts negotiated thereby were not executed (and one could have doubts as to the conditions for the "execution" of the contract stipulated by the company, i.e. the long periods during which the agent's remuneration was potentially subject to a refund) due to no fault on the principal's part. The result may be morally questionable as the agent must have made efforts to negotiate contracts with those clients who later defaulted, however this area of the contractual relationship of agency has been ;left, both at the EU and domestic levels, to the discretion of the parties.

6. CONCLUSIONS – POLISH VS. EU REGULATIONS

Whilst the Poznań court envisaged relying on Article 761^4 as an alternative possibility, concurrent opening of the unjust enrichment avenue may give rise to some questions in the context of the ratio in the *Barlíková* case. One must pose the question what happens if the parties do not exclude unjust enrichment liability in their contract[51]. Whilst, as it appears, it is in principle possible and within the bounds of the law[52], should the parties neglect or overlook it, one could potentially be held liable in unjust enrichment even where contractual liability is not available due to the parties' agreement to that effect. It is also a tempting avenue for devious principals who may craft their contracts in a manner that preserves potential liability in unjust enrichment. The Poznań Regional Court in its judgment of 21 November 2016 found in favour of the complainant and awarded compensation under unjust enrichment proportionate to the volume of transactions which, in defiance of the agreement concluded between the parties, were terminated in a way that extinguished the agent's claim to remuneration in part. The flexibility shown by the judges makes it so that the practical effect of resorting to any of the claims, be it by virtue of contract or undue performance, is comparable.

[51] There is no obstacle to assuming that, by virtue of Article 353^1 of the Civil Code in conjunction with Article 58, they could do it.

[52] See Article 353^1 of the Civil Code: "Parties entering into a contract may determine the legal relation at their own discretion, provided that its content or purpose do not prejudice the nature of the relation, a statute or the principles of community coexistence".

The examined Slovak provisions appear to mirror the wording of the Polish regulations (art. 761^4 of the Civil Code in particular) strikingly faithfully[53]. However, importantly for question 3 answered by the Court, Polish law does not contain a provision that would hold a contract terminated due to a client's failure to pay the premiums due[54]. In such an event the client is subject to contractual liability (unless, of course, an express contractual condition to that effect is in place or relevant consumer legislation concerning unfair terms in consumer contracts renders non-inclusion of such a term impermissible) under the general terms laid down in the Civil Code[55]. Therefore, it is uncertain whether the outcome of the case would be the same against the background of the Polish law of obligations. More weight could have been accorded to the fact that it appears ERGO did take actions that adversely affected their clients' willingness to stay with the company.

Barlíková has, on its face, clarified the law concerning the extinguishment of an agent's right to commission. Notably, the Court seems to have accepted Advocate General Szpunar's analogies between, first, the circumstances where the right to remuneration arises and those where it is extinguished, and, second, the existence of the agent's right to indemnity contrasted with his duty under Article 11 to repay his commission, if only in part. In this way a subtle balance has been struck between the agent's entitlements and duties. The pronunciation that in determining whether the reasons for non-execution of a negotiated contract are attributable to the principal all attendant facts must be considered – and not only legal acts – also goes a long way to strengthen the position of the agent and compensate for his often underprivileged bargaining position. Above all, however, *Barlíková*, for the first time, confirmed the Directive's envisaged degree of flexibility it injects into the remuneration arrangements of principals and agents in the contemporary world of commerce. Inasmuch as this means a whole lot of trouble should disputes arise – think of the evidentiary problems that are inevitable where, for example, the exact extent to which the agent's right to remuneration should be said to have been extinguished – it is an emphatic attempt at making the law of commercial agency fairer.

I wish to signal, however, one alarming feature of both the contract in dispute in *Barlíková* but also in the Poznań Regional Court case. In both cases the prin-

[53] Compare Article 761^4 of the Polish Civil Code (see the first paragraph of section IV) with Paragraph 662(1) and (3) of the Slovak Commercial Code: "(1) The entitlement to commission shall cease only if it is clear that the contract between the principal and the third party will not be performed and its non-performance is not the consequence of circumstances for which the principal is responsible, unless some other consequence follows from the contract. (…) (3) The ceasing of the entitlement to commission in accordance with subparagraph 1 may be regulated otherwise by agreement, to the advantage of the commercial agent only".

[54] See Article 812 of the Civil Code.

[55] The problem is, admittedly, more theoretical than practical as most, if not all, insurers insert appropriate stipulations into their contracts that terminate the insurance arrangement should no premium be paid within, typically 30 days since payment becomes mature.

cipal stipulated long periods during which the agent's remuneration was subject to a refund (1 year in the Poznań case, 3 to 5 years in *Barlíková*). These are the conditions for the "execution" (within the meaning of Article 11 of the Directive) of the contract, after which the agent becomes fully entitled to his commission. The courts in the cases analyzed in the paper showed a good deal of understanding to those rather stringent, I submit, contractual terms. Such arrangements would be hardly defensible in relations between a business and a consumer (if only by virtue of the unfair terms in consumer contracts legislation) but, understandably, the law is more demanding and often less interventionist when it comes to dealings between businesses.

A QUEST FOR CONSISTENCY IN THE LAW OF COMMERCIAL AGENCY. LOSS OF THE RIGHT TO REMUNERATION IN POLISH AND EUROPEAN LAW

Summary

In a recent judgment in *ERGO Poist'ovňa, a.s. v Alžbeta Barlíková*, the Court of Justice of the European Union attempted to clarify the ambit of Article 11 of Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, that is the circumstances where a commercial agent's right to remuneration may be extinguished should a negotiated transaction not be executed between the principal and the client. Notably, the Court held that in the event of even partial non-execution of a negotiated contract between the principal and the third party client, provided it happened due to no fault on the part of the principal, the agent's right to commission is proportionately extinguished. The paper discusses the judgment in the light of previous CJEU case law and the Polish transposition of the said European standards with a view to finding any potential divergences between the two. The paper notes two problems. First, Polish law, as opposed to Slovak law, does not recognize an automatic termination of an insurance contract in the event of default on the part of the customer. Conversely, whether such an effect eventuates is left to contractual discretion of the parties. Second, Polish courts have been recently willing to substitute unjust enrichment for contractual liability even where, it appears, complainants have valid claims under Article 761^4 of the Civil Code.

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przedstawicielstwo handlowe, wynagrodzenie, prowizja, dyrektywa 86/653, wygaśnięcie prawa do prowizji

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ACQUIS COMMUNAUTAIRE IN THE FIELD OF NUCLEAR AND RADIATION SAFETY AND UKRAINIAN LEGISLATION: PROSPECTS AND CHALLENGES OF HARMONIZATION

1. INTRODUCTION

Since the Chernobyl disaster, special attention is paid in Ukraine to the effects of radiation on human health and the environment. People are constantly exposed to small amounts of ionizing radiation from the environment as they carry out their normal daily activities (natural background radiation). Exposure to ionizing radiation arises from naturally occurring sources (such as radiation from outer space and radon gas emanating from rocks in the earth). Radioactive minerals are naturally found in the contents of food and drinking water. For instance, vegetables are typically cultivated in soil and ground water which contains radioactive minerals[1]. Exposure to ionizing radiation arises also from sources of an artificial origin (such as medical diagnostic and therapeutic procedures; radioactive material resulting from nuclear weapons testing; energy generation, including by means of nuclear power; unplanned events such as the nuclear power plant accidents at Chernobyl in 1986 and that following the great east-Japan earthquake and tsunami of March 2011; and workplaces where there may be increased exposure to radiation from artificial or naturally occurring sources)[2].

The accident at the Chernobyl Nuclear Power Plant on 26 April 1986 in Ukraine, then part of the former Soviet Union, was a tragedy of social and political significance for the USSR and the whole world. Among the technical causes of the Chernobyl disaster experts name, *inter alia*, a lack of a developed system of nuclear legislation.

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[1] For more details, see: http://nuclearsafety.gc.ca/eng/resources/radiation/introduction-to-radiation/types-and-sources-of-radiation.cfm (accessed 6 May 2017).

[2] For more details, see: http://www.unscear.org/docs/publications/2016/UNSCEAR_2016_GA-Report.pdf (accessed 6 May 2017).

It is necessary to emphasize that Ukraine began to develop its own law in the field of nuclear energy only in 1995. Nowadays the main Ukrainian laws regulating nuclear and radiation safety are: the Law of 8 February 1995 on Nuclear Energy Use and Radiation Safety[3]; the Law of 30 June 1995 on Radioactive Waste Management[4]; the Law of 14 January 1998 on Human Protection Against Impact of Ionizing Radiation[5]; the Law of 11 January 2000 on Authorizing Activity in Nuclear Energy Use[6]; the Law of 8 September 2005 on the Procedure of Decision-Making on Location, Design, Construction of Nuclear Installations and Radioactive Waste Management Facilities of National Significance[7] etc.

A new stage of enhancing Ukrainian nuclear and radiation safety legislation begun with the signing in 2014 of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (hereinafter – the Association Agreement)[8].

2. THE ASSOCIATION AGREEMENT AS AN IMPETUS TO ENHANCE THE LAW OF UKRAINE ON NUCLEAR AND RADIATION SAFETY

According to the Association Agreement, cooperation between Ukraine and the EU is to provide a high level of nuclear safety, clean nuclear energy use for peaceful purposes. Cooperation covers an entire range of activities in the field of civil nuclear energy and all stages of the fuel cycle, the safety aspects of nuclear energy, emergency preparedness and also health, environmental issues and non-proliferation of nuclear weapons (Article 342).

Much attention in the Association Agreement is paid to issues around the Chernobyl disaster and the consequences of recovery efforts. According to the third paragraph of Article 342 of the Association Agreement, cooperation is aimed at solving the problems caused by the Chernobyl disaster, and decommis-

[3] Law of Ukraine of 8 February 1995 on Nuclear Energy Use and Radiation Safety (Official Journal of the Supreme Council of Ukraine, 1995, No. 12, P. 178).

[4] Law of Ukraine of 30 June 1995 on Radioactive Waste Management (Official Journal of the Supreme Council of Ukraine, 1995, No. 27, P. 198).

[5] Law of Ukraine of 14 January 1998 on Human Protection Against the Impact of Ionizing Radiation (Official Journal of the Supreme Council of Ukraine, 1998, No. 22, P. 115).

[6] Law of Ukraine of 11 January 2000 on Authorizing Activity in Nuclear Energy Use (Official Journal of the Supreme Council of Ukraine, 2000, No. 9, P. 68).

[7] Law of Ukraine of 8 September 2005 on the Procedure of Decision-Making on Location, Design, Construction of Nuclear Installations and Radioactive Waste Management Facilities of National Significance (Official Journal of the Supreme Council of Ukraine, 2005, No. 51, P. 555).

[8] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (Official Journal of the European Union, L 161, 29.05.2014, pp. 3–2137).

sioning of the Chernobyl nuclear power plant, including: a) the Implementation Plan for the site "Shelter" to convert an existing blasted 4- unit (Object "Shelter") into an ecologically safe system; b) management of spent nuclear fuel activities; c) decontamination areas; d) radioactive waste; e) environmental monitoring; e) other issues that can be jointly agreed upon, such as medical, scientific, economic, social and administrative aspects of activities aimed at minimizing the consequences of the disaster.

Today, 30 years later, the Ukrainian government tries to turn around the Exclusion Zone Chernobyl Nuclear Power Plant into a scientific and ecological park and location of renewable energy sources. Thus, the main directions of work on decommissioning the Chernobyl Nuclear Power Plant and transforming the "Shelter" into an ecologically safe system by the Law of Ukraine of 15 January 2009 on the National Program Decommissioning of the Chernobyl Nuclear Power Plant and Transforming the "Shelter" into an Ecologically Safe System[9]. A Chernobyl radiation-ecological biosphere reserve was created to preserve the natural state of the most typical natural systems[10]. The Ukrainian government has been turning Chernobyl Exclusion Zone into a global Chernobyl Solar Farm. Thus, the State Agency of Ukraine in the Exclusion Zone Management, Chernobyl Research and Development Institute and Easy Business in 2016 developed the investment project Chernobyl Solar, concerning the generation in the Zone Park of solar electricity[11]. The Minister of Ecology and Natural Resources of Ukraine said that Ukraine as a whole received 52 applications from different companies to install solar power facilities in the zone. Applications were received from companies from Denmark, the USA, China, Germany, France, Ukraine and Belarus[12]. Today, the Government of Ukraine is continuing to develop transparent procedures of renting land for renewable energy facilities.

In addition to this, the Ordinance of the Cabinet of Ministers of Ukraine of 17 September 2014 on the Implementation of the Association Agreement on Atomic Energy between Ukraine from One Side and the European Union, the European Community and its Member-Countries from Another Side[13] provided for the development and adoption of regulations in the energy sector (including

[9] Law of Ukraine of 15 January 2009 on the National Decommissioning of the Chernobyl Nuclear Power Plant and Transforming the "Shelter" into an Ecologically Safe System (Official Journal of the Supreme Council of Ukraine of 2009, No 24, P. 300).

[10] Decree of the President of Ukraine of 26 April 2016 on the Creation of a Chernobyl Radiation-Ecological Biosphere Reserve (Official Journal of Ukraine of 2016, No. 35, P. 1355).

[11] For more details, see: http://dazv.gov.ua/?start=140 (accessed 6 May 2017).

[12] For more details, see: http://www.kmu.gov.ua/control/publish/article?art_id=249830254 (accessed 6 May 2017).

[13] Ordinance of the Cabinet of Ministers of Ukraine of 17 September 2014 on the Implementation of the Association Agreement on Atomic Energy between Ukraine from One Side and the European Union, European Community and its Member-Countries from Another Side (Official Journal of Ukraine of 2014, No. 77, P. 2197).

nuclear) in order to implement Directives: 1) Council Directive 2014/87/Euratom of 8 July 2014 amending Directive 2009/71/Euratom establishing a Community framework for the nuclear safety of nuclear installations[14], 2) Council Directive 2006/117/Euratom of 20 November 2006 on the supervision and control of shipments of radioactive waste and spent fuel[15], 3) Council Directive 2013/59/Euratom of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionizing radiation[16]. Implementation of these guidelines is provided for in Annex 27 to the Association Agreement (a division of "Nuclear Energy" Section 5 of Chapter 1).

Along with this, outside of the Association Agreement remain issues of nuclear security guarantees implementation provided by the guarantors of Ukraine in exchange for giving up nuclear weapons. They are becoming particularly important in the current conditions of limiting the Ukrainian sovereignty, which created a threat to European and international security, and now it is necessary to take urgent steps to resolve it.

3. IMPLEMENTATION OF EU DIRECTIVES IN THE FIELD OF NUCLEAR SAFETY IN UKRAINE

3.1. BRINGING THE LEGAL NATIONAL FRAMEWORK OF UKRAINE INTO COMPLIANCE WITH THE EUROPEAN UNION APPROACHES: SAFETY REGULATION OF NUCLEAR INSTALLATIONS

Ukraine operates 15 power units, 13 of which are WWER-1000 and 2 are WWER-440. Ukraine ranks tenth in the world in this area and takes seventh place in terms of installed capacity that is 13.835 MW[17]. Most existing nuclear power plants in Ukraine were commissioned in the 1980s and therefore in recent years have undertaken measures of nuclear safety reevaluation.

[14] Council Directive 2014/87/Euratom of 8 July 2014 amending Directive 2009/71/Euratom establishing a Community framework for the nuclear safety of nuclear installations (Official Journal of the European Union, L 219, 25.07.2014, pp. 42–52).

[15] Council Directive 2006/117/Euratom of 20 November 2006 on the supervision and control of shipments of radioactive waste and spent fuel (Official Journal of the European Union, L 337, 5.12.2006, pp. 21–32).

[16] Council Directive 2013/59/Euratom of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionizing radiation (Official Journal of the European Union, L 013, 17.01.2014, pp. 42–52).

[17] See more about the Ukraine nuclear power plants: http://www.snrc.gov.ua/nuclear/doccatalog/document?id=327019 (accessed 6 May 2017).

The Fukushima nuclear accident in Japan in 2011 renewed attention worldwide regarding the measures needed to minimize risk and ensure the most robust levels of nuclear safety. Measures to improve safety of national nuclear power plants have been implemented in Ukraine according to the Comprehensive (Integrated) Safety Improvement Program for Operating Nuclear Power Units, approved by the Cabinet of Ministers of Ukraine on 7 December 2011[18]. The Cabinet of Ministers of Ukraine adopted on 30 September 2015 the Ordinance on Amending the Comprehensive (Integrated) Safety Improvement Program for Nuclear Power Units[19], which envisages extension of the C(I)SIP to 2020. The C(I)SIP's objectives are to: 1) further improve operational safety of nuclear power plants units; 2) decrease risks of nuclear power plants accidents during natural disasters or other hazards; 3) improve the effectiveness in management of design-basis and beyond design-basis accidents at nuclear power plants, minimize their consequences.

To increase the level of nuclear safety, protection of workers, population and environment from radiation exposure using nuclear facilities, the EU produced the Council Directive 2014/87/Euratom, amending Council Directive 2009/71/Euratom establishing the Community basics of nuclear safety of nuclear units (hereinafter – Council Directive 2014/87/Euratom). Council Directive 2014/87/Euratom is intended to: 1) maintain a national legislative, regulatory and organizational framework ("national framework") for the nuclear safety of nuclear installations; 2) strengthen the role and effective independence of the national regulatory authorities; 3) enhance transparency in nuclear safety and emergency preparedness and response; 4) establish general nuclear safety objectives for nuclear installations and requirements; 5) further improve monitoring and exchange of experiences by establishing an EU-wide system of topical peer reviews and reporting, nuclear safety guidelines and a strong nuclear safety culture; 6) enhance accident management and on-site emergency response, and ensure continuous review and adoption of lessons learned.

A plan for the implementation of Council Directive 2014/87/Euratom in Ukraine was approved by the Ordinance of the Cabinet of Ministers of Ukraine of 18 February 2015[20]. It should be emphasized that the legislation of Ukraine providing for nuclear safety regulation conforms to the Council Directive 2014/87/Euratom. The main program document in the field of nuclear safety is the *Energy*

[18] Ordinance of the Cabinet of Ministers of Ukraine of 7 December 2011 on the Comprehensive (Integrated) Safety Improvement Program for Operating Nuclear Power Units (Official Journal of Ukraine of 2011, No. 96, P. 3504).

[19] Ordinance of the Cabinet of Ministers of Ukraine of 30 September 2015 on Amending the Comprehensive (Integrated) Safety Improvement Program for Nuclear Power Units (Official Journal of Ukraine of 2015, No. 80, P. 2776).

[20] Order of the Cabinet of Ministers of Ukraine of 18 February 2015 on the Plan for the Implementation of Council Directive 2004/87/Euratom in Ukraine (Official Journal of Ukraine of 2015, No. 16, P. 419).

Strategy of Ukraine till 2030, approved by the Cabinet of Ministers of Ukraine on 24 July 2013[21]. The main legislative acts regulating legal relations similar to those regulated in the Directive are: the Law on Nuclear Energy Use and Radiation Safety; the Law on the Arrangement of Issues on Nuclear Safety Assurance of 24 June 2004[22]; the Law on Human Protection Against the Impact of Ionizing Radiation; the Law on Authorizing Activity in Nuclear Energy Use; the Law on Decision-Making about Site Selection, Design, Construction of Nuclear Installations and Radioactive Waste Storage Facility of National Importance etc.

The main step in the transition of Ukraine to EU standards in the regulation of nuclear and radiation safety was the acquisition on 26 March 2015 by the State Nuclear Regulatory Inspectorate of full membership in the Western European Nuclear Regulators Association (Western European Nuclear Regulatory Association – WENRA). Participation in WENRA allows Ukraine to improve national legislation on nuclear safety in accordance to EU standards (reference levels of WENRA), and participate in their development.

However, shortcomings of the Ukrainian legislation impede the implementation of Council Directive 2014/87/Euratom. According to Article 5, paragraphs 2 and 3, the Member States shall ensure that the national framework requires that the competent regulatory authority is functionally separate from any other body or organization concerned with the promotion or utilization of nuclear energy, and does not seek or take instructions from any such body or organization when carrying out its regulatory tasks. The above gives an opportunity to talk about the need for a single state authority in the field of nuclear safety in Ukraine.

Today, in Ukraine there are two public authorities which are empowered in the area of nuclear safety – the Ministry of Energy and Coal Industry and the State Nuclear Regulatory Inspectorate. Mainly, the State Nuclear Regulatory Inspectorate of Ukraine shall: draft regulatory requirements, rules and standards on nuclear safety; carry out expert reviews of the safety of nuclear installations or ionizing radiation sources and issue appropriate permits; carry out state supervision of compliance with regulatory requirements, rules and standards on nuclear safety, and also of observance of the conditions of issued permissions; organize and carry out research work aimed at enhancing the safety of nuclear installations and ionizing radiation sources and at solving problems of radiation protection of personnel, the public and the environment; have the rights to send to licensees,

[21] Ordinance of the Cabinet of Ministers of Ukraine – Energy Strategy of Ukraine till 2030 (Governmental Courier, 29.01.2014, No. 17). See also: T. Daintith, S. F. Williams, *The Legal Integration of Energy Markets*, Berlin–New York 1987; R. Petrov, *Association Agreements between the UE and Ukraine*, *Moldova and Georgia: legal and constitutional challenges of implementation*, (in:) T. Kerikmäe, A. Chochia (eds.), *Political and Legal Perspectives of the EU Eastern Partnership Policy*, Heidelberg–New York–London, pp. 153–165; G. Van der Loo, *The EU–Ukraine Association Agreement and Deep and Comprehensive Free Trade Area*, Leiden–Boston 2016.

[22] Law of Ukraine of 24 June 2004 on the Arrangement of Issues on Nuclear Safety Assurance (Official Journal of the Supreme Council of Ukraine of 2004, No. 46, P. 511).

owners or managers of enterprises a written statement concerning non-fitness of specific persons for their positions (article 24 the Law of Ukraine on Nuclear Energy Use and Radiation Safety). The only operator of all nuclear power plants in Ukraine that performs activity related with site selection, designing, constructing, commissioning, operating, decommissioning of a nuclear installation is the National Nuclear Energy Generating Company Energoatom (article 33 the Law of Ukraine on Nuclear Energy Use and Radiation Safety), operating under the supervision of the Ministry of Energy and Coal Industry.

It is recognized that actions of public authorities in the field of nuclear safety are not always consistent, and often even contradictory. This situation requires major changes by transferring all powers in the field of nuclear safety to a single body – the State Nuclear Regulatory Inspectorate of Ukraine, the legal authority and technical competence of which will allow for providing reliable and safe use of nuclear technology. In connection with the above it is necessary to prepare a draft bill on amendments to the regulations on the State Nuclear Regulatory Inspectorate of Ukraine".

3.2. BRINGING THE LEGAL NATIONAL FRAMEWORK OF UKRAINE INTO COMPLIANCE TO EUROPEAN UNION APPROACHES: REGULATION OF INTERNATIONAL TRANSPORT OF RADIOACTIVE MATERIAL

An important sphere of nuclear energy use is transport of radioactive materials to be used in nuclear energy, industry, medicine during waste management. Transportation of radioactive materials is carried out through public roads, so it is necessary to ensure such conditions while transporting which would reduce or eliminate impact hazards inherent in radioactive materials, personnel, population and environment. In order to achieve this objective, administrative and technical measures should be taken such as licensing of radioactive material transport, issuing permits for international transport of radioactive materials, inspections, approval of package design and special conditions for radioactive material transport. An important segment in the structure of radioactive materials transporting is transportation of fresh and spent nuclear fuel Ukraine and transit of fuel between Russia and Eastern European countries – Slovakia, Hungary and Bulgaria, implemented in accordance with intergovernmental agreements on cooperation in the transportation of nuclear materials[23].

Operations involved in shipments of radioactive waste or spent fuel are subject to a number of international legal instruments regarding, in particular, safe transport of radioactive material. To protect human health and the environment

[23] For more details, see: http://www.snrc.gov.ua/nuclear/doccatalog/document?id=327019 (accessed 10 May 2017).

against the dangers arising from radioactive waste is the main issues governed by Council Directive 2006/117/Euratom of 20 November 2006 on the supervision and control of radioactive waste and spent fuel shipments.

Council Directive 2006/117/Euratom lays down a Community system of supervision and control of transboundary shipments of radioactive waste and spent fuel, so as to guarantee adequate protection of the population. Mainly, this Directive specifies an approval procedure for the transportation of radioactive waste and spent nuclear fuel from competent authorities internationally.

A plan for the implementation of Council Directive 2006/117/Euratom by the State Nuclear Regulatory Inspectorate was approved by the Order of the Cabinet of Ministers of Ukraine of 18 February 2015[24]. The main objective was the implementation of the legislation of Ukraine in compliance with the provisions of Directive 2006/117/Euratom on procedures of coordination with the competent authorities of the Member States as regards cross-border shipments of radioactive waste and spent nuclear fuel.

At present, according to Article 59 of the Law of Ukraine on Nuclear Energy Use and Radiation Safety, prior to international and transit transporting of radioactive materials through the territory of Ukraine the state regulatory body for nuclear and radiation safety coordinates such transporting with the competent authorities of all countries, through the territory of which the materials will be transported. The procedure of issuing permits for transporting of radioactive materials, including approval of relevant documents, issuing permits, and confirmation of the issuance of a permit, is established by the Ordinance of the Cabinet of Ministers of Ukraine of 15 October 2004 on the Approval of the Procedure for Radioactive Materials Transportation Through Ukraine[25] and the Ordinance of the Cabinet of Ministers of Ukraine of 3 October 2007 on Some Issues Concerning Radioactive Materials Transportation[26]. However, the legislation of Ukraine does not provide for a procedure applicable to radioactive waste and spent fuel shipments reconcilements with the competent authorities of the countries involved in transportation, as is stated in Directive 2006/117/Euratom. Furthermore, radioactive material transfer is licensed according to the Law of Ukraine on Authorizing Activity in Nuclear Energy Use.

Pursuant to the Action Plan on implementing Council Directive 2006/117/Euratom, a draft Ordinance of the Cabinet of Ministers of Ukraine on amending

[24] Order of the Cabinet of Ministers of Ukraine "The plan for the implementation of Council Directive 2006/117/Euratom in Ukraine" of February 18, 2015 (Official Journal of Ukraine of 2015, No. 16, P. 419).

[25] Ordinance of the Cabinet of Ministers of Ukraine of 15 October 2004 on the Approval of the Procedure for Radioactive Materials Transportation Through Ukraine (Official Journal of Ukraine of 2004, No. 68, P. 2771).

[26] Ordinance of the Cabinet of Ministers of Ukraine of 3 October 2007 on Some Issues Concerning Radioactive Materials Transportation (Official Journal of Ukraine of 2007, No. 76, P. 2820).

the procedure to issue permits for international transport of radioactive materials was developed by the State Nuclear Regulatory Inspectorate in Ukraine[27]. This document establishes procedures governing the authorization of transport of radioactive waste and spent nuclear fuel by Ukraine and EU Member States with competent bodies in the countries of origin, destination and transit that will contribute to oversight and control of such transport to ensure appropriate protection of the public and the environment. It should be emphasized that the State Nuclear Regulatory Inspectorate in Ukraine, in pursuit of implementing Council Directive 2006/117/Euratom, developed a draft law on amendments to some laws of Ukraine in nuclear energy use of 16 December 2016[28], which suggests amending the Law on Nuclear Energy Use and Radiation Safety and the Law on Authorizing Activity in Nuclear Energy Use. In particular, the draft law provides that an application for a permit to transport internationally must be accompanied by a statement of reconciliation with such transportation issued by the countries through which traffic will run. Issuance of such an agreement must occur within the competence of bodies performing state regulation of safety in the transport of radioactive materials, including permits. Unfortunately, the draft laws are still being considered either in Parliament or in the Cabinet of the Ministers of Ukraine.

4. IMPLEMENTATION OF THE EU DIRECTIVES IN THE FIELD OF RADIATION SAFETY IN UKRAINE

Ionizing radiation is a natural and permanent part of the environment. Its properties are widely used in the process of human activity: science, technology, medicine, industry, agriculture etc.

It is important that production and use of ionizing radiation as well as the operation of nuclear facilities meets the standards of radiation safety. After all, a failure to comply with radiation safety properties of ionizing radiation can cause irreparable damage to life, health and the environment. It is a question of very great importance for the proper regulation of radiation safety (safety from harmful effects of ionizing radiation) in Ukraine.

The basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation in EU are prescribed by Council Directive 2013/59/Euratom (hereinafter – Council Directive 2013/59/Euratom).

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[27] For more details see: http://www.snrc.gov.ua/nuclear/uk/publish/article/296434;jsessionid=219BDB8B94D5B6B317011EE1E441184F.app1 (accessed 10 May 2017).

[28] For more details, see: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=60744 (accessed 10 May 2017).

This Directive aims to establish uniform basic safety standards to protect health and those who are exposed in a professional or medical capacity, the efficiency of radiation safety and radiation protection in the application of ionizing in various sectors of the economy. In particular, Chapter VII of Council Directive 2013/59/Euratom is devoted to radiation safety regulation in medicine using radiation sources, particularly the requirements for licensing of medical institutions, justification of medical exposure, monitoring of radiation parameters of equipment with radioactive sources, establishment and application of reference diagnostic levels for diagnostic procedures, and other safety requirements.

Implementation of the Council Directive 2013/59/Euratom is being carried out according to the Plan for the Implementation of Council Directive 2013/59/Euratom establishing basic safety standards for protection against the dangers arising from ionizing radiation and repealing Directives 89/618/Euratom, 90/641/Euratom, 96/29/Euratom, 97/43/Euratom and 2003/122/Euratom, approved by the Cabinet of Ministers of Ukraine" on February 18, 2015[29].

The legislation of Ukraine regarding radiation safety in general conforms with Directive 2013/59/Euratom. Today, the system of legal regulation in the field of radiation safety in Ukraine consists of documents on three levels. Documents of the first level are laws and regulations. The basic laws of Ukraine, the ones that define the legal principles for radiation safety (safety from harmful effects of ionizing radiation) are Laws: on Nuclear Energy Use and Radiation Safety; on Radioactive Waste Management; on Human Protection Against Impact of Ionizing Radiation; on Authorizing Activity in Nuclear Energy Use etc. The main subordinate regulations are the Ordinances of the Cabinet of the Ministers of Ukraine on the Approval of the Procedure to Hold Public Hearings in Nuclear Power Use and Radiation Safety of 18 July 1998[30], on the Approval of the Procedure for Interaction of Executive and Entities Operating in the Field of Nuclear Energy in Case of Radionuclide Radiation Sources of the Illegal Trafficking of 2 June 2003[31]; the Order of the State Nuclear Regulatory Inspectorate in Ukraine on the Approval of the State Nuclear and Radiation Safety Expertise Procedure of 21 February 2005[32] etc.

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[29] Order of the Cabinet of Ministers of Ukraine of 18 February 2015 on the Plan for the Implementation of Council Directive 2013/59/Euratom in Ukraine (Official Journal of Ukraine of 2015, No. 16, P. 419).

[30] Ordinance of the Cabinet of the Ministers of Ukraine of 18 July 1998 on the Approval of the Procedure to Hold Public Hearings in Nuclear Power Use and Radiation Safety (Official Journal of Ukraine of 1998, No. 29, P. 1096).

[31] Ordinance of the Cabinet of the Ministers of Ukraine of 2 June 2003 on the Approval of the Procedure for Interaction of Executive and Entities Operating in the Field of Nuclear Energy in Case of Illegal Trafficking of Radionuclide Radiation Sources (Official Journal of Ukraine of 2003, No. 23, P. 1049).

[32] Order of the State Nuclear Regulatory Inspectorate in Ukraine of 21 February 2005 on the Approval of the State Nuclear and Radiation Safety Expertise Procedure (Official Journal of Ukraine of 2005, No. 15, P. 794).

Second-level documents include regulations (rules, regulations, standards) on radiation security based on the principles and provisions of the laws of Ukraine, and these set the criteria, requirements, conditions of radiation safety as regards nuclear energy and other radiation sources. The second group of regulations exacts direct regulatory impact on basic industries which use nuclear energy and other sources of ionizing radiation, as well as on adjacent areas where ionizing radiation is used to address a variety of scientific research, industrial and social problems. Basic requirements for the protection of human health and the environment against likely harm, associated with exposure to ionizing radiation and safe operation of such sources are defined in the Radiation Safety Standards of Ukraine of 7 December 1997[33], the Basic Health and Safety Rules of Radiation Safety of Ukraine of 2 February 2005[34], and the Rules for Nuclear and Radiation Safety in Transporting of Radioactive Materials of 30 August 2006[35] etc.

Documents of the third level are industry standards and departmental documents, adopted with the aim of achieving compliance with the regulations of the second level and specifying measures established thereby as well as possible ways of achieving them. Documents of the third level are the following industry standards: the Hygienic Standard of Specific Activity of Radionuclides Cs^{137} and Sr^{90} in Wood and Products of Wood of 31 October 2005[36], Permissible Levels of Radionuclides Cs^{137} and Sr^{90} in Food and Drinking Water of 3 May 2006[37]; Hygienic Requirements to Placement and Operation of X-ray Rooms and Radiology Procedures of 4 June 2007[38].

It should be emphasized that for the current Ukrainian system of radiation safety regulation can be characterized by a "hard" regulatory approach. It involves the development and implementation of regulations containing detailed technical requirements, criteria and parameters. This makes it difficult to regulate. Furthermore, nowadays there are many documents of the former USSR, especially as

[33] Radiation Safety Standards of Ukraine of 7 December 1997 (Public hygiene standards. Kyiv 1998, P. 4).

[34] Order of the Ministry of Health of Ukraine of 2 February 2000 on the Basic Health and Safety Rules of Radiation Safety of Ukraine (Official Journal of Ukraine of 2005, No. 23, P. 1322).

[35] Order of the State Nuclear Regulation Committee of Ukraine of 30 August 2006 on the Rules for Nuclear and Radiation Safety in the Transport of Radioactive Materials (Official Journal of Ukraine of 2006, No. 168, P. 2606).

[36] Order of the Ministry of Health of Ukraine of 31 October 2005 on the Hygienic Standard of Specific Activity of Radionuclides Cs^{137} and Sr^{90} in Wood and Products of Wood (Official Journal of Ukraine of 2005, No. 46, P. 2927).

[37] Order of the Ministry of Health of Ukraine of 3 May 2006 on the Permissible Levels of Radionuclides Cs^{137} and Sr^{90} in Food and Drinking Water (Official Journal of Ukraine of 2006, No. 29, P. 2114).

[38] Order of the Ministry of Health of Ukraine of 4 June 2007 on the Hygienic Requirements for the Placement and Operation of X-ray Rooms and Radiology Procedures (Official Journal of Ukraine of 2007, No. 87, P. 3202).

regards regulation of the safety of nuclear installations and radiation sources that are continuing to operate in the territory of independent Ukraine.

Most of the provisions of the Directive are reflected in national regulations, but there are some differences (mismatches or gaps) between the domestic law and the provisions of the Directive. So, it is necessary to complement legislation with regulations concerning the requirements for radiation protection education, training and information, justification and regulatory control of practices, medical exposures an so forth. These are the provisions of the Directive which are absent in national legislation and require full implementation in national law:

1) Regulation of radionuclides of natural origin – an environmental monitoring programme, indoor exposure to radon, gamma radiation from building materials;

2) Identification, restoration and control of wasteful radioactive sources;

3) Monitoring of radioactive discharges;

4) Cosmic radiation exposure of aircraft crews.

5. CONCLUSION

A legal basis for the implementation of EU Directive on the protection of human safety and the environment from the negative effects of ionizing radiation in Ukraine is laid down in national law. However, Ukraine must make radical changes and additions to legislation in the field of nuclear energy and radiation safety in order to ensure effective implementation of the Association Agreement between Ukraine and the EU in its internal legal order. Implementation of EU legislation in the field of nuclear and radiation safety will reveal major shortcomings of the current state of affairs and, at the same time, mechanisms to improve Ukraine's national legislation with the aim of preventing another Chernobyl disaster in the future.

ACQUIS COMMUNAUTAIRE IN THE FIELD OF NUCLEAR AND RADIATION SAFETY AND UKRAINIAN LEGISLATION: PROSPECTS AND CHALLENGES OF HARMONIZATION

Summary

Since the Chernobyl disaster, special attention is paid in Ukraine to legislation in the field of nuclear energy and radiation safety. A new stage of enhancing Ukrainian nuclear and radiation safety legislation began with the signing in 2014 of the Association

Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other. In addition, the Ordinance of the Cabinet of Ministers of Ukraine of 17 September 2014 on the implementation of the Association Agreement on atomic energy between Ukraine from one side and the European Union, the European Community and its member-countries from another side, provided for the development and adoption of new regulations in the energy sector (including nuclear) in order to implement Directives: 1) Council Directive 2014/87/Euratom of 8 July 2014 amending Directive 2009/71/Euratom establishing a Community framework for the nuclear safety of nuclear installations, 2) Council Directive 2006/117/Euratom of 20 November 2006 on the supervision and control of shipments of radioactive waste and spent fuel, 3) Council Directive 2013/59/Euratom of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionizing radiation. Implementation of EU legislation in the field of nuclear and radiation safety will reveal major shortcomings of the current state of affairs and, at the same time, mechanisms to improve Ukraine's national legislation with the aim of preventing another Chernobyl disaster in the future.

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EXTENDED CONFISCATION OF A MATERIAL BENEFIT IN POLISH CRIMINAL LAW[1]

On 23 March 2017 the Sejm (the lower chamber of the Polish Parliament) passed the Act on Amending the Criminal Code and Numerous Other Acts[2]. In the reasons appended to the draft bill it was asserted that the law intended "to introduce into Polish substantive, executive and procedural criminal law amendments with a view to enhancing the effectiveness of mechanisms employed to deprive offenders of the benefits they accrued as a result of committing a crime". The legislator also noted that the projected law transposes into domestic law the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union[3].

As a consequence of the amendments, the provisions concerning forfeiture of material proceeds of crime were transformed, with the introduction of so-called extended confiscation. This paper sets out to present a construction of Article 45 of the Polish Criminal Code as amended and to assess the correctness of the amendment, particularly in the context of the Polish Constitution and the aforementioned Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. Notwithstanding, this is not to say that the regulation of extended confiscation is limited merely to Article 45 of the Criminal Code, yet it is indisputably the key pertinent provision.

1. CONTENT OF THE DIRECTIVE

Before the content of the draft bill is addressed, some comments will be made with regard to the Directive 2014/42/EU of the European Parliament and

[1] This paper takes further the comments by the author in: M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna. Komentarz do art. 1–116*, Warszawa 2017.

[2] Polish Official Journal of Laws of 2017, item 768.

[19] Similar motivations were called upon by the legislator previously in respect of the Act of 20 February 2015 (Journal of Laws of 2015, item 398).

of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. Pertinently, the Polish legislator explicitly noted that the law amending Article 45 of the Criminal Code implemented the said Directive.

It is the aim of the Directive to enhance the institutions of confiscation of instrumentalities used to commit crimes and proceeds thereof. Such legal instruments are grouped under the legal term of forfeiture. The Directive was clearly primarily intended against organized criminal groups as the first three recitals of the Directive pertain thereto. The European legislator starts with the assumption that it must take harmonized cooperation of Member States to enhance the fight against organized crime, especially considering the increasingly more transnational character thereof. As stated in recital 1, "effective prevention of and fight against organised crime should be achieved by neutralising the proceeds of crime and should be extended, in certain cases, to any property deriving from activities of a criminal nature".

Recital 11 of the Directive claims that the concept of proceeds of crime shall include the direct proceeds from criminal activity and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds. As clarified in the Directive's further provisions, all property, including property transformed – in its entirety or partially – into some other property as well as property connected to property acquired through legal means (up to the value of proceeds connected thereto), may qualify as proceeds of crime. Proceeds of crime may also encompass income or other revenue accrued from committing a crime or from property being involved in the said connection or transformation. In addition, the Directive provides for a broad definition of property that can be subject to freezing and confiscation. That definition includes legal documents or instruments evidencing title or interest in such property. Such documents or instruments could include, for example, financial instruments, or documents that may give rise to creditor claims and are normally found in the possession of the person affected by the relevant procedures.

The crux and essence of extended confiscation may be found in recital 19 which, at the outset, notes that criminal groups engage in a wide range of criminal activities. Therefore, in order to effectively tackle organised criminal activities there may be situations where it is appropriate that a criminal conviction be followed by the confiscation not only of property associated with a specific crime, but also of additional property which the court determines constitutes the proceeds of other crimes. The European legislator notes further in recital 21 that extended confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct. This does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is

substantially more probable, that the property in question has been obtained from criminal conduct rather than from other activities. The recital stipulates also that disproportionality of property belonging to a person to his lawful income could be among facts giving rise to a conclusion of the court that the property derives from criminal conduct. Member States could also determine a requirement for a certain period of time during which the property could be deemed to have originated from criminal conduct.

Furthermore, the Directive addresses confiscation of property transferred to a third party. Relevant here are situations where a third party acquired property – directly or indirectly, for instance through an intermediary – from a suspect or an accused, including cases of ordering or leading a crime or committing a prohibited act for the benefit of a suspect or an accused, or where an accused is not possessed of any property liable to confiscation. Recital 24 of the Directive provides that such confiscation should be possible at least in cases where third parties knew or ought to have known – based upon concrete facts and circumstances such as complimentary transfer or transfer for a price well below the property's market value – that the purpose of the transfer or acquisition was to avoid confiscation. It should be reserved, however, that the Directive does not allow for violating the rights of third parties acting in good faith.

The Directive explicitly indicates that its provisions are meant to only set minimal standards. Member States are free to introduce more elaborate regimes within their domestic systems.

Member States are obliged to implement the Directive to the extent delineated by the following enactments:

1) Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union;

2) Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro;

3) Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment;

4) Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime;

5) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism;

6) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector;

7) Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking;

8) Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime;

9) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA;

10) Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

Pursuant to Article 5(2) of the Directive, extended confiscation shall be possible in respect of the following crimes:

1) active and passive corruption in the private sector, as provided for in Article 2 of Framework Decision 2003/568/JHA, as well as active and passive corruption involving officials of institutions of the Union or of the Member States, as provided for in Articles 2 and 3 respectively of the Convention on the fight against corruption involving officials;

2) offences relating to participation in a criminal organisation, as provided for in Article 2 of Framework Decision 2008/841/JHA, at least in cases where the offence has led to economic benefit;

3) causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes if the child is over the age of sexual consent, as provided for in Article 4(2) of Directive 2011/93/EU; distribution, dissemination or transmission of child pornography, as provided for in Article 5(4) of that Directive; offering, supplying or making available child pornography, as provided for in Article 5(5) of that Directive; production of child pornography, as provided for in Article 5(6) of that Directive;

4) illegal system interference and illegal data interference, as provided for in Articles 4 and 5 respectively of Directive 2013/40/EU, where a significant number of information systems have been affected through the use of a tool, as provided for in Article 7 of that Directive, designed or adapted primarily for that purpose; the intentional production, sale, procurement for use, import, distribution or otherwise making available of tools used for committing offences, at least for cases which are not minor, as provided for in Article 7 of that Directive;

5) a criminal offence that is punishable, in accordance with the relevant instrument in Article 3 or, in the event that the instrument in question does not contain a penalty threshold, in accordance with the relevant national law, by a custodial sentence of a maximum of at least four years.

2. CONSTRUCTION OF EXTENDED CONFISCATION OF A MATERIAL BENEFIT

27 April 2017 saw the entry into force of the Act of 23 March 2017 on Amending the Criminal Code and Numerous Other Acts. One important amendment is the introduction of the concept of extended confiscation, for the first time, into Polish criminal law. The table below presents the wording of Article 45 of the Code before and after the amendments.

Article 45 of the Criminal Code

	Before 27 April 2017	**After 27 April 2017**
§ 1	If the perpetrator has even indirectly gained a material benefit from committing a crime that is not subject to the forfeiture of the items referred to in art. 44 § 1 or § 6, the court imposes the forfeiture of such benefit or of its equivalent-in-value. Forfeiture is not imposed with regard to the full benefit or with regard to a part of it, if the benefit or its equivalent-in-value is to be returned to a harmed party or another entity.	If the perpetrator has even indirectly gained a material benefit from committing a crime that is not subject to the forfeiture of the items referred to in art. 44 § 1 or § 6, the court imposes the forfeiture of such benefit or of its equivalent-in-value. Forfeiture is not imposed with regard to the full benefit or with regard to a part of it, if the benefit or its equivalent-in-value is to be returned to a harmed party or another entity.
§ 1a	*N/A*	A material benefit gained from committing a crime is deemed to include a thing's produce and rights constitutive of the benefit.
§ 2	While sentencing for a crime from the commission of which the perpetrator has even indirectly gained a material benefit of substantial value, it is deemed that the property which the perpetrator has taken possession of, or has acquired entitlement to, while committing a crime or afterwards, until the moment of passing of even a non-final sentence, constitutes a benefit derived from the commission of the crime, unless the perpetrator or another interested person proves otherwise.	While sentencing for a crime from the commission of which the perpetrator has even indirectly gained a material benefit of substantial value, or a crime from the commission of which the perpetrator gained or could have gained, even if indirectly, a material benefit, which is subjected to a sentence the upper limit of which is not less than 5 years, or which was committed within an organized group or association intent on committing a crime, it is deemed that the property which the perpetrator has taken possession of, or has acquired entitlement to, within 5 years before committing the crime until at least a non-final sentence has been rendered, constitutes a benefit derived from the commission of the crime, unless the perpetrator or another interested person proves otherwise.

§ 3	If a property constituting a benefit derived from committing a crime referred to in § 2 has been, effectively or under any legal title, transferred to another natural person, juridical person or organisational entity without a legal personality, it is deemed that the items remaining in the autonomous possession of that person or organisational entity, and other property rights that person is entitled to, belong to the perpetrator, unless the circumstances attendant to the acquisition of such property could not have given rise to the assumption that it has been even indirectly obtained by means of a prohibited act.	If a property constituting a benefit derived from committing a crime referred to in § 2 has been, effectively or under any legal title, transferred to another natural person, juridical person or organisational entity without a legal personality, it is deemed that the items remaining in the autonomous possession of that person or organisational entity, and other property rights that person is entitled to, belong to the perpetrator, unless the circumstances attendant to the acquisition of such property could not have given rise to the assumption that it has been even indirectly obtained by means of a prohibited act.
§ 4	*repealed*	*Repealed*
§ 5	In case of a joint ownership, the forfeiture applies to a share belonging to the perpetrator or its equivalent-in-value.	In case of a joint ownership, the forfeiture applies to a share belonging to the perpetrator or its equivalent-in-value.
§ 6	*repealed*	*Repealed*

A material benefit that warrants the application of forfeiture under Article 45 § 1 of the Criminal Code consists of assets gained, even if indirectly, by the perpetrator from committing a crime. As noted in the literature, by a "material benefit" one may understand a "benefit that fulfils, first and foremost, a material need the achievement of which changes the material standing of the perpetrator or the person to whom the benefit is transferred, and that change is not justified by entitlements belonging to the perpetrator in the name which stem from a legal relation in existence between him and a natural or legal person victimised by his actions"[4]. W. Zalewski has defined "indirect material benefit" as "an entirety of benefits gained from trade in things, material rights, receivables etc., originating from a crime, together with any profit accrued by the perpetrator"[5]. Therefore, a material benefit must be definable in monetary terms. It is a peculiar inconsistency to enclose within a definition of "material benefit" its criminal origin. For the notion, in and of itself, does not have a negative connotation. It is the circumstances of the acquisition or gaining of a benefit that lead to its classification as right or wrong. Otherwise it would not be necessary for the legislator to point to, in Article 45, a connection between a benefit subject to forfeiture with a committed crime. Consequently, it appears that there is a relation of synonymy

[4] O. Górniok, *O pojęciu "korzyści majątkowej" w kodeksie karnym (Problemy wybrane)*, "Państwo i Prawo" 1978, issue 4, p. 117; *cf.* also J. Raglewski, *Przepadek*, (in:) M. Melezini (ed.), *System Prawa Karnego. Tom 6. Kary i inne środki reakcji prawnokarnej*, Warszawa 2016, p. 798.

[5] W. Zalewski, *Komentarz do art. 45*, (in:) M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna. Tom II. Komentarz do artykułów 32–116*, Warszawa 2011, p. 205.

between the criminal term of "material benefit" and the civil "property", understood as an entirety of material rights.

This way of understanding forfeiture under Article 45 of the Criminal Code is based upon the assumption that perpetrators of crimes should not be awarded where they could multiply their profits stemming from committing a crime. This interpretation seems to be buttressed by the wording of § 1a which stipulates that "a material benefit gained from committing a crime is deemed to include a thing's produce and rights constitutive of the benefit". In support of this provision let me call upon Article 12(5) of the United Nations Convention against Transnational Organized Crime (Polish Official Journal of Laws of 2005, No. 18, item 158) which reads: "Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime". The metaphor of fruit of a poisonous tree is also pertinent here as it would be incompatible with the aim of forfeiture to allow the perpetrator of a crime to keep a benefit that would have been outside of his reach had it not been for his criminal activity.

Difficulties with applying Article 45 of the Criminal Code arise where the perpetrator connects a benefit originated from a crime with an asset acquired lawfully. The perpetrator could, for instance, purchase a car half of payment for which came from a legal source, the other half, however, constituted proceeds of a crime. A strict interpretation of Article 45 § 1 should, on its face, lead to a conclusion that only the half which originated, even if indirectly, from a criminal act shall be subject to forfeiture. If only a part of funds devoted to the purchase of a movable or immovable originated from a crime, it would be unwarranted to maintain that the entire thing purchased is a material benefit gained from committing a crime. One caveat to that would be property affected by Article 45 § 2, pursuant to which such property is presumptively subject to confiscation unless it is proven otherwise. Not without significance is Article 45 § 5 under which, in case of joint ownership, forfeiture applies to the share belonging to the perpetrator or its equivalent-in-value. The broad presumption in Article 45 § 2 undermines the previous legislative stance that the perpetrator shall be deprived of the benefits gained thereby from committing a crime, without imposing thereupon – at least not by means of confiscation – any additional material burdens, let alone imposing such burdens on third party co-owners of given property[6]. Problems arise where, for example, there is a bank account where both lawfully and unlawfully (within the meaning of Article 45 § 1) acquired assets are held. In such cases "the overstated value of financial assets (a number of abstract monetary units)

[6] J. Raglewski, *Przepadek*, (in:) M. Melezini (ed.), *System Prawa Karnego*..., pp. 840–841; K. Postulski, M. Siwek, *Przepadek w polskim prawie karnym*, Kraków 2004, p. 120; S. Śliwiński, *Polskie prawo karne materialne. Część ogólna*, Warszawa 1946, p. 461.

held in a bank account as against the balance, which should correctly reflect its true state, constitutes a benefit directly connected with a prohibited act"[7], unless the presumption in Article 45 § 2 applies.

The definition of a material benefit subject to confiscation in Article 45 § 1 of the Criminal Code includes not only the perpetrator's profit (gain), but also any costs sustained to achieve that profit. In other words, the entire income derived from committing a crime is potentially subject to forfeiture. As rightly noted by the Supreme Court, "The benefit represents the perpetrator's income. So if a narcotics factory sells their produce before they are confiscated on site, it is clear that the value of the price obtained through the sale will be subject to forfeiture. The sum should not be lessened by the value of costs, even if lawful, born to produce the narcotics. As a consequence, every subsequent transferee (trader) of the narcotics will be stripped of the material benefit representing the price paid (plus any "mark-up"), without lessening it by any costs born to buy the product"[8].

In the light of Article 45 § 1, the exercise of assessing the value of a material benefit subject to forfeiture necessitates relating it to a particular set of facts – the benefit actually gained by the perpetrator. The market value may only provide guidance and is not decisive. One value cannot be replaced by another, be it for the benefit or to the detriment of the perpetrator. It is necessary to distinguish between the notion of value of a thing, e.g. a psychotropic substance introduced to the market, from the benefit gained[9].

3. PRESUMPTIONS

The crux of the regulation of confiscation of a material benefit lies in the presumptions enshrined in Article 45 of the Criminal Code, particularly in the amended Article 45 § 2. The purpose of the presumptions is to switch the burden of proof where the criminal source of a material benefit is being established. If it was not for these presumptions, successful application of forfeiture/confiscation would be in some cases impossible as assets could have been transferred to third parties or it could be difficult to establish exactly which assets originated from

[7] Resolution of the Polish Supreme Court (7 judges) of 24 June 2015, I KZP 5/15, OSNKW 2015, No. 7, item 55.

[8] Decision of the Polish Supreme Court of 26 August 2010, I KZP 12/10, OSNKW 2010, No. 9, item 78; judgment of the Appellate Court for Łódź of 29 October 2012, II AKA 212/12, Legalis; judgment of the Appellate Court for Warsaw of 28 December 2012, II AKA 291/12, Legalis.

[9] Judgment of of the Polish Supreme Court of 21 November 2012, III KK 32/12, Legalis.

a crime. Therefore, to shield his assets from forfeiture, the perpetrator is obliged to prove that they were not gained from committing a crime[10].

In the literature one may encounter conflicting accounts of the presumptions pertaining to forfeiture of a material benefit[11]. In the light of the above, the view that portrays forfeiture as a necessary cost of an effective fight against crime appears convincing[12]. This is not to say, however, that the legislature should overlook the guaranteeing function of the criminal law and refuse to look for a compromise between conflicting goods without forgetting the constitutional context. The presumptions in Article 45 of the Criminal Code maybe applicable also as part of proprietary security in criminal proceedings, by virtue of Article 291 § 1 and § 2 of the Code of Criminal Procedure.

The reasons appended to the draft bill (Sejm paper No. 1186), which served as the starting point for the Act of 23 March 2017 on Amending the Criminal Code and Numerous Other Acts, stated that the proposed regulations are intended to introduce "into Polish substantive, executive and procedural criminal law amendments with a view to enhancing the effectiveness of mechanisms employed to deprive offenders of the benefits they accrued as a result of committing a crime. the proposals envisage a rise in the effectiveness of forfeiture". In other words, by reducing evidentiary standards and introducing a significantly broadened presumption pertaining to the criminal origin of benefits the legislator wants to prevent situations where the perpetrator could keep any unlawfully gained material benefit.

The scope of the presumption in Article 45 § 2 is very broad. For it covers property which the perpetrator has taken possession of, or has acquired entitlement to, within 5 years before committing the crime until at least a non-final sentence has been rendered, provided that:

1) the perpetrator has even indirectly gained a material benefit of substantial value, or

2) the perpetrator gained or could have gained, even if indirectly, a material benefit, which is subjected to a sentence the upper limit of which is not less than 5 years, or which was committed within an organized group or association intent on committing a crime.

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[10] J. Raglewski, *Materialnoprawna regulacja przepadku w polskim prawie karnym*, Kraków 2005, p. 105.

[11] N. Kłączyńska, R. Korczyński, *Kilka uwag o nowelizacji art. 45 k.k. (przepadek korzyści majątkowej)*, (in:) L. Bogunia (ed.), *Nowa kodyfikacja prawa karnego. Tom XV*, Wrocław 2004, p. 46 *et seq*; M. Prengel, *Odwrócenie ciężaru dowodu w przedmiocie przepadku mienia*, "Jurysta" 2003, issue 2, p. 39 *et seq*

[12] J. Raglewski, *Materialnoprawna*..., p. 112; L. Wilk, *Problem wartości majątkowych pochodzących ze źródeł nielegalnych lub nieujawnionych*, "Radca Prawny" 2002, issue 2, p. 71 *et seq.*

The presumption applies not only to property that the perpetrator has taken possession of, but to property he has gained any entitlement to. Therefore, even property of which the perpetrator is not the owner may be subject to forfeiture.

If the perpetrator gained property of substantial value from committing a crime, this alone triggers the presumption in Article 45 § 2. Two concepts of "property of substantial value" have been proffered in the literature. The dominant one relates to the definition of "property of substantial value" in Article 115 § 5 of the Criminal Code which classifies as such property whose value exceeds 200,000 PLN[13]. Opponents of this view claim Article 115 § 5 may only be used alternatively where there is no other indication on the facts of a given case[14].

A court may also order extended confiscation under Article 45 § 2 where the benefit gained, even if indirectly, was not substantial. It suffices that the perpetrator commits a crime which is subjected to a sentence the upper limit of which is not less than 5 years, from which he gained or could have gained a benefit, even if indirectly. Even if a benefit was not gained but, in the opinion of the court, could have been gained, the presumption of confiscation covers all property acquired within the period of 5 years before the commission of the crime. The 5-year threshold is not especially high as crimes such as theft, where the upper limit for sentencing is exactly 5 years, would qualify (Article 278 § 1 of the Criminal Code).

Contrary evidence to refute the presumption under Article 45 § 2 should prove the legality of the sources of ownership or other entitlement to the property in question. The evidence should disclose reliable information concerning the origin of an asset, and mere circumstantial evidence of legality is insufficient. As the legislator did not specify who is authorized to present contrary evidence, it may be the perpetrator or another interested person, one whose legal status may be affected by potential confiscation[15]. To prove the legal origin of an asset one need not always present a document directly pointing to a legal transaction or act that formed the basis for the acquisition of the property (for example, it is not absolutely necessary to produce an invoice or a bill). The evidence must undeniably prove that the asset in question was acquired lawfully. The law does not explicitly lay down any other requirements.

The presumption in Article 45 § 2 is meant to facilitate preventing the transfer of assets gained as a result of a crime to other persons in order to avoid its confiscation. In essence, this is an example of ostensible trade of an asset motivated

[13] J. Raglewski, *Przepadek*, (in:) M. Melezini (ed.), *System Prawa Karnego*..., p. 819; R. A. Stefański, *Przepadek korzyści majątkowej uzyskanej przez sprawcę z przestępstwa*, "Prokuratura i Prawo" 2001, issue 3, p. 160.

[14] D. Bunikowski, *Przepadek korzyści majątkowych pochodzących z popełnienia przestępstwa jako środek karny*, "Prokuratura i Prawo" 2008, issue 5, p. 68; N. Kłączyńska, R. Korczyński, *Kilka uwag o nowelizacji*..., (in:) L. Bogunia (ed.), *Nowa kodyfikacja*..., pp. 52–53.

[15] J. Raglewski, *Materialnoprawna*..., p. 123.

by the will to exempt it from the scope of application of criminal measures. For the presumption to apply property must have been transferred to a natural person, a legal person or an organisational unit without the status of a legal person, factually or under any legal title. In addition, the property must be in the inherent possession of that person or unit. By virtue of the presumption the property or other assets belonging to that person or unit are deemed to be owned by the perpetrator. A possible refutation would be to prove that, based upon the circumstances of the transfer, one could not have suspected that the property originated from a prohibited act, even if indirectly. Article 45 § 2 may give rise to doubts pertaining to the scope of property belonging to a natural person, a legal person or an organisational unit without the status of a legal person, which could be governed by the presumption. It appears that it covers all assets belonging to a person, and not only the assets which may originate from a crime, transferred by the perpetrator or another agent. The threshold, however, must be the value of the asset gained by the perpetrator by committing the crime. Therefore, a third party may not be stripped of all their assets if it exceeds in value the asset gained by committing the crime, even if the third party is unable to prove the origin of their assets[16].

Before the 2017 amendments, it was claimed that the presumption in Article 45 § 3 did not cover situations where a third party transferred an asset acquired from the perpetrator of a crime to another agent. In other words, the provision applied merely to relations between the perpetrator and the person to whom he transferred the asset. This restriction is no longer the law. Previously, in conjunction with § 2, § 3 referred to transfers by the perpetrator, however the current wording of the provision does not determine the transferor.

The presumption may be refuted by reference to good faith – one must point to circumstances surrounding a transfer which evince that one could not have suspected that the property originated from a crime. The legislator, it appears, attempted here to address criticisms levelled against the previous wording of the provision where a person attempting to refute the presumption had to present evidence of lawful acquisition of the disputed assets. One criticism was that this construction did not take into account the good faith of the transferee. The amended version necessitates devising a model of an objective reasonable bystander on the basis of which one may assess whether it is plausible to suppose that the property even if indirectly, originated from a crime. There is no need to single out a specific prohibited act, the commission of which the property must have been gained from[17]. M. Błaszczyk argues that it is, however, necessary to show "a connection between property covered by the presumption and a concrete crime attributed to the perpetrator, for which confiscation of a material benefit was imposed"[18].

[16] M. J. Szewczyk, *Przepadek korzyści majątkowej*, "Palestra" 2009, issue 3–4, pp. 83–84.

[17] J. Raglewski, *Przepadek*, (in:) M. Melezini (red.), *System Prawa Karnego*..., pp. 822–823.

[18] M. Błaszczyk, *Przepadek w znowelizowanym kodeksie karnym*, "Studia Iuridica" 2016, Vol. LXV, pp. 102–103.

Interpretation by reference to the ideal of a reasonable bystander has an objectivizing character – the assessment made is detached from the knowledge and skills of any particular person and the specific facts of the case[19]. The presumption is interpreted differently by M. Błaszczyk, who claims that the requirement of good faith dictates that "by reference to the circumstances surrounding the acquisition of property or material rights one could not have suspected that property acquired by a third party, even if indirectly, originated from a prohibited act (…) This condition necessitates objective reconstructing of the suspicion of a concrete transferee, based upon the circumstances surrounding the acquisition or its origin"[20].

4. ASSESSMENT OF THE PROVISIONS

Extended confiscation may be a useful tool in the fight against financially motivated and organized crime. However, effectiveness of it cannot be the sole measure of its correctness and reasonableness. It is necessary to, first and foremost, verify the new Criminal Code provisions from the constitutional perspective, taking into account the regulations of the EU directive which, according to the Polish legislature itself, the recent amendment attempted to implement.

The circumstances that justify the use of extended confiscation are cast very broadly. The legislator does not define the term "material benefit of substantial value". It is merely by analogy that one may compare it with "property of substantial value" which, under Article 115 § 5 of the Criminal Code, is property whose value exceeds PLN 200,000. More doubts are given rise to by the passage: "a crime from the commission of which the perpetrator gained or could have gained, even if indirectly, a material benefit, which is subjected to a sentence the upper limit of which is not less than 5 years". Here, it is not even necessary for the property to be of substantial value. The 5-year upper threshold is only ostensibly high as it covers, for instance, theft, which is subject to up to 5 years' imprisonment (Article 278 § 1 of the Criminal Code). Therefore, a person who stole PLN 1,000 could be subjected to forfeiture of property he gained or acquired any entitlement to within 5 years before committing the crime until a non-final sentence is rendered. This presumption could only be refuted if evidence to the opposite effect is presented. In other words, the person would have to prove that each and every of his assets throughout the previous 5 years was acquired lawfully.

It should also be noted that property forfeited under Article 45 § 2 need not be owned by the perpetrator. It suffices that he obtained any entitlement thereto. Therefore, an analysis of the provision shall take into consideration not only the

[19] J. Majewski, *Kodeks karny. Komentarz do zmian 2015*, Warszawa 2015, p. 136.

[20] M. Błaszczyk, *Przepadek w znowelizowanym*..., p. 103.

need to protect the perpetrator's property, but also that to which he has some entitlement but which is owned by third parties.

The institution of extended confiscation as transposed into Polish law goes far beyond the requirements imposed in Directive 2014/42/EU. This is not, in and of itself, impermissible because the Directive explicitly states it intends to merely lay down minimum standards. The problem is that such a broad brush approach to creating a presumption of forfeiture triggers doubts as to its compatibility with the Polish Constitution.

Academic writers have noted that Article 46 of the Constitution ("Property may be forfeited only in cases specified by statute, and only by virtue of a final judgment of a court"), which allows for limits to be placed upon the right enshrined in Article 64 ("Everyone shall have the right to ownership, other property rights and the right of succession"), pertains to things and not to property, which leads to the conclusion that it is impermissible to permit forfeiture of one's all assets. An exception may be where a thing subject to forfeiture (e.g. a tool used to commit a crime) constitutes all property of the perpetrator[21]. The doctrine has not worked out any uniform criteria to apply. It is certain, however, that the constitutionality of forfeiture cannot be interpreted extendedly and purposively as it constitutes an exception to the right to ownership. Ownership is not only regulated in Article 64(1) of the Constitution, but also its protection is one of the fundamental constitutional principles: "The Republic of Poland shall protect ownership and the right of succession" (Article 21(1) of the Polish Constitution).

Restrictions of the right to ownership are conceivable. As noted above, the Constitution itself envisages the possibility of forfeiture or confiscation. Also, it appears that introduction of the concept of extended confiscation could be defensible so long as an appropriate provision meets the criteria stemming from the principle of proportionality in Article 31(3) of the Constitution. As stated numerous times by the Constitutional Court, the proportionality principle demands, first, that all restrictions of the use of constitutional freedoms and rights be enacted by statute and not by means of secondary legislation. Second, such restrictions may not violate the essence of a given right or freedom and may be imposed only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or freedoms and rights of other persons. Pertinently, the scope of restrictions must be proportional to the goal pursued. Three criteria have been distilled on the basis of the above: utility, necessity and proportionality in its strict sense. Interference is lawful, therefore, if it is capable of achieving the goal pursued, is necessary to protect

[21] T. Sroka, *Komentarz do art. 46*, (in:) M. Safjan, L. Bosek, *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016, side No. 37. A similar view is espoused, it appears, by P. Sarnecki (*cf.* P. Sarnecki, *Komentarz do art. 46*, (in:) L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. II, Warszawa 2016, p. 247).

the public interest which it furthers, and its effects are proportional to the burden imposed thereby on citizens[22].

Since every law that broadens the scope of criminalization or the extent of activities of the government within criminal law imposes restrictions on the exercise of rights and freedoms, the criminal legislator should always prove that a proposed measure fulfils the criteria derived from the proportionality test. The legislator shall, first, establish the purpose of a projected norm, prove its necessity in the light of the goal pursued, its utility in the attainment of that goal, and decide between two conflicting goods: the one it intends to protect, and the one associated with the rights and freedoms that the proposed measure violates.

The part of Article 45 § 2 of the Criminal Code which penalizes perpetrators of crimes committed within an organized group or association intent on committing a crime is defensible in the light of the above. This is not to say that this catalogue may not be broadened. However, to that end the legislator shall not avail itself of a sanction but an objective criterion which would justify extending legal protection to some especially important legal goods. As already discussed, the threshold of 5 years' imprisonment does not constitute a sufficient criterion to justify extended confiscation. Take the example of Article 283 of the Criminal Code in conjunction with Article 279 § 1, pursuant to which the perpetrator of a larceny by breaking in, in cases of lesser gravity, is subject to the penalty of deprivation of liberty (imprisonment) of between 3 months and 5 years. It appears that in such said cases of lesser gravity extended confiscation could be enforced. In conclusion, extended confiscation as such deserves to stay in the Criminal Code, however it should be modified in line with principles demanding a proper level of ownership protection.

[22] Judgment of the Polish Constitutional Court of 3 June 2008, ref. number K 42/07, judgment of the Polish Constitutional Court of 29 September 2008, ref. number SK 52/05. *Cf.* also K. Wojtyczek, *Zasada proporcjonalności jako granica prawa karania*, (in:) A. Zoll (ed.), *Racjonalna reforma prawa karnego*, Warszawa 2001, p. 297; M. Piechowiak, *Klauzula limitacyjna a nienaruszalność praw i godności*, "Przegląd Sejmowy" 2009, Vol. 17, issue 2, pp. 56–57; A. Stępkowski, *Zasada proporcjonalności w europejskiej kulturze prawnej*, Warszawa 2010, p. 194; A. Zoll, *Konstytucyjne aspekty prawa karnego*, (in:) T. Bojarski (ed.), *System Prawa Karnego. Tom 2. Źródła prawa karnego*, Warszawa 2011, pp. 237–241.

EXTENDED CONFISCATION OF A MATERIAL BENEFIT IN POLISH CRIMINAL LAW

Summary

On 23 March 2017 the Sejm (the lower chamber of the Polish Parliament) passed the Act on Amending the Criminal Code and Numerous Other Acts[23]. In the reasons appended to the draft bill it was asserted that the law intended "to introduce into Polish substantive, executive and procedural criminal law amendments with a view to enhancing the effectiveness of mechanisms employed to deprive offenders of the benefits they accrued as a result of committing a crime". This paper sets out to present a construction of Article 45 of the Polish Criminal Code as amended and to assess the correctness of the amendment, particularly in the context of the Polish Constitution and the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

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SŁOWA KLUCZOWE

przepadek, prawo karne, postępowanie karne

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THE LEGAL STATUS OF THE ENERGY REGULATOR IN UKRAINE IN THE CONTEXT OF RECENT LEGISLATIVE CHANGES AND EUROPEAN INTEGRATION

Energy sector is a strategic industry of each state. Sustainable, reliable, safe, acceptable and affordable energy supply is an essential condition for the adequate functioning of other fields of economy. Access to modern energy services is crucial for efficient participation of people in social and economic life, enjoyment of human rights and freedoms. Energy security is a vital element of national security.

The energy industry is one of the most important regulated fields at the EU level and a crucial direction of cooperation between the EU and Ukraine. In accordance with the Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine[1], energy is one of the priority areas of approximation of laws of Ukraine to Community legislation (Article 51) and a key arena of economic cooperation between Ukraine and the Community (Article 52). Ukraine, as a full-fledged member of the Energy Community, and obliged by the EU-Ukraine Association Agreement[2] ratified by the Law of Ukraine No. 1678-VII of 16 September 2014, shall institute laws and regulations necessary for the implementation of EU energy legislation requirements.

Efficiency of state regulation in certain fields of the economy in general and in the field of energy in particular depends on there being an adequate institutional framework. New approaches to the understanding of the role of the state as an economic regulator resulted in a brand new model of independent regulatory authorities that aims to conduct state regulation of the activity of economic entities on the basis of a balance of interests of different stakeholders: economic actors, consumers, society and the state. Adequate performance of functions by

[1] Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine [1998] Official Journal of the European Union, L 49/3.

[2] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part. [2014] Official Journal of the European Union, L 161.

the independent regulatory authority is supported by legislation developed by reference to scientifically proven recommendations.

The energy regulator in Ukraine is the National Energy and Communal Services Regulatory Commission. In recent years, Ukrainian public authorities have undertaken steps to develop and approve a legal framework in order to implement the requirements of EU energy legislation, in particular those related to the legal status of the national regulatory authority. The approval of the Law of Ukraine on the National Energy and Communal Services Regulatory Commission[3] in 2016 has become one of the critical achievements in this direction. However, additional legislative initiatives need to be introduced in order to achieve correspondence of the Ukrainian legal framework for the energy regulator with the respective requirements of EU legislation, on the one hand, and with the provisions of the Constitution of Ukraine, on the other hand.

It should be noticed that certain legal issues surrounding the energy regulatory authority in Ukraine have been discussed by Y. Vashchenko[4], O. Y. Bytyak[5], V. V. Korobkin[6], O. V. Serdyuchenko[7], and N. I. Skoreiko[8]. However, legal research in this field needs to be intensified in order to establish an adequate theoretical basis for further refinements of the legal status of the energy regulator in Ukraine.

This paper aims to analyze the problems of the legal status of the energy regulator in Ukraine in the light of recent legislative developments in Ukraine and European integration, and to provide scientifically proven solutions.

Ukraine has recently developed and approved several laws in order to implement the requirements of EU legislation on economic regulation in the sectors of electricity and natural gas. First of all, the Law of Ukraine on the National Energy and Utilities Regulatory Commission (hereinafter – the Law on the

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[3] Zakon Ukrainy "Pro Natsionalnu Komisiyu shcho zdiisnyuye dergavne reguluvannya u sferakh energetyky ta komunalnykh poslug" [Law of Ukraine on National Energy and Communal Services Regulatory Commission]. Vidomosti Verkhovnoyi Rady Ukrainy. 2016, No 51.

[4] Vashchenko Y. *Energy Regulator in Ukraine: Legal Aspects of the Independence in the Light of the EU Requirements* / Y. Vashchenko // Jurisprudence. – 2014. – Vol. 21 (1). – P. 185–203.

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NKREKP) was approved in 2016. It was a significant step towards institutional encouragement of economic regulation in the energy sector in Ukraine since the energy regulator has obtained a stable legal footing provided by an act of supreme legal force. However, the new Law has not solved the problem of the constitutional legal status of the energy regulator that has existed since 2010 when the Law of Ukraine of 7 October 2010 on Amending Certain Acts and Putting Them into Accordance with the Constitution of Ukraine[9] entered into force. According to this Law, the status of natural monopolies regulatory commissions, including the energy regulator, was shifted from central bodies of executive power with a special status to state collegial bodies. Previously, natural monopolies regulatory commissions were excluded from the system of central bodies of executive power by Presidential Decree No. 1085/2010 of 9 December 2010 on the Optimization of the System of Bodies of Executive Power"[10]. This approach has also been reflected also in later legislative developments in Ukraine.

However, such provisions as those above contradict the Constitution of Ukraine to the extent that they distinguish the category of special state collegial bodies. This problem has been analysed by the author of this paper in previous publications on this matter[11]. However, it needs to be explored further in the light of recent changes in Ukrainian legislation, namely the approval of the Law on the NKREKP.

Currently, the legal status of the NKREKP is regulated by the Law on the NKREKP. The explanatory note to the Law on the NKREKP stipulates that this Law was developed in order to perform the obligations of Ukraine as part of the Treaty on Establishing the Energy Community. EU legislation, primarily directives and regulations from the Third Energy Package, prescribe requirements in respect of the legal status of national regulatory authorities in the fields of energy and natural gas. Ukraine, as a full-fledged member of the Energy Community, as well as in line with the EU-Ukraine Association Agreement, shall enter into force laws and regulations necessary for the implementation of those requirements. In particular, Directive 2009/72/EC of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market in electricity and

[9] Zakon Ukrainy "Pro vnesennya zmin do deyakyh zakonodavchyh aktiv Ukrainy shchodo pryvedennya ih u vidpovidnist iz Konstytutsiyeyu Ukrainy" [On amendments to certain legal acts of Ukraine on putting them into accordance with the Constitution of Ukraine]. 2010. Ofitsiinyi visnyk Ukrainy, No 79.

[10] Ukaz Prezydenta Ukrainy "Pro optymizatsiyu systemy tsentralnyh organiv vykonavchoi vlady" [Decree of the President of Ukraine "On optimization of the system of bodies of executive power"] N 1085/2010 of 9 December 2010. 2010. Ofitsiinyi visnyk Ukrainy, No 94.

[11] Vashchenko Y., *Energy Regulator in Ukraine: Legal Aspects of the Independence in the Light of the EU Requirements* / Y. Vashchenko // Jurisprudence. – 2014. – Vol. 21 (1). – P. 185–203.

repealing Directive 2003/54/EC[12] and Directive 2009/73/EC of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC[13] stipulate requirements pertaining to the independence of national regulatory authorities from other state authorities during the exercise of their regulatory powers. The European Commission in the Interpretative Note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas explained the new requirements on the legal status of energy regulators prescribed by the Directives. In particular, the European Commission stated that in accordance with the national constitution the government can be authorized to determine the policy framework within which national regulatory authorities must operate, e.g. concerning security of supply, renewables or energy efficiency targets. However, general energy policy guidelines issued by the government must not encroach on the national regulatory authority's independence and autonomy.

In accordance with this Law (Article 1(part 1)), the NKREKP (hereinafter – the Regulator) is a permanent independent state collegial body. The Law (Article 5) guarantees the independence of the Regulator during the performance of its functions and powers from other bodies of power, public authorities, local self-government bodies, as well as their officials. The members of the Regulator and other public officials of the Regulator shall act independently. Any written or oral instructions, orders or mandates of a body of power, other state body, self-government body and their public officials related to the functions and powers performed by the members of the Regulator or its public officials shall be considered illegal influence. Interventions of bodies of power, self-government bodies and their public officials in the regulatory procedures in the fields of energy and communal services are prohibited.

A special procedure governing the structure of the Regulator is prescribed by the Law on the NKREKP. Thus, the Regulator consists of seven members including the head of the Regulator. Members of the Regulator are elected for terms of six years. In accordance with the Law (Article 8 (part 6)), early termination of the tenure of the members of the Regulator is a power of the President of Ukraine. The head of the Regulator is elected by the members of the Regulator by secret vote (Article 9 (part 1)).

Periodical rotation of the members of the Regulator shall be encouraged (Article 8 of the Law). It should be noticed that under the Law on the NKREKP (Section

[12] Directive 2009/72/EC of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC. [2009] Official Journal of the European Union, L 211/55.

[13] Directive 2009/73/EC of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC. [2009] Official Journal of the European Union, L 211/94.

"Final and transitional provisions") rotation of the head and the members of the Regulator who perform their duties by the day when the Law of the NKREKP has entered into the force (26 November 2016) shall be implemented by the President of Ukraine according to the following procedure: three members shall be removed from office not later than after 6 months from the day when the Law entered into force (before 27 May 2017); two members – within 12 months from the day when the Law entered into force; and two members within 18 months from the day when the Law entered into force. The rotation plan with a list of names shall be approved by the President of Ukraine, which took place by means of the Presidential Decree No 78/2017 of 23 March 2017[14]. It should be stressed that by this Decree the President of Ukraine merely approved the rotation plan. In order to remove a member of the Regulator from office in line with the rotation plan a separate Presidential Decree shall be approved. However, appointment of new members of the Regulator shall be conducted on the basis of an open competition organized and conducted by a competition commission. Such a competition commission consists of two persons nominated by the President of Ukraine, two persons selected by the Verkhovna Rada of Ukraine, and one person delegated by the Government of Ukraine upon a request of the Ministry for Energy and Coal Industry. A member (members) of the Regulator shall be appointed by a decree of the President of Ukraine from candidates selected by the competition commission. Under Article 8 of the Law on the NKREKP, in case of completion of the term of office of a member (members) of the Regulator, the competition commission shall call for applications within three months before the day of the completion of the term of office. As mentioned above, the first rotation shall be implemented before 27 May 2017. However, the competition commission has not been established yet.

Thus, the Law on the NKREKP regulates an appointment and dismissal procedure for the members of the Regulator that includes only one decision-maker – the President of Ukraine. Considering the EU legislative requirement of independence of the energy regulator it seems more reasonable to define more than one authority responsible for the appointment and dismissal of its members – for instance, the President of Ukraine and the Verkhovna Rada of Ukraine. A similar procedure is prescribed by the Constitution of Ukraine for the members of the Council of the National Bank of Ukraine.

As to the place of the Regulator in the system of public authorities, the following provisions of Ukrainian legislation should be considered. According to Article 92 (point 12 of part 1) of the Constitution of Ukraine, organization and activity

[14] Ukaz Prezydenta Ukrainy "Pro zatverdgennya planu rotatsii Golovy ta chleniv Nationalnoi komisii, shcho zdiisnyuye derganve regulyuvannya u sferah energetyky ta komunalnyh poslug" [Decree of the President of Ukraine "On approval of the Rotation Plan of the Head and the members of the National Energy and Utility Regulatory Commission"] No 78/2017 of 23 March 2017. 2017. Ofitsiynyi visnyk Prezydenta Ukrainy, No 8.

of bodies of executive power are defined exclusively by the laws of Ukraine. However, the Law on the NKREKP does not define the Regulator as a body of executive power. There are no permanent independent collegial bodies in the system of central bodies of executive power defined by the Law of Ukraine of 17 March 2011 on Central Bodies of Executive Power[15], nor in the scheme of direction and coordination of the activity of central bodies of executive power by the Cabinet of Ministers of Ukraine via certain members of the Cabinet of Ministers of Ukraine approved by the Decree of the Cabinet of Ministers of Ukraine of 10 September 2014 No 442[16]. The establishment procedure of the Regulator and its relations with other state authorities are different from the establishment procedure and managerial relations of bodies of executive power. Under Article 116 (point 9^{l}) of the Constitution of Ukraine, establishment, reorganization and liquidation of ministries and other central bodies of executive power in accordance with the law refer to the powers of the Cabinet of Ministers of Ukraine. In accordance with Article 116 (point 9) of the Constitution of Ukraine, the Government of Ukraine also directs and coordinates the work of the ministries and other bodies of executive power. Article 116 (point 9^{2}) prescribes that the Cabinet of Ministers of Ukraine appoints and dismisses, upon a request of the Prime Minister of Ukraine, the heads of central bodies of executive power who are not members of the Cabinet of Ministers of Ukraine.

Therefore, the provisions of the Law on the NKREKP, in particular those regarding the appointment procedure for the members of the Regulator, the guaranties of its independence, relations of the Regulator with the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine and other bodies of power defined in Article 6 of this Law testify to the intention of the legislator to define a special place for the Regulator in the system of state bodies. However, as mentioned above, these provisions of the Law on the NKREKP are not in line with the Constitution.

Another important issue is the legal framework for the activity of the Regulator in the light of recent legislative changes. In accordance with Article 2 (part 2) of the Law on the NKREKP, the Regulator performs regulatory functions under the provisions of this Law, the Laws of Ukraine on Natural Monopolies, on Electricity, on the Framework for the Functioning of the Electricity Market, on the Natural Gas Market, on Pipeline Transport, on the Combined Production of Heat and Electricity Energy (Cogeneration) and West Energy Potential Use, on State Regulation in the Field of Communal Services, on Heat Supply, on Drinking

[15] Zakon Ukrainy "Pro tsentralni organy vykonavchoi vlady" [Law of Ukraine "On Central Bodies of Executive Power"] No 3166-VI of 17 March 2011. 2011. Ofitsiinyi visnyk Ukrainy, No 27.

[16] Постанова Кабінету Міністрів України "Про оптимізацію системи центральних органів виконавчої влади" [Decree of the Cabinet of Ministers of Ukraine "On optimization of the system of central bodies of executive power"] No 442 of 10 September 2014. 2014. Uryadovyi Kuryer, No 169.

Water and Drinking Water Supply, as well as other legislative acts that regulate relations in certain fields. It should be considered that in accordance with Section IV of the Law on the NKREKP entitled "Final and Transitional Provisions" the provisions of Section III of the Law of Ukraine on Natural Monopolies[17] that regulate the legal status of national natural monopolies regulatory commissions do not cover the NKREKP. Section III includes Article 11 that, in particular, prescribes the powers of the President of Ukraine in respect of the establishment and liquidation of state collegial bodies, appointment and dismissal of their heads and members, legal regulation of the activity of such bodies. Thus, the provisions of the Law of Ukraine on Natural Monopolies regarding the establishment, liquidation and legal regulation of the activity of national natural monopolies regulatory commissions by the President of Ukraine do not apply to national natural monopolies regulatory commissions to the extent that the Law on the NKREKP has entered into force. Under the Regulation on the Development and Submission Procedure of the Acts of the President of Ukraine approved by Decree of the President of Ukraine of 15 December 2006 No 970/2006[18], decisions of the President of Ukraine, approved on the basis and for the implementation of the Constitution and laws of Ukraine, are valid until repealed by a new presidential decree. Decrees of the President of Ukraine of 27 August 2014 on the National Energy and Utilities Regulatory Commission No 694/2014[19], and of 10 September 2014 on the Approval of the Regulation on the National Energy and Utilities Regulatory Commission No 715/2014[20] have not been cancelled by a decree of the President of Ukraine. However, considering that a legal act of supreme force – the Law on the NKREKP – has entered into force, the Presidential Decrees on the NKREKP mentioned above should not be considered as part of the legal framework for the Regulator's activity.

One of the most important issues with regard to the legal status of the Regulator is the powers of the President of Ukraine and the Verkhovna Rada of Ukraine concerning this body. It should be noticed that the Constitution of Ukraine does

[17] Zakon Ukrainy "Pro pyrodni monopolii" [Law of Ukraine "On Natural Monopolies"] No 1682-III of 20 April 2000. 2000. Vidomosti Verkhovnoi Rady Ukrainy, No 30.

[18] Ukaz Prezydenta Ukrainy "Pro Pologennya pro poryadok pidgotovky ta vnesennya proektiv activ Prezydenta Ukrainy" [Decree of the President of Ukraine "On the Regulation on the Development and Submission Procedure of the Acts of the President of Ukraine"] No 970/2006 of 15 November 2006. 2006. Uryadovyi Kuryer, No 220.

[19] Ukaz Prezydenta Ukrainy "Pro Natsionalnu komisiyu, shcho zdiysnyuye dergavne reguluvannya u sferah energetyky ta komunalnyh poslug" [Decree of the President of Ukraine of 27 August 2014 "On National Energy and Communal Services Regulatory Commission"] No 694/2014 of 27 August 2014. 2014. Ofitsiynyi Visnyk Ukrainy, No 71.

[20] Ukaz Prezydenta Ukrainy "Pro zatverdgennya Pologennya pro Natsionalnu Komisiyu, shcho zdiysnyuye dergavne reguluvannya u sferah energetyky ta komunalnyh poslug" [Decree of the President of Ukraine of 10 September 2014 on the Approval of the Regulation on National Energy and Utilities Regulatory Commission, No. 715/2014]. 2014. Ofitsiynyi Visnyk Ukrainy, No 74.

not define such a type of state bodies as permanent independent state collegial bodies. Also, the Constitution does not stipulate the powers of the President of Ukraine and the Verkhovna Rada of Ukraine regarding such bodies. At the same time, the Constitution of Ukraine provides an exhaustive list of the powers of the President of Ukraine. The Constitutional Court of Ukraine, in its judgment on a constitutional complaint brought by 60 People's Deputies of Ukraine regarding the constitutionality of certain provisions of Article 11 of the Law of Ukraine of 8 July 2008 on Natural Monopolies (the national natural monopolies regulatory commissions' case)[21], stated that, in accordance with the provisions of paragraph 31 of the first part of Article 106 of the Constitution of Ukraine, the powers of the President of Ukraine shall be defined only by the Constitution. In accordance with Article 85 of the Constitution of Ukraine, the Verkhovna Rada of Ukraine performs only the powers defined in the document.

It should be stressed that two cases related to the constitutionality of some legislative acts on Ukraine regarding the status of the NKREKP are currently under consideration by the Constitutional Court of Ukraine. The first case was opened on 23 March 2017 upon a constitutional submission of 46 People's Deputies and is devoted to the constitutionality of certain provisions of the Law on the NKREKP; in particular, regarding the definition of the Regulator as a permanent independent collegial state body, its independence and establishment procedure. The second case was opened upon a constitutional submission of the Supreme Court of Ukraine and is related, in particular, to the legal status of the NKREKP defined by the legislation that had been in force prior to the Law on the NKREKP[22]. The cases are pending. Different arguments appear in those constitutional submissions, however, both of them are connected with the problem of the constitutional legal status of such a special state authority.

In sum, the approval of the Law of Ukraine on the National Energy and Communal Services Regulatory Commission should be considered an important step towards the adaptation of Ukrainian energy legislation to EU energy standards. However, the legal framework for the Energy Regulator needs to be improved in order to fulfil, on the one hand, the requirements of EU legislation, in particular those regarding the independence of the energy regulator, and, on the other hand, the provisions of the Constitution of Ukraine. Currently, the Constitution of Ukraine does not define such a type of state authorities as permanent inde-

[21] Rishennya Konstytutsiynogo Sudu Ukrainy u spravi za konstytutsiynym podannyam 60 narodnyh deputativ shchodo vidpovidnosti Konstytutsii Ukrainy (konstytutsiynosti) pologen' abzatsiv pershogo, drugogo chastyny pershoi, chastyny drugoi statti 11 Zakonu Ukrainy "Pro pryrodni monopolii" (sprava pro natsionalni komisii reguluvannya pryrodnyh monopoliy) [Decision of the Constitutional Court in the case on national natural monopolies regulatory commissions] No 14- pп/2008 of 8 July 2008. 2008. Ofitsiynyi Visnyk Ukrainy, No 52.

[22] Na rozglyadi v Konstytutsiynomu Sudi Ukrainy. Konstytutsiyni podannya [Under consideration of the Constitutional Court of Ukraine. Constitutional Submissions], http://ccu.gov.ua:8080/uk/publish/article/330210 (accessed 10 May 2017).

pendent state collegial bodies (as prescribed by the Law on the NKREKP). Also, the Constitution provides an exhaustive list of powers of the President and the Verkhovna Rada and it contains no mention of any powers related to permanent independent state collegial bodies. Therefore, the Law of Ukraine on the National Energy and Communal Services Regulatory Commission cannot solve the problem of the constitutional legal status of the regulator. Thus, the Constitution's provisions specifying the powers of the President of Ukraine and the Verkhovna Rada of Ukraine as against permanent independent regulatory authorities (e.g., pertaining to the establishment, appointment and dismissal of members, accountability) shall be amended in order to bolster the principle of independence of national regulatory authorities in the energy sector as prescribed by EU legislation.

THE LEGAL STATUS OF THE ENERGY REGULATOR IN UKRAINE IN THE CONTEXT OF RECENT LEGISLATIVE CHANGES AND EUROPEAN INTEGRATION

Summary

The energy sector is a strategic industry of each state. Energy industry is one of the most important regulated fields at the EU level and a crucial direction of cooperation between the EU and Ukraine. EU legislation, primarily directives and regulations from the Third Energy Package, prescribe requirements in respect of the legal status of national regulatory authorities in the fields of energy and natural gas. Ukraine, as a full-fledged member of the Energy Community, as well as in line with the EU–Ukraine Association Agreement, shall institute laws and regulations necessary for the implementation of those requirements. In particular, EU legislation stipulates requirements with regard to the independence of national regulatory authorities from other state authorities during the exercise of their regulatory powers. In recent years, Ukrainian public authorities have undertaken steps to develop and approve a legal framework in order to implement the requirements of EU energy legislation, in particular those related to the legal status of national regulatory authorities. The approval of the Law of Ukraine on the National Energy and Communal Services Regulatory Commission in 2016 was one of the critical achievements in this direction. However, the new Law has not solved the problem of the constitutional legal status of the energy regulator. The Constitution of Ukraine's provisions specifying the powers of the President of Ukraine and the Verkhovna Rada of Ukraine as against permanent independent regulatory authorities (e.g., pertaining to the establishment, appointment and dismissal of members, accountability) shall be amended in order to bolster the principle of independence of national regulatory authorities in the energy sector as prescribed by EU legislation.

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