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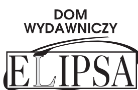

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OFF-LABEL USE OF MEDICINAL PRODUCTS

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ANDRZEJ SIWIEC*

1. INTRODUCTION

Legal regulations concerning the use of medicinal products are an extremely significant issue for at least three groups of entities that are involved in a broadly understood process of providing medical services: patients, physicians and pharmaceutical drugs producers. A mistake made in the real legal norms regulating this field may have far-reaching consequences for the appropriate exercise of rights and obligations of each of those entities; in particular, it may have a considerable impact on the appropriateness of the process of treatment. Such a risk occurs especially in case of untypical situations and these include the use of medicinal products for an indication that is not contained in the Summary of Product Characteristics (SPC), i.e. off-label.

The article aims to present the legal state in the field of admissibility of off-label use of medicinal products for indications not contained in the SPC. In accordance with currently binding regulations, the issue raises many doubts and there is no uniform opinion on the requirements for lawfulness of the use or prescription of off-label products. In my opinion, such activities are legal, if general rules of healthcare services provision are complied with.

The first part of the article explains a few issues constituting a basis for further discussion of the possibility of administering/prescribing medicinal products not contained in the SPC. Opinions on the issue expressed so far are presented in the next section. In the third part, I present my view on the issue and try to justify it.

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2. EXPLANATION OF BASIC ISSUES

The first concept that requires explanation is "medicinal product". It is defined in Article 2(32) of the Act of 6 September 2001: Pharmaceutical law.[1] In accordance with its content, a "medicinal product" means a substance or a mixture of substances advertised as one having the characteristics that allow preventing and treating illnesses that people or animals suffer from or administered in order to diagnose or to restore, improve or modify physiological functions of an organism by means of pharmacological, immunological or metabolic activities. The definition raises a series of doubts and has been subject to numerous judgements, including ones issued by the European Court of Justice.[2] However, an analysis of them would go beyond the scope of this article and is not necessary to understand the subject matter. It is also worth pointing out that in accordance with Article 26(1) of the Act of 6 September 2001: Provisions introducing Act: Pharmaceutical law, Act on medical products and Act on the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products,[3] in the event pharmaceutical drugs or medicines are referred to in the binding regulations, they should be understood as medicinal products laid down in Pharmaceutical law. A similar provision is found in Article 2(10) of the Act of 12 May 2011 on reimbursement of medicines, foods for special medical purposes and medical devices,[4] in accordance with which the concept of "medicine" used in statute means a medicinal product as defined in the Pharmaceutical law. In accordance with the definition laid down in Pharmaceutical law, the terms "medicinal product" and "medicine" are used as synonyms in the article.

Another concept that needs explanation is the "Summary of Product Characteristics". The term is also used in Pharmaceutical law. In accordance with Article 10(2.11), the Summary of Product Characteristics is an element of documents submitted in the process of applying for authorisation for marketing a medicinal product. Article 11(1) lays down the data that must be contained in the document. Giving up an analysis of details, one should point out that this is any thorough information about a medicinal product, including its characteristic features that make it possible to determine in what situations and in what way it should be used and what consequences it may have. The data are determined based on clinical trials.[5] It should be mentioned that it is not information about any possible applications of a given medicinal product but only those that are listed in an application for marketing authorisation. An applicant may decide not to apply for authorisation for marketing a given medicinal product for all possible indications because of various reasons (unprofitability of a given therapy, marketing medicines for particular illnesses, a lack of sufficient clinical data at the moment of an application submission, reimbursement of medicines only for some indications).

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[1] Uniform text, Journal of Laws [Dz.U.] of 2017, item 2211; hereinafter: Pharmaceutical law.

[2] See, M. Krekora, M. Świerczyński, E. Traple, *Prawo Farmaceutyczne*, Warsaw 2012, p. 39 ff.

[3] Journal of Laws [Dz.U.] of 2001 No. 126, item 1382, as amended.

[4] Uniform text, Journal of Laws [Dz.U.] of 2017, item 1844.

[5] W. Masełbas, A. Członkowski, *Stosowanie produktów leczniczych poza wskazaniami rejestracyjnymi*, Przewodnik lekarza No. 3, 2008, p. 82.

In general, every medicine authorised for marketing in the territory of the Republic of Poland[6] must have officially approved characteristics, including indications registered for its use.

The off-label use of medicinal products may be defined in at least two ways: a narrow and a broad one. As it was indicated in the Introduction, it refers to the use of medicines for indications that are not registered. It is the narrow meaning of the term off-label and this is how it will be used in the article. However, it should be mentioned that there is a broad use of the term, closer to the English meaning, which also covers the use of a medicinal product that is not in compliance with the provisions of the SPC other than just indications, e.g. prescription regardless of special warnings, a different method of administration or a different dosage.[7]

Another issue that should be explained is connected with the rules physicians should follow in their practice. In accordance with Article 2 of the Act of 5 December 1996 on the profession of a physician and a dentist,[8] the practice of a physician's profession consists in the provision of healthcare services, in particular: examining a patient's health, diagnosing illnesses and preventing them, treatment and rehabilitation of patients, providing medical advice and issuing medical opinions and certificates. The term "healthcare services" is defined in the Act of 15 April 2011 on medical activities.[9] Article 2(1.10) of the Act defines healthcare services as activities serving to maintain, rescue, restore and improve health and other medical activities resulting from the process of treatment or other provisions laying down the rules for their performance. It is indicated in jurisprudence that it is an activity concerning a person's health and undertaken with the use of methods and techniques recognised in medical science as those serving to achieve specified medical aims.[10] Undoubtedly, the concept covers the administration or prescription of medicinal products aimed at improving or maintaining (not worsening) a patient's state of health. Thus, prescribing medicines should be treated as one of the aspects of a physician's job.[11] By the way, it should be highlighted that the act of prescribing medicines does not constitute the substantive provision of healthcare services. The substantive provision of healthcare services includes medicinal products as material things (in accordance with civil law) that most often a healthcare entity provides to a patient and not the process of a therapeutic decision-making concerning their use.[12] However, for the purpose of this article, the latter is most important.

Article 4 of the Act on the profession of a physician and a dentist imposes a particularly important duty on a physician. Pursuant to it, a physician is obliged to

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[6] I omit the issues concerning the way in which a medicinal product is authorised for marketing and the use of unauthorised products, which are of minor importance for the discussion in this article.

[7] O. Luty, *Zaniechanie zlecenia produktu leczniczego poza zarejestrowanym wskazaniem a odpowiedzialność cywilna lekarza* – part I, Prawo i Medycyna No. 1, 2014, p. 106.

[8] Uniform text, Journal of Laws [Dz.U.] of 2017, item 125 as amended.

[9] Uniform text, Journal of Laws [Dz.U.] of 2018, item 160.

[10] B. Janiszewska, *Pojęcie świadczenia zdrowotnego*, [in:] M. Safjan, L. Bosek (ed.), *System Prawa Medycznego,* Vol. 1, *Instytucje Prawa Medycznego*, 2018, p. 1064.

[11] Compare, *ibid*., p. 1035 ff.

[12] *Ibid*., p. 1060.

practice following the indications of the current medical knowledge, with the use of available methods and preventive, diagnostic and treatment measures, in compliance with the principles of professional ethics and due diligence. This means that every practicing physician is obliged to permanently broaden his/her knowledge and to study the current developments in the knowledge within the practice. Moreover, this knowledge must be used in the job practice.[13] Current medical knowledge means present standards adopted in the contemporary medical science. Being current means that this knowledge is subject to constant updating resulting from the progress in science.[14] It is not only the state of medical knowledge in Poland but the whole global scientific output available in publications (mainly medical books).[15] At present, the Evidence-Based Medicine is the doctrine that plays an essential role in determining the scope of current medical knowledge. In accordance with its principles, when taking therapeutic decisions, a physician follows reliable and up-to-date results of scientific research.[16] Generally, a randomised clinical trial is recognised as reliable research.[17] In order to get access to current results, physicians must read recognised medical journals. Thus, the obligation to practice following the indications of the current medical knowledge means a requirement to use the latest achievements of medical science as well as a ban on using obsolete methods or those recognised as erroneous.[18] As a result, a physician having the knowledge of new, better methods of treatment should use them in his/her practice. The obligation is limited by availability of methods and means. Thus, a physician shall not be obliged to use a method of treatment, even if it is recognised as a standard procedure, in the event a healthcare institution in which he provides services does not possess the medical equipment necessary to use the method. In such a situation, he should provide a service with the use of the best available methods. However, the norm is not only a limitation of the obligation to act following the indications of the current medical knowledge to the available methods but also (and probably mainly) an obligation to use all available methods and means of treatment. This means that, having a possibility of implementing a better medical procedure, a physician is obliged to use such an opportunity.

It is also necessary to draw attention to Article 45 of the Act on the profession of a physician and a dentist. It imposes an obligation on a physician to prescribe only medicines that are authorised for marketing in the territory of the Republic

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[13] L. Ogiegło, *Art. 4 Ustawy o zawodach lekarza i lekarza dentysty*, [in:] L. Ogiegło (ed.), *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz 2015*, 2nd edition, System Informacji Prawnej Legalis.

[14] D. Bach-Golecka et al., *Prawa Pacjenta*, [in:] M. Safjan, L. Bosek (ed.), *System Prawa Medycznego*, Vol. I, *Instytucje Prawa Medycznego*, 2018, p. 819.

[15] Obviously, a physician is not obliged to know all publications or research findings. However, it is important what sources he uses in order to solve medical problems he encounters in his medical practice. Compare, R. Jaeschke, D.J. Cook, G.H. Guyatt, *Evidence based medicine (EBM), czyli praktyka medyczna oparta na wiarygodnych i aktualnych publikacjach (POWAP). Wprowadzenie*, Medycyna Praktyczna, Special issue 1/1999, pp. 3–10.

[16] W. Masełbas, A. Członkowski, *Stosowanie produktów...*, p. 83.

[17] R. Jaeschke, D.J. Cook, G.H. Guyatt, *Evidence based...*, pp. 6–8.

[18] E. Zielińska, *Komentarz do art. 4 ustawy o zawodach lekarza i lekarza dentysty*, [in:] E. Zielińska (ed.), *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz*, LEX, 2014.

of Poland. Article 45(3) of the regulation allows the prescription of a medicine authorised for marketing in another country but only in exceptional, specially justified situations.

3. ARGUMENTS FOR LIMITATION OF ADMISSIBILITY OF OFF-LABEL USE OF MEDICINAL PRODUCTS

Both in the literature and in practice, various opinions are formulated concerning lawfulness of application of off-label medicinal products. There are voices that this activity is inadmissible, admissible under some conditions and those treating off--label administration of medicines as a physician's standard practice.

According to J. Zajdel, off-label prescription of medicines is not in compliance with the binding regulations.[19] This author recognises the data from the officially approved SPC as the only admissible indications to use a medicinal product. As a result, almost every application of a medicine in a different way exposes a physician to liability for infringing law. The legal risk a physician prescribing an off-label medicine faces and the importance of the decision approving the SPC are, in J. Zajdel's opinion, the main arguments against application of medicinal products in the way that is not contained in the registered indications. She says that such an activity may be legal, provided that the following conditions are met:

– all available medicinal products registered for the given indication have already been used in the treatment process;
– the applied therapy has been inefficient;
– the treatment results are insufficient.[20]

J. Zajdel recognises any other instance of off-label treatment as action in the circumstances of a medical experiment and in order to make such action legal, it is necessary to meet the requirements for such an experiment.

There is also an opinion in the literature that, in accordance with the regulations currently in force, off-label application of medicines should be recognised as either a medical experiment or medical service carrying an increased risk.[21] That results from the fact that such treatment is never confirmed by an adequate administrative decision as scientifically proved and authorised to be used. Therefore, the off-label prescription of medicines would be an action carrying a greater risk than in a standard medical procedure.

It should also be pointed out that there are opinions in the doctrine indicating the initial unlawfulness of off-label therapy and its later legalisation by the construct

[19] J. Zajdel, *Stosowanie produktów leczniczych „off-label" – eksperyment medyczny czy działanie zgodne z prawem?*, Gazeta Lekarska No. 12, 2010, p. 36.

[20] *Ibid*.

[21] See, T. Szafrański, A. Szafrańska, *Przechadzki po polu minowym – uwagi dotyczące stosowania leków niezgodnie z charakterystyką produktu leczniczego*, Postępy Psychiatrii i Neurologii No. 21(2), 2012, pp. 107–115.

of the state of necessity.[22] In such a case, human health or life is the interest protected by law, and the obligation to use a medical product in accordance with the SPC is the interest sacrificed. The obligation must result from the norms of Pharmaceutical law.[23]

W. Masełbas and A. Członkowski suggest assuming that a medicine may be applied in a way different than indicated in the SPC in two situations (apart from clinical trials and a medical experiment):

- if a given indication was mentioned in the SPC of another product containing the same active substance, or
- a given indication was confirmed in reliable clinical trials and described by a competent scientific society or in recognised literature.[24]

It should be noted that these are criteria for recognising a given therapy as part of current medical knowledge rather than an indication of a norm of legal admissibility of off-label product application.

4. ARGUMENTS FOR FULL LAWFULNESS OF OFF-LABEL THERAPY

Eventually, the last group of opinions, in general, recognises the off-label application of medicinal products as fully legal and equivalent to the on-label one from the legal point of view.[25] In my opinion, it is a right stand and, thus, the discussion to follow aims to support it and, at the same time, criticise other opinions.

The first issue on which I would like to focus is the nature of the administrative decision, which is the authorisation for marketing a medicine. In accordance with Article 3(1) Pharmaceutical law, medicines given this authorisation can be marketed. Article 3(3) stipulates that the President of the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products must be an authority competent to issue a decision concerning the matter. In accordance with Article 23(2) Pharmaceutical law, the approval of the SPC, i.e. an official confirmation of the data contained in it, is an element of this authorisation. As a result of the decision, a medicine can be marketed in the territory of the Republic of Poland. Article 65(1) of the Act stipulates that medicinal products marketing must follow the rules laid down in statute.

Pharmaceutical law does not define the concept of "marketing", however, the analysis of regulations makes it possible to assume that it refers to civil law transactions, in particular all forms of ownership transfer (also free of charge) and physical activities such as storing medicinal products.[26] Obviously, the term covers operations of pharmaceutical industry, wholesalers, importers and pharmacies. There are no doubts, however, that the definition does not cover a physician's

[22] J. Kanturski, *Leczenie off-label: eksperyment medyczny czy stan wyższej konieczności?*, Prokuratura i Prawo No. 10, 2012.

[23] *Ibid*.

[24] W. Masełbas, A. Członkowski, *Stosowanie produktów...*, p. 85.

[25] O. Luty, *Zaniechanie zlecenia...* .

[26] M. Krekora, M. Świerczyński, E. Traple, *Prawo Farmaceutyczne...*, p. 392.

activities consisting in the prescription of medicinal products because it is not part of production- and trade-related activity but part of a process of providing healthcare services.

The above-presented findings show that the authorisation for marketing medicinal products and all the regulations concerning it are not applicable to the process of treatment. They only determine the rules of production, storage and sale of medicines and are binding on entities involved in that activity.

One should mention Article 1 Pharmaceutical law determining the subject matter of the regulation. In accordance with the provision, the Act determines:

1) the rules and mode of authorisation for marketing medicinal products, including in particular requirements for quality, efficiency and safety of application;
2) conditions of medicinal products clinical trials;
3) conditions of medicinal products production;
4) requirements concerning medicinal products advertising;
5) conditions of medicinal products marketing;
6) requirements concerning pharmacies, wholesalers and out-of-pharmacy sale;
7) organisation and rules of functioning of the system of supervising and monitoring safe application of medicinal products;
8) tasks of the Pharmaceutical Inspection and its bodies' competences.

Therefore, the Act does not regulate the process of providing healthcare services, prescription of medicinal products or application of medicines.

As a result, there is a lack of whatsoever justification of the above-mentioned opinions about an obligation to apply medicines in accordance with the SPC seemingly laid down in Pharmaceutical law. The Act is not applicable to any stages of healthcare services provision, including in particular the prescription of medicinal products. Thus, J. Kanturski is wrong to draw a rule saying that a physician cannot be at variance with the indications in the SPC from Pharmaceutical law[27] because there is no (and should not be) such a rule in this legal act. The Act regulates other matters. Thus, J. Kanturski's considerations concerning the possibility of applying the above norm because of the state of necessity, i.e. the necessity of saving a patient's health or life with the use of off-label therapy, are groundless, because considering a possibility of avoiding a legal norm that does not exist and sacrificing an interest that does not exist is groundless.

Assigning the SPC a special power as an official authorisation for a given therapy or the confirmation of admissibility of the application of a medicine for given indications should also be critically assessed. Although the SPC is subject to approval in the course of authorisation for marketing a medicine, the President of the Office for Registration is not an authority responsible for defining standards of medical procedures. In accordance with Article 2 of the Act of 18 March 2011 on the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products,[28] the President of the Office is an authority competent in matters connected, inter alia, with authorisation for marketing medicinal products and clinical trials.

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[27] J. Kanturski, *Leczenie off-label...*, p. 96.
[28] Journal of Laws [Dz.U.] of 2011, No. 82, item 451, as amended.

His competences do not include any one concerning issuing recommendations for the application of medicines. The President's activities in the course of registration procedure concern marketing a medicine, not its application.

It should be highlighted that the authority acts, as a rule, on the motion filed by a party (Article 9(1) Pharmaceutical law). In accordance with Article 8 Pharmaceutical law, it verifies an application for authorisation for marketing a medicinal product (including the SPC) but only within the scope of the motion and does not examine all the possible applications of that medical product. Simply speaking, if an applicant wants a medicine X to be authorised for sale as a medicine for flu, the President of the Office examines whether the medicine X may be marketed as a medicine for flu. He does not check whether the medicine X might be also marketed as a medicine for tonsillitis, pneumonia, etc. One can even state that it is not examined whether it is admissible to prescribe a medicine for a given indication, but admissibility of marketing for a given indication. The assessment of admissibility of application for a given indication is a physician's task each time. Of course, this last distinction is in some sense theoretical, however, it is worth making in order to explain the real role of the President of the Office.

As a result, in my opinion, it should be recognised that the above-mentioned views assigning a decision of authorisation for marketing a special legal power to recognise a therapy with the use of a given medicine as legal are erroneous. It must be added that the decision of the President of the Office not only depends on the motion but also comes later than the findings of the latest clinical trials.[29] Therefore, assigning the SPC a binding power on the choice of therapy by a physician would often mean permission for non-application of the latest inventions in medical science. The decision of the President of the Office is binding on entities involved in marketing medicinal products, not on people involved in the provision of healthcare services. One should also highlight a general principle of administrative law in accordance with which a decision is binding on the parties to the proceedings (in this case, a responsible entity that is an applicant) and not on an indefinite group of addressees, because it constitutes adjudication in an individual case concerning the parties.[30] Therefore, there are no grounds for stating that the Act is binding on a physician, also because of the nature of this Act.

It is also worth pointing out that there are categories of products that can be marketed without the need to obtain any official authorisation. One can mention made-to-order medication prepared by a pharmacist based on a physician's prescription (Article 3(4) Pharmaceutical law). What clearly results from it is that the legislator assumes that medical professionals are competent to independently decide what substances their patients should be given.

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[29] O. Luty, *Zaniechanie zlecenia...*, p. 114.

[30] J. Borkowski, A. Krawczyk, *Postępowanie zwykłe. Przedmiot postępowania zwykłego*, [in:] R. Hauser (ed.), *System Prawa Administracyjnego*, Vol. 9, *Prawo procesowe administracyjne*, 2017, p. 188.

The Polish legislator, as a rule, does not lay down legal norms regulating standards of medical procedures.[31] Their determination is the competence of science and appropriate professional self-governments or scientific societies.[32] Thus, it seems there is no reason justifying the assignment a binding character to the decisions of the President of the Office in the process of treatment, especially as there is no legal norm in the system of law that would justify it.

The SPC most often constitutes a fragment of current medical knowledge because the data included in it are based on the findings of randomised clinical trials.[33] However, it is not a complete reflection of the current medical knowledge in relation to the specified substance, but only its fragment, in addition, one that has been up-to-date at least a few months before the date of issue of its authorisation decision.[34] Therefore, it is worth looking at the current medical knowledge as a certain collection, of which the SPC is just one (of course, very important) element. We will find research results, articles and course books, which do not have their reflection in the characteristics. A complete review of all these elements may constitute grounds for a physician's therapeutic decision. The determined content of the SPC cannot limit a physician's obligation to act following the current medical knowledge.

Also the suggestion that the necessity of using medicines in accordance with the SPC seemingly results from an attempt to limit physicians' liability cannot be recognised as right. Obviously, one must agree that a physician faces a lesser risk using a medicine on-label than using one off-label. In a situation like this (in case of a therapy failure caused by inappropriate working of a medicine), it would be much easier to prove a producer's liability based on the Civil Code regulations concerning liability for hazardous products and exclude a physician's liability.[35] However, there is a reservation that it concerns a situation in which, in the light of the current medical knowledge, both therapies offer identical opportunities to succeed as well as potential threats. If off-label therapy offers more therapeutic advantages, a physician should choose it. Otherwise, he may be liable for omission to use it.[36]

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[31] Some exception should be pointed out here, e.g. regulations concerning perinatal care, the nature of which raises controversies, and their content was amended many times. See, inter alia, D. Karkowska, *Nowe standardy opieki nad matką i dzieckiem w kontekście prawnej organizacji opieki okołoporodowej w Polsce*, Warsaw 2013.

[32] Stanowisko Nr 67/15/P-VII Prezydium Naczelnej Rady Lekarskiej z dnia 16 października 2015 r. w sprawie projektów rozporządzeń Ministra Zdrowia: 1) w sprawie standardów postępowania medycznego przy udzielaniu świadczeń zdrowotnych z zakresu opieki profilaktycznej nad dziećmi i młodzieżą, 2) w sprawie standardów postępowania medycznego w dziedzinie patomorfologii. Compare, K. Kordus, R. Śpiewak, *Lekarz wobec ordynacji „off-label"*, Przegląd Lekarski No. 1, 2015, pp. 40–41.

[33] W. Masełbas, A. Członkowski, *Stosowanie produktów...*, p. 82.

[34] O. Luty, *Zaniechanie zlecenia...*, p. 116.

[35] O. Luty, *Zaniechanie zlecenia produktu leczniczego poza zarejestrowanym wskazaniem a odpowiedzialność cywilna lekarza* – part II, *Obowiązek zlecenia leku off-label i konsekwencje jego niewykonania*, Prawo i Medycyna No. 2, 2014, p. 138.

[36] *Ibid*.

Also, it cannot be assumed that off-label application of a medicine always excludes the liability of its producer or a responsible entity. A medicine remains a definite chemical substance with specific characteristics. Thus, if, in accordance with the current medical knowledge, such a substance works in a certain way, even if it is not contained in the SPC, a producer is liable for its failure to work this way, provided that it results from the product characteristics.

It is worth drawing attention to Article 35a(4) Pharmaceutical law, which stipulates: "A responsible entity, a producer, an entity authorised for wholesale or retail marketing, a physician or other persons authorised to prescribe or provide a medicinal product in accordance with other regulations are not subject to civil or disciplinary liability for the effects of a medical product administration other than medical indications laid down in the authorisation or for the effects of the application of a medicinal product without such an authorisation if such application is connected with authorisation for marketing a medicinal product for a limited period determined by a competent minister of health in accordance with Article 4(8)" (Article 4(8) is applicable in case of natural disasters). Thus, if in case of application of a medicine for not registered indications required in accordance with the decision of the Minister of Health, the statutory provision clearly excludes liability of the entities listed above, it can *a contrario* lead to the conclusion that in other situations the entities can be made liable.

It must be remembered that a producer or a responsible entity has liability for a medicinal product and a physician for the process of treatment. At the same time, physicians should not forget that they have tools that enable them to use adequate legal protection, also in case of application of medicines for not registered indications. It includes obtaining a patient's written consent for a given therapy after the provision of adequate information about it. There are no obstacles to informing a patient that a medicine will be used off-label (of course, the term must be explained in a proper way) and presenting scientific arguments for the choice. In case of a lack of adequate data in the SPC, it is worth finding additional documented grounds for such a therapeutic decision by appropriately justifying it and attaching (if possible) scientific articles or research findings. Of course, first of all the on-label treatment is fully understandable and approved of, provided that it has at least the same value in a given clinical condition as the off-label one.

There is no doubt that off-label prescription of a medicine often matches the conditions of a medical experiment. However, under no circumstances, can one assume this in advance. It depends on the fulfilment of statutory requirements laid down in Article 21 of the Act on the profession of a physician and a dentist. Thus, a therapy should have the features of a new and only partly tried diagnostic, medicinal or therapeutic method. The prescription of a medicine that is not for registered indications, which is confirmed by numerous clinical trials and sufficiently described in medical literature, cannot be recognised as such. A physician choosing such a treatment does not act as an experimenter but has sufficient knowledge that lets him choose that therapeutic method. Thus, if the off-label treatment can be recognised as part of current medical knowledge, it certainly cannot be treated as a medical experiment.

In addition, one can point out that in some situations the off-label therapy may be subject to reimbursement. Therefore, if the legislator admits funding of this type of treatment from the state budget, it is hard to recognise it as banned at the same time. In accordance with Article 40 of the Act on reimbursement of medicines, the Minister of Health may, if it is necessary to save patients' life and health, and there is a lack of other procedures to be used and financed from public funds, issue a decision to reimburse for a medicine used for indications other than laid down in the SPC. It must be remembered, however, that it is an exception that can take place under certain conditions and is only applicable to healthcare services funding. Thus, one cannot draw too far-reaching conclusions based on that. However, together with the above-presented arguments, it supports full admissibility of off-label prescription of medicines following the same rules as the on-label one.

5. CONCLUSIONS

The arguments for inadmissibility of prescribing medicines for non-registered indications presented in the article, in my opinion, have no grounds in the legal regulations in force. One cannot also say that clinical practice or a patient's interest support this stand because it would limit a patient's access to some therapies. If we take into consideration the arguments I presented, we must draw a conclusion that off-label application of medicines is admissible and should follow the same rules as the prescription of medicines in accordance with the SPC. Each case should be individually analysed by a physician and a decision made after taking a patient's interest into consideration. The directive to act in compliance with the indications of the current medical knowledge cannot be limited in a way that is different from clearly expressed legal norms, which does not take place in this case. Thus, a physician should take decision based on it and not on administrative acts concerning the registration of medicinal products.

BIBLIOGRAPHY

Hauser R. (ed.), *System Prawa Administracyjnego*, Vol. 9, *Prawo procesowe administracyjne*, 2017.

Jaeschke R., Cook D.J., Guyatt G.H., *Evidence based medicine (EBM), czyli praktyka medyczna oparta na wiarygodnych i aktualnych publikacjach (POWAP). Wprowadzenie*, Medycyna Praktyczna, special issue 1/1999.

Kanturski J., *Leczenie off-label: eksperyment medyczny czy stan wyższej konieczności?*, Prokuratura i Prawo No. 10, 2012.

Karkowska D., *Nowe standardy opieki nad matką i dzieckiem w kontekście prawnej organizacji opieki okołoporodowej w Polsce*, Warsaw 2013.

Kordus K., Śpiewak R., *Lekarz wobec ordynacji „off-label"*, Przegląd Lekarski No. 1, 2015.

Krekora M., Świerczyński M., Traple E., *Prawo Farmaceutyczne*, Warsaw 2012.

Luty O., *Zaniechanie zlecenia produktu leczniczego poza zarejestrowanym wskazaniem a odpowiedzialność cywilna lekarza* – part I, Prawo i Medycyna No. 1, 2014.

Luty O., *Zaniechanie zlecenia produktu leczniczego poza zarejestrowanym wskazaniem a odpowiedzialność cywilna lekarza* – part II, *Obowiązek zlecenia leku off-label i konsekwencje jego niewykonania*, Prawo i Medycyna No. 2, 2014.

Masełbas W., Członkowski A., *Stosowanie produktów leczniczych poza wskazaniami rejestracyjnymi*, Przewodnik lekarza No. 3, 2008.

Ogiegło L. (ed.), *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz 2015*, 2nd edition, System Informacji Prawnej Legalis.

Safjan M., Bosek L. (ed.), *System Prawa Medycznego*, Vol. 1, *Instytucje Prawa Medycznego*, 2018.

Stanowisko Nr 67/15/P-VII Prezydium Naczelnej Rady Lekarskiej z dnia 16 października 2015 r. w sprawie projektów rozporządzeń Ministra Zdrowia: 1) w sprawie standardów postępowania medycznego przy udzielaniu świadczeń zdrowotnych z zakresu opieki profilaktycznej nad dziećmi i młodzieżą, 2) w sprawie standardów postępowania medycznego w dziedzinie patomorfologii.

Szafrański T., Szafrańska A., *Przechadzki po polu minowym – uwagi dotyczące stosowania leków niezgodnie z charakterystyką produktu leczniczego*, Postępy Psychiatrii i Neurologii No. 21(2), 2012.

Zajdel J., *Stosowanie produktów leczniczych „off-label" – eksperyment medyczny czy działanie zgodne z prawem?*, Gazeta Lekarska No. 12, 2010.

Zielińska E. (ed.), *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz*, LEX, 2014.

Legal regulations

Ustawa z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentysty [Act of 5 December 1996 on the profession of a physician and a dentist], uniform text, Journal of Laws [Dz.U.] of 2017, item 125, as amended.

Ustawa z dnia 6 września 2001 r. Przepisy wprowadzające ustawę – Prawo farmaceutyczne, ustawę o wyrobach medycznych oraz ustawę o Urzędzie Rejestracji Produktów Leczniczych, Wyrobów Medycznych i Produktów Biobójczych [Act of 6 September 2001: Provisions introducing Act: Pharmaceutical law, Act on medical products and Act on the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products], Journal of Laws [Dz.U.] of 2001, No. 126, item 1382, as amended.

Ustawa z dnia 6 września 2001 r. – Prawo farmaceutyczne [Act of 6 September 2001: Pharmaceutical law], uniform text, Journal of Laws [Dz.U.] of 2017, item 2211.

Ustawa z dnia 18 marca 2011 r. o Urzędzie Rejestracji Produktów Leczniczych, Wyrobów Medycznych i Produktów Biobójczych [Act of 18 March 2011 on the Office for Registration of Medicinal Products, Medical Devices and Biocidal Products], Journal of Laws [Dz.U.] of 2011, No. 82, item 451, as amended.

Ustawa z dnia 15 kwietnia 2011 r. o działalności leczniczej [Act of 15 April 2011 on medical activities], uniform text, Journal of Laws [Dz.U.] of 2018, item 160.

Ustawa z dnia 12 maja 2011 r. o refundacji leków, środków spożywczych specjalnego przeznaczenia żywieniowego oraz wyrobów medycznych [Act of 12 May 2011 on reimbursement of medicines, foods for special medical purposes and medical devices], Uniform text, Journal of Laws [Dz.U.] of 2017, item 1844.

OFF-LABEL USE OF MEDICINAL PRODUCTS

Summary

The aim of the article is to present the Polish regulations concerning off-label application of medicinal products as well as a critical review of opinions of the doctrine on this matter. The author analyses and makes comments on the most important arguments raised in the discussion and makes conclusions that the off-label application of medicines is originally lawful. His justification for the presented opinions is based on the literature and arguments offered for the first time.

Keywords: off-label, application of medicinal products for non-registered indications, medical law

STOSOWANIE PRODUKTÓW LECZNICZYCH *OFF-LABEL*

Streszczenie

Artykuł ma na celu ukazanie polskich regulacji prawnych dotyczących problematyki stosowania produktów leczniczych poza zarejestrowanymi wskazaniami (*off-label*), jak również krytyczny przegląd poglądów doktryny na ten temat. Autor analizuje i komentuje najważniejsze argumenty podnoszone w dyskusji, a następnie wyprowadza wnioski o pierwotnej legalności stosowania leków *off-label*. Uzasadnia to twierdzeniami zarówno już podnoszonymi w literaturze, jak i wskazanymi po raz pierwszy.

Słowa kluczowe: *off-label*, stosowanie produktu leczniczego poza zarejestrowanymi wskazaniami, prawo medyczne

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CONTENT OF A TOURIST SERVICES CONTRACT IN THE LIGHT OF AMENDMENTS TO THE REGULATIONS ON TOURIST PACKAGES

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1. INTRODUCTION

It is unambiguously emphasised in jurisprudence that doing business professionally is a reason for increased community, including customers' one, expectations of professional entities' knowledge, skills, diligence, forethought and ability to predict. Thus, more can be required from those professional entities, in the discussed case tourism organisers and intermediaries. This is justified because they have specific competence in the field of tourism organisation. However, as P. Kaflik indicates, one cannot expect "all the participants of the professional business to have the same ability to assess the risk occurring in every branch".[1] Assessing activities undertaken by professional entities, it is necessary to choose (specify) adequate measures of diligence, which should differ depending on the branch of business. A tourism organiser's obligation to take care of tourist package participants is an inseparable element of tourist services contracts (i.e. contracts to provide tourist packages, trips or excursions) and also a factor differentiating it from other types or categories of contracts.[2] This obligation constitutes a basic measure of assessment of activities

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[1] P. Kaflik, *Glosa do wyroku s. apel. z dnia 1 kwietnia 2015 r., I ACa 1431/14*, Glosa No. 2, 2016, pp. 46–50 [accessed at Lex Omega].

[2] P. Cybula points out: "It is proposed in the literature to recognise the provision of services in a precisely defined time in the future, equivalence of the services of the parties to the contract, integrity and complexity of services, **a travel organiser's obligation to ensure care of participants** and an obligation of the participants' cooperation in order to perform the programme of a journey as characteristic elements shaping the nature of the legal relation resulting from the discussed contract the elimination or deformation of which should be excluded" (P. Cybula, *Usługi turystyczne. Komentarz*, Warsaw 2012, p. 163 [accessed at Lex Omega]). Thus, the above are often recognised as rudimentary elements of a tourist services contract. In comparison, W. Kurek concludes that this concerns the following elements: (1) the subjective layout of a contract,

undertaken by professional entities. The term "tasks" may be intuitively associated with an obligation that occurs only during a tourist package, when as a rule it is fulfilled by persons providing services (e.g. various contractors, a tour pilot, a tour guide or a resident). However, the conclusion should be recognised as erroneous, which is confirmed in the legal norms laid down in the provisions concerning tourist packages. In fact, its implementation starts from the protection of consumer trust treated both as a social value and an economic one. The protection of the weaker party to a contract, a consumer, as a rule consists in the protection of trust, which makes the legislator undertake steps to create regulations, i.e. mechanisms facilitating proper functioning of professional entities, e.g. in the field of contract law (contract conclusion and implementation), so that consumers are certain of the specified course of events (fulfilment of the obligation). Z. Radwański noticed that customers must be protected against dangers resulting from the trust that is typical of them and is demonstrated in their market unawareness and a lack of sufficient knowledge of phenomena taking place in the economy.[3]

Information has the basic significance for "(…) appropriate and conscious development of the parties' rights and obligations and satisfactory fulfilment of a concluded contract",[4] which has a positive impact on the process of law application (mainly the law of obligations) and indirectly also on business transactions. It is also worth mentioning that consumer regimes have a specific feature, where information is important not only at the pre-contract stage but also in the course of contract conclusion and thereafter. Appropriate fulfilment of information duties is an expression of taking care of a tourist package participant (alternatively, potential participants to whom a tourist package offer is addressed), and thus of protecting their trust. Obviously, a consumers' right to information is developed already at the constitutional regime level but its implementation is undoubtedly guaranteed in the civil law norms, which impose certain strict obligations on the professional entities. Following P. Mikłaszewicz, it is necessary to state that: "A consumer is ensured access to information by the instruments of the general part of civil law (the principles of interpretation of a declaration of will, basic legal mechanisms of contract conclusion, defects of declarations of will), certain specific solutions adopted for transactions with the participation of consumers (control over abusiveness of clauses not agreed upon individually, the construction of withdrawal from a contract in case of distance contracts concluded away from the provider's office), detailed information duties established in connection with specific named contracts and other more general mechanisms such as general requirements concerning the method of an obligation

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(2) the complex nature of services, (3) fixed fee for services, (4) **provision of care for a tourist package participant** (see, W. Kurek (ed.), *Turystyka*, Warsaw 2007; compare, J. Gospodarek, *Prawo w turystyce i rekreacji*, Warsaw 2007, p. 222 ff).

[3] Z. Radwański, *Kodeks cywilny wymaga unowocześnienia*, Kancelaria No. 7–8, 2010, p. 18; for an interesting discussion of trust as a guarantee of performance of obligations, see M. Grochowski, *Venire contra factum proprium a zaufanie i „słabość sytuacyjna"*, [in:] M. Boratyńska (ed.), *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana Profesorowi Adamowi Zielińskiemu*, Warsaw 2016 [accessed at Lex Omega].

[4] P. Mikłaszewicz, *Obowiązki informacyjne w umowach z udziałem konsumentów na tle prawa Unii Europejskiej,* Warsaw 2008, p. 15 [accessed at Lex Omega].

fulfilment or doctrinal constructions of contractual loyalty (honesty) obligation. A consumer's right to information in the sphere of contractual relationships is implemented through the application of all the above-mentioned mechanisms, however, each of them acts in a different way and in a different 'field'".[5] Thus, the issue of what type of information a tourist services consumer is entitled to and how this right is exercised is essential. The obligation to thoroughly and honestly inform a party to a contract is a general (fundamental) feature of the contract law and results from an obligation to maintain loyalty and professionalism at all stages of the legal relationship.

In principle, one can distinguish the following categories of professional entities' information duties in the tourist services contract regime:

– pre-contractual information, i.e. information provided before a tourist services contract is concluded;
– **contractual information, i.e. information included in the contract**;[6]
– information provided before a journey starts.[7]

The article describes thoroughly the issue of contractual information (information included in a contract) because it is purposeful to indicate that professional entities communicate with customers also via the content of a contract, where basic information about tourist services provided is included, and thus customers should pay special attention to the analysis of its content. It is obvious that the lack of equality between professional entities and customers on any service market reflects its defectiveness, and thus results in far-reaching competition disturbances. By the way, these drawbacks often depend on internal features of a given market.[8] Thus, a consumer's position is antagonistic to an entrepreneur's (this is how a consumer's position is interpreted in economics) and is at the end of the economic chain (end recipient of goods and services provided by professional entities).[9]

This is why, the article first of all indicates the most important features of the tourist market (resulting from the specificity of tourist products) and only then the issues concerning the content of a contract are discussed in detail.

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[5] *Ibid.*, pp. 15–16.

[6] It is indicated that the regimes of consumer contracts not only require that they have an appropriate form (recording of the content) but also their content must include some strictly defined information (inter alia about the contract performance from the point of view of a consumer's needs; see, B. Gnela, *Umowa konsumencka w polskim prawie cywilnym i prywatnym międzynarodowym*, Warsaw 2013).

[7] It is pointed out here that a different classification of professional entities' information obligations is made in the literature. M. Sekuła-Leleno divided them into three categories: (1) an organiser's obligations before a contract conclusion; (2) an organiser's obligations resulting from the provisions of the contract; (3) an organiser's obligations before the start of a tourist package (see, M. Sekuła-Leleno, *Odpowiedzialność za szkodę niemajątkową wyrządzoną niewykonaniem umowy o imprezę turystyczną*, Warsaw 2014, p. 102 ff).

[8] J. Bazylińska, *Ochrona zbiorowych interesów konsumentów w prawie Unii Europejskiej i wybranych porządkach prawnych państw członkowskich,* Toruń 2012, p. 218.

[9] E. Łętowska, *Europejskie prawo umów konsumenckich*, Warsaw 2004, p. 45 ff.

2. TOURIST PRODUCT AS A CONSTITUENT OF A CONTRACT

The content of a tourist services contract is one of the most important elements constituting the quality of the contract on the market of tourist services. Due to the fact that tourism is a cross-border phenomenon, the above-mentioned issues are reflected in abundant European law, especially in the field of consumer protection.

Basically, it can be assumed that tourist packages, in some sense, may be classified as consumer goods.[10] However, these goods have their specific characteristic features. In accordance with the new directive on the tourist market, i.e. Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC,[11] the term "tourist package" was in general extended (Article 3(2)). Looking at the definition from a broader perspective, it should be emphasised that a tourist package is a type of tourist service (a combination of elements, including goods and services as well as their image, which are purchased by tourists in order to satisfy needs connected with tourism[12]). Its obligatory elements and features must not only be developed by the provisions of law but they also should depend on inseparable features of a tourist product. Namely, unlike in case of other consumer goods, one can distinguish immanent as well as most important features of a tourist product, i.e. its service nature, illusiveness, unity of time and place of provision and consumption, inability of storage, immovability, complexity, comprehensiveness, typical lack of ownership and seasonality.[13] It should be emphasised here that a catalogue of features selected this way distinguishes only tourist products. Obviously, tourist products alone may be classified as different types. According to J. Kaczmarek, A. Stasiak and B. Włodarczyk, the following categories of tourist products can be listed: (1) tourist products – things, (2) tourist products – services, (3) tourist products – events, (4) **tourist products – packages**, (5) tourist products – objects, (6) tourist products – routes, (7) tourist products – areas.[14]

Referring the comments on tourist products to the area of the present discussion, it is absolutely necessary to highlight that the establishment of the above-mentioned features and categories of classification is essential for the identification and potential assessment of the catalogue of information duties. One can make a preliminary assumption that legal regulations depend (or at least should depend) on the above-mentioned ones, and thus their construction should correspond to them.

[10] Possibly "final goods", which mean (for the need of this article) goods (products) manufactured to be purchased and used by a consumer.

[11] OJ L of 2015, item 326, p. 1; Member States must apply the provisions of the Directive from 1 July 2018 (full harmonisation).

[12] See, W. Kurek (ed.), *Turystyka...*, p. 361 ff.

[13] R. Seweryn, *Produkt turystyczny i wyznaczniki jego atrakcyjności*, Zeszyty Naukowe Akademii Ekonomicznej w Krakowie, No. 697, 2005, p. 71.

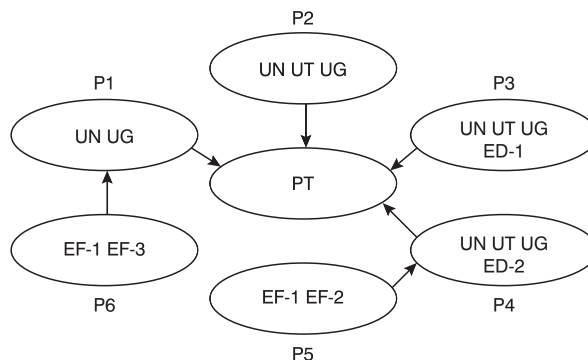
[14] Kaczmarek, A. Stasiak, B. Włodarczyk, *Produkt turystyczny*, Warsaw 2005, pp. 75–89.

A tourist (or a visitor)/consumer/traveller takes a decision to participate/purchase a tourist product in the form of a tourist package under the influence of an idea or image. The quality of a tourist package offered to customers in the form of a selection of services (and some benefits) depends almost exclusively on its organiser, i.e. honesty and professionalism in the selection of the quality of partial services included.[15] At the same time, inter alia thanks to information provided by a professional entity, a consumer may acquire basic knowledge about the said quality of a tourist package. The tourist package, which a tourist perceives as a specific type of "experience available for a specified price", in general, may only constitute a combination of basic elements of a tourist offer (goods and services). In practice, however, it has marginal application; that is why, the structure of tourist packages is greatly varied and includes:

– basic packages, i.e. basic goods and services, including overnight accommodation, board and transport;
– enlarged packages, i.e. a basic package and additional services and goods increasing the attractiveness of the offer but a customer (a tourist) usually cannot influence their selection;
– optional packages, i.e. elements supplementing a basic package (or an enlarged one), which a tourist may order for a specified price choosing them freely in different configurations[16] (see, Fig. 1).

That is why, it is a very difficult task to select a general catalogue of information provided to customers. This catalogue must be flexible enough to include all the possibilities of developed tourist packages.

Fig. 1. Sample structures of tourist packages



Note: PT – tourist product; UN – overnight accommodation; UG – gastronomic service; UT – transport service; ED-1, ED-2 – additional elements; EF-1, EF-2, EF-3 – optional elements; P1, P2 – basic packages; P3, P4 – enlarged packages; P5, P6 – optional packages.

Source: J. Kaczmarek, A. Stasiak, B. Włodarczyk, *Produkt turystyczny*, Warsaw 2005, p. 99.

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[15] *Ibid.*, p. 91.
[16] *Ibid.*, p. 99.

In order to make a decision, a consumer must have a complete set of reliable and true information concerning the constituents of a tourist package (a tourist product), and thus all information concerning every element (including the basic package, the enlarged package, the optional package or the destination). Thanks to the purchase of a tourist product when a decision has been made based on carefully analysed information, "(…) a consumer obtains certain additional profits constituting its attractiveness, such as comfort resulting from the provision of all services in one place, in addition synchronised in terms of things, space and time, and the **feeling of security** connected with the guarantee of services still at the place of residence and a possibility of focusing responsibility for failure to perform or inappropriate performance on one entity (organiser)".[17]

Summing up the considerations concerning theoretical issues connected with the phenomenon of tourism, undoubtedly, every (even the shortest) journey requires financial as well as service-related preparation. It is the responsibility of the provider (i.e. a tourism organiser) who is obliged to prepare a proposal of a potential tourist product (in the discussed case: a tourist package), which after the assessment made by a potential tourist or a visitor after his/her choice becomes a real tourist product. A consumer's choice of a particular tourist product is reflected in an obligation relationship, i.e. conclusion of a tourist services contract. A fundamental question that arises here is the issue whether the obligatory content of a contract imposed by the legal regulations corresponds to the special features that a tourist product in the form of a tourist package has.

3. OBLIGATORY CONTENT OF TOURIST SERVICES CONTRACTS

3.1. COMMENTS IN THE LIGHT OF THE ACT OF 29 AUGUST 1997 ON TOURIST SERVICES AND DIRECTIVE 90/314

The issues connected with threats resulting from the purchase of a tourist package (a tourist services package) were regulated at the European Union level as well as in the domestic legal system.[18] The provision of Article 14(2) of the Act of 29 August 1997 on tourist services[19] (hereinafter referred to as Act on tourist services) specifies elements that every tourist services contract should contain. The issues concerning the right to information in relation to a tourist services contract are laid down in Chapter 3 Act on tourist services entitled "Consumer protection" (the Chapter contains the provisions of Articles 11–19a, including the right to contractual information directly regarding the content of a tourist services contract).

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[17] R. Seweryn, *Produkt turystyczny…*, p. 76.

[18] It is worth drawing attention to the statement made by B. Gnela in accordance with which "(…) a tourist package contract is classified subjectively and objectively. However, the Act on tourist services, like Directive 90/314/EEC, does not regulate the tourist package contract but only selected issues connected with threats for a consumer in conjunction with using the combination of tourist services called a tourist package" (B. Gnela, *Umowa konsumencka...*, p. 372).

[19] Journal of Laws [Dz.U.] of 2017, item 1553, as amended.

Looking at the elements of a tourist services contract that the legislator lists, one can classify them into the following categories:
– provisions concerning information about parties to a contract;
– provisions concerning the parties' rights and obligations;
– provisions concerning a tourist package;
– provisions concerning the legal regime governing a contract.[20]

First of all, it must be pointed out that the legislator did not indicate in Article 14(2) that the content of a tourist services contract should contain basic information concerning a consumer, mainly data serving his/her identification (given name and surname, place of residence and address, valid identification document number or PESEL identification number), unlike in case of a tourism organiser, whose data are listed in the provision discussed. It seems that it can be assumed that the above-mentioned fact is the legislator's evident error (an oversight). Undoubtedly, unanimous declarations of will of at least two parties are necessary for the validity of a contract (in the discussed case: a professional entity – a tourism organiser and a non-professional party – a consumer).

Moving on to the substance of the present discussion, it is necessary to make a critical evaluation of the provisions concerning the content of a contract. It is pointed out that as a rule they mainly impose an obligation to conclude a contract in writing. However, the obligatory content of a contract that the legislator proposes raises doubts. The provision does not raise any interpretational doubts: the phrase "a contract should specify" clearly indicates that the elements specified by the legislator must be recognised as obligatory content (at the same time, the minimum) of a contract where its "extension" may be an expression of the Napoleonic principle of freedom to develop contractual relationships. The provision discussed means in practice that a professional entity has no choice (to include or not to include) with respect to particular contractual provisions, and thus specifies a "strict" obligation to include all elements listed in statute. It is also often emphasised in the literature that Act on tourist services determines the minimum information that should be found in a contract. It is often pointed out that the above-mentioned elements are to guarantee the appropriate catalogue of parties' obligations. However, "The lack of some data in a contract causes the situation when the scope of mutual obligations of the parties is not precisely determined, which can lead to a dispute based on the implementation of a contract and result in difficulties in providing evidence in case such a dispute arises".[21]

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[20] Obviously, a different division of the provisions proposed by the legislator can be found in the literature. Namely, (1) provisions that enable identification of an organiser, (2) provisions directly concerning services that are subject to a contract, (3) provisions concerning the rules of modifying or terminating a contract, (4) provisions regulating the procedure in case of inappropriate performance of a contract (Office of Competition and Consumer Protection, Branch Office in Katowice, *Raport z kontroli działalności organizatorów turystyki*, Warsaw–Katowice 2011, p. 8).

[21] E. Rutkowska-Tomaszewska, *Decyzje prezesa UOKiK w sprawach praktyk naruszających zbiorowe interesy konsumentów stosowanych przez organizatorów turystyki*, [in:] P. Cybula (ed.), *Transformacje prawa turystycznego*, Kraków 2009, pp. 170–171.

Taking into consideration the literal wording of the above-mentioned provision, it is hard to disagree with the presented approach. However, some dysfunctions occur in terms of operation of a tourist services contract. The elements specified in Article 14(2) Act on tourist services do no always refer to all contracts, i.e. they do not apply to every tourist contract, and thus they do not match its features. Therefore, the assumption that they are obligatory elements imposes an obligation on professional entities to provide the "negative information" in a tourist services contract (e.g. it should be clearly indicated that an organiser does not provide meals within a tourist package). It should be provisionally assumed that in general this violates the interests of professional entities because it is hard to approve of a situation when the above-mentioned entity must provide information about services that are not offered in a tourist package.

The above-mentioned situation also results from the characteristic features of a tourist package, which undoubtedly should be classified as a tourist product. In practice, a situation in which a tourist package constitutes a simple combination of just a few services is very rare. Nevertheless, it does not mean it cannot take place. Therefore, it is necessary to emphasise again that the structure of a tourist package is differentiated and comprises basic packages, and enlarged and optional packages (see, Fig. 1). The adoption of the above leads to an unambiguous conclusion that it is impossible to include all the products belonging to this category in the framework of Article 14(2) Act on tourist services (a tourist package does not always contain elements indicated in statute, and thus not all tourist packages contain the same components). Moreover, it is justifiable to point out here that one cannot put forward a theory that Article 14(2.4) – namely: "(…) a programme of a tourist package comprising the type, quality and time of the offered services, including: (a) the type, nature and category of the means of transport and the date, time and place of departure and scheduled return; (b) the location, type and category of hotel facilities in accordance with the regulations of the destination country or a description of the equipment of the facilities that are not classified within the type and category; (c) the number and types of meals; (d) the programme of sight-seeing and other services included in the price of a tourist package (…)" – results in a possibility of choosing the elements that a professional entity should include in the programme of a tourist package as obligatory elements of a contract. The issue of regulations concerning the programme of a tourist package should be recognised as especially disputable when discussing which elements listed in Article 14(2) Act on tourist services are obligatory. The phrase "including" used by the legislator is similar to the concept of "in particular", which means that the provision includes an open catalogue of elements, which a professional entity may include in the programme of a tourist package. Nevertheless, it must be clearly highlighted that those elements listed by the legislator must be found in the programme, which again indicates that a professional entity has an obligation to provide "negative information".

Attention is drawn to the opinion expressed by the Competition and Consumer Protection Court in its sentence of 26 May 2010, XVII Ama 77/09, in accordance with which "The Act on tourist services precisely regulates tourism organiser's activities with respect to the type of services provided, conditions for their provision,

obligatory elements of a contract, an organiser's liability for failure to fulfil or inappropriately fulfil the contract, etc. (…)". One can also indicate the opinion that "Failure to fulfil information duties consisting in narrowing the content of a contract in relation to the one that is required by the provisions of the Act on tourist services is recognised in the rulings of the President of the Office and courts as the use of practices violating the collective rights of consumers. (…) All the information listed in Article 14(2) Act on tourist services is important, although it is necessary to agree that its omission in a contract may result in various consequences".[22] However, it should be acknowledged that it remains insignificant that a category of contractual provisions can be "omitted" in the process of developing a tourist services contract. A different statement would lead to a conclusion that the legislator makes a classification (hierarchy) in accordance with clauses, which does not result from the literary wording of the provision of Article 14(2) and the legislator's intention. Therefore, it should be indicated that at present failure to fulfil any of the information duties (i.e. non-inclusion of all the elements in a contract) results in appropriate legal consequences.

It also seems that the European Union regulations, especially the provision of Article 4(2a) Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours[23] (hereinafter referred to as Directive 90/314), which stipulates that depending on a particular package, the contract should contain at least the elements listed in the Annex, have not been appropriately implemented. A contract should also clearly and comprehensively determine a consumer's obligation to communicate any failure in the performance of a contract to the service provider, organiser or retailer of the services (Article 5(4) Directive 90/314).[24] It should be emphasised that the highlighted provisions describe professional entities' obligations more precisely and indicate the obligation to include only clauses concerning a particular tourist package in a contract (while it is obvious that the provisions concerning the rights and obligations of the parties remain the same, regardless of the form of a tourist product). Summing up, the European regulations do not impose an obligation on a professional entity to provide "negative information", which makes them more flexible and gives them the possibility of adjusting the form of a contract to the services offered by an organiser.

It is also necessary to emphasise at least two aspects. Firstly, a thorough analysis of the Act on tourist services indicates that the issue of the content of a contract was established not only in the provision of Article 14(2), which envisages that a professional entity may have problems with its interpretation, and thus with the development of a contract alone. Inter alia, Article 16b(2) Act on tourist services stipulates that a contract should unambiguously determine a customer's obligation in the area referred to in (1), namely: "If in the course of a tourist package a customer recognises inappropriate performance of a contract, he should

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[22] Office for the Competition and Consumer Protection, Branch Office in Katowice, *Raport z kontroli...*, pp. 11–12. P. Cybula also refers to that citation in *Usługi turystyczne...* [accessed at Lex Omega].

[23] OJ L of 1990, item 158, p. 58, as amended.

[24] For detailed comments, see P. Mikłaszewicz, *Obowiązki informacyjne...* .

immediately communicate that to the service provider and a tourism organiser in the way that is proper for the type of service". Nevertheless, as the thorough analysis of Article 14(2) shows, the legislator "stipulates" only a duty to indicate the way of making complaints about the performance of services by a tourism organiser or a person cooperating with them as well as the deadline for filing complaints. At the same time, as it is clearly indicated in literature,[25] a complaint procedure should be distinguished from a consumer's (customer's) obligation to inform a professional entity about the inappropriate performance of a contract (still in the course of a tourist package). Moreover, the wording of Article 16b(1) determines that a customer's notification should be treated not as the right but as an obligation (therefore, a tourism organiser is obliged to inform a customer about this obligation). P. Cybula indicates that the lack of the above-mentioned notification may result in two types of consequences, namely:

1) The omission may be recognised as a reason of increased loss, which at the same time may lead to the reduction of the obligation to redress it in accordance with Article 362[26] Act of 23 April 1964 – Civil Code;[27]
2) The omission may result in negative consequences for evidence (Article 6 Act of 23 April 1964 – Civil Code[28]).[29]

Secondly, it is also justifiable to indicate that the scope of provisions concerning the obligatory content of contracts is in general the same as that laid down in Article 12(1) Act on tourist services (the scope of information that consumers are provided with when a tourist package is offered), where the relation between them may reflect different relationships, a different shape. In accordance with Article 12(2), contractual provisions have priority. Nevertheless, in case a contract does not refer to the written information included in various materials (e.g. brochures), it should be assumed that the content of the information becomes a part (an element) of a contract.[30]

It must be clearly emphasised that at present case law (in particular that of the Competition and Consumer Protection Court) quite unambiguously indicates that

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[25] See, P. Cybula, *Usługi turystyczne...* [accessed at Lex Omega].

[26] In accordance with Article 362 Act of 23 April 1964 – Civil Code, "If the aggrieved contributed to the occurrence of or the increase in the loss, the obligation to redress it is subject to reduction adequate to the circumstances, especially the degree of both parties' guilt". In short, it can be pointed out that circumstances classified as contributing to the occurrence of or the increase in the loss include: (1) adequate proximate cause relation between the conduct of the aggrieved and the loss (or its increase); (2) objectively inappropriate conduct of the aggrieved (i.e. the infringement of legal norms, decorum or praxeological rules of behaviour; A. Olejniczak, *Komentarz do art. 362 Kodeksu cywilnego*, [in:] A. Kidyba (ed.) *Kodeks cywilny. Komentarz*, Vol. III: *Zobowiązania – część ogólna*, Warsaw 2014 [accessed at Lex Omega].

[27] Journal of Laws [Dz.U.] of 2017, item 459, as amended.

[28] In accordance with Article 6 Act of 23 April 1964 – Civil Code, "The burden of proof of a fact is the duty of the party bringing an action based on that fact". However, it is worth mentioning here that the new Directive (2015/2302) introduces a rule pursuant to which a professional entity bears the burden of proof in relation to **the performance of information duties** – Article 8. After the transposition to the national legal system, it will be *lex specialis* in relation to Article 6 Act of 23 April 1964 – Civil Code.

[29] See, P. Cybula, *Usługi turystyczne...* [accessed at Lex Omega].

[30] B. Gnela, *Umowa konsumencka...*, pp. 376–377.

the omission of any contractual provision laid down in the Act on tourist services or inappropriately performed information duties by a professional entity should be recognised as a practice violating collective rights of consumers, and thus as the non-commercial tort[31] (therefore, the consequences are the same, regardless of the type of the provision that has been omitted in a contract). The provision of Article 24 of the Act of 16 February 2007 on the competition and consumer protection[32] stipulates that the use of practices violating collective rights of consumers is forbidden. The legislator indicates that a practice of violating collective rights of consumers[33] should be understood as an entrepreneur's conduct that is in conflict with law and decorum and violates them, including:[34] the non-compliance with the obligation to provide consumers with reliable, true and **complete** information.

An activity (omission) violating collective rights of consumers should be recognised when the conduct of a professional entity results in taking advantage of the stronger market position as well as when it can be assessed as dishonest, unprofessional or resulting from a professional entity's lack of knowledge. That is why, it is emphasised that the role of preparation to do professional business (including organisation of tourist packages) is significant. Many examples of entrepreneurs' malpractice can be found in the literature. These include:

– inappropriate or untrue information about products and services consumers are provided with;
– unreliable (or complete lack of) information that is essential for a consumer, inter alia concerning consumer rights (e.g. the right to complain, to withdraw from a contract, etc.);
– imposing unfavourable, often unlawful contract terms on consumers;
– pressure to use products or services exerted on consumers (minors and elderly people can be considered the most endangered groups).[35]

The above catalogue also makes it possible to cover activities consisting in constructing a contract that is in conflict with commonly binding law (thus also the development of a contract that does not contain clauses required by legal provisions). As a rule, it should be assumed that such an activity is unlawful but it also breaches decorum because activities leading to misinformation, disorientation, invoking erroneous conviction as well as the use a consumer's lack of knowledge

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[31] There are also two commercial torts distinguished in the literature, i.e. related to the violation of law between entrepreneurs.

[32] Journal of Laws [Dz.U.] of 2017, item 229, as amended.

[33] M. Sieradzka's discussion of the above issues should be recognised as especially interesting; see, M. Sieradzka, *Wykładnia pojęcia „zbiorowy interes konsumentów" na tle orzecznictwa*, Glosa No. 3, 2008, pp. 102–111.

[34] It should be clearly emphasised that the above-mentioned categories of the violation of consumers' rights do not constitute a closed catalogue (*numerus clausus*). Therefore, "Classification of an entrepreneur's conduct as a practice violating the consumers' collective rights cannot be based on the establishment of matching features of the general clause concerning the violation of consumers' collective rights (Article 24(2)), or the recognition of the application of the named practice violating the consumers' collective rights (Article 24(2.1–3))" (M. Sieradzka, *Glosa do wyroku SOKiK w Warszawie z dnia 25 maja 2009 r., XVII Ama 98/08*, LEX/el. 2010).

[35] A. Wędrychowska-Karpińska, A. Wiercińska-Krużewska, [in:] A. Stawicki (ed.) *Ustawa o ochronie konkurencji i konsumentów. Komentarz,* Warsaw 2011 [accessed at Lex Omega].

(or possibly also naivety) are undoubtedly recognised as being in conflict with the rules of decorum.[36] Therefore, the violation takes place at the stage of concluding a contract, during the development of contractual clauses "consisting in the breach of legal regulations that have impact on the content of a contract"[37] (breaches at the pre-contract stage are also distinguished, e.g. a breach aimed at convincing a consumer to enter into a contract and a breach at the stage of performing a contract by the use of advantage over a consumer resulting from the conclusion of a contract by deformation of the rights and obligations of the parties laid down in legal provisions).[38] Following M. Sieradzka, one can indicate that: "(…) the breach of collective rights of consumers at the stage of contract performance is recognised as the most serious, followed by a breach at the stage of contract conclusion and at the pre-contract stage".[39] To clarify, it is unambiguously determined in the literature that the practice of failing to include the provisions required by law in the content of a contract belongs to the category of practices misleading consumers as they make the addressee have an erroneous image of a service or a product (or may evoke such an erroneous image). Obviously, it does not refer to an error in the meaning of the provisions of the Act of 23 April 1964 – Civil Code (see, Article 84 Civil Code). It would be groundless to state that there is a breach of collective rights of consumers and misleading a consumer in relation to information a consumer is obliged to have (in other words: which, from the logical point of view, professional entities are not obliged to provide).

It is also obvious that the content of a tourist services contract is especially important for the establishment of a professional entity's liability for failure to perform or inappropriate performance of a contract. With respect to that, Article 11a Act on tourist services, which is the equivalent of Article 5(1) and (2) Directive 90/314, constituting a tourist package (travel) organiser's liability for damage caused to a customer (a consumer) as a result of failure to perform or inappropriate performance of a contract, is of fundamental importance. The above-mentioned provisions are also the basis for awarding a consumer compensation for non-financial loss: the "wasted vacation".[40] Therefore, it should be pointed out that, as the Court of Justice case law clearly indicates that Article 5 Directive 90/314 should be interpreted in the way recognising non-financial loss in the form of wasted vacation as damage, the above-mentioned Article 11a transposing Article 5 Directive 90/314 to the Polish legal system must be interpreted in the same way. Such interpretation, which is also consolidating in nature, makes it possible to draw a conclusion that the solution adopted in the domestic law is in compliance with the

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36 See, the judgement of the Competition and Consumer Protection Court of 23 February 2006, XVII Ama 118/04.

37 M. Sieradzka, *Komentarz do art. 24 ustawy o ochronie konkurencji i konsumentów*, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw 2014 [accessed at Lex Omega].

38 *Ibid*.

39 *Ibid*.

40 Compare, the judgement of the Court of Justice of 12 March 2002 in case *Simone Leitner v. TUI Deutschland GmbH & Co. KG*, C-168/00.

directive.[41] As J. Gospodarek indicates, "The possibility of claiming compensation for the 'wasted vacation' under contractual liability is ensured by the appropriately interpreted Article 11a Act [of 1997 on tourist services], which is a special provision in relation to Article 471 Civil Code".[42] In principle, a similar solution is introduced in Directive 2015/2302 as well as in the Bill on tourist packages and related tourist services,[43] where a definition of a term "non-compliance" is laid down, which means failure to perform or inappropriate performance of tourist services included in a tourist package. Therefore, it seems that the proposal put forward by M. Łolik was accepted: "In connection with the above-mentioned, it seems purposeful to put forward a proposal that the legislator should amend the act in order to establish clear legal grounds for claiming compensation as it was recently done in relation to the possibility of claiming compensation for the death of a relation (…). The introduction of such a clear legal basis would certainly lead to greater transparency and coherence of private law and would eliminate the necessity of performing sophisticated legal interpretation serving the possibility of getting compensation for non-financial damage."[44]

3.2. COMMENTS IN THE LIGHT OF THE BILL ON TOURIST PACKAGES AND RELATED TOURIST SERVICES AND DIRECTIVE 2015/2302

Directive 2015/2302, which devotes Chapter II: Information Obligations and Content of the Package Travel Contract to the issue of a contract construction alone, in comparison with the above-mentioned legal acts, demonstrates a much more detailed approach to the matters connected with the content of a tourist services contract in the provisions of Article 7. The catalogue of the provisions that should be found in a contract is very broad (inter alia, it concerns the main features of tourist services, the organiser's data, prices and payments, rights and obligations of the parties, the legal regime, etc.). The provisions of Directive 2015/2302 concerning the content of a package contract should be recognised as extremely precise, especially if compared with those laid down in Directive 90/314. The issue that requires most attention is the fact that the new directive also points out the obligation to indicate all the elements determined therein in a tourist services contract, which is criticised in the present article ("The package travel contract or confirmation of the contract shall set out the full content of the agreement which shall include all the information referred to (…)"). It can be stated that the provisions of the new

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[41] Resolution of the Supreme Court of 19 November 2010, III CZP 79/10.

[42] J. Gospodarek, *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Orzecznictwo Sądów Polskich No. 1, 2012, p. 2 ff; compare: P. Zasuwik, *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Monitor Prawniczy No. 24, 2016, pp. 1329–1333; K. Kryla, *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Przegląd Sądowy No. 9, 2011, pp. 137–145; M. Łolik, *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Europejski Przegląd Sądowy No. 9, 2011, pp. 45–47.

[43] Accessed at Lex Omega on 30/09/2017.

[44] M. Łolik, *Glosa do uchwały SN z dnia 19 listopada 2010 r. ...*, pp. 45–47 [accessed at Lex Omega].

directive are in general an expression of the European Union policy in the field of consumer protection, which means the extension of that protection at the expense of professional entities.

Theoretically, the new regulations were to adjust the European Union policy to the changing conditions on the tourist services market, i.e. the "lack of borders" when choosing a tourism organiser (this is most probably the reason for harmonising regulations[45]) and the level of tourist services computerisation (i.e. on-line purchase of packages). Nevertheless, it seems that the legislator failed to notice that it would be purposeful to determine some obligations also on the part of consumers. At the same time, one can notice that despite more and more evident distinction of a new type of consumer, including a tourist services consumer, legal regulations are in general developed irrespective of this distinction; the above in particular does not correspond to the specificity of the European Union consumer law. Only as a rule, it is necessary to assume a consumer as a weaker party to a contract, who is characterised by trust to a professional entity and needs special legal protection provided by the legislator. The above idea has been present since the beginning of consumer regimes, however, in the course of development of new technologies in particular, requires updating, or at least reviewing the standards concerning professional entities' obligations in order to ensure appropriate (expected) performance of contractual obligations. The protection standards should, therefore, be based on the broader understanding of the economic weakness. Situations in which a consumer is a person who acts in the economic transactions professionally and is well informed and experienced are really important (therefore, pointing out a consumer's features in accordance with the economic or colloquial language meaning may prove to be fallible). Nevertheless, the today's consumer, often actively participating in the creation of a tourist package, and first of all an active Internet user, has a potential and possibilities of acquiring factors that let him make a conscious choice. That is why, it is more and more difficult to treat him as a weaker party to a contract, which as a rule should result in the limitation of some professional entities' obligations (e.g. in the area of contractual information, i.e. providing negative information, which is imposed by the obligation to include all the clauses listed in the provision of Article 7 Directive 2015/2302). The behaviour of contemporary consumers "(…) greatly differs from the behaviour of traditional consumers (…). While they are given a lot of attention in economic and sociological research and media studies, legal studies remain indifferent to the changes taking place. A consumer is still perceived to be a weaker party to a contract, who should be protected against producers' attempts, and a receiver or user of the Internet

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[45] The desire to create the common internal market constituting the foundation for the development of competitiveness between professional entities in various European Union Member States should be recognised as a positive expression of the EU policy. It is also important for the free provision of tourist services. That is why, the proposal to standardise regulations should be recognised as a positive and desired process. The discussion, however, concerns the form of common regulations. For criticism of the imposed model of maximum harmonisation with numerous exceptions, see K. Marak, *Harmonizacja maksymalna projektowanej dyrektywy turystycznej i możliwe odstępstwa od tak wyznaczonego poziomu harmonizacji*, [in:] B. Gnela, K. Michałowska (ed.), *Współczesne wyzwania prawa konsumenckiego,* Warsaw 2016, p. 16 ff.

content is treated as an 'addition' to the relations occurring between an author and a producer".[46]

Comparing the above-mentioned acts (Directive 90/314, the Act on tourist services and Directive 2015/2302) one may highlight the following. Directive 2015/2302, despite its thoroughness, like the repealed Directive 90/314 and the Act on tourist services, does not contain a requirement of including information about a customer, mainly data serving identification (first name and surname, place of residence, identification document number or PESEL identification number). In the considerations presented above, it has been classified as a typical legislators' oversight. Now, it is emphasised again that determination of a consumer in a given contract is an obvious activity. Moreover, it must be highlighted that determining a professional entity's data again seems to be aimed at protecting tourist products purchasers' interests. It must be noted here that in accordance with the new directive, a tourist services contract should contain information enabling direct contact with the minor or the person responsible for the minor at the minor's place of stay. By the way, in accordance with the provisions of the Act on tourist services and Directive 90/314 with respect to tourist packages for minors, a professional entity is obliged to provide information about the possibility of direct contact with the child or the person responsible for the child in the child's place of stay in appropriate time, before the tourist package starts,[47] and not in a tourist services contract (the above role also applies to information identifying the entity that a consumer may rely on in the event of any difficulties). There is also an interesting proposal of a requirement of determining the first name and surname of a person signing a contract on behalf of the organiser (this concerns the Act on tourist services only). It seems that the above-mentioned information is important only for the professional entity's potential internal organisational procedures and has no significance for the consumer's potential claims.

As far as clauses concerning information about a tourist package are concerned, criticism has already been expressed, so now attention is drawn only to the provisions of Directive 2015/2302 that are especially remarkable, including:

- information whether any services are going to be provided for a group and if so, within the bounds of possibility, information about the approximate number of group members;
- in the event a traveller's use of other services provided for tourists depends on effective oral communication in a foreign language, information about the language in which the service will be provided;
- information whether a given journey or vacation is appropriate for people with limited mobility, and on a traveller's demand, detailed information on the adjustment of the given journey or vacation to the needs of such travellers.

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[46] K. Grzybczyk, *Nowy typ konsumenta w kulturze konwergencji*, [in:] M. Boratyńska (ed.), *Ochrona strony słabszej...*, thesis 3 [accessed at Lex Omega].

[47] The use of an indefinite and so extraordinarily unclear phrase "in appropriate time" should be critically assessed. In principle, the moment just before a minor's departure can be recognised as such. Moreover, it should be pointed out that the Act on tourist services uses an unclear term "child" and it seems that "minor" (i.e. a person under the age of 18) should be used instead.

The above should be treated as novelties introduced in Directive 2015/2302.

The obligation to provide information about the adjustment of a tourist package to the needs of people with limited mobility should be recognised as especially significant and treated as a reflection of trends in tourism occurring over the last years (they are also connected with the phenomenon of population aging, which results in the increased number of people with physical impairments).[48] A. Zajadacz and E. Stroik point out that "The ratification of the Convention on the Rights of Persons with Disabilities (2006) as well as many other legal acts adopted in the European Union or particular Member States is aimed at equal access agenda based on the principles of non-discrimination and equal participation of people with disabilities in social life (Ambrose 2012). Therefore, ensuring equal access to goods and services will be an obligatory requirement for tourist services. Both private and public sector tourism organisers should have the knowledge and ability to fulfil legal requirements. Activities aimed at supporting tourist industry in the development of an offer meeting the conditions of access should be undertaken at all levels connected with the development of tourism and by all stakeholders involved in the development".[49] It is also highlighted that the proposal of equal access to tourism in the context of consumer information should be also implemented at the stage of pre-contract information.

In the context of tourist package prices, it is highlighted that the basic difference between the discussed legal acts consists in the method of providing the above-mentioned data for the consumer. In accordance with the Act on tourist services and Directive 90/314, a consumer must be informed about the price of a tourist package with the specification of taxes, fees and other necessary charges (Directive 90/314 uses the phrase "fees chargeable for certain services", unless they are included in the price). Directive 2015/2302 imposes an obligation to provide the complete price and gives an opportunity to separately specify the additional costs only in case they cannot be established before the conclusion of a contract (however, a consumer must be informed what kind of costs these may be). Therefore, these are going to be determined circumstances that can cause the rise in price.

Directive 2015/2302 also imposes an obligation on a professional entity to include clauses that are not required in the current provisions of the Act on tourist services or Directive 90/314. These include:

– information concerning passport and visa regulations in a country of destination (the Act on tourist services and Directive 90/314 oblige a professional entity to

[48] Reliability and ease of access to information about the possibility of participation in a tourist package by a person with limited mobility should undoubtedly be recognised as a proposal of "accessible tourism", which means "(…) the form of tourism that requires cooperation between the stakeholders in order to enable people with various needs, connected with mobility, sight, hearing and cognition abilities, independent and dignified functioning" (A. Zajadacz, E. Stroik, *Podstawy planowania rozwoju „turystyki dostępnej"*, [in:] Z. Młynaczyk, A. Zajadacz (ed.), *Uwarunkowania i plany rozwoju turystyki. Społeczno-ekonomiczne problemy rozwoju turystyki*, Poznań 2016, p. 66). The common right to participate in tourism is undoubtedly also connected with the proposal to equalise opportunities for disabled persons so it is necessary to create a proposal of universal accessibility in relation to all the elements of the tourist chain, including information about an accessible tourist package and guarantees of the provision of a service adjusted to the needs of people with impairments.

[49] A. Zajadacz, E. Stroik, *Podstawy planowania rozwoju...*, p. 70.

provide the above-mentioned information at the pre-contract stage, e.g. in brochures, leaflets or before a contract conclusion, emphasising at the same time that this can be a circumstance influencing the decision on taking part in a journey);
- information about a professional entity's responsibility for the performance of a contract and ensuing care for a traveller if he finds himself in a difficult situation (the Act on tourist services and Directive 90/314 determine the regime of professional entities' liability, however, there is no obligation to include the above-mentioned information in a contract; regulations concern the lack of possibility of limiting liability).

At the same time, all legal acts require that a consumer be informed about the time when he should be notified about the cancellation of a journey because of insufficient number of participants (in addition to the above-mentioned clause, Directive 2015/2302 lays down a provision concerning information about the fact that a traveller is entitled to contract termination at any time before the start of a tourist package for an adequate termination fee charged or, in specific situations, information about standard fees for termination of a contract charged by an organiser). The above also applies to the complaint procedure, i.e. deadlines and methods in which a participant of a tourist package may complain (at the same time, Directive 2015/2302 requires that information about alternative dispute resolution methods (ADR) be provided).

The Act on tourist services and Directive 2015/2302 also determine an obligation to include a provision in a contract concerning a traveller's right to transfer a contract to another traveller, however, the Act indicates that the information must provide details (about the deadline for this transfer). Analysing the provisions of the Directive, one can state that it only requires that consumers be informed they have that right.

One can also note that information concerning legal grounds for a contract and legal consequences resulting from a contract are only required in the regime of the Act on tourist services.

It should be highlighted, and this can be recognised as especially significant, that Directive 2015/2302 determines an obligation to provide consumers with the name of an entity providing protection in the event of insolvency and the entity's contact data, including the address and, in applicable cases, the name of the authority appointed by the Member State for that purpose and its contact data. Taking into account problems resulting from insolvency of travel agents, especially among tourism organisers offering remote destinations, the provision should be recognised as especially necessary and justifiable.

The provisions of Directive 2015/2302 indicate that: "Member States shall ensure that package travel contracts are in plain and intelligible language". Thus, they determine the requirements of a language (a substrate of a material sign) in which the content of a contract must be developed. According to the Dictionary of the Polish language, the term "plain" (*prosty*) means "easy, not complicated, obvious",[50] and the term "intelligible" (*zrozumiały*) means understandable, i.e. "making it possible to realise the meaning of words, statements, relations between things and phenomena

[50] *Słownik języka polskiego*, https://sjp.pl/prosty [accessed on 13/09/2017].

(…), to draw conclusions”[51]. Thus, it seems that a contract should be developed in the language a consumer uses and which is communicative for him (not necessarily his native language). As it has been emphasised above, intelligible also means direct, thus not requiring explanation and interpretation of the intentions of an entity performing an act of will.[52] The plainness of a language undoubtedly applies to the level of complexity of phrases used so that an ordinary consumer could easily reconstruct the meaning of the contract provisions. In this context, it should be indicated that according to the wording of the formerly binding Directive 90/314 as well as the Act on tourist services, a tourist services contract, due to the fact that it is a kind of a consumer agreement, pursuant to Article 8 of the Act of 7 October 1999 on the Polish language,[53] as a rule should be concluded in Polish. However, it should be remembered that Directive 90/314 laid down a standard of minimum harmonisation; therefore, Member States could adopt more restrictive provisions. At present, Directive 2015/2302 lays down maximum, complete harmonisation and thus determines the minimum and maximum standards of domestic regulations. As a result, Member States cannot introduce more restrictive regulations (e.g. imposing the language of a contract when the Directive stipulates its free choice and sets a limit on it only by introducing a comprehensibility condition). The judgement of the European Court of Justice of 3 June 1999 in the case C-33/97 *Colim NV v. Bigg's Continent Noord NV* indicated that only in the absence of full harmonisation of language requirements applicable to information appearing on imported products, Member States may adopt national measures requiring such information to be given in the language of the area in which the products are sold or in another language which may be readily understood by consumers in that area, provided that those national measures apply without distinction to all national and imported products and are proportionate to the objective of consumer protection which they pursue. The Court emphasised that, as a rule, language requirements laid down by national legislation may constitute a barrier in domestic trade. However, in case the regulations envisage the possibility of introducing stricter provisions and the consumers' right to information justifies it, the solution is admissible (it does not constitute a violation of Article 34 Treaty on the Functioning of the European Union[54]).[55] The phrase “intelligible language” which aims to ensure the provision of information for consumers and not the imposition of a particular language does not mean an official language of the given Member State or the language of a particular region.[56] Therefore, national legislation, which on the one hand imposes a more restrictive obligation than just the use of a more understandable language, such as e.g. the obligation to use only the language of a region, goes beyond the

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[51] *Słownik języka polskiego PWN*, https://sjp.pwn.pl/sjp/zrozumiec;2547310.html [accessed on 13/09/2017].

[52] S. Dmowski, S. Rudnicki, *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna*, X ed., Warsaw 2011 [accessed at Lex Omega].

[53] Journal of Laws [Dz.U.] of 2011, No. 43, item 224, as amended.

[54] OJ L of 2004, item 90, p. 864/2, as amended.

[55] Judgement of the European Court of Justice of 3 June 1999 in case C-33/97; compare judgement of the European Court of Justice of 18 June 1991 in case C-369/89.

[56] Compare judgement of the European Court of Justice of 12 October 1995 in case C-85/94.

requirements resulting in this case from the provisions of Directive 2015/2302. A potential obligation to use only the language of the given country would constitute a measure having equivalent effect as quantitative restrictions banned in Article 34 Treaty on the Functioning of the European Union.

Having become acquainted with the Bill on tourist packages and related tourist services[57] (hereinafter referred to as the Bill), one can state that in general it constitutes a ona-to-one transposition of the Directive provision on the content of a tourist package contract into the national law. As it is indicated in the justification for the Bill: "Solutions adopted in the Chapter, although they may seem to be restricting the freedom of contracts, are indispensable in the light of the provisions of Article 8 Directive 2015/2302. They introduce considerable standardisation of contracts concluded between tourism organisers and entities facilitating the purchase of consolidated tourist services, which will make it easier to use them. At the same time, they ensure the provision of all necessary information for travellers and this way increase their safety. As a result, this will make it possible to, at least partly, eliminate the possibility of disputes and claims occurring between travellers and tourism organisers or entities facilitating the purchase of tourist packages".[58]

It also seems that the Bill tightens the requirements concerning the provisions proposed by the European legislator. To recapitulate, the provisions of the Directive stipulate: "Member States shall ensure that package travel contracts are in plain and intelligible language and, in so far as they are in writing, legible" (Article 7(1)). The Bill indicates that a tourist package contract must be developed in a plain, intelligible and legible manner. Therefore, it seems that the proposal of "legibility" is not appropriately articulated in Directive 2015/2302 because it applies only to contracts in writing[59] ("(…) package travel contracts are in plain and intelligible language and, in so far as they are in writing, legible"). Thus, the legislator associates legibility with writing and indicates that legible means easy to read, thus easy to get to know while reading the text[60] and not with the getting to know the appropriate meaning of something[61] (that the Bill seems to propose), which can be in general obtained not only by reading the text but also by opening a file, an audio recording, etc. The legislator also forgets that the requirement of plainness and intelligibility is to apply to language of a contract, which indicates that a tourist package contract may be concluded in any language comprehensible for a consumer, not necessarily his native language, which constitutes *lex specialis* in the provisions concerning the use of the Polish language in relations with consumers.

Full harmonisation laid down in Directive 2015/2302 determines not only its minimum but also maximum scope, thus it interferes into the sphere of national

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57 Accessed at Lex Omega on 30/09/2017.

58 https://legislacja.rcl.gov.pl/docs//2/12294859/12412687/12412688/dokument271980.pdf [accessed on 21/09/2017].

59 The discussion concerning the principle of "writing" is included in the commentary on the provisions of Directive 90/314.

60 *Słownik języka polskiego PWN*, https://sjp.pwn.pl/sjp/odczytac;2492822.html [accessed on 23/09/2017].

61 *Wielki słownik języka polskiego*, http://wsjp.pl/index.php?id_hasla=281&id_znaczenia=4874413&l=12&ind=0&pwh=1 [accessed on 23/09/2017].

legislation more aggressively. Therefore, a Member State cannot regulate the issues in a way different than laid down in the Directive. More liberal or more restrictive regulations are repealed from the system of national law and the implementation freedom acquires the form of fiction (the range of "manoeuvres" of a Member State is considerably limited so it is necessary to appropriately distinguish the subjective and objective scope of the Directive). Full harmonisation in practice causes many interpretational problems for Member States as far as the level of regulations transposition is concerned, especially in order to avoid a plea of inappropriate implementation. Therefore, it is often done in one-to-one correspondence, which can disturb the domestic legal order. Nevertheless, "Full harmonisation in practice is getting closer to unification; their effects are similar. Full harmonisation results in the stiffening ('freezing') of a given standard (e.g. the level of consumer protection) at the Community level. Adopting some simplified assumptions, one should state that full harmonisation leads to 'field occupation' by pushing away national legislation, and the scope of implementation freedom in fact does not exist."[62] In the above context, it should be noted that the linguistic aspect of the proposal to implement the provisions concerning the content of a tourist services contract raises certain doubts. Attention should be drawn in particular to the proposal of provisions determining main features of tourist services (Article 40(1.1)), where it is laid down, inter alia, that a contract should indicate the number and types of meals, while the European legislator imposes an obligation to inform a traveller about meals (but does not determine what components of this information should be provided; thus, it seems that in order to fulfil the requirement Directive 2025/2302 imposes on professional entities, it is sufficient to include information whether a professional entity provides meals or not). Unlike that, however, in case of dates of a tourist package, the Bill imposes an obligation to include in the content of a contract at least approximate dates, i.e. "not exact dates but close to the actual ones",[63] which is in conflict with the content of the Directive, where it is clearly laid down that it is necessary to provide "(…) the place or destination of journey, route and the time of stay with dates [specified in detail – A.K.M.] and, in case of a tourist package including accommodation, the number of overnight stays within the service provided" (Article 5(1a)). In that context, it should also be indicated that the European legislator imposes an obligation to inform about the number of overnight stays only when a tourist package includes accommodation. The Bill lays down an obligation to provide information about the number of overnight stays provided during the tourist package, and thus a professional entity is obliged to provide negative information. Taking into consideration the European legislators' attempts, it is necessary to emphasise their inconsistency, which is reflected in rather arbitrary (unjustified) imposition of the obligation to provide negative information only in case of some types of component services (e.g. overnight stay).

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[62] A. Kunkiel-Kryńska, *Glosa do wyroku TS z dnia 25 kwietnia 2002 r., C-183/00*, Europejski Przegląd Sądowy No. 10, 2008, pp. 49–55.

[63] *Słownik języka polskiego PWN*, https://sjp.pwn.pl/sjp/przyblizony;2511796.html [accessed on 14/10/2017].

4. CONCLUSIONS

The above-presented considerations allowed the author to formulate the following conclusions:

1) The provisions of the Act on tourist services as well as Directive 2015/2302 and the Bill on tourist packages and related services impose an obligation on professional entities to include all the clauses concerning the content of a contract listed in those legal acts in their tourist services contracts. This in principle means that professional entities also have an obligation to provide negative information (e.g. clearly indicate that a tourist package does not include meals), which can be perceived as the infringement of their rights. If the above proposal is recognised as correct, one should approve of P. Mikłaszewicz's statement: "In the literature, it is rightly highlighted that some of the obligatory elements of a contract are not (and because of their nature, cannot be) so definite that they can shape the content of obligations in case of a lack of the parties' agreement concerning the issues those elements refer to. **That is why, there is pressure on informing consumers and including such data in a contract the main function of which is to provide a consumer with the knowledge of the service. It is assumed that a consumer informed this way will be able to take care of himself**".[64] In this context, it should be also highlighted that the legislator is inconsistent, which is reflected in the provisions of Directive 2015/2302. In case of some components of the service (e.g. overnight stay), the information must be provided only if the given service is a component of a tourist package. Thus, it is not obligatory to include negative information. In other cases, however, there is such an obligation (e.g. meals).
2) In the above context, it is therefore necessary to highlight that the provisions of commonly binding law, including Directive 2015/2302, do not correspond to the features of a tourist product in the form of a tourist package. This has far-reaching consequences because the regulations are not flexible enough to correspond to various structures of tourist packages, which may lead to the infringement of professional entities' rights.
3) The provisions of Directive 2015/2302 in principle do not reflect the proposal to change the interpretation of a term "ordinary consumer", whose features indicated above (including carefulness and consideration in decision-taking[65]) should be supplemented with the features of a consumer living in the information society dominated by modern technologies, i.e. a consumer who to some extent can search for certain information. Nevertheless, it must be clearly emphasised that it is too early to speak about a transfer of the burden of information from entrepreneurs onto consumers and a proposal of a model in which consumers would be obliged to seek information, while entrepreneurs' attitude would be

[64] P. Mikłaszewicz, *Obowiązki informacyjne...*, thesis 6.2.1. [accessed at Lex Omega].

[65] K. Jasińska, *Pojęcie przeciętnego konsumenta w rozumieniu ustawy o przeciwdziałaniu nieuczciwym praktykom rynkowym i jego znaczenie dla wykładni przepisów ustawy o zwalczaniu nieuczciwej konkurencji*, Transformacje Prawa Prywatnego No. 3–4, 2008, pp. 39–40.

passive.[66] However, it seems that a solution that should be pursued is activation of consumers' attitudes, i.e. the creation of a system in which both parties should have obligations concerning the right to information. Unfortunately, Directive 2015/2302 completely imposes that obligation on professional entities, which in the author's opinion may cause negative consequences on the tourist services market, inter alia by limiting competition. There was a proposal to introduce similar solutions to the provisions of the Act of 23 April 1964 – Civil Code. Namely, the Bill assumes the introduction of information obligations at two levels, i.e. an obligation to give access to information (passive information duty) and an obligation to provide information on demand and an obligation to provide information on the obliged entity's own initiative (spontaneous information duty).[67] The initiative alone that was proposed in the above-mentioned Bill should be approved of. What is interesting, the Bill (in the same way as Directive 2015/2302) assumes a transfer of the burden of proof of the performance of information duties on an entrepreneur obliged to give access to or provide information. However, a question arises how to assess which information should not be a part of the obligatory content of a tourist services contract, and what information consumers should find out on their own.

4) It is necessary to repeat the proposal connected with the plainness of the construction of regulations concerning the content of a tourist services contract. The analysis of the Bill on tourist packages and related services shows that the issue of the content of a contract was referred to not in one single provision, which may lead to a professional entity having difficulties with its interpretation, and thus with the formulation of the appropriate content of a contract (inter alia, provisions concerning the increase in the price of services).
5) The Bill on tourist packages and related services proposes inappropriate implementation of the provisions concerning the language of a tourist services contract. The authors of the Bill forget also that the idea of plainness and intelligibility should refer to the language of a contract, which means that a tourist services contract may be developed and concluded in any language that is understandable for a consumer, not necessarily his native language, which constitutes *lex specialis* in the area of regulations concerning the use of the Polish language in relations with consumers. Moreover, the proposal of "legibility", which in accordance with Directive 2015/2302 refers only to a contract developed in writing, is not appropriately articulated (this, however, would need further considerations on the form of a tourist services contract).
6) The authors of the Bill on tourist packages and related services should pay more attention to the aim that the Directive imposes on Member States, especially the requirement of full harmonisation. Therefore, more attention should be paid to the linguistic sphere of the Bill so that the potential charges that the introduced provisions are too strict or not strict enough can be avoided.

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[66] Compare, M. Gumularz, *Ochrona konsumenta a fenomen „rozszerzonej rzeczywistości" – nowe wyzwania polityki prawa*, Transformacje Prawa Prywatnego No. 3, 2013, pp. 39–58.

[67] U. Ernst, M. Kućka, M. Pecyna, F. Zoll, *Obowiązki informacyjne – projekt*, Transformacje Prawa Prywatnego No. 4, 2010, p. 74.

BIBLIOGRAPHY

Bazylińska J., *Ochrona zbiorowych interesów konsumentów w prawie Unii Europejskiej i wybranych porządkach prawnych państw członkowskich,* Toruń 2012.

Boratyńska M. (ed.), *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana Profesorowi Adamowi Zielińskiemu*, Warsaw 2016.

Cybula P., *Usługi turystyczne. Komentarz*, Warsaw 2012.

Delegatura UOKiK w Katowicach, *Raport z kontroli działalności organizatorów turystyki*, Warsaw–Katowice 2011.

Dmowski S., Rudnicki S., *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna*, X ed., Warsaw 2011.

Ernst U., Kućka M., Pecyna M., Zoll F., *Obowiązki informacyjne – projekt*, Transformacje Prawa Prywatnego No. 4, 2010.

Gnela B., *Umowa konsumencka w polskim prawie cywilnym i prywatnym międzynarodowym*, Warsaw 2013.

Gospodarek J., *Prawo w turystyce i rekreacji*, Warsaw 2007.

Grochowski M., *Venire contra factum proprium a zaufanie i „słabość sytuacyjna"*, [in:] M. Boratyńska (ed.), *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana Profesorowi Adamowi Zielińskiemu*, Warsaw 2016.

Grzybczyk K., *Nowy typ konsumenta w kulturze konwergencji*, [in:] M. Boratyńska (ed.), *Ochrona strony słabszej stosunku prawnego. Księga jubileuszowa ofiarowana Profesorowi Adamowi Zielińskiemu*, Warsaw 2016.

Gumularz M., *Ochrona konsumenta a fenomen „rozszerzonej rzeczywistości" – nowe wyzwania polityki prawa*, Transformacje Prawa Prywatnego No. 3, 2013.

Jasińska K., *Pojęcie przeciętnego konsumenta w rozumieniu ustawy o przeciwdziałaniu nieuczciwym praktykom rynkowym i jego znaczenie dla wykładni przepisów ustawy o zwalczaniu nieuczciwej konkurencji*, Transformacje Prawa Prywatnego No. 3–4, 2008.

Kaczmarek J., Stasiak A., Włodarczyk B., *Produkt turystyczny*, Warsaw 2005.

Kaczorowska S., Kurzyńska-Lipniewicz A., *Prawne aspekty ochrony konsumenta w Polsce i w Unii Europejskiej*, Legnica 2009.

Kurek W. (ed.), *Turystyka*, Warsaw 2007.

Łętowska E., *Europejskie prawo umów konsumenckich*, Warsaw 2004.

Marak K., *Harmonizacja maksymalna projektowanej dyrektywy turystycznej i możliwe odstępstwa od tak wyznaczonego poziomu harmonizacji*, [in:] B. Gnela, K. Michałowska (ed.), *Współczesne wyzwania prawa konsumenckiego*, Warsaw 2016.

Mikłaszewicz P., *Obowiązki informacyjne w umowach z udziałem konsumentów na tle prawa Unii Europejskiej*, Warsaw 2008.

Olejniczak A., *Komentarz do art. 362 Kodeksu cywilnego*, [in:] A. Kidyba (ed.) *Kodeks cywilny. Komentarz*, Vol. III: *Zobowiązania – część ogólna*, Warsaw 2014.

Radwański Z., *Kodeks cywilny wymaga unowocześnienia*, Kancelaria No. 7–8, 2010.

Rutkowska-Tomaszewska E., *Decyzje prezesa UOKiK w sprawach praktyk naruszających zbiorowe interesy konsumentów stosowanych przez organizatorów turystyki*, [in:] P. Cybula (ed.), *Transformacje prawa turystycznego*, Kraków 2009.

Sekuła-Leleno M., *Odpowiedzialność za szkodę niemajątkową wyrządzoną niewykonaniem umowy o imprezę turystyczną*, Warsaw 2014.

Seweryn R., *Produkt turystyczny i wyznaczniki jego atrakcyjności*, Zeszyty Naukowe Akademii Ekonomicznej w Krakowie, No. 697, 2005.

Sieradzka M., *Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym. Komentarz*, Warsaw 2008.

Sieradzka M., *Wykładnia pojęcia „zbiorowy interes konsumentów" na tle orzecznictwa*, Glosa No. 3, 2008.
Sieradzka M., *Komentarz do art. 24 ustawy o ochronie konkurencji i konsumentów*, [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw 2014.
Słownik języka polskiego, https://sjp.pl.
Tischner A., *Model przeciętnego konsumenta w prawie europejskim*, Kwartalnik Prawa Prywatnego No. 1, 2006.
Wędrychowska-Karpińska A., Wiercińska-Krużewska A., [in:] A. Stawicki (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz,* Warsaw 2011.
Wielki słownik języka polskiego, http://wsjp.pl.
Zajadacz A., Stroik E., *Podstawy planowania rozwoju „turystyki dostępnej"*, [in:] Z. Młynaczyk, A. Zajadacz (ed.), *Uwarunkowania i plany rozwoju turystyki. Społeczno-ekonomiczne problemy rozwoju turystyki*, Poznań 2016.

Legal regulations

International law

Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L of 1990, item 158, as amended.
Treaty on the Functioning of the European Union of 16 April 2003, OJ L of 2004, No. 90, item 864/2, as amended.
Convention on the Rights of Persons with Disabilities of 13 December 2006, http://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf.
Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L of 2015, item 326, p. 1.

Polish law

Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Act of 23 April 1964 – Civil Code], Journal of Laws [Dz.U.] of 2017, item 459, as amended.
Ustawa z dnia 29 sierpnia 1997 r. o usługach turystycznych [Act of 29 August 1997 on tourist services], Journal of Laws [Dz.U.] of 2017, item 1553, as amended.
Ustawa z dnia 7 października 1999 r. o języku polskim [Act of 7 October 1999 on the Polish language], Journal of Laws [Dz.U.] of 2011, No. 43, item 224, as amended.
Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów [Act of 16 February 2007 on the competition and consumer protection], Journal of Laws [Dz.U.] of 2017, item 229, as amended.
Projekt ustawy o imprezach turystycznych i powiązanych usługach turystycznych [Bill on tourist packages and related tourist services], February 2017.

Court rulings

Judgement of the European Court of Justice of 3 June 1999 in case *Colim NV v. Bigg's Continent Noord NV*, C-33/97.
Judgement of the European Court of Justice of 12 March 2002 in case *Simone Leitner v. TUI Deutschland GmbH & Co. KG*, C-168/00C-168/00.
Judgement of the Competition and Consumer Protection Court of 23 February 2006, XVII Ama 118/04.
Judgement of the Competition and Consumer Protection Court of 26 May 2010, XVII Ama 77/09.
Resolution of the Supreme Court of 19 November 2010, III CZP 79/10.

Glosses

Gospodarek J., *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Orzecznictwo Sądów Polskich No. 1, 2012.

Kaflik P., *Glosa do wyroku s. apel. z dnia 1 kwietnia 2015 r., I ACa 1431/14*, Glosa No. 2, 2016.

Kryla K., *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Przegląd Sądowy No. 9, 2011.

Kunkiel-Kryńska A., *Glosa do wyroku TS z dnia 25 kwietnia 2002 r., C-183/00*, Europejski Przegląd Sądowy No. 10, 2008.

Łolik M., *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Europejski Przegląd Sądowy No. 9, 2011.

Sieradzka M., *Glosa do wyroku SOKiK w Warszawie z dnia 25 maja 2009 r., XVII Ama 98/08*, LEX/el. 2010.

Zasuwik P., *Glosa do uchwały SN z dnia 19 listopada 2010 r., III CZP 79/10*, Monitor Prawniczy No. 24, 2016.

CONTENT OF A TOURIST SERVICES CONTRACT IN THE LIGHT OF AMENDMENTS TO THE REGULATIONS ON TOURIST PACKAGES

Summary

A tourist services contract is one of the most common contracts concluded on the market of tourism services, which in general comprehensively regulates the relationship between a participant of tourist packages (a consumer, a traveller) and a professional entity (basically, although with some simplification, a tour operator). Proper stimulation of the relationship between professional and non-professional (consumers) entities should, therefore, be the priority task of the tourism policy, which can be achieved by using a wide catalogue of instruments, including legal acts. Problems with proper functioning of a contract cause dysfunctions, which, due to the universality of the agreement, can result in far-reaching negative effects. Of course, it is necessary to remember that the content of a tourist services contract is one of the most important elements determining the quality of the agreement on the market of tourist services. That is why, the study concentrates on the issue of contractual information (the information contained in the contract), because it is reasonable to indicate that the professional entities "communicate" with consumers also via the content of the agreement, which includes basic information about the provided services, and therefore, consumers should pay special attention to the analysis of that content. It is more than obvious that the lack of equality between professional and non-professional entities on any services market can be considered this market defectiveness, and hence can result in far-reaching distortions of competition. Defects often depend on the internal characteristics of the market. Therefore, the article first identifies the main characteristics of the tourist market (determined by the specificity of tourist products). Then, issues related to professional entitles' information obligations, with a special emphasis on the content of a tourist services contract, are discussed in detail. The main considerations are divided into two areas: (1) comments on Directive 90/314 and the Act on tourist services of 1997; (2) comments on Directive 2015/2302 and the Bill on tourist packages and related tourist services.

Keywords: tourism law, tourist services market, tourist services contract, content of a tourist services contract, information obligation

TREŚĆ UMOWY O USŁUGI TURYSTYCZNE W KONTEKŚCIE ZMIAN PRZEPISÓW DOTYCZĄCYCH IMPREZ TURYSTYCZNYCH

Streszczenie

Umowa o usługi turystyczne jest jedną z najbardziej powszechnych umów zawieranych na rynku usług turystycznych, która w zasadzie kompleksowo reguluje stosunek łączący uczestnika imprezy turystycznej (konsumenta, podróżnego) i podmiot profesjonalny, za jaki co do zasady i dla pewnego uproszczenia należy uznać organizatora turystyki. Właściwe stymulowanie wzajemnych relacji pomiędzy podmiotem profesjonalnym, a nieprofesjonalnym (konsumentem) należy zatem do zadań priorytetowych polityki turystycznej, która w celu ich realizacji wykorzystuje szeroki katalog instrumentów, w tym prawnych. Problemy w prawidłowym funkcjonowaniu umowy powodują różnego rodzaju dysfunkcje, które ze względu na powszechność umowy rodzą daleko posunięte negatywne skutki. Należy przy tym pamiętać, iż treść umowy o usługi turystyczne stanowi jeden z ważniejszych elementów konstytuujących jakość funkcjonowania umowy na rynku usług turystycznych. Niniejsze opracowanie konkretyzuje zatem problematykę informacji umownych (informacji zawartych w umowie), gdyż zasadne jest wskazanie, iż podmioty profesjonalne „komunikują się" z konsumentami również za pomocą treści umowy, w której zawarte są podstawowe informacje dotyczące świadczonych usług turystycznych, a zatem konsumenci powinni szczególną uwagę poświęcić analizie owej treści. Oczywiste jest, iż brak równorzędności pomiędzy podmiotami profesjonalnymi a konsumentami, na jakimkolwiek rynku usług, jest przejawem jego wadliwości, a przeto powoduje daleko idące zaburzenia konkurencji, przy czym bardzo często wady te uzależnione są od wewnętrznych cech danego rynku. Stąd w pierwszej kolejności w niniejszych rozważaniach zostają wskazane najważniejsze cechy rynku turystycznego (kreowane przez specyfikę produktów turystycznych), dopiero następnie szczegółowo omówione są kwestie związane z obowiązkiem informacyjnym podmiotów profesjonalnych, ze szczególnym uwzględnieniem treści komentowanej umowy. Rozważania główne zostały podzielone na dwie sfery: (1) uwagi dotyczące ustawy z dnia 29 stycznia 1997 r. o usługach turystycznych oraz dyrektywy 90/314; (2) uwagi dotyczące dyrektywy 2015/2302 oraz projektu ustawy o imprezach turystycznych i powiązanych usługach turystycznych.

Słowa kluczowe: prawo w turystyce, rynek usług turystycznych, umowa o usługi turystyczne, treść umowy o usługi turystyczne, obowiązek informacyjny

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CIVIL LAW PROTECTION OF THE SECRECY OF CORRESPONDENCE

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TERESA MRÓZ*

1. SECRECY OF CORRESPONDENCE AS A PERSONALITY RIGHT

It is estimated that there are about 239 legal acts in force in Poland the provisions of which refer to various types of secrecy (e.g. professional privilege, corporate confidentiality).[1] It must be pointed out that to a great extent these are regulations in the sphere of public law. Undoubtedly, a big social and legal rank is given to official secrets, especially in connection with the state security, defence and diplomacy. However, the secrecy of correspondence has always been of great value. Over the recent years, the legal issue of secrecy has become the subject of great interest of jurisprudence. In scientific considerations concerning human rights, the secrecy of correspondence has been called a human right of the first generation, a "classical" right[2]. It should be added that corporate secrets having economic value constitute a separate issue.

The content of Article 23 of the Polish Civil Code unambiguously suggests that the secrecy of correspondence belongs to the category of personality rights, i.e. the most important values for a human being, which are protected by civil law. Although, in accordance with Article 43 Civil Code, the provisions on the protection of personality rights of natural persons are applied to legal persons respectively, an individual is without doubt ontologically the constructive basis of personality

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[1] See e.g., G. Szpor (ed.), *Jawność i jej ograniczenia*, [in:] A. Gryszczyńska (ed.), *Struktura tajemnic*, Vol. IV, C.H. Beck, Warsaw 2014, p. 23 and the legal regulations referred to therein. For physician-patient privilege, see e.g. M. Safjan, *Prawne problemy tajemnicy lekarskiej*, Kwartalnik Prawa Prywatnego issue 1, 1995, p. 5 ff; J. Sobczak, *Godność pacjenta*, Medyczna Wokanda No. 1, 2009, p. 34.

[2] L. Bosek, *Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne*, Wydawnictwo Sejmowe, Warsaw 2012, p. 335 and the literature referred to therein.

rights, which was expressed in Article 23 Civil Code ("Personality rights of a human being…").[3]

In the conditions of common and dynamic development of correspondence means and methods, the problem of the secrecy of correspondence has a global dimension. Today, correspondence can reach an addressee immediately and still not so long ago the word "correspondence" was associated with a handwritten paper letter or an official letter delivered by a postman. The violation of the secrecy of correspondence was easily detectable in case of the opening of a letter. At present, the art of epistolography is disappearing and new ways of passing information and thoughts are developing. Paper correspondence is evidently pushed away by electronic correspondence.

The secrecy of correspondence is compared with other legally protected rights and interests in different ways. In the literature, one can find a statement that the secrecy of correspondence is a single right that exists on its own.[4] There is also an opinion that the secrecy of correspondence is a personality right within the sphere of privacy.[5] As M. Pazdan rightly notices, the attempts to precisely separate personality rights and adequate subjective rights (the secrecy of correspondence and the sphere of privacy) are useless.[6] Inter alia because of that the protection of privacy is becoming another contemporary problem. The development of modern technologies is a benefit but also a threat to health, privacy and many other areas of people's lives. Information, often also this concerning privacy and obtained with the violation of the secrecy of correspondence, is a "marketable product".

The secrecy of correspondence referred to in Article 23 Civil Code cannot be looked at from the perspective of the limitation of the principle of openness to the public because the principle of freedom of information and its limitation belong to the sphere of public law. In public law, openness to the public is a principle, and from the point of view of the study of administration, "it is an element of the functions of necessary administrative systems (…)",[7] thus, in this field, various types of secrets are exceptions to the rule. Private law protects private interests, including the secrecy of correspondence. Therefore, every type of correspondence is confidential unless the author's will, statute or a custom decides otherwise.

According to the dominating opinion in the study of private law, the protection of personality rights of an individual is implemented within the construction of personal rights.[8] Ignoring the scientific discussions on the issue whether, based

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[3] By the way, it can be mentioned that the provisions of Articles 23 and 43 Civil Code use different terms, namely the former refers to personality rights of a human being and the latter to the personality rights of a natural person.

[4] I. Dobosz, *Tajemnica korespondencji jako dobro osobiste oraz jej ochrona w prawie cywilnym*, Jagiellonian University, Kraków 1989, p. 61 and the literature referred to therein.

[5] A. Kopff, *Koncepcja praw do intymności i prywatności życia osobistego. Zagadnienia konstrukcyjne*, Studia Cywilistyczne, Vol. XX, Warsaw–Kraków 1972, pp. 30, 40.

[6] M. Pazdan, [in:] M. Safjan (ed.), *System prawa prywatnego*, Vol. 1, 2nd ed., C.H. Beck, Warsaw 2012, p. 1269 ff.

[7] Z. Cieślak, *Aksjologiczne podstawy jawności. Perspektywa nauki o administracji*, [in:] Z. Cieślak (ed.), *Jawność i jej ograniczenia*, Vol. II: *Podstawy aksjologiczne*, C.H. Beck, Warsaw 2013, p. 9.

[8] L. Bosek, *Gwarancje godności ludzkiej…*, p. 335 and the literature referred to therein.

in the Civil Code, we deal with a construction of a general right of personality or with many personal rights connected with personality rights, e.g. referred to in Article 23 Civil Code, it can be assumed that the secrecy of correspondence is a component of a superior, original personality right such as human dignity, especially in a personalistic approach.[9] This statement is fully justified if, approving of the opinions of the legal doctrine representatives,[10] we assume that personality rights should be derived from human dignity, which was also emphasised in non-legal professional circles.[11]

The exceptionality of human dignity is a basis for inviolability of personal rights of a human being.[12] It is emphasised in the doctrine that if we want to point out the types of ethical values that are really represented by personality rights, it is necessary to mention two of them, namely dignity and freedom.[13]

Analysing basic regulations concerning the discussed issues, it is necessary to point out that in the content of the Charter of Fundamental Rights, the second title: "Freedoms", Article 7 entitled "Respect for private and family life", there is a statement that everyone has the right to respect for his or her private and family life, home and communications.[14] As it is seen, the right to communication has not been included in the sphere of human dignity,[15] but in the sphere of freedoms. In the Constitution of the Republic of Poland, which guarantees the freedom and protection of privacy of communication in Article 49, it is included in the part dealing with personal freedoms and rights, i.e. in the same section as in the Charter of Fundamental Rights.

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9 For more on the concepts of human dignity, see *ibid*., p. 43 ff, and the literature referred to therein.

10 A. Mączyński, *Konstytucyjne prawa do godności i prawa do prywatności*, http://26konferencja.giodo.gov.pl/data/resources/MaczynskiA_paper.pdf [accessed on 2/05/2018]; J. Sobczak, *Godność człowieka i prawo do prywatności w orzecznictwie Trybunału Konstytucyjnego*, [in:] A.J. Madera, T. Ślęzak (ed.), *Nowa Konstytucja czy nowe państwo? Państwo. Bezpieczeństwo. Gospodarka*, Kraków 2005, p. 45 ff.

11 Pope John Paul II drew attention to dignity of a human being as the highest value. His first encyclical *Redemptor hominis* of 1979 discussed this issue. Moreover, on many occasions, the Pope emphasised that dignity is the source and the foundation of human rights, the basic element of humanity and, at the same time, an indicator of the moral value of human activities. See, K. Wojtyła, Address to the General Assembly of the United Nations of 2 October 1979, [in:] John Paul II, *Dzieła zebrane,* Vol. 12, Kraków 2009, p. 108; J. Matys, *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym,* Oficyna Wolters Kluwer, Warsaw 2010, p. 105.

12 M.A. Krąpiec, *Człowiek jako osoba*, Polskie Towarzystwo Tomasza z Akwinu, Lublin 2005, p. 262.

13 M. Wilejczyk, *Zagadnienia etyczne części ogólnej prawa cywilnego*, C.H. Beck, Warsaw 2014, p. 163.

14 Karta Praw Podstawowych Unii Europejskiej [Charter of Fundamental Rights of the European Union], OJ C 326 of 26 October 2012, pp. 391–407.

15 For more on the right to privacy, see: J. Sobczak, https://www.kul.pl/files/983/mgr_fabian_wider/Recenzja_prof._Jacka_Sobczaka.pdf and the literature referred to therein [accessed on 2/05/2018].

2. VIOLATION OF THE SECRECY OF CORRESPONDENCE VS PRIVACY OF COMMUNICATION

The legal protection of the secrecy of correspondence is provided to a sender and an addressee. Other persons that may be harmed as a result of the infringement of the secrecy of correspondence may seek protection claiming the violation of or a threat to the rights other than the secrecy of correspondence. In general, not only natural persons are protected but also legal persons under private law and organisational units referred to in Article 33^1 Civil Code. The principle does not apply to legal persons under public law because their activities, including communication, should be open to the public as a rule.

It is especially well seen in the court practice that in the era of fast development of modern technologies, legal protection of the secrecy of correspondence requires up-to-date or even current establishment of the content of the term "secrecy of correspondence" and its confrontation with "privacy of communication", i.e. the term used in the Constitution of the Republic of Poland. To tell the truth, the concept of secrecy (in a general way), as well as the concept of correspondence, has not been defined in the Polish legal system. It seems that the judicature and jurisprudence "fill in" this "gap" and manage to meet contemporary challenges concerning the protection of the secrecy of correspondence. In the course of time, the problems that theoreticians and practitioners face in connection with the secrecy of correspondence are changing. In the past, legal literature focused on the concepts of "correspondence" and "letter" and the relationship between the two.[16] At present, from the point of view of the method of legal protection, the issue of the relationship between the concepts of "correspondence" and "information" is up-to-date. It is pointed out in the literature that the secrecy of correspondence does not refer to obtaining any information but only such that is in the form of correspondence. The infringement of privacy of information that is not correspondence (e.g. computer hacking) may be the violation of the right to privacy.[17] As a rule, a hacker breaks into the computer systems for different reasons and for different purposes than the person obtaining information addressed to a particular addressee via e-mail. Drawing a clear borderline between the secrecy of information and the secrecy of correspondence may sometimes be difficult because the concepts may overlap.

Selected types of secrecy are regulated in different – broad or narrow – ways by determining information concerned (or circumstances of such information), entities obliged to keep a secret and indicating special duties.[18] The issue of secrets and the

[16] I. Dobosz, *Tajemnica korespondencji…*, p. 27.

[17] P. Księżak, [in:] M. Pyziak-Szafnicka (ed.), *Kodeks cywilny. Część ogólna*, Wolters Kluwer, Warsaw 2009, p. 265.

[18] In the judicature's opinion, the concept of legally protected secrecy should be based on the co-existence of two conditions: financial and formal ones. Financial conditions concern the subjective scope, including indication of entities obliged and beneficiaries of secrecy, the objective scope and the period of secrecy. Formal conditions include the will to keep information secret demonstrated in the form of secrecy (*ex officio*, information sensitivity clause, agreement) or declassification of information (consent of the beneficiary of secrecy, court ruling). G. Szpor (ed.), *Jawność i jej ograniczenia…*, p. 5.

secrecy of correspondence give the judicature and jurisprudence a basis to legal inquiries into modern methods of communication, which are necessary in order to adjudicate in particular cases.[19]

In case law, the term "secrecy of correspondence" is interpreted in different ways. Both the judicature and jurisprudence assume that the term covers all types of communication (a letter, an e-mail, radio messages, light signals, etc.). Information included in correspondence does not have to be protected in a special method (e.g. a postcard).[20] It does not matter to whom it has been addressed (a natural person, an office, etc.). The infringement of the secrecy of correspondence means any unauthorised interference in it by a third party, especially getting to know or changing its content, as well as creating a situation in which such interference may take place, opening a letter that has not been addressed to a perpetrator of the infringement, hiding or damaging a letter before an addressee got to know its content and overhearing a telephone conversation and not only a telephone one. The infringement of the secrecy of correspondence also takes place when, as a result of loss of someone's correspondence, real conditions (threats) are created for third parties who most probably will be able to get to know its content.

In another judgement, a court assumed that the secrecy of correspondence is included in the broadly understood right to communicate. However, it is a separate personality right of much narrower range protecting the right to keep the content of communication secret from third parties.[21]

The above-presented theses of the judicature indicate different stands on the relationship between the secrecy of correspondence and privacy of communication. In accordance with the former,[22] the term "correspondence" should be interpreted broadly and it should cover all types of communication. However, according to the latter, secrecy of communication is a separate personality right that has not been *expressis verbis* referred to in Article 23 Civil Code.[23] One may wonder whether privacy of communication is a separate personality right or it is only included in the sphere of privacy. It seems that the right to communication may be protected within the right to privacy. The protection is sufficient and the distinction of the right to communication as a separate personality right is not going to result in changes in its protection.

Communication covers not only the secrecy of correspondence but also all types of interpersonal contacts. M. Wild[24] believes that it is improper to think

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[19] M. Jaśkowska, *Materialne i formalne przesłanki tajemnic publicznoprawnych*, [in:] M. Jaśkowska (ed.), *Jawność i jej ograniczenia*, Vol. IV: *Znaczenie orzecznictwa*, C.H. Beck, Warsaw 2014, pp. 3–12.

[20] Judgement of the Appellate Court in Wrocław – Civil Chamber of 26 June 2012, I ACa 521/12, Legalis No. 738967; P. Księżak, [in:] M. Pyziak-Szafnicka (ed.), *Kodeks cywilny…*, p. 265.

[21] Judgement of the District Court in Gdańsk of 31 January 2014, I C 1551/11, Legalis No. 1556485.

[22] Judgement of the Appellate Court in Warsaw of 6 July 1999, I ACa 380/99), Legalis No. 48547.

[23] Judgement of the District Court in Gdańsk of 31 January 2014, I C 1551/11, Legalis No. 1556485.

[24] M. Wild, [in:] M. Safjan, L. Bosek (ed.), *Konstytucja RP*, Vol. I: *Komentarz do art. 1–86*, C.H. Beck, Warsaw 2016, p. 1214.

that the necessary condition for privacy of communication under Article 49 of the Constitution is the use of a particular means of transmission. According to this author, constitutional protection applies to all methods of communication, regardless of the way and circumstances of communication. Correspondence is in general bilateral in nature and a type of interpersonal communication similar to a conversation. Communication takes place both in the presence of parties as well as at a distance, while correspondence covers different forms of communication at a distance. Therefore, communication is a concept broader than correspondence.

Still, in accordance with the Civil Code, one can assume that the secrecy of correspondence and privacy of communication are not the same concepts. The protection of privacy of communication applies to just the fact of communicating of a message with an addressee individually selected by an author and may concern interference into the sphere of privacy as a personality right. The secrecy of correspondence covers the content dedicated to an addressee, including the protection against any interference into the content of a message. It may concern getting to know the content of correspondence by an unauthorised person in order to use the information or altering its content, and a possibility of getting to know the content of correspondence by an unauthorised person.

Opening a letter addressed to an indicated individual by another person should be classified as the infringement of the secrecy of correspondence. It does not matter that the person is e.g. a superior of an addressee. Only a person to whom a letter is addressed can open it. However, in general, the person does not have the right to reveal correspondence. An addressee is not a person entitled to reveal correspondence if the circumstances or an author's clear reservations indicate that it is intended exclusively for that addressee.[25] The provisions of copyright give the right to give consent to disseminate it only to an addressee of correspondence, and in the period of 20 years after his/her death also to his/her spouse, and in case there is no spouse, to other heirs, parents or siblings, unless the addressee's will is different. In accordance with Article 82 of the Act on copyright, if a person to whom correspondence was addressed does not express a different will, in the period of 20 years after his/her death, dissemination of correspondence requires consent of his/her spouse, and in case there is no spouse, of successive heirs, parents or siblings.[26] It should be emphasised that it applies to a person to whom correspondence is addressed, i.e. an addressee and not a sender of correspondence.

As a result of publicising, the content of correspondence changes its essence and nature, it loses the feature of individuality. The legal classification of information and its aim change and it can be subject to protection under Article 54 of the Constitution of the Republic of Poland, in accordance with which the freedom to acquire and to disseminate information is guaranteed to everyone. However, when the disseminated information concerns private and family life, dignity and reputation, to protect it one can apply the provisions of the Civil Code that provide

[25] P. Księżak, [in:] M. Pyziak-Szafnicka (ed.), *Kodeks cywilny*…, pp. 265–266.

[26] Act of 4 February 1994 on copyright and related rights, Journal of Laws [Dz.U.] No. 24, item 83.

financial and non-financial measures of protection for endangered or infringed personality rights.

The violation of the secrecy of correspondence often starts a chain of events that infringe other personality rights and values that are subject to legal protection. It seems that at present this problem is practically becoming more apparent and perceptible than the violation of the secrecy of correspondence as such.

The conduct of a sender of correspondence can lead to the infringement of an addressee's personality right other than the secrecy of correspondence. A court assumed that a personality right includes a person's right to respect his/her private life, including the right to secrecy of the content of information concerning this sphere of life, also protected by the secrecy of correspondence. A defendant (a bank) sending correspondence to an out-of-date address of a plaintiff (a customer) enabled an unauthorised person to get acquainted with its content. At the same time, it does not matter for the issue of the sued bank's liability whether a third person infringed the secrecy of correspondence. What matters is whether the defendant's activity may also be recognised as the infringement of the secrecy of correspondence.[27]

The secrecy of correspondence is not absolute in nature. Public authorities' interference into the secrecy of correspondence is admissible. The conditions of this interference are strictly regulated, especially in Article 8(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950,[28] which stipulates that it may take place in accordance with the law and if necessary in a democratic society in the interest of the specified socially desired objectives.[29].

3. MEASURES OF PROTECTION FOR THE SECRECY OF CORRESPONDENCE UNDER THE CIVIL CODE

Traditionally, measures of protection of personality rights are classified as non--financial and financial ones. The protection of personality rights with the use of non-financial measures is laid down in Article 24 Civil Code. A person whose personality right is endangered by another person's activity may demand that the activity be stopped, unless it is legal. In case of violation, he/she can also demand that the perpetrator undertake steps necessary to eliminate the consequences, especially that the perpetrator makes an appropriate declaration and in an appropriate form. Thus, non-financial protection of the secrecy of correspondence depends on the fulfilment of the following conditions: endangerment or infringement of the secrecy of correspondence and unlawful nature of an activity. In order to make it easier to enforce non-financial protection of personality rights, the legislator made use of the assumption of unlawfulness of endangerment or infringement of personality

[27] Judgement of the Appellate Court in Warsaw – VI Civil Chamber of 18 November 2013, VI ACa 674/13, www.orzeczenia.ms.gov.pl, Legalis No. 831513.

[28] Journal of Laws [Dz.U.] of 1993, No. 61, item 284.

[29] Judgement of the Appellate Court in Katowice – I Civil Chamber of 3 December 2014, I ACa 696/14, http://orzeczenia.katowice.sa.gov.pl/content/$N/151500000000503_I_ACa_000696_2014_Uz_2014-12-03_002 [accessed on 19/07/2017].

rights. Pursuant to Article 24 Civil Code, an aggrieved person may demand that specific conduct be stopped, and may demand that action necessary to eliminate consequences of the infringement of a personality right be performed. The above--mentioned activities are just examples.

The non-exhaustive catalogue of measures referred to in Article 24 Civil Code results from the fact that they must be adequate to the type of personality right infringed, the type and extent of the infringement.[30] It is rightly emphasised in the judicature that a declaration eliminating the consequences of the infringement of a personality right in the form of the secrecy of correspondence, in order to be effective, must reach other people who dealt with that unlawful infringement. On the other hand, the measure used to eliminate the consequences of the violation should be adequate to the extent of the infringement.[31] This stand expresses the need for unconventional approach to the measures of protection for personality rights, both non-financial and financial ones.

It is not necessary to conduct detailed inquiries to claim that in case of the infringement of personality rights the reparation for non-financial damage and restitution of the former state is very difficult or, in fact, impossible. Appropriate apologies and declarations do not usually eliminate all the negative consequences of the violation of personality rights. It was assumed that an action to declare rights or a legal relationship may constitute a measure of protection for personality rights if a plaintiff has a legal interest in it (e.g. the recognition that the infringement of personality rights resulted in the creation of a legal relationship between the plaintiff and the defendant). A declaratory action is exceptional in nature because it cannot be assumed that this lawsuit ensures the protection of rights to a greater extent than a lawsuit to protect personality rights. And only in such a case, does the doctrine exceptionally admit a possibility of a declaratory action when there are other measures of legal protection.[32] The Supreme Court in its judgement of 8 May 2008 ruled that there are no grounds for demanding that just the fact of violation of a personality right be established without the indication of legal measures of protection (adequate claims) referred to in Article 24 Civil Code.[33]

Financial measures in the form of compensation are becoming more and more important because they are treated as a modern way of moderating the consequences of the violation of personality rights. The adoption and approval of consumerist lifestyle and universality of money use in the contemporary world cause that compensation as a financial measure of protection of personality rights is becoming the most effective instrument of protection of non-financial values.[34] An adequate sum of compensation is not the only financial measure of protection

[30] P. Machnikowski, [in:] E. Gniewek, P. Machnikowski (ed.), *Kodeks cywilny. Komentarz*, 7th ed., C.H. Beck, Warsaw 2016, pp. 61–64.

[31] Judgement of the Appellate Court in Warsaw – VI Civil Chamber of 8 September 2011, VI ACa 297/11, www.orzeczenia.ms.gov.pl, Legalis, No. 740943.

[32] Judgement of the Appellate Court in Gdańsk – I Civil Chamber of 27 February 2015, I ACa 842/14, http://orzeczenia.gdansk.sa.gov.pl/content/$N/151000000000503_I_ACa_000842_2014_Uz_2015-02-27_001 [accessed on 24/06/2017].

[33] V CSK 568/07, Lex No. 496388.

[34] J. Matys, *Model zadośćuczynienia pieniężnego*…, p. 14.

of personality rights. In accordance with Article 448 Civil Code, the aggrieved may claim alternatively (exclusive disjunction)[35] pecuniary compensation for harm or an adequate money contribution towards an indicated social aim. Therefore, as in case of violation of the secrecy of correspondence the provision of Article 448 Civil Code is applied, the choice of a claim to make an adequate money contribution towards an indicated social aim may mean that a repressive function may become most important: to oppress a perpetrator. Maybe, in some cases, the observations made by Cicero and Publilius Syrus that "the pain is mitigated by the punishment of an adversary" and "the pain of an enemy is a hearing remedy to a wounded spirit" will come true.[36]

If, as a result of the infringement of a personality right, there is a financial loss, the aggrieved may claim damages in accordance with general rules (Article 24 §2 Civil Code). As it is pointed out in the literature, the scope of actual damages may create a problem because, due to the non-financial nature of personality rights (including the secrecy of correspondence), only in a few cases the aggrieved can prove that the violation of their rights resulted in failure to conclude a particular contract and consequently to obtain a particular profit from it (*lucrum cessans*).[37]

Taking into account the issue of compensation for the harm caused by the violation of the secrecy of correspondence, it is worth considering whether, in connection with the need for unconventional treatment of the measures of personality rights protection signalled above, there should also be a certain gradation of personality rights and their protection in practice, and if so, what position in that gradation should be given to the protection of the secrecy of correspondence.

The provision of Article 23 Civil Code compiles a list of personality rights with health topping it and the secrecy of correspondence ranked eighth. Does it automatically mean weaker protection of this personality right? Can it constitute grounds for establishing the legislator's stand on the issue of which personality rights are valued more and are prioritised? Theoretically, it is the legislator's suggestion, and thus the sequence of the listed rights does not constitute an unchangeable evaluation or hierarchical order of the rights. In practice, in case of violation of the right to health or freedom, the rights are sure to get stronger protection than the secrecy of correspondence. It seems that in particular circumstances the gradation of compensation depending on which right was infringed is justified. For most people, it is unquestionable that life and health are most important. It is confirmed in the doctrine and judicature, which assume that when assessing what sum is appropriate as compensation for harm caused by the infringement of personality rights, it is necessary to take into consideration which right was infringed and its nature, degree and time when the aggrieved was exposed to it, and the negative psychical

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[35] M. Pazdan, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny,* Vol. I: *Komentarz do art. 1–449^10*, C.H. Beck, Warsaw 2015, p. 148 and the literature referred to therein; K. Mularski, [in:] M. Gutowski (ed.), *Kodeks cywilny*, Vol. I: *Komentarz do art. 1–449^11*, C.H. Beck, Warsaw 2016, p. 1849.

[36] Citation after H. Grotius, *O prawie wojny i pokoju*, Vol. II, PWN, Warsaw 1957, p. 53.

[37] M. Wilejczyk, *Zagadnienia etyczne…*, p. 204.

experiences resulting from the infringement.[38] Courts rule higher and higher amounts of damages. It takes place in particular in lawsuits against physicians, which confirm the common opinion that life and health are especially valuable interests; low amounts of compensation in case of serious damage to health leads to undesired depreciation of that interest. Interpreting regulations literally, such a conclusion can be drawn from Article 445 in conjunction with Article 444 Civil Code and the regulation laid down in Article 448 Civil Code. The provision of Article 444 Civil Code only lists body damage and a health disorder, and Article 445 Civil Code gives grounds for ruling compensation in case those interests are violated. At present, claiming a payment of a certain sum of money for an indicated social aim is not envisaged on this basis. Article 448 Civil Code does not list protected rights but states: "in case of violation of a personality right (…)". Claiming compensation for harm inflicted as a result of the infringement of the secrecy of correspondence, it is necessary to refer to Article 448 Civil Code. Moreover, in case of this provision, there is a possibility of formulating claims for a certain amount of money towards an indicated social aim. The provision of Article 448 Civil Code *in fine* lays down admissibility of a redress or claims for a specified amount of money towards an indicated social aim together with non-financial measures of protection referred to in Article 24 Civil Code.[39] The relationship between Article 445 and Article 448 Civil Code and legal protection measures laid down in those provisions has raised many doubts. In general, it is analysed in detail in every commentary on the Civil Code and many other scientific publications.[40] Therefore, there is no need to report already identified problems and interpretational dilemmas here. It seems that A. Śmieja puts all basic issues in order emphasising that Article 448 Civil Code is not a provision independent in nature but refers to the provisions preceding it and concerning liability for financial loss resulting from prohibited acts.[41] Thus, it may concern not only liability based on guilt but also based on risk. The same rules should constitute grounds for liability for inflicted non-financial harm. It should be added that there has been a discussion for some time on the issue of admissibility of a redress for non-financial loss in contractual obligations.[42] The problem also appeared in the

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[38] Judgement of the Appellate Court in Łódź of 26 April 2013, I ACa 1467/12, Lex No. 1321976.

[39] M. Pazdan, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny…*, p. 148 and the literature referred to therein.

[40] K. Pietrzykowski, *Nowelizacja kodeksu cywilnego z 23 sierpnia 1996 r.*, PS No. 3, 1997, p. 5; J. Matys, *Model zadośćuczynienia pieniężnego…*, p. 150 ff and the literature referred to therein; A. Cisek, W. Dubis, [in:] E. Gniewek, P. Machnikowski (ed.), *Kodeks cywilny…*, commentary on Art. 448.

[41] A. Śmieja, *Z problematyki odpowiedzialności uregulowanej w art. 448 k.c.*, [in:] M. Pyziak--Szafnicka (ed.), *Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara*, Wolters Kluwer, Kraków 2004, p. 298; A. Mączyński, *Zadośćuczynienie pieniężne za krzywdę spowodowaną naruszeniem dobra osobistego. Geneza, charakterystyka i ocena obowiązujących regulacji,* [in:] M. Pyziak-Szafnicka (ed.), *Odpowiedzialność cywilna. Księga pamiątkowa…*, pp. 242–243.

[42] P. Księżak unambiguously stated that the possibility of awarding financial compensation in contractual obligations is *de lege lata* excluded. P. Księżak, [in:] M. Pyziak-Szafnicka (ed.), *Kodeks cywilny…*, p. 308.

judicature.[43] In case of the infringement of the secrecy of correspondence, one cannot ignore a situation in which providers of correspondence delivery services, based on contracts concluded with senders or addressees, may be potential violators of the secrecy of correspondence. A possibility of claiming compensation for inappropriate fulfilment of an obligation is not unimportant for the financial protection of the secrecy of correspondence. A few years ago, a court examined a case of lost correspondence sent to an imprisoned person. The plaintiff's suffering resulted from the fact that his correspondence remained unanswered, while he was convinced his letters had been delivered and waited for replies. The addressee was a woman who was in close relation with the sender. Failure to deliver letters resulted in the breakdown of the relationship and the plaintiff's attempted suicide.[44] The court considered the issue of claims concurrence (Article 443 Civil Code) and a possibility of ruling compensation. M. Nesterowicz's opinion that the principle of awarding damages only in tort starts fading proves to be right.[45]

The awarded sum of compensation is to constitute an equivalent of the non-financial harm that the aggrieved suffered. The basis for establishing the sum of compensation is the amount of suffering; and thus in particular cases of violation of the secrecy of correspondence, a big sum may be awarded because there are no separate criteria for establishing the sum of compensation for individual personality rights.

The sum of financial compensation should be adequate, established in such an amount that its use could remove the negative feelings resulting from the violation of personality rights.[46] Ideally, compensation is to restore the state that was before the event inflicting harm. It is often impossible. A compensatory function of damages for harm differs from compensation for financial loss. It can be assumed that the role of redress is to mitigate the immeasurable non-financial harm.[47] Claims for an adequate sum of money to be paid for an indicated social aim in case of violation of the secrecy of correspondence play a repressive, pedagogical and preventive role.

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[43] Supreme Court Judgement of 14 December 2010, I PK 95/10, Lex No. 785643; also the judgement of the Appellate Court in Szczecin, I ACa 235/14, http://orzeczenia.szczecin.sa.gov.pl/content/$N/155500000000503_I_ACa_000235_2014_Uz_2014-06-17_001 [accessed on 24/06/2017].

[44] Justification of the judgement of the Appellate Court in Szczecin of 17 June 2014, I ACa 235/14, http://orzeczenia.szczecin.sa.gov.pl/content/$N/155500000000503_I_ACa_000235_2014_Uz_2014-06-17_001 [accessed on 24/06/2017].

[45] See e.g., M. Nesterowicz, *Zadośćuczynienie pieniężne ex contractu i przy zbiegu z odpowiedzialnością ex delicto*, PiP No. 1, 2007, p. 23; M. Serwach, *Przesłanki odpowiedzialności cywilnej lekarza za szkodę wyrządzoną pacjentowi w orzecznictwie sądów polskich*, PiM No. 4, 2006, p. 10; also compare, K. Warzecha, *Glosa do wyroku SN z dnia 17 grudnia 2004 r., II CK 300/04*, Palestra No. 1–2, 2007, p. 324; K. Zacharzewski, *Glosa do wyroku SN z dnia 15 lutego 2008 r., I CSK 358/07*, Glosa No. 2, 2009, p. 66.

[46] J. Matys, *Model zadośćuczynienia pieniężnego…*, p. 328.

[47] Supreme Court judgement of 12 October 1999, II UKN 141/99, Lex No. 151535.

4. CONCLUSIONS

"The idea of communicating thoughts from a distance is as old as the human mind".[48] Only methods of sending information have changed and improved over the successive historic epochs. Letters have been a basic traditional element of correspondence for years. The oldest letters date back to 2200-2000 BC but they supposedly occurred earlier.[49] Nowadays nobody questions the fact that the secrecy of correspondence is broad in nature, encompassing messages and information obtained in various ways. Legal and non-legal factors influence the scope and methods of protection of the secrecy of correspondence. The Civil Code classifies the secrecy of correspondence within personality rights that are subject to financial and non-financial protection. The Constitution of the Republic of Poland includes the secrecy of correspondence in the sphere of personal freedoms and rights. In the time of modern technologies, there may be many real situations endangering or infringing this personality right. In practice, there is a need to establish a relationship between the concept of "the secrecy of correspondence" referred to in Article 23 Civil Code and the concept of "privacy of communication" used in Article 49 of the Constitution of the Republic of Poland. The problem requires that terminology be normatively unified. There is no general normative concept of "secrecy" in law. It can be assumed that "secrecy" is an elementary concept and the legislator in general does not define such. As it is rightly noticed in the legal literature, constitutions and civil codifications are based on such concepts. In the continental culture, mainly the doctrine and to some extent also case law define them.[50]

At present, in the light of Article 23 Civil Code, it should be assumed that the secrecy of correspondence covers information (regardless of what it refers to) saved in different forms (letters, audio recordings, e-mails, other electronic formats, etc.) that a sender passes to an addressee. For the protection of the secrecy of correspondence, the form of correspondence and the method of sending it (by post, courier, fax) are unimportant. Only information that is memorised or in the form of an open letter is not subject to protection of the secrecy of correspondence. A sender may exclude the secrecy of correspondence granting it the status of an open letter addressed to a wider number of addressees. Although there is no clear statutory requirement, senders and addressees should treat individual information enclosed in correspondence as confidential. However, the secrecy of correspondence is not conditioned by any other additional statutory requirements typical of other secrets, e.g. corporate secrets.[51]

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[48] L. Jardel, *La lettre missive (Essai d´une théorie juridique nouvelle de la correspondence épistolaire)*, Paris 1911, p. 5, citation after: I. Dobosz *Tajemnica korespondencji…*, p. 7.

[49] I. Dobosz, *Tajemnica korespondencji…*, p. 7.

[50] S. Sołtysiński, *Czynności rozporządzające. Przyczynek do analizy podstawowych pojęć cywilistycznych*, [in:] *Rozprawy z prawa cywilnego. Księga pamiątkowa ku czci Witolda Czachórskiego*, PWN, Warsaw 1985, pp. 301–302.

[51] Attention should be drawn to the fact that Article 11(4) of the Act of 16 April 1993 on the fight against unfair competition (uniform text Journal of Laws [Dz.U.] of 2003, No. 153, item 1503) lays down that corporate information is secret only if it jointly meets three criteria:

1. it has not been revealed to the public;
2. it has economic value (e.g. corporate technical, technological and organisational data);
3. an entrepreneur has undertaken necessary steps to keep it secret.

The provision of Article 24 Civil Code contains the assumption of unlawfulness of an action performed by a person infringing personality rights, including the secrecy of correspondence. The assumption of unlawfulness of someone's action laid down in Article 24 Civil Code does not exempt the protected entities from reasonable diligence in ensuring confidentiality of the passed information concerning an addressee's privacy.

Although general rules of redressing the wrong (Article 363 Civil Code) also apply to the measures of personality rights protection, e.g. indicated in Article 24 Civil Code, and compensation, it is not possible in general to restore the previous state, and the payment of an adequate sum of money in the era of consumerist lifestyle may only mitigate the consequences of unlawful infringement of personality rights. Compensation is at present the most important legal measure of protection of the secrecy of correspondence. The violation of the secrecy of correspondence often starts a sequence of other events infringing privacy, image and other personality rights, the basis of which is human dignity.

BIBLIOGRAPHY

Bosek L., *Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne,* Warsaw 2012.

Cieślak Z. (ed.), *Jawność i jej ograniczenia*, Vol. II: *Podstawy aksjologiczne*, C.H. Beck, Warsaw 2013.

Dobosz I., *Tajemnica korespondencji jako dobro osobiste oraz jej ochrona w prawie cywilnym*, Jagiellonian University, Kraków 1989.

Grotius H., *O prawie wojny i pokoju*, Vol. II, PWN, Warsaw 1957.

Jaśkowska M. (ed.), *Jawność i jej ograniczenia*, Vol. IV: *Znaczenie orzecznictwa,* C.H. Beck, Warsaw 2014.

John Paul II, *Dzieła zebrane,* Vol. 12, Kraków 2009.

Kopff, A. *Koncepcja praw do intymności i prywatności życia osobistego. Zagadnienia konstrukcyjne*, Studia Cywilistyczne, Vol. XX, Warsaw–Kraków 1972.

Krąpiec M.A., *Człowiek jako osoba*, Polskie Towarzystwo Tomasza z Akwinu, Lublin 2005.

Księżak P., [in:] M. Pyziak-Szafnicka (ed.), *Kodeks cywilny. Część ogólna*, Wolters Kluwer, Warsaw 2009.

Machnikowski P., [in:] Gniewek E., Machnikowski P. (ed.), *Kodeks cywilny. Komentarz*, 7th edition, C.H. Beck, Warsaw 2016.

Matys J., *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym*, Oficyna Wolters Kluwer, Warsaw 2010.

Mączyński A., *Zadośćuczynienie pieniężne za krzywdę spowodowaną naruszeniem dobra osobistego. Geneza, charakterystyka i ocena obowiązujących regulacji*, [in:] M. Pyziak-Szafnicka (ed.), *Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara*, Wolters Kluwer, Kraków 2004.

Mączyński A., *Konstytucyjne prawa do godności i prawa do prywatności*, http://26konferencja.giodo.gov.pl/data/resources/MaczynskiA_paper.pdf [accessed on 2/05/2018].

Mularski K., [in:] M. Gutowski (ed.), *Kodeks cywilny*, Vol. I: *Komentarz do art. 1–449*^{11}, C.H. Beck, Warsaw 2016.

Nesterowicz M., *Zadośćuczynienie pieniężne ex contractu i przy zbiegu z odpowiedzialnością ex delicto*, PiP No. 1, 2007.

Panowicz-Lipska J., *Majątkowa ochrona dóbr osobistych*, Warsaw 1975.

Pazdan P., [in:] K. Pietrzykowski (ed.), *Kodeks cywilny,* Vol. I: *Komentarz do art. 1–449*[10], C.H. Beck, Warsaw 2015.

Pietrzykowski K., *Nowelizacja kodeksu cywilnego z 23 sierpnia 1996 r.*, PS No. 3, 1997.

Pyziak-Szafnicka M. (ed.), *Kodeks cywilny. Część ogólna,* Wolters Kluwer, Warsaw 2009.

Safjan M., *Prawne problemy tajemnicy lekarskiej*, Kwartalnik Prawa Prywatnego issue 1, 1995.

Safjan M. (ed.), *System prawa prywatnego*, Vol. 1, Warsaw 2007; 2nd edition, C.H. Beck, Warsaw 2012.

Safjan M., Bosek L. (ed.), *Konstytucja RP*, C.H. Beck, Warsaw 2016.

Serwach M., *Przesłanki odpowiedzialności cywilnej lekarza za szkodę wyrządzoną pacjentowi w orzecznictwie sądów polskich*, PiM No. 4, 2006.

Sobczak J., *Godność człowieka i prawo do prywatności w orzecznictwie Trybunału Konstytucyjnego*, [in:] A.J. Madera, T. Ślęzak (ed.), *Nowa Konstytucja czy nowe państwo? Państwo. Bezpieczeństwo. Gospodarka*, Kraków 2005.

Sobczak J., *Godność pacjenta*, Medyczna Wokanda No. 1, 2009.

Sobczak J., https://www.kul.pl/files/983/mgr_fabian_wider/Recenzja_prof._Jacka_Sobczaka.pdf [accessed on 2/05/2018].

Sołtysiński S., *Czynności rozporządzające. Przyczynek do analizy podstawowych pojęć cywilistycznych,* [in:] *Rozprawy z prawa cywilnego. Księga pamiątkowa ku czci Witolda Czachórskiego,* PWN, Warsaw 1985.

Szpor G. (ed.), *Jawność i jej ograniczenia*, [in:] A. Gryszczyńska (ed.), *Struktura tajemnic*, Vol. IV, C.H. Beck, Warsaw 2014.

Śmieja A., *Z problematyki odpowiedzialności uregulowanej w art. 448 k.c.*, [in:] M. Pyziak--Szafnicka (ed.), *Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara*, Wolters Kluwer, Kraków 2004.

Wilejczyk M., *Zagadnienia etyczne części ogólnej prawa cywilnego*, C.H. Beck, Warsaw 2014.

Legal regulations

International law

Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Journal of Laws [Dz.U.] of 1993, No. 61, item 284.

Charter of Fundamental Rights of the European Union, OJ C 326 of 26 October 2012.

Polish law

Ustawa z dnia 23 sierpnia 1964 r. – Kodeks cywilny [Act of 23 April 1964 – Civil Code], Journal of Laws [Dz.U.] of 1964, No. 16, item 93, as amended.

Ustawa z dnia 16 kwietnia 1993 r. o zwlaczaniu nieuczciwej konkurencji [Act of 16 April 1993 on the fight against unfair competition], uniform text, Journal of Laws [Dz.U.] of 2003, No. 153, item 1503.

Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych [Act of 4 February 1994 on copyright and related rights], Journal of Laws [Dz.U.] No. 24, item 83.

Court rulings

Judgement of the Appellate Court in Warsaw of 6 July 1999, I ACa 380/99, Legalis No. 48547.

Supreme Court judgement of 12 October 1999, II UKN 141/99, Lex No. 151535.

Supreme Court judgement of 8 May 2008, V CSK 568/07, Lex No. 496388.

Supreme Court Judgement of 14 December 2010, I PK 95/10, Lex No. 785643.

Judgement of the Appellate Court in Warsaw – VI Civil Chamber of 8 September 2011, VI ACa 297/11, Legalis, No. 740943.

Judgement of the Appellate Court in Wrocław – Civil Chamber of 26 June 2012, I ACa 521/12, Legalis No. 738967.
Judgement of the Appellate Court in Łódź of 26 April 2013, I ACa 1467/12, Lex No. 1321976.
Judgement of the Appellate Court in Warsaw – VI Civil Chamber of 18 November 2013, VI ACa 674/13, Legalis No. 831513.
Judgement of the District Court in Gdańsk of 31 January 2014, I C 1551/11, Legalis No. 1556485.
Justification of the judgement of the Appellate Court in Szczecin of 17 June 2014, I ACa 235/14, http://orzeczenia.szczecin.sa.gov.pl/content/$N/155500000000503_I_ACa_000235_2014_Uz_2014-06-17_001.
Judgement of the Appellate Court in Katowice – I Civil Chamber of 3 December 2014, I ACa 696/14, http://orzeczenia.katowice.sa.gov.pl/content/$N/151500000000503_I_ACa_000696_2014_Uz_2014-12-03_002.
Judgement of the Appellate Court in Gdańsk – I Civil Chamber of 27 February 2015, I ACa 842/14, http://orzeczenia.gdansk.sa.gov.pl/content/$N/151000000000503_I_ACa_000842_2014_Uz_2015-02-27_001.

Glosses

Warzecha K., Glosa do wyroku SN z dnia 17 grudnia 2004 r., II CK 300/04, Palestra No. 1–2, 2007.
Zacharzewski K., Glosa do wyroku SN z dnia 15 lutego 2008 r., I CSK 358/07, Glosa No. 2, 2009.

CIVIL LAW PROTECTION OF THE SECRECY OF CORRESPONDENCE

Summary

The purpose of this article is to identify and analyse the basic legal issues related to the protection of the secrecy of correspondence as a personality right in the era of modern technologies. Presently, the protection of the secrecy of correspondence by civil law is viewed in relation to privacy of communication. The judicature and jurisprudence identify a number of new legal issues that, in the absence of elementary normative concepts, play an important role in the protection of the secrecy of correspondence.
A dogmatic method, which is a classical method of research in legal works, is used in the discussion. The analysis of legal provisions and views of the doctrine and the judicature allowed the author to present the nature of the violation of the secrecy of correspondence and to determine the direction of the optimum protection of this personality right. The importance of financial measures of protection is growing in the same way as in case of other personality rights. Currently, compensation is the basic means of protecting the secrecy of correspondence, although it is also possible to use non-financial protection measures. Societies highly appreciating a consumerist lifestyle believe that financial protection measures might lead to the mitigation of harm resulting from the violation of non-tangible values closely related to humanity and dignity.

Keywords: secrecy of correspondence, privacy of communication, violation of the secrecy of correspondence, protection of the secrecy of correspondence by civil law

CYWILNOPRAWNA OCHRONA TAJEMNICY KORESPONDENCJI

Streszczenie

Celem artykułu jest identyfikacja i analiza podstawowych problemów prawnych związanych z ochroną dobra osobistego, jakim jest tajemnica korespondencji w dobie nowoczesnych technologii. Obecnie cywilnoprawna ochrona tajemnicy korespondencji rozpatrywana jest w relacji do tajemnicy komunikowania się. Szereg nowych kwestii prawnych dostrzegają doktryna i judykatura, które w sytuacji braku normatywnych pojęć o charakterze elementarnym spełniają istotną rolę w sferze ochrony tajemnicy korespondencji.
W rozważaniach wykorzystano klasyczną metodę badań stosowaną w pracach prawniczych, czyli metodę dogmatyczną. Analiza przepisów prawnych, poglądów doktryny i stanowiska judykatury pozwoliła ukazać rodzaj naruszeń tajemnicy korespondencji i określić kierunki optymalnej ochrony tego dobra osobistego. Podobnie jak w przypadku innych dóbr osobistych rośnie znaczenie majątkowych sposobów ochrony. Obecnie podstawowym środkiem ochrony tajemnicy korespondencji jest zadośćuczynienie, chociaż korzysta się także ze środków ochrony niemajątkowej. Społeczeństwa wysoko ceniące konsumpcyjny tryb życia uznają, że środki majątkowe mogą prowadzić do złagodzenia dolegliwości wynikających z naruszenia wartości niemajątkowych ściśle związanych z człowiekiem i jego godnością.

Słowa kluczowe: tajemnica korespondencji, tajemnica komunikowania się, naruszenie tajemnicy korespondencji, cywilnoprawna ochrona tajemnicy korespondencji

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COMPLAINT ABOUT A BAILIFF'S OMISSION TO TAKE ACTION: SELECTED COMMENTS *DE LEGE LATA* AND *DE LEGE FERENDA*

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1. INTRODUCTION

A complaint about a bailiff's action constitutes the basic complaint measure available in the judicial executive proceedings, which is at the same time an element of judicial supervision over a bailiff. Assessing the scope of admissibility of a complaint, *prima facie* one can see an unlimited scope of admissibility of this complaint measure. In accordance with Article 767 §1 sentences 1–2 Code of Civil Procedure (hereinafter CCP), there is a right to complain about a bailiff's action at a district court, unless stipulated otherwise in statute. It also applies to a bailiff's omission to take action. It is worth noticing that the specificity of the judicial executive procedure results in the possibility of filing complaints in these proceedings not only about a court ruling but also about such action of an executive body that does not constitute a ruling as well as about that body's omission to take action.[1] Thus, *expressis verbis*, in case of a bailiff's both active and passive conduct, a complaint about a bailiff's action is admissible.

Any bailiff's action may be subject to a complaint.[2] This means that the concept of "a bailiff's action" subject to the above complaint measure is characterised by

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[1] Compare, Z. Szczurek, *Kodeks postępowania cywilnego. Postępowanie zabezpieczające i egzekucyjne. Komentarz*, Sopot 2013, pp. 155–156; A. Cudak, [in:] A. Marciniak, K. Piasecki (ed.), *Kodeks postępowania cywilnego*, Vol. III: *Komentarz do art. 730–1088*, Warsaw 2015, p. 177; H. Pietrzkowski, *Zarys metodyki pracy sędziego w sprawach cywilnych*, Warsaw 2005, p. 429.

[2] A. Cudak, *Skarga na czynności komornika*, Sopot 2015, pp. 7–8; A. Marciniak, *Nadzór judykacyjny nad czynnościami komornika*, PPE No. 6, 2011, pp. 14–15. A complaint is applicable to every type of a bailiff's action taken within his competence and to action referred to this executive body by a court (see, Article 1051 §3 CCP); thus, K. Korzan, *Sądowe postępowanie zabezpieczające i egzekucyjne w sprawach cywilnych*, Warsaw 1986, p. 199.

a broader meaning than the concept of "enforcement action" undertaken by this executive body, which is thoroughly discussed below. The scope of admissibility of a complaint about a bailiff's action covers all legally regulated types of a bailiff's conduct, i.e. positive conduct (action) as well as negative conduct (omission). Therefore, it is rightly emphasised in jurisprudence that admissibility of a complaint, the substrate of which is a complaint about a bailiff's omission, constitutes a typical precedent in the system of complaint measures in civil procedure.[3] M. Uliasz rightly distinguishes between a complaint about a bailiff's omission and a complaint about other negative decisions made by a proceeding body such as dismissal or refusal of a claim, which, unlike a bailiff's omission, should be classified as the body's acts (action).[4] The possibility of appealing against those decisions is discussed below.

2. THE CONCEPT OF OMISSION

The provision of Article 767 §1 sentences 1-2 CCP regulates *expressis verbis* admissibility of appealing by way of a complaint about a bailiff's conduct consisting in the performance of action (not necessarily enforcement action) or about omission to take specified action. It can be added that a "complaint about omission" is not applicable in case of another type of an executive body's (court's) omission to take action. Therefore, a statement that "an executive body's omission to take action may also be subject to a complaint" is imprecise.[5]

Further comments require explanation of the concept of a bailiff's omission, which is a starting point to further considerations concerning the differentiation between a bailiff's omission and refusal to take action or this executive body's inaction. The judicature emphasises that omission means neglect of duty to engage in additional activities in the course of the initiated enforcement action that should be performed in order to protect the rights of the parties or third persons, e.g. failure to perform an obligation to seize the revealed property of a debtor that is subject to enforcement action for the benefit of persons entitled to alimony, or failure to appoint a custodian in the circumstances of mortgage pursuant to Article 855 §1 CCP.[6] The justification of one of the rulings of the Supreme Court suggests that omission may consist, inter alia, in a bailiff's failure to take enforcement action and to inform a creditor about the state of the case, which constitutes the violation of the norms of the formalised executive procedure.[7] There is also a stand that every instance of partial or total failure

[3] A. Cudak, *Skarga na czynności…*, pp. 73–74; M. Uliasz, [in:] J. Ignaczewski (ed.), *Komentarz do spraw z zakresu postępowania zabezpieczającego i egzekucyjnego*, Warsaw 2013, p. 214.

[4] M. Uliasz, [in:] J. Ignaczewski (ed.), *Komentarz do spraw z zakresu…*, p. 214.

[5] D. Olczak-Dąbrowska used this term, see also *Skarga na czynności komornika – efektywny instrument nadzoru judykacyjnego czy narzędzie blokowania egzekucji przez dłużników?*, Warsaw 2014, p. 7.

[6] Judgement of the Supreme Court of 14 June 1973, I CR 250/73, OSNCP 1974, No. 6, item 110 with a gloss by K. Korzan, OSP 1975, issue 1, item 1. Similarly, Z. Szczurek, [in:] Z. Szczurek (ed.), *Egzekucja sądowa w Polsce*, Sopot 2007, p. 191.

[7] Judgement of the Supreme Court of 5 February 2014, V CSK 166/13, Legalis.

to perform a sufficiently defined regulatory obligation may be recognised as omission.[8] Administrative courts' case law also indicates that omission to take action consists in the fact that a bailiff neglects the duty to engage in a certain activity, which he is clearly obliged to do by the law (e.g. failure to perform a duty to inform a debtor about the initiation of enforcement action and failure to seize the debtor's revealed property).[9]

Analysing the stand of the doctrine, it is worth referring to the comment by J. Jankowski, who emphasised that the concept of omission was discussed as early as the period when CCP of 1932 was in force.[10] This author referred to J. Korzonek's opinion at the time that a bailiff's omission consists in his giving up activities necessary to protect the rights of the parties or third persons.[11] E. Wengerek stated that omission means a bailiff's neglect of duties violating the rights of the parties or third persons.[12] At present, it is added that a bailiff's omission to take action referred to in Article 767 §1 CCP cannot be identified with this body's conduct leading to delay in the executive proceedings, and thus such conduct that is manifestation of the lack of conscientious and timely performance of a bailiff's duties.[13]

In D. Zawistowski's opinion, omission referred to in Article 767 §1 CCP takes place when, regardless of a bailiff's duty to engage in an activity resulting from the provisions concerning the procedure, he does not undertake it and the activity is essential from the point of view of the parties to the proceedings or third persons, e.g. omission to notify a debtor about the initiation of executive proceedings.[14] Making comments on the presented stand, it is necessary to assume *a contrario* that a complaint about a bailiff's omission is inadmissible when a bailiff does not take action that he is obliged to take in the light of the provisions of CCP, but the activity is not essential from the point of view of the rights of the parties or third persons.[15] A doubt arises as well whether, in the light of the presented framework of the definition of omission, one can speak about omission in a situation when a bailiff did not take action that he was not required by

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8 Judgement of the Appellate Court in Białystok of 23 November 2011, I ACa 501/11, Legalis.

9 Ruling of the Voivodeship Administrative Court in Wrocław of 14 March 2014, IV SO/Wr 6/14, http://www.orzeczenia-nsa.gov.pl [accessed on 12/10/2017].

10 See, Announcement of the Ministry of Justice of 1 December 1932 on the promulgation of the uniform text of the Code of Civil Procedure, Journal of Laws [Dz.U.] No. 112, item 934.

11 J. Korzonek, *Postępowanie egzekucyjne i zabezpieczające – Komentarz*, Vol. I, Kraków 1934, p. 354 ff, after J. Jankowski, [in:] K. Piasecki (ed.), *Kodeks postępowania cywilnego. Komentarz*. Vol. II, Warsaw 2002, p. 990.

12 E. Wengerek, *Sądowe postępowanie egzekucyjne w sprawach cywilnych*, Warsaw 1978, p. 132.

13 M. Śladkowski, *Skarga na czynności komornika w praktyce sądowej*, MoP No. 18, 2014, p. 984 ff.

14 D. Zawistowski, [in:] H. Dolecki, T. Wiśniewski (ed.), *Kodeks postępowania cywilnego*, Vol. IV: *Artykuły 730–1217*, Warsaw 2014, p. 170. F. Zedler and Z. Szczurek define omission in a similar way, drawing attention to indispensability of an action to protect the rights of the parties, third persons and other participants of the proceedings that a bailiff has failed to take, see Z. Szczurek, [in:] Z. Szczurek (ed.), *Egzekucja sądowa...*, p. 191; F. Zedler, *Dopuszczalność skargi na czynności komornika*, Palestra No. 12, 1987, p. 14.

15 Here, reference can be made to Z. Szczurek's statement. He believes that a complaint about a bailiff's action can cover only the action that is related to the legal sphere of parties or other participants of executive proceedings. A bailiff's real action that does not affect the legal situation of these entities is not subject to appeal by way of a complaint – by this author, [in:] Z. Szczurek (ed.), *Egzekucja sądowa...*, p. 191.

the law and might lead to the violation of the rights of a party or a third person.[16] The above-mentioned construction of the concept of omission proposed in the doctrine, through an obligatory conjunction of two events, i.e. a bailiff's failure to take action required by the law and the violation of, and probably also a threat to, the rights of the parties or third persons, may raise the above-mentioned doubts concerning the semantic scope of the concept of omission. Therefore, it is worth mentioning here that questioning the requirement of the influence of a substrate (which is a bailiff's omission) of a complaint on the legal sphere of the parties, other participants of the proceedings and third persons, the provision of Article 767 §2 CCP imposes clear requirements in this area. One of the conditions of admissibility of a complaint about a bailiff's omission is that it is demonstrated there is a legal interest in filing a complaint measure (*gravamen*, in German: *Beschwer*).[17] Thus, the conditions of admissibility of a complaint measure should be differentiated from the semantic scope of the concept of omission.

In the light of the above comments, it is worth referring to a definition of omission develped by A. Marciniak, who stated that omission is a bailiff's conduct consisting in failure to take enforcement action that he is obliged to take by statute. This author presented examples of a bailiff's failure to perform a duty to deliver a debtor a notification of the initiation of executive proceedings together with the content of the enforcement title and the information about the method of the executive proceedings during the first enforcement activity (Article 805 CCP), failure to appoint a custodian of movable property (Article 855 CCP), failure to notify a debtor of the term and place of auction (Article 867 §3 and Article 855 CCP), and failure to hear the parties before suspension or discontinuance of the executive proceedings (Article 827 CCP).[18] There are more examples of a bailiff's omission to take action indicated in the literature, e.g. failure to hear the parties when a custodian is changed (Article 860 CCP),[19] omission to issue a decision on discontinuance of executive proceedings *ex officio* (Article 824 CCP),[20] failure to appoint an expert witness in spite of a complaint filed in connection with the challenged bailiff's quotation of the real estate value (Article 853 §2 CCP),[21] or failure to meet a four-day time limit for transferring executed liabilities to the entitled party

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[16] Following A. Marciniak, it should be assumed that taking action by a bailiff in accordance with the provisions of the law, although it violates the rights of parties, is not subject to complaint but should be fought against via anti-enforcement litigation – by this author, *Postępowanie egzekucyjne w sprawach cywilnych*, Warsaw 2005, p. 140. An appeal against omission results from the lack of a bailiff's action required by statute. The lack of a bailiff's action violating the rights of parties is not subject to appeal by way of a complaint in the event it is not required by statute.

[17] For more, see: W. Broniewicz, *Dopuszczalność środków odwoławczych w postępowaniu cywilnym ze względu na przedmiot zaskarżenia*, PiP No. 5, 1997, p. 19; S. Włodyka, *Interes prawny jako przesłanka dopuszczalności zaskarżenia orzeczeń w procesie cywilnym*, NP No. 9, 1963, p. 927 ff; A. Wilczyńska, *Interes prawny i jego granice w postępowaniu cywilnym*, Palestra No. 9–10, 2010, p. 31 ff; T. Ereciński, [in:] J. Gudowski (ed.), *System Prawa Procesowego Cywilnego*, Vol. III: *Środki zaskarżenia*, part 1, Warsaw 2013, pp. 98–100.

[18] A. Marciniak, *Postępowanie egzekucyjne*…, p. 140. Since 8 September 2016, the hearing referred to in Article 827 §1 CCP has been optional.

[19] A. Różalska, *Skarga na czynności komornika*, PES No. XVIII, 1996, p. 26.

[20] D. Olczak-Dąbrowska, *Skarga na czynności komornika*…, p. 7.

[21] A. Cudak, *Skarga na czynności*…, p. 73 ff.

(Article 22 ACBEP).[22] Pursuant to the wording of Article 865 §1 CCP before the amendment of 29 August 1997,[23] it was recognised that a bailiff's omission occured when he failed to deliver seized unused movable property to appropriate entities of cooperative trade for sale.[24]

A terminological comment can be made in connection with the above-mentioned definition of omission. It concerns the explanation whether a bailiff's omission consists in failure to take "enforcement action" or probably it would be better to use the term "action". The issue refers to the fundamental problem of admissibility of a complaint about a bailiff's action. It should be taken into consideration that the provision of Article 767 §1 sentence 1 *in principio* CCP lays down the right to a complaint about "a bailiff's action" to a regional court. General provisions concerning the issue of executive bodies, their features and procedure in general, however, stipulate that it is regional courts and their bailiffs' competence to conduct "executive cases" (Article 758 CCP), and bailiffs take "enforcement action" with the exception of action reserved for courts (Article 759 §1 CCP). Thus, the terminology used by the legislator in the regulations on the court executive procedure is not uniform. The issue of the meaning of the above-mentioned phrases has already been the subject of doctrinal considerations. However, it is necessary to return to this issue in order to define the meaning of the concept of omission.

In accordance with Article 2(1) ACBEP, only a bailiff takes "enforcement action" in civil cases, unless otherwise laid down in statute. A bailiff also takes other types of "action" pursuant to other regulations. The concept of "enforcement action" does not have a uniform definition in jurisprudence, and the differences concern the point of reference of a bailiff's action, i.e. the objective aspect of the definition. There is an opinion that enforcement action means activities performed by executive bodies that are competent to deal with executive cases (Article 758 CCP) if they can cause legal consequences in a particular executive case.[25] The consequences of enforcement action defined with regard to the form, place and time of performance are also referred to the executive procedure,[26] thus *in abstracto*, not to a particular executive case. It worth emphasising that the concept of enforcement action is also understood as executive bodies' action (Article 759 CCP) performed in the course of the proper executive proceedings and being its consequence in distributing proceedings.[27]

Next, it is necessary to point out that executive proceedings do not mean the same as the concept of enforcement action. Enforcement action is taken only within

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[22] D. Zawistowski, [in:] H. Dolecki, T. Wiśniewski (ed.), *Kodeks postępowania...*, p. 170. Act of 29 August 1997 on court bailiffs and enforcement procedure, uniform text, Journal of Laws [Dz.U.] of 2017, item 1277 as amended, hereinafter referred to as ACBEP.

[23] Article 95(7) ACBEP, Journal of Laws [Dz.U.] No. 133, item 882, which entered into force on 30 November 1997. In the present legal circumstances, the delivery of the movable property for sale is optional and depends on a party's motion.

[24] F. Zedler, *Dopuszczalność skargi…*, p. 14.

[25] W. Siedlecki, *Komentarz do kodeksu…*, p. 1080; E. Wengerek, *Postępowanie zabezpieczające i egzekucyjne. Komentarz*, Warsaw 1994, p. 36; Z. Świeboda, *Pojęcie i rodzaje czynności egzekucyjnych sądu*, Palestra No. 10, 1976, p. 4; H. Mądrzak, *Czynności egzekucyjne (analiza pojęć)*, Zagadnienia egzekucji sądowej w Polsce No. 3, 1994, p. 106 ff.

[26] H. Pietrzkowski, [in:] T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. V: *Postępowanie egzekucyjne*, Warsaw 2016, p. 29.

[27] A. Marciniak, *Postępowanie egzekucyjne w sprawach cywilnych*, Warsaw 2008, pp. 82–83.

executive proceedings. In the course of executive proceedings, other activities may be performed but they are not enforcement action. In other words, executive proceedings serve the performance of enforcement action, meaning all coercive measures typical of a particular type of enforcement action that an executive body may use in a particular sequence within the method of enforcement action chosen by a creditor in order to satisfy the creditor's claims, in accordance with the content of the enforcement title.[28] The executive proceedings, on the other hand, are the organised action of executive bodies in cooperation with entities involved that are aimed at effective enforcement of a given legal norm established in the enforcement title and, with the use of coercive measures, obtaining a debtor's liabilities owed to a creditor.[29]

Z. Szczurek assumed that a bailiff's action analysed in the context of admissibility of a complaint under Article 767 §1 CCP should always be defined within the framework of carried out enforcement action, with full awareness of the fact that not all the activities performed by a bailiff constitute enforcement action.[30] Therefore, every executive activity performed by a bailiff within enforcement action is undoubtedly subject to a complaint. A. Cudak rightly noticed, however, that also some other types of a bailiff's action are subject to a complaint: firstly, those activities that are not enforcement ones because they are performed before a bailiff initiates enforcement (e.g. call for advance payment); secondly, activities performed by a bailiff without the initiation of enforcement (e.g. return of an application to initiate enforcement in case a debtor did not eliminate defects in the document); and thirdly, a bailiff's activities performed within executive proceedings but after the enforcement (e.g. rulings concerning costs of the proceedings).[31]

The above-presented considerations lead to a conclusion that a complaint about a bailiff's action referred to in Article 767 §1 CCP is admissible in case a bailiff takes action, which is a broader term and does not always mean the same as the concept of "enforcement action". Therefore, "a bailiff's action" is subject to appeal by way of a complaint and enforcement action constitutes a type of activities this executive body undertakes in the course of enforcement. Moreover, it should be emphasised that also a bailiff's activities other than those undertaken in executive proceedings may be appealed against by way of a complaint. As A. Cudak rightly noticed, all the activities undertaken by a bailiff as an executive body, other activities under executive proceedings and all other activities undertaken by him in accordance with statutory provisions may be subject to a complaint.[32] The above comments on the semantic

[28] R. Kowalkowski, [in:] *Encyklopedia egzekucji sądowej*, Sopot 2002, p. 61. Enforcement constitutes a process serving the implementation of substantive law norms, see S. Gołąb, Z. Wusatowski, *Kodeks postępowania cywilnego, część druga*, Kraków 1933, p. 1; P. Cioch, J. Nowińska, *Postępowanie cywilne*, Warsaw 2007, pp. 373–374.

[29] Z. Szczurek, [in:] Z. Szczurek (ed.), *Egzekucja sądowa...*, p. 31; S. Dalka, *Podstawy postępowania cywilnego*, Sopot 1999, p. 47.

[30] Z. Szczurek (ed.), *Egzekucja sądowa...*, p. 31. Z. Świeboda expressed an opinion referring enforcement action to executive bodies' activity in the course of enforcement, see by this author *Pojęcie i rodzaje...*, p. 4.

[31] A. Cudak, *Skarga na czynności…*, pp. 54–55.

[32] A. Cudak, *ibid.*, p. 56. The concept of "a bailiff's action" that can be subject to complaint should be understood in a broad way, referring not only to enforcement action, compare, I. Gil, [in:] E. Marszałkowska-Krześ (ed.), *Postępowanie cywilne, Meritum*, Warsaw 2017, p. 1365.

scope of the concept of a bailiff's action, which as that executive body's active action is subject to appeal by way of a complaint, should be referred to as a bailiff's omission to take action. *Interpretatio declarativa* of Article 767 §1 sentences 1–2 CCP indicates that the legislator used the concept of "a bailiff's action" in the same sense in relation to admissibility of appeal against both active and passive conduct of this executive body. In accordance with the principle *lege non distinguente nec nostrum est distinguere*, the interpretation of the substrate of a complaint about "a bailiff's action" in the event of an appeal against his action and omission should be the same.

It is worth asking another question about the source of the requirement that a bailiff should take action which this body has failed to perform. The issue is important due to the fact that one of the doctrinal definitions of a bailiff's omission interprets the subject of a complaint about a bailiff's omission as a bailiff's failure to take action he is obliged to take,[33] without the indication of the source of this obligation. The problem concerns establishing whether it is a statutory provision or perhaps a concerned entity's motion that is the source of the requirement for a bailiff's action. In other words, it is worth determining whether a complaint about a bailiff's omission is applicable in case a bailiff fails to take action that a party to executive proceedings or another entity authorised to complain under Article 767 §1 CCP has requested but a bailiff has not been obliged by statute to undertake. It should be recognised that omission occurs when a bailiff's duty to take action results from the provisions of CCP or other statutory regulations. As O. Marcewicz rightly stated, a bailiff's omission is neglect of duty to take action to which a statutory provision clearly obliges him. Other conduct of this body, e.g. failure to take action requested by a creditor, constitutes an executive body's inaction.[34]

In the light of the above-presented considerations, taking into account the universal nature of a complaint about a bailiff's action,[35] omission should be defined as a bailiff's conduct consisting in failure to take enforcement action to which he is obliged by a particular statutory provision.

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[33] I. Gil adopted the definition, see also, [in:] *Postępowanie cywilne…*, p. 1366.

[34] O. Marcewicz, [in:] A. Jakubecki (ed.), *Kodeks postępowania cywilnego*, Vol. II: *Komentarz do art. 730–1217*, Warsaw 2017, p. 149.

[35] It is applicable inter alia in protective proceedings to secure claims (compare, Article 743 §1 CCP as well as the Resolution of the Supreme Court of 22 September 1995, III CZP 117/95, OSNC 1995, No. 12, item 179 and the Judgement of the Supreme Court of 26 January 2001, II CKN 366/00, MoP No. 7, 2005, p. 348). Also in the proceedings to secure an inheritance, to change a measure of securing claims or to take inventory, the provisions of Articles 759–774 CCP are applied respectively (compare, Article 638[2] §4 CCP and I. Kunicki, [in:] W. Broniewicz, A. Marciniak, I. Kunicki (ed.), *Postępowanie cywilne w zarysie*, Warsaw 2016, p. 444.). The Regulation of the Minister of Justice of 15 October 2015 on some activities performed in the course of securing an inheritance (Journal of Laws [Dz.U.] of 2015, item 1643) does not contain autonomous grounds for filing complaints about a bailiff's action as it was under the force of the former wording of this regulation repealed on 18 October 2015. Moreover, a complaint is applicable in relation to a bailiff's action under Article 1051 §3 and Article 1057 §1 CCP in the event when not a bailiff but a court is an executive body. On the other hand, it should be emphasised that the special nature of a complaint about a bailiff's action is generally expressed in its admissibility in relation to a bailiff's conduct as an executive body; compare, H. Pietrzkowski, [in:] T. Ereciński (ed.), *Kodeks postępowania...*, p. 58.

3. BAILIFF'S OMISSION TO TAKE ACTION VS INACTION

A complaint about a bailiff's omission to take action should be distinguished from a complaint about inaction.[36] The provision of Article 767 §1 CCP *expressis verbis* regulates a complaint about a bailiff's activities that are admissible when he takes action as well as when he fails to take action. There is no right to make a complaint about a bailiff's activities under Article 767 §1 CCP in case of a bailiff's inaction.[37] As early as on 14 June 1973, the Supreme Court issued its Judgement I CR 250/73, in which it expressed an opinion that the term "omission" used in Article 767 §1 sentence 2 CCP does not cover the term inaction leading to the lengthiness of the proceedings, which is not subject to a complaint about a bailiff's action or to any other legal measure.[38] The problem of inadmissibility of a complaint about a bailiff's inaction has already been a subject matter of doctrinal discussions.[39] However, the differentiation of designates that correspond to the concepts of a bailiff's "inaction" and "omission" remains a problem that is still up-to-date, regardless of the flow of time.

As far as the explanation of the concept of a bailiff's inaction is concerned, it is necessary to refer to the definition developed in case law, which assumes that a bailiff's inaction is expressed not in his failure to perform duties laid down in statute but in conduct other than a bailiff's omission, e.g. failure to take any action in the case or failure to perform activities requested by a creditor. A bailiff's inaction is non-compliance with obligations under Article 45a ACBEP.[40] Pursuant to the wording of this provision, a bailiff must without delay, not later than in the period of seven days from the date of the receipt of a creditor's motion, take action necessary to efficient enforcement or protection of claims, including a European Account Preservation Order. Therefore, in order to establish a bailiff's inaction, it is essential to establish the lack of whatever action on his part, interpreted as positive conduct (lack of action that is not omission). It is assumed in the doctrine that the concept of a bailiff's inaction in the context of Article 23(1) ACBEP also covers this body's sluggishness, which together with unlawfulness obliges a bailiff and

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[36] F. Zedler, *Dopuszczalność skargi…*, p. 14.

[37] K. Flaga-Gieruszyńska, [in:] A. Zieliński (ed.), *Kodeks postępowania cywilnego. Komentarz*, Warsaw 2017, p. 1357. In this context, M. Uliasz's opinion is unclear. In one work, although he differentiates a bailiff's omission from his inaction, he states that: "a complaint is an appeal measure applicable in relation to a bailiff's action as well as inaction"; by this author, *Kodeks postępowania cywilnego. Komentarz*, Warsaw 2008, p. 1123. Also see, the Ruling of the District Court in Toruń 18 October 2013, VIII CZ 593/13, http://www.orzeczenia.torun.so.gov.pl [accessed on 12/10/2017], in which the court decided that a complaint about a bailiff's action is applicable also in the event of his inaction, i.e. failure to take a decision adequate to circumstances (Article 767 §1 sentence 2 CCP).

[38] OSNCP 1974, No. 6, item 110.

[39] A. Laskowska, *Przyznanie odpowiedniej sumy pieniężnej wskutek uwzględnienia skargi na przewlekłość postępowania egzekucyjnego*, PPE No. 9, 2007, p. 11 ff and the literature referred to therein; Z. Szczurek, *Propozycje zmian przepisów k.p.c. regulujących postępowanie zaskarżeniowe w egzekucji*, Problemy Egzekucji Sądowej No. XXV, 1997, p. 21.

[40] Ruling of the Voivodeship Administrative Court in Wrocław of 14 March 2014, IV SO/Wr 6/14, http://www.orzeczenia-nsa.gov.pl [accessed on 12/10/2017].

the State Treasury to jointly redress the loss that results from that inaction.[41] In accordance with the provision of Article 23(1) ACBEP, a bailiff is obliged to redress the loss resulting from unlawful action or omission to take action. Thus, a bailiff's inaction should be interpreted as this executive body's lack of conscientiousness and time discipline in the performance of activities. The inaction, understood as a type of neglect, may have its source in simple carelessness or disrespect for obligations imposed by statute on a bailiff as a basic executive body.[42]

Before the presentation of methods of reaction to a bailiff's inaction, it is worth highlighting that it may be subject to non-judicial supervision over a bailiff, which, unlike the judicial supervision, is subjective in nature and addressed directly to a bailiff. Non-judicial supervision is aimed at counteracting lengthiness of the judicial executive proceedings. Thus, inaction is subject to administrative supervision exercised by presidents of regional courts, in accordance with Article 3(2.1) ACBEP, and corporate supervision exercised by bailiffs' self-government in accordance with Article 65(3) ACBEP.[43] Pursuant to those regulations, a president of a regional court that a bailiff is affiliated to supervises his activities, inter alia, assessing the pace, efficiency and diligence of executive proceedings by analysing whether undue lengthiness in taking action occurs in particular cases. Promptness and diligence of executive proceedings are also subject to supervision by the National Bailiffs Council (Krajowa Rada Komornicza). Article 6 ACBEP is a specific extension of the above-mentioned corporate supervision of bailiffs[44] and based on it, bailiffs' self-government bodies are to ensure the maintenance of the high standard of activities performed by bailiffs without interference in the scope of administrative supervision.[45] A bailiff's inaction, i.e. taking action with undue delay (Article 71(5) ACBEP), also constitutes grounds for a bailiff's disciplinary liability.

Administrative and corporate supervision activities, i.e. non-judicial supervision exercised by a president of a regional court and persons authorised to supervise bailiffs' activities, cannot interfere in the scope of judicial supervision performed in accordance with Article 759 §2 CCP. Application of the measures laid down in this provision is the competence of a court and not a regional court president. Only if necessary, a court president may file a motion to a court to take action under the indicated provision. Irregularities found by a regional court president and persons authorised to supervise bailiffs may constitute grounds for initiating action pursuant

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[41] E. Bagińska, J. Prachomiuk, [in:] R. Hauser, A. Wróbel, Z. Niewiadomski (ed.), *Odpowiedzialność odszkodowawcza w administracji. System Prawa Administracyjnego*, Warsaw 2016, p. 479.

[42] Compare, Z. Szczurek, [in:] Z. Szczurek (ed.), *Egzekucja sądowa...* According to T. Bukowski, the collection of an advance payment on the cost of enforcement only is a manifestation of a bailiff's inaction; by this author, *Rozstrzyganie o kosztach procesu cywilnego*, Warsaw 1971, p. 7 ff.

[43] D. Zawistowski, [in:] H. Dolecki, T. Wiśniewski (ed.), *Kodeks postępowania...*, p. 170. The provisions of Articles 79–94a ACBEP regulate bailiffs' self-government and the rules of its operation.

[44] In accordance with it, bailiffs' self-government bodies deal with complaints about a bailiff's conduct not related to enforcement action and not subject to a regional court president's supervision.

[45] M. Dziewulska, [in:] J. Świeczkowski (ed.), *Ustawa o komornikach sądowych i egzekucji. Komentarz*, Warsaw 2012, p. 50.

to Article 759 §2 CCP *ex officio*.[46] It is indicated in jurisprudence that a complaint about inaction should be treated as a motion to take action by a regional court president who is a body responsible for providing administrative supervision of bailiffs.[47] However, it is not appropriate to fight against a bailiff's inaction by way of appeal measures or other non-statutory legal measures available in the judicial executive proceedings.

As far as the consequences of a bailiff's inaction are concerned, it is worth mentioning that inaction, which is different from omission to take action, in general leads to lengthiness of the judicial executive proceedings.[48] Lengthiness of the judicial executive proceedings[49] is subject to a complaint regulated in separate provisions, i.e. the Act of 17 June 2004 on the complaint about the violation of parties' right to a hearing in preparatory proceedings conducted or supervised by a prosecutor and in judicial proceedings without an undue delay (Article 1(2) of the Act).[50] Before the Act entered into force, it was assumed in jurisprudence that lengthiness of executive proceedings justifies taking action within administrative supervision of bailiffs exercised by a regional court president.[51] However, inaction of a bailiff as an executive body does not constitute grounds for discontinuation of executive proceedings *ex officio*.[52]

To finish this thread of thought, it is worth emphasising again that the distinction between the semantic scope of a bailiff's omission and inaction is not easy. The problem concerns in particular creditors who, often misunderstanding legal language terms, make use of inadmissible *in concreto* legal measures. Z. Szczurek, supporting changes in the regulations of a complaint about a bailiff's action, noticed this doctrinal problem. He drew attention to the construction of a complaint about a bailiff's activities in the context of a proposal to speed up executive proceedings. He emphasised the fact that the juridical distinction between the concepts of a bailiff's "omission" and "inaction" is not in the interest of a creditor who is only interested in fast and efficient enforcement. From a creditor's point of view, the consequences of a bailiff's omission and inaction are the same. Therefore, in this author's opinion, it is justified that pursuant to Article 767 CCP, it should be admissible to file a complaint about a bailiff's inaction.[53] However, one should be really careful when considering this proposal. It seems that, especially in the

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[46] Compare, J. Jankowski, [in:] K. Piasecki (ed.), *Kodeks postępowania...*, p. 990; F. Zedler, *Dopuszczalność skargi…*; Z. Szczurek, [in:] Z. Szczurek (ed.), *Egzekucja sądowa...*, p. 191. See also, the provisions of Article 3(2.4) and Article 65(4) ACBEP.

[47] I. Gil, [in:] E. Marszałkowska-Krześ (ed.), *Postępowanie cywilne...*, p. 1366.

[48] K. Korzan, *Sądowe postępowanie zabezpieczające…*, p. 201.

[49] For more on the reasons of lengthiness of executive proceedings, see: D. Olczak--Dąbrowska, *Wybrane zagadnienia egzekucji sądowej*, Instytut Wymiaru Sprawiedliwości, Warsaw 2016.

[50] Uniform text, Journal of Laws [Dz.U.] of 2016, item 1269 as amended; for more on this complaint, see also: M. Michalska-Marciniak, *Skarga o stwierdzenie przewlekłości postępowania egzekucyjnego*, PPE No. 12, 2007, p. 5 ff; M. Krakowiak, *Skarga o stwierdzenie przewlekłości postępowania egzekucyjnego*, PPE No. 1–6, 2005, p. 19 ff.

[51] K. Korzan, *Sądowe postępowanie zabezpieczające…*, p. 201.

[52] Ruling of the Supreme Court of 25 June 2015, III CZP 39/15, OSNC 2016, No. 6, item 77.

[53] Z. Szczurek, *Propozycje zmian przepisów…*, p. 31.

context of speeding up the executive proceedings, the extension of admissibility of a complaint under Article 767 §1 CCP would have consequences different from intended. The introduction of a new substrate of a complaint (about a bailiff's inaction) might also lead to actual threat of abuse of procedural law.

4. BAILIFF'S OMISSION VS REFUSAL TO TAKE ACTION

It is also indicated in the literature and case law that it is admissible to appeal by way of a complaint about a bailiff's action as this executive body's conduct consisting in refusal to take action necessary to perform enforcement.[54] In the Resolution of 26 February 1969, III CZP 131/68, the Supreme Court stated that a debtor has the right to complain about a bailiff's refusal to quash the judicial seizure of claims.[55] The assumption of admissibility of an appeal by way of a complaint under Article 767 §1 CCP about a bailiff's refusal to take action caused that the doctrine recognised this complaint as similar to another measure of legal protection, i.e. a complaint about refusal to take notary action (called a complaint about a notary)[56] laid down in Article 83 of the Act of 14 February 1991: Law on notarial services.[57]

However, in Article 767 §1 CCP, the legislator does not distinguish a separate substrate of a complaint about a notary's action in the form of a notary's refusal to take action. The legislator only regulates a complaint about a notary's action and omission to take action. A complaint about a notary's refusal to take action was laid down *expressis verbis* in the provision of §2(2) sentence 3 of the Regulation of the Minister of Justice of 1 October 1991 on detailed mode of proceedings in securing an inheritance and taking inventory[58] applicable in non-litigious proceedings, which was repealed a few years ago. The provision directly stipulated that a complaint might also be filed in case of the refusal to take action.

Although it is justifiable to admit a complaint about a notary's refusal to take action, there is a problem with classification of the legal grounds for the measure with the so determined appeal substrate. It is highlighted in the doctrine that the matters subject to complaint under Article 767 §1 CCP include a bailiff's executive action, this body's omission to take action or refusal to take action, e.g. dismissal of a motion to

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[54] Resolution of the Supreme Court of 20 November 2008, III CZP 108/08, OSNC 2009, No. 10, item 139; D. Zawistowski, [in:] H. Dolecki, T. Wiśniewski (ed.), *Kodeks postępowania...*, p. 170; A. Pytel, *Moment ustalenia wysokości wynagrodzenia radcowskiego i adwokackiego w sprawie egzekucyjnej*, MoP No. 18, 2017, p. 1006; Z. Szczurek, *Propozycje zmian przepisów…*, p. 22; B. Bladowski, *Dopuszczalność środków zaskarżania w sprawach egzekucyjnych*, Palestra No. 5–6, 2014, p. 150.

[55] OSNCP 1969, No. 9, item 156.

[56] See, P. Telenga, *Skarga na czynności komornika (zagadnienia wybrane związane z rozstrzyganiem skargi przez sąd rejonowy)*, [in:] M. Michalska-Marciniak (ed.), *Wokół problematyki środków zaskarżenia w postępowaniu cywilnym*, Sopot 2015, p. 457.

[57] Uniform text, Journal of Laws [Dz.U.] of 2016, item 1796.

[58] Journal of Laws [Dz.U.] of 1991, No. 92, item 411; the Regulation was in force until 17 October 2015. Its provisions made a complaint admissible in two situations, i.e. about a bailiff's action and refusal to take action.

suspend the proceedings.[59] However, a question arises whether a bailiff's refusal to take action is a separate subject to appeal. A positive answer to this question, however, may raise objections with regard to the need to introduce, and thus differentiate, three substrates of the appeal, i.e. a bailiff's action, omission to take action and refusal to take action. However, a bailiff's refusal to take action is something different from his omission to take action. Making use of the considerations presented above concerning referents of the concept of omission, it is not possible to classify a bailiff's refusal to take action as one of them. Refusal to take action is an executive body's decision preceded by a substantive assessment of the filed motion[60] or may also result from the fact of failure to pay a fixed fee, which is directly referred to in Article 49a(2) ACBEP.

Not questioning admissibility of a complaint about a bailiff's refusal to take action, e.g. a bailiff's decision on refusal to make an additional description and quotation (Article 951 CCP), refusal to issue an executive proceeding discontinuation certificate (Article 827 §2 CCP) or refusal to discontinue executive proceedings (Article 825(1) CCP), it should be admitted that the right to file a complaint about such a substrate of appeal results from the general rule under which a complaint about a bailiff's action operates. This complaint serves the control of every indication of a bailiff's action with respect to this conduct compliance with the binding provisions.[61] One of the reflections of a bailiff's conduct about which a complaint is admissible may be refusal to take action. A bailiff's negative attitude to a request to take action certainly cannot be treated as this executive body's omission to take action. Thus, it seems right to believe that a bailiff's refusal to take action is subject to appeal pursuant to Article 767 §1 sentence 1 CCP. Refusal to take action, on the other hand, belongs to referents of the concept of "a bailiff's action" discussed in the above-mentioned provision. It should be assumed that the broadly understood concept of "a bailiff's action" concerns every conventional activity performed by a bailiff, regardless of its content, the consequences of which, determined by the binding legal order, violate or endanger the rights of a party to the executive proceedings or another person. As it has been indicated above, the requirement of taking action must result from statute. However, a bailiff's refusal to take action cannot be treated as separate grounds for appeal because the legislator has not laid down such legal grounds for appeal.[62] It should be assumed that a bailiff's refusal to take action is an executive body's "action" referred to in Article 767 §1 sentence 1 *in principio* CCP aimed at having a legal effect that can trigger a legal right to appeal against it.

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[59] D. Olczak-Dąbrowska, *Skarga na czynności komornika…*, p. 7. On appeal by way of a complaint about a bailiff's decision to suspend proceedings, see also K. Kazimierczak, [in:] A. Marciniak, M. Michalska-Marciniak (ed.), *Metodyka pracy komornika sądowego*, Sopot 2015, p. 424. T. Demendecki expressed a similar opinion stating that a complaint is applicable in relation to every "activity of a bailiff (…) and omission or refusal to take action", see by this author, *Tryb wnoszenia, forma i treść skargi na czynności komornika sądowego*, [in:] J. Misztal-Konecka (ed.), *Środki zaskarżenia w sądowym postępowaniu egzekucyjnym. Zbiór studiów*, Sopot 2017, p. 34.

[60] Similarly to the refusal to perform notarial activities.

[61] M. Sorysz, *Projektowane zmiany w Kodeksie postępowania cywilnego – zagadnienia wybrane (Druk nr 2678 Sejmu VII kadencji). Głos w dyskusji*, PPE No. 2, 2015, p. 23.

[62] One of the requirements of admissibility of every appeal measure is suability of a given decision (action) with the use of a given appeal measure, see, I. Kunicki, [in:] W. Broniewicz, A. Marciniak, I. Kunicki (ed.), *Postępowanie cywilne...*, p. 315.

5. COMPLAINT ABOUT A BAILIFF'S OMISSION *DE LEGE FERENDA*

Admissibility of a complaint about a bailiff's positive conduct, i.e. performance of action stipulated by statutory provisions, does not raise any objections in the literature. Some comments are only made in relation to the amendments consisting in the addition of Article 767 §1[1] CCP.[63] Still, recently, some opinions have appeared in jurisprudence questioning admissibility of a complaint about a bailiff's omission. The issue needs explanation. It is worth preceding considerations *de lege ferenda* with a retrospective comment. It can be noted that under ACBEP of 1932, there was no measure of complaint about a bailiff's omission to take action within the executive procedure.[64] The legislator only laid down a complaint about a bailiff's action in Article 512 §1 ACBEP of 1932. A complaint about a bailiff's omission appeared in the provision of Article 767 §1 sentence 2 CCP that entered into force on 1 January 1965.[65] However, already in the 1930s and then before the present CCP entered into force, there were proposals *de lege ferenda* to make a complaint about a bailiff's action applicable to omission to take action.[66] Other reasons for the introduction of a complaint about omission included the requirements for candidates for bailiffs that were not so strict as they are now as well as a different status of a court bailiff then and now.[67] Therefore, the provision of an appeal measure in case of a bailiff's neglect had a negative effect on the legal situation of this conduct addressee seemed to be a necessity. It appears that the idea of admissibility of a complaint about a bailiff's omission originates from the leading authorities of the scientific circles and the contemporary model of a complaint is still being developed by the doctrinal proposals.

The example of the proposals to take into consideration exclusion of admissibility of a bailiff's omission formulated in jurisprudence confirms this stand. The proposals will be discussed below. They focus on the broadly understood action aimed at objection to the parties' obstructive action. In order to obtain their particular interests, they often use their rights in the way that is not adequate to the aim of the procedural measures laid down by law and violate Article 3 CCP. It is worth mentioning that the legislator, based on the binding CCP, successively undertakes

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[63] Although the provision was approved of, a negative opinion of A. Antkiewicz can be noted. He believes that it is justifiable to further limit admissibility of a complaint about a bailiff's action; see by this author, *Zmiany w postępowaniu egzekucyjnym w rządowym projekcie nowelizacji Kodeksu postępowania cywilnego zawartym w druku nr 2678 Sejmu VII kadencji,* PPE No. 5, 2015, p. 41.

[64] A complaint about omission is not laid down in the Code of Civil Procedure – Appendix to the Announcement of the Minister of Justice of 25 August 1950 on promulgation of the uniform text of the Code of Civil Procedure (Journal of Laws [Dz.U.] No. 43, item 394), and Article 519 §1 CCP regulates only a complaint about a bailiff's action.

[65] Act of 17 November 1964 – Code of Civil Procedure, Journal of Laws [Dz.U.] of 1964 No. 43, item 296.

[66] J. Korzonek, *Postępowanie egzekucyjne i zabezpieczające…*, p. 354 ff; E. Wengerek, *Postępowanie egzekucyjne w sprawach cywilnych*, Warsaw 1961, p. 104.

[67] It is worth highlighting that when the present CCP entered into force, the Regulation of the Minister of Justice of 31 December 1960 on bailiffs was binding (Journal of Laws [Dz.U.] of 1961, No. 13, items 65 and 66; the act was repealed on 30 November 1997). The provisions of §§1 and 7 of the Regulation stipulated that a bailiff was a state official appointed to perform executive activities, and the requirement for candidates for bailiff apprentices included, inter alia, secondary education.

steps to broaden the scope of admissibility of a complaint about a bailiff's action. One can recognise the introduction of admissibility of a complaint about a bailiff's omission as a starting point for this tendency. The Act of 2 July 2004 amending the Act: Code of Civil Procedure and some other acts was another important step.[68] The amendment let the legislator introduce the possibility of filing a complaint by a party or another person in the event a bailiff's action or its omission violates or endangers their rights (Article 767 §2 CCP). The only amendment to a complaint about a bailiff's action that reduced the scope of admissibility of that complaint was introduced in the Act of 10 July 2015 amending the Act – Civil Code, the Act – Code of Civil Procedure and some other acts.[69] Pursuant to it, the legislator added the provision of Article 767 §11 CCP,[70] which excludes a complaint with regard to enumerated bailiff's activities constituting only a stage of proceedings that ends with another activity which can be subject to appeal.

Referring to the key proposals *de lege ferenda*, it is worth considering the justifiability of a complaint about a bailiff's omission to take action. M. Sorysz proposed to give up a complaint about a bailiff's omission to take action. This author noticed that a complaint about omission to take action was inadmissible in committal proceedings. However, a court president's supervision and a complaint about lengthiness of proceedings, which can successfully protect the rights of the parties that are affected by a bailiff's omission (this does not refer to inaction),[71] may constitute a disciplining element. A problem that arises in relation to the above proposal concerns, inter alia, the establishment whether a complaint about a bailiff's omission is just a legal instrument thanks to which a potential complainant may demand that a bailiff take specific action. It seems that it does not. One should emphasise the possibility resulting from the application of the dispositive part of the provisions laid down in Article 760, Article 763, Article 799 §1 sentences 2 and 3 or Article 801 CCP. In jurisprudence, Z. Knypl emphasises a creditor's obligation expressed in the necessity of his participation in the whole executive proceedings. The examples of that activity should include a creditor's motions and requests, participation in activities and providing a bailiff with necessary explanation.[72]

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[68] Journal of Laws [Dz.U.] No. 172, item 1804. For more on the issue, see: H. Pietrzkowski, *Skarga na czynności komornika po zmianach przepisów Kodeksu postępowania cywilnego dokonanych w latach 2004–2015*, PPC No. 3, 2016, p. 477 ff; M. Sorysz, *Nowy system środków zaskarżenia w postępowaniu egzekucyjnym w świetle nowelizacji k.p.c. z 2.7.2004 r.*, MoP No. 2, 2005, p. 74.

[69] Journal of Laws [Dz.U.] of 2015, item 1311, the Act entered into force on 8 September 2016.

[70] In accordance with its wording, a complaint is not applicable in relation to a bailiff's ruling to summon a party to complete documents, the notification of the time of action and the payment of VAT. For more on the issue, see: G. Julke, *Skarga na czynności komornika po zmianach przepisów Kodeksu postępowania cywilnego*, [in:] A. Marciniak (ed.), *Sądowe postępowanie egzekucyjne. Zasadnicze kierunki zmian z 2016 roku*, Sopot 2017, p. 281 ff; Ł. Zamojski, *Skarga na czynność komornika sądowego po nowelizacji Kodeksu postępowania cywilnego dokonanej ustawą z 10.7.2015 r.*, MoP No. 21, 2016, p. 1138; A. Antkiewicz, *Zmiany w postępowaniu egzekucyjnym w świetle rządowej noweli Kodeksu postępowania cywilnego zawartej w druku nr 2678 Sejmu VII kadencji*, [in:] I. Kunicki, A. Antkiewicz (ed.), *Ku lepszemu prawu – dyskurs nauki i praktyki. Uwagi na tle ostatnich zmian legislacyjnych w zakresie prawa cywilnego i procedury cywilnej*, Sopot 2015, p. 139.

[71] M. Sorysz, *Projektowane zmiany w Kodeksie…*, pp. 29–30.

[72] Z. Knypl, [in:] Z. Szczurek (ed.), *Encyklopedia egzekucji sądowej*, Sopot 2002, p. 738.

Determining the relationship between a creditor and a bailiff, Z. Szczurek used an even further-reaching concept of a principle of cooperation between a creditor and a bailiff,[73] although it seems that it is more adequate to use the "proposal of cooperation" of the two entities in this context.

Returning to the main issue, it is necessary to draw attention to the consequences of a bailiff's valid omission to take action. However, as M. Uliasz points out, a bailiff's omission to take action leading to stabilisation of the legal situation of an entity affected by that omission does not result in irreversible legal consequences. The entity concerned may file a motion with a bailiff to take action and appeal against a bailiff's negative decision issued after the examination of the motion.[74] A complaint about refusal to take action also starts a court's supervision proceedings *ex officio* within the judicial supervision procedure pursuant to Article 759 §2 CCP. The mode can be used to eliminate the consequences of a bailiff's omission to take action.

According to M. Uliasz, admissibility of a complaint about a bailiff's omission to take action leads to accelerating and de-formalising executive proceedings. Thus, it seems that this author notices in this specific appeal measure a legal instrument that is desired and adequate to the aim, which a complaint about a bailiff's action is to serve. This author indicates, however, two ways of challenging the circumstances in which a bailiff fails to take necessary action. Firstly, it is filing a motion with a bailiff to take action. In the event a bailiff refuses to take action, the entity concerned is entitled to a complaint about the circumstance. Secondly, there is an alternative solution: filing a motion with a court to issue a decision eliminating the irregularities noticed in accordance with Article 759 §2 CCP.[75] Therefore, it does not seem that, under the current legal state, the elimination of a complaint about omission leads to significant limitation of the level of legal protection guaranteed to the parties and other entities authorised to file a complaint that are referred to in Article 767 §2 CCP. However, taking into account that the institution of judicial supervision exercised by a court should be exceptional in nature and applied only in case the initiative of entities affected by a bailiff's action or omission fails to occur, it is worth referring to a very important judicial opinion. The resolution of seven judges of the Supreme Court of 12 January 1988, III CZP 59/87,[76] constituting a legal principle, presents a stand that the provision of Article 759 §2 CCP authorises a court, which is a supervisory body, to far-reaching interference into the executive proceedings performed by a bailiff. However, it must be remembered that the legal instrument of judicial supervision laid down in Article 759 §2 CCP imposes on a court an

73 Z. Szczurek, *Egzekucja sądowa w sprawach cywilnych. Część ogólna*, Sopot 2005, p. 40.

74 M. Uliasz, [in:] J. Ignaczewski (ed.), *Komentarz do spraw...*, p. 211.

75 *Ibid.*, p. 215.

76 OSNCP 1988, No. 9, item 110. The Supreme Court expressed a similar opinion in the ruling of 12 March 1975, III CRN 456/74, OSPiKA 1976, No. 1, item 8, stating that the provision of Article 759 §2 CCP imposes an obligation on a court to fully use its authority in the field of supervision over executive proceedings. A court's supervision over executive proceedings may apply not only to the formal but also subjective aspects. At the same time, it should aim to appropriately ensure and protect the rights of a creditor as well as all the other participants of the proceedings.

executive duty to interfere when it learns that such action is required to ensure appropriate enforcement. A complaint about a bailiff's action the justification of which indicates that a bailiff's action or omission violates law should be an "alarm signal" for a court.[77]

6. CONCLUSIONS

Based on the presented analysis, it seems right to state that the legislator has equipped the parties and other entities involved in executive proceedings with a series of legal instruments serving the prevention of negative consequences of a bailiff's omission to take action. A complaint about omission laid down in Article 767 §1 sentence 2 CCP constitutes a direct remedy for the legal situation in which an entity affected by a bailiff's omission is. Taking into consideration the unlimited scope of admissibility of a complaint about a bailiff's action, one should also note that complaints about omission form an appeal measure that is relatively rarely applied in practice.[78] In the presence of admissibility of other legal instruments indicated above, which can effectively prevent the consequences of omission, the question about the need for a complaint about a bailiff's omission becomes up-to-date. It does not seem, however, that it would be a good direction of change to abandon a complaint about a bailiff's omission to take action. The conclusion is drawn not only based on the stable establishment of this instrument in civil procedure and its over fifty-year-old tradition but also on the lack of a real need to introduce such a revolutionary change to executive proceedings. However, the presented statement does not negate that the measures that may constitute an alternative to so specified substrate of a complaint and have been indicated in the above comments are right. Nevertheless, it seems that other situations create more threats to fast and efficient enforcement. This concerns admissibility of a complaint about a bailiff's action or omission, which can only potentially endanger the rights of parties or other persons, as referred to in Article 767 §2 *in fine* CCP, or still existing omnipotence of a complaint about a bailiff's action understood as this executive body's activity and not omission.

BIBLIOGRAPHY

Antkiewicz A., *Zmiany w postępowaniu egzekucyjnym w rządowym projekcie nowelizacji Kodeksu postępowania cywilnego zawartym w druku nr 2678 Sejmu VII kadencji*, PPE No. 5, 2015.

Antkiewicz A., *Zmiany w postępowaniu egzekucyjnym w świetle rządowej noweli Kodeksu postępowania cywilnego zawartej w druku nr 2678 Sejmu VII kadencji*, [in:] I. Kunicki, A. Antkiewicz (ed.), *Ku lepszemu prawu – dyskurs nauki i praktyki. Uwagi na tle ostatnich zmian legislacyjnych w zakresie prawa cywilnego i procedury cywilnej*, Sopot 2015.

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[77] Judgement of the Supreme Court of 10 May 1968, I CR 160/68, OSNCP 1969, No. 2, item 34.

[78] M. Uliasz, [in:] J. Ignaczewski (ed.), *Komentarz do spraw...*, p. 215.

Bagińska E., Prachomiuk J., [in:] R. Hauser, A. Wróbel, Z. Niewiadomski (ed.), *Odpowiedzialność odszkodowawcza w administracji. System Prawa Administracyjnego*, Warsaw 2016.

Bladowski B., *Dopuszczalność środków zaskarżania w sprawach egzekucyjnych*, Palestra No. 5–6, 2014.

Broniewicz W., *Dopuszczalność środków odwoławczych w postępowaniu cywilnym ze względu na przedmiot zaskarżenia*, PiP No. 5, 1997.

Bukowski T., *Rozstrzyganie o kosztach procesu cywilnego*, Warsaw 1971.

Cioch P., Nowińska J., *Postępowanie cywilne*, Warsaw 2007.

Cudak A., [in:] A. Marciniak, K. Piasecki (ed.), *Kodeks postępowania cywilnego*, Vol. III: *Komentarz do art. 730–1088*, Warsaw 2015.

Cudak A., *Skarga na czynności komornika*, Sopot 2015.

Dalka S., *Podstawy postępowania cywilnego*, Sopot 1999.

Demendecki T., *Tryb wnoszenia, forma i treść skargi na czynności komornika sądowego*, [in:] J. Misztal-Konecka (ed.), *Środki zaskarżenia w sądowym postępowaniu egzekucyjnym. Zbiór studiów*, Sopot 2017.

Dziewulska M., [in:] J. Świeczkowski (ed.), *Ustawa o komornikach sądowych i egzekucji. Komentarz*, Warsaw 2012.

Ereciński T., [in:] J. Gudowski (ed.), *System Prawa Procesowego Cywilnego*, Vol. III: *Środki zaskarżenia,* part 1, Warsaw 2013.

Flaga-Gieruszyńska K., [in:] A. Zieliński (ed.), *Kodeks postępowania cywilnego. Komentarz*, Warsaw 2017.

Gil I., [in:] *Postępowanie cywilne, Meritum*, Warsaw 2017.

Gołąb S., Wusatowski Z., *Kodeks postępowania cywilnego, część druga*, Kraków 1933.

Jankowski J., [in:] K. Piasecki (ed.) *Kodeks postępowania cywilnego. Komentarz*, Vol. II, Warsaw 2002.

Julke G., *Skarga na czynności komornika po zmianach przepisów Kodeksu postępowania cywilnego*, [in:] A. Marciniak (ed.), *Sądowe postępowanie egzekucyjne. Zasadnicze kierunki zmian z 2016 roku*, Sopot 2017.

Kazimierczak K., [in:] A. Marciniak, M. Michalska-Marciniak (ed.), *Metodyka pracy komornika sądowego*, Sopot 2015.

Knypl Z., [in:] Z. Szczurek (ed.), *Encyklopedia egzekucji sądowej*, Sopot 2002.

Korzan K., *Sądowe postępowanie zabezpieczające i egzekucyjne w sprawach cywilnych*, Warsaw 1986.

Korzonek J., *Postępowanie egzekucyjne i zabezpieczające – Komentarz*, Vol. I, Kraków 1934.

Kowalkowski R., [in:] *Encyklopedia egzekucji sądowej*, Sopot 2002.

Krakowiak M., *Skarga o stwierdzenie przewlekłości postępowania* egzekucyjnego, PPE No. 1–6, 2005.

Kunicki I., [in:] W. Broniewicz, A. Marciniak, I. Kunicki (ed.), *Postępowanie cywilne w zarysie*, Warsaw 2016.

Laskowska A., *Przyznanie odpowiedniej sumy pieniężnej wskutek uwzględnienia skargi na przewlekłość postępowania egzekucyjnego*, PPE No. 9, 2007.

Marcewicz O., [in:] A. Jakubecki (ed.), *Kodeks postępowania cywilnego*, Vol. II: *Komentarz do art. 730–1217*, Warsaw 2017.

Marciniak A., *Postępowanie egzekucyjne w sprawach cywilnych*, Warsaw 2005, 2008.

Marciniak A., *Nadzór judykacyjny nad czynnościami komornika*, PPE No. 6, 2011.

Mądrzak H., *Czynności egzekucyjne (analiza pojęć)*, Zagadnienia egzekucji sądowej w Polsce No. 3, 1994.

Michalska-Marciniak M., *Skarga o stwierdzenie przewlekłości postępowania egzekucyjnego*, PPE No. 12, 2007.

Olczak-Dąbrowska D., *Skarga na czynności komornika – efektywny instrument nadzoru judykacyjnego czy narzędzie blokowania egzekucji przez dłużników?*, Warsaw 2014.
Olczak-Dąbrowska D., *Wybrane zagadnienia egzekucji sądowej*, Instytut Wymiaru Sprawiedliwości, Warsaw 2016.
Pietrzkowski H., *Zarys metodyki pracy sędziego w sprawach cywilnych*, Warsaw 2005.
Pietrzkowski H., *Skarga na czynności komornika po zmianach przepisów Kodeksu postępowania cywilnego dokonanych w latach 2004–2015*, PPC No. 3, 2016.
Pietrzkowski H., [in:] T. Ereciński (ed.), *Kodeks postępowania cywilnego. Komentarz*, Vol. V: *Postępowanie egzekucyjne*, Warsaw 2016.
Pytel A., *Moment ustalenia wysokości wynagrodzenia radcowskiego i adwokackiego w sprawie egzekucyjnej*, MoP No. 18, 2017.
Różalska A., *Skarga na czynności komornika*, PES No. XVIII, 1996.
Siedlecki W., *Komentarz do kodeksu postępowania cywilnego*, Warsaw 1975.
Sorysz M., *Nowy system środków zaskarżenia w postępowaniu egzekucyjnym w świetle nowelizacji k.p.c. z 2.7.2004 r.*, MoP No. 2, 2005.
Sorysz M., *Projektowane zmiany w Kodeksie postępowania cywilnego – zagadnienia wybrane (Druk nr 2678 Sejmu VII kadencji). Głos w dyskusji*, PPE No. 2, 2015.
Szczurek Z., *Propozycje zmian przepisów k.p.c. regulujących postępowanie zaskarżeniowe w egzekucji*, Problemy Egzekucji Sądowej No. XXV, 1997.
Szczurek Z., *Egzekucja sądowa w sprawach cywilnych. Część ogólna*, Sopot 2005.
Szczurek Z., [in:] Z. Szczurek (ed.), *Egzekucja sądowa w Polsce*, Sopot 2007.
Szczurek Z., *Kodeks postępowania cywilnego. Postępowanie zabezpieczające i egzekucyjne. Komentarz*, Sopot 2013.
Śladkowski M., *Skarga na czynności komornika w praktyce sądowej*, MoP No. 18, 2014.
Świeboda Z., *Pojęcie i rodzaje czynności egzekucyjnych sądu*, Palestra No. 10, 1976.
Telenga P., *Skarga na czynności komornika (zagadnienia wybrane związane z rozstrzyganiem skargi przez sąd rejonowy*), [in:] M. Michalska-Marciniak (ed.), *Wokół problematyki środków zaskarżenia w postępowaniu cywilnym*, Sopot 2015.
Uliasz M., *Kodeks postępowania cywilnego. Komentarz*, Warsaw 2008.
Uliasz M., [in:] J. Ignaczewski (ed.), *Komentarz do spraw z zakresu postępowania zabezpieczającego i egzekucyjnego*, Warsaw 2013.
Wengerek E., *Postępowanie egzekucyjne w sprawach cywilnych*, Warsaw 1961.
Wengerek E., *Sądowe postępowanie egzekucyjne w sprawach cywilnych*, Warsaw 1978.
Wengerek E., *Postępowanie zabezpieczające i egzekucyjne*. *Komentarz*, Warsaw 1994.
Wilczyńska A., *Interes prawny i jego granice w postępowaniu cywilnym*, Palestra No. 9–10, 2010.
Włodyka S., *Interes prawny jako przesłanka dopuszczalności zaskarżenia orzeczeń w procesie cywilnym*, NP No. 9, 1963.
Zamojski Ł., *Skarga na czynność komornika sądowego po nowelizacji Kodeksu postępowania cywilnego dokonanej ustawą z 10.7.2015 r.*, MoP No. 21, 2016.
Zawistowski D., [in:] H. Dolecki, T. Wiśniewski (ed.), *Kodeks postępowania cywilnego*, Vol. IV: *Artykuły 730–1217*, Warsaw 2014.
Zedler F., *Dopuszczalność skargi na czynności komornika*, Palestra No. 12, 1987.

Legal regulations

Announcement of the Minister of Justice of 1 December 1932 on promulgation of the uniform text of the Code of Civil Procedure, Journal of Laws [Dz.U.] No. 112, item 934.
Announcement of the Minister of Justice of 25 August 1950 on promulgation of the uniform text of the Code of Civil Procedure, Journal of Laws [Dz.U.] No. 43, item 394.

Regulation of the Minister of Justice of 31 December 1960 on bailiffs, Journal of Laws [Dz.U.] of 1961 No. 13, items 65 and 66.
Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego [Act of 17 November 1964 – Code of Civil Procedure], Journal of Laws [Dz.U.] of 1964, No. 43, item 296.
Ustawa z dnia 14 lutego 1991 r. Prawo o notariacie [Act of 14 February 1991: Law on notarial services], Journal of Laws [Dz.U.] of 2016, item 1796.
Regulation of the Minister of Justice of 1 October 1991 on detailed mode of proceedings in securing an inheritance and taking inventory, Journal of Laws [Dz.U.] of 1991, No. 92, item 411.
Ustawa z dnia 29 sierpnia 1997 r. o komornikach sądowych i egzekucji [Act of 29 August 1997 on court bailiffs and enforcement procedure], uniform text, Journal of Laws [Dz.U.] of 2017, item 1277, as amended.
Ustawa z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki [Act of 17 June 2004 on the complaint about the violation of parties' right to a hearing in preparatory proceedings conducted or supervised by a prosecutor and in judicial proceedings without an undue delay], Journal of laws [Dz.U.] of 2016, item 1269, as amended.
Ustawa z dnia 2 lipca 2004 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw [Act of 2 July 2004 amending the Act: Code of Civil Procedure and some other acts], Journal of Laws [Dz.U.] No. 172, item 1804.
Ustawa z dnia 10 lipca 2015 r. o zmianie ustawy – Kodeks cywilny, ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw [Act of 10 July 2015 amending the Act – Civil Code, the Act – Code of Civil Procedure and some other acts], Journal of Laws [Dz.U.] of 2015, item 1311.
Regulation of the Minister of Justice of 15 October 2015 on some activities performed in the course of securing an inheritance, Journal of Laws [Dz.U.] of 2015, item 1643.

Court rulings

Judgement of the Supreme Court of 10 May 1968, I CR 160/68, OSNCP 1969, No. 2, item 34.
Resolution of the Supreme Court of 26 February 1969, III CZP 131/68, OSNCP 1969, No. 9, item 156.
Judgement of the Supreme Court of 14 June 1973, I CR 250/73, OSNCP 1974, No. 6, item 110 with a gloss by K. Korzan, OSP 1975, Vol. 1, item 1.
Ruling of the Supreme Court of 12 March 1975, III CRN 456/74, OSPiKA 1976, No. 1, item 8.
Resolution of seven judges of the Supreme Court of 12 January 1988, III CZP 59/87, OSNCP 1988, No. 9, item 110.
Resolution of the Supreme Court of 22 September 1995, III CZP 117/95, OSNC 1995, No. 12, item 179.
Judgement of the Supreme Court of 26 January 2001, II CKN 366/00, MoP No. 7, 2005.
Resolution of the Supreme Court of 20 November 2008, III CZP 108/08, OSNC 2009, No. 10, item 139.
Judgement of the Appellate Court in Białystok of 23 November 2011, I ACa 501/11, Legalis.
Ruling of the District Court in Toruń of 18 October 2013, VIII CZ 593/13, http://www.orzeczenia.torun.so.gov.pl.
Judgement of the Supreme Court of 5 February 2014, V CSK 166/13, Legalis.
Ruling of the Voivodeship Administrative Court in Wrocław of 14 March 2014, IV SO/Wr 6/14, http://www.orzeczenia-nsa.gov.pl.

COMPLAINT ON A BAILIFF'S OMISSION TO TAKE ACTION: SELECTED COMMENTS *DE LEGE LATA* AND *DE LEGE FERENDA*

Summary

A complaint about a bailiff's action is a fundamental appeal measure in the executive proceedings. Pursuant to Article 767 §1 of the Code of Civil Procedure, it is granted *de lege lata* not only with respect to a bailiff's action, but also with regard to this executive body's omission to take action. The term "action" should also be understood as a bailiff's refusal to take action. A complaint is not admissible, however, in the case of a bailiff's inaction. Inaction is understood as a bailiff's excessive delay and negligence in the fulfilment of obligations under Article 45a of the Act on court bailiffs and enforcement procedure. It leads to excessive lengthiness of executive proceedings. A bailiff's inaction should not be *de lege ferenda* subject to complaint under Article 767 §1 sentence 2 CCP. Thus, the pursuit of equating the semantic scopes of the terms "omission" and "inaction" does not deserve approval. This attitude should be upheld, despite the fact that a creditor often believes the effects of a bailiff's omission and inaction are the same. It is also very important to treat with great caution the proposals to abandon a complaint about the bailiff's omission. The effectiveness of enforcement is supported by the recently introduced changes limiting the scope of admissibility of a complaint in relation to active, not passive, bailiff's conduct.

Keywords: bailiff's action, omission, inaction, enforcement, judicial supervision, refusal to take action

SKARGA NA ZANIECHANIE PRZEZ KOMORNIKA DOKONANIA CZYNNOŚCI – WYBRANE UWAGI *DE LEGE LATA* I *DE LEGE FERENDA*

Streszczenie

Skarga na czynności komornika stanowi podstawowy środek zaskarżenia w postępowaniu egzekucyjnym. Z art. 767 §1 k.p.c. wynika, iż *de lege lata* przysługuje ona nie tylko na „czynności" komornika, lecz także na „zaniechanie" tego organu egzekucyjnego. Pod pojęciem czynności należy rozumieć także odmowę dokonania czynności przez komornika. Skarga nie przysługuje jednak w przypadku bezczynności komornika. Bezczynność rozumiana jest jako opieszałość i zaniedbanie komornika w realizacji obowiązków wynikających z art. 45a ustawy o komornikach sądowych i egzekucji. Prowadzi ona do przewlekłości postępowania egzekucyjnego. *De lege ferenda* bezczynność komornika nie powinna podlegać zaskarżeniu w drodze skargi z art. 767 §1 zd. 2 k.p.c. Tym samym dążenia do zrównania zakresu znaczeniowego pojęć „zaniechanie" oraz „bezczynność" nie zasługują na aprobatę. Stanowisko to należy podtrzymać, mimo iż niejednokrotnie w ocenie wierzyciela skutki zaniechania i bezczynności komornika są takie same. Z dużą ostrożnością należy też podejść do postulatów rezygnacji ze skargi na zaniechanie komornika. Efektywność egzekucji wspierają bowiem dokonane w ostatnim czasie zmiany ograniczające zakres dopuszczalności przedmiotowej tej skargi w odniesieniu do aktywnego, nie zaś pasywnego, zachowania komornika.

Słowa kluczowe: czynności komornika, zaniechanie, bezczynność, egzekucja, nadzór judykacyjny, odmowa dokonania czynności

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INSTITUTIONS FULFILLING THE FUNCTION OF A CENTRAL CONTRACTING BODY IN PUBLIC PROCUREMENT LAW

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1. INTRODUCTION

First of all, to organise the issue to be discussed, it should be pointed out that a central contracting body in the Polish system of public procurement is interpreted as an extremely broad term. One can distinguish a central contracting body in a precise sense, which is defined in the Act of 29 January 2004: Public procurement law,[1] but the ministerial central contracting bodies are also distinguished, who can act in particular sectors of government administration. A central contracting body, however, can also represent contracting bodies in territorial self-governments. In addition, the use of this legal institution is regulated at the national as well as cross-border level. The article presents all procurement aspects concerning a central contracting body available in the Polish Public procurement law system.

The above-mentioned legal institution lets contracting bodies aggregate contracts. It is one of the basic results obtained through the use a central contracting body in order to carry out proceedings concerning public procurement. It is worth explaining in this context that the term "aggregate" has not been unambiguously defined in PPL. There is a lack of whatever definition in the legal jargon, however, in legal literature, the term is most often used with reference to the establishment of the value of a contract before the initiation of given proceedings.[2] In my opinion, there

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[1] Journal of Laws [Dz.U.] of 2017, item 1579, uniform text, as amended; hereinafter: PPL.

[2] Compare, M. Stachowiak, [in:] M. Stachowiak, J. Jerzykowski, W. Dzierżanowski, *Komentarz do ustawy Prawo zamówień publicznych*, Warsaw 2014, 6th edition, p. 261; also compare, A. Sołtysińska's discussion concerning the value of contracts, [in:] M. Lemke (ed.) et al., *Wprowadzenie w zamówienia publiczne w Unii Europejskiej. Sektor użyteczności publicznej*, Urząd Zamówień Publicznych 2000, pp. 42–43.

are no contraindications against referring this term also to legal institutions that serve contracting bodies to award a joint contract within single proceedings. This concerns legal instruments allowing both one contracting authority to aggregate individual orders within proceedings (e.g. with the use of a framework agreement) and to award a joint contract in many institutions within given procurement proceedings. In the latter case, aggregating can take place especially through direct participation of many entities in the process or with the use of a central contracting body.

A central contracting body was introduced to the currently binding PPL by an amendment of 7 April 2006.[3] Originally, the term "central contracting body" was not defined in the legal jargon.[4] However, it was indicated that in accordance with Article 15a(1) PPL, this entity may prepare and carry out procurement proceedings, place orders and conclude framework agreements for the needs of contracting bodies of public administration. According to the justification for the Bill amending PPL, the provisions concerning a central contracting body are also included, apart from the necessity to adjust Polish law to the European Union regulations, to increase competitiveness and improve the purchasing process.[5] The introduction of this legal instrument to Polish legislation was connected with the requirement to implement the provisions of Directive 2004/18/EC.[6] It also aimed at enabling contracting parties to make a purchase with the use of the "returns to scale"[7] and awarding contracts representing a specified level of standardisation.

Many advantages of centralised purchasing procedures, i.e. awarding contracts by a central contracting body in particular, are listed in literature. In this context, it is indicated that there is an opportunity to obtain a better price, increase the volume of a contract, decrease the cost of procurement proceedings, obtain a better product and lower legal risk.[8] The intention to obtain these benefits makes procurement proceedings conducted by a central contracting body result in the increase in the value of a contract, and this leads to aggregation.

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[3] Act of 7 April 2006 amending the Act: Public procurement law and the Act on liability for infringing public finance discipline, Journal of Laws [Dz.U.] of 2006, No. 79, item 551.

[4] There were attempts to define the term, especially in case law; compare, the ruling of the District Court in Warsaw, V Civil Appellate Department, of 19 March 2013, V Ca 3341/12, Legalis No. 1327506.

[5] Compare, justification for the Bill amending the Act of 7 April 2006, available at: http://orka.sejm.gov.pl/Druki5ka.nsf/wgdruku/127.

[6] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134 of 30.04.2004.

[7] In the context of public procurement, returns to scale means in particular benefits resulting from the decrease in costs of the proceedings thanks to summing the values of contracts within single proceedings and benefits from the possibility of obtaining lower prices because of the extended scope of an order.

[8] Compare, J. Pawelec, *Dyrektywa 2014/24/UE w sprawie zamówień publicznych. Komentarz, art. 37*, Legalis; and: OECD (2011), *Centralised Purchasing Systems in the European Union*, SIGMA Papers, No. 47, OECD Publishing.

By the way, it can be pointed out that even based on the former Act of 10 June 1994 on public procurement, there was an opportunity to carry out proceedings with the use of an entity similar to the institution being discussed.[9]

The amendment to the Act on public procurement of 22 June 2016[10] introduced fundamental changes in the provisions concerning a central contracting body, which resulted from the necessity to transpose Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (referred to as new classical directive)[11] to the Polish legal system. The EU legal act introduced broad modification to the possibility of using various legal instruments by contracting entities (including a central purchasing body) serving aggregation of contracts within single proceedings. On the one hand, in general, the purpose of using them has not changed. The basic reason for awarding aggregated contracts still concerns economic benefits. On the other hand, what is interesting is the fact that the increase in micro, small and medium-sized enterprises' (SMEs) access to the public procurement market is one of the main tasks to be achieved by public procurement law in the individual EU Member States.[12] According to many findings resulting from research conducted in recent years, SMEs' share in the public procurement market is decreasing along with the increase in the value of a contract, which results from its aggregation.[13] Therefore, wider use of a central purchasing body to award contracts may undoubtedly cause a decrease in this group of contractors' accessibility to a given contract.

As early as in the course of work on the new classical directive, the European Commission emphasised that "the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for small and medium-sized enterprises".[14] The thesis demonstrates, in my opinion, that the issue is quite important and should not be underestimated by competent public administration bodies.

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[9] Compare, Article 5 Act of 10 June 1994 on public procurement, Journal of Laws [Dz.U.] of 2002, No. 72, item 664, as amended.

[10] Act of 22 June 2016 amending the Act: Public procurement law and some other acts, Journal of Laws [Dz.U.] of 2016, item 1020.

[11] OJ L 94 of 28.03.2014.

[12] Compare, objective (2) of the Preamble to the new classical directive. For the sake of explanation, it is necessary to additionally indicate that the category of micro, small and medium-sized enterprises (SMEs) includes businesses employing up to 250 workers with annual turnover of up to EUR 50 million and/or with annual balance sheet total not exceeding EUR 43 million, including small businesses employing up to 50 workers with annual turnover and/or balance sheet total not exceeding EUR 10 million and micro businesses employing up to 10 workers with annual balance sheet total not exceeding EUR 2 million. Compare, Article 2 Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, L 124 PL OJ EU of 20.05.2003.

[13] Compare, *SMEs' access to public procurement markets and aggregation of demand in the EU*, study prepared for the European Commission by PwC, ICF GHK and Ecorys, February 2014, p. 49, available at: http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/smes-access-and-aggregation-of-demand_en.pdf.

[14] European Commission Proposal COM(2011), 896 final 2011/0438 (COD) Directive of the European Parliament and of the Council on public procurement, p. 20, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0896_/com_com(2011)0896_pl.pdf.

2. CENTRAL CONTRACTING BODY: DEFINITION AND STATUTORY TASKS

Article 2(1.16) of the new classical directive defines the term of "central purchasing body", which in the Polish public procurement law system is the equivalent of a central contracting body. However, this fact influenced the introduction of the term of a central contracting body into the Act on public procurement.

The institution in question is at present regulated especially in Articles 15a–15d PPL, while the definition is laid down in Article 15b PPL. In comparison to the legal state before the amendment, the normative construction of particular provisions was changed and some completely new provisions were added. These include an extended opportunity to award contracts. Article 15d PPL may be an example of such totally new provision. Pursuant to it, a contracting body may use the services of a central purchasing body based in another Member State of the European Union.

As far as the change in the construction of the normative provisions is concerned, paragraphs (1)–(3) of Article 15a were repealed. With regard to this modification concerning a central contracting body, it is emphasised that "at the same time, assignment of its basic role to implementing contracts for the needs of contracting bodies from the governmental administration was repealed, provided they concerned the activity of more than one contracting body. With the introduction of a definition of auxiliary purchasing activities (which is discussed below), apart from introducing new regulations, paragraphs (2) and (3) of Article 15 PPL, including the catalogue of a central contracting body's tasks and an opportunity to make central purchases for other, indefinite contracting bodies, were repealed".[15]

However, paragraphs (4)–(6) of Article 15a were left unchanged; therefore, the Article is now the main statutory delegation for the President of the Council of Ministers, who can choose a central contracting body from among the government administration bodies or organisational units subordinate to those bodies or supervised by them. The President of the Council of Ministers still keeps his competence to instruct government administration contracting bodies to purchase specific types of products or services from a central contracting body or contractors chosen by a central contracting body and award contracts based on framework agreements concluded by a central contracting body, as well as the right to determine the scope of information passed to a central contracting body by those contracting entities, which are necessary to carry out proceedings and establish the method of cooperation with a central contracting body. The regulation stipulating that the provisions concerning a contracting body are applicable respectively to a central contracting body remained unchanged, too. It should be taken into account that in such a case "respective application of provisions means their direct application or with some modifications".[16]

Awarding contracts with the use of a central contracting body does not limit the principle of decentralisation, which results from Article 18(1) PPL. I agree with the

[15] M. Kuźma, *Zamówienia publiczne po implementacji dyrektyw 2016*, Warsaw 2016.

[16] Thus, the Voivodeship Administrative Court in Kielce in the judgement of 21 March 2013, II SA/Ke 119/13, Lex No. 1299528.

opinion expressed in relation to the former legal state because it is still up-to-date. According to it, there is no contradiction between a central contracting body and the principle of decentralisation that is laid down, although it is not directly articulated, in PPL. As it is rightly noticed, "in this case, it does not concern a specific type of incapacitation of a unit conducting proceedings. The institution of a central contracting body shows a method of organising purchases by public administration, which can choose a model that each organisational unit may follow when making purchases, or indicate one to conduct proceedings on behalf of other units".[17]

As I have mentioned it earlier, after the amendment, a central contracting body has been defined and it has been determined that it is a contracting body referred to in Article 3(1.1–4) PPL. Thus, the legislator unambiguously specifies which entities might be given the status of a central contracting body. It is worth highlighting that the catalogue cannot include entities other than those referred to in Article 3(1.1–4) PPL. In other words, not all institutions, whose purchases are recognised as public contracts in accordance with PPL, may be a central contracting body pursuant to this Act. In case of a contracting body referred to in Article 3(1.5) PPL, there are no grounds for assuming that a given public procurement will be subject to the provisions of PPL.

At present, a central contracting body may be involved in purchasing supplies or services to be used by contracting entities and in awarding contracts or concluding framework agreements concerning works, supplies or services for contracting entities. It is also admissible to perform auxiliary purchasing activities. At the same time, a regulation was adopted which stipulates that contracting entities referred to in Article 3(1.1–4) PPL may purchase supplies or services from a central contracting body. They may also purchase supplies, services and works with the use of dynamic purchasing systems operated by a central contracting body or based on a framework agreement concluded by a central contracting body.

A new solution is that proceedings to award a contract conducted by a central contracting body must be carried out exclusively with the use of electronic communications.[18] It is connected with the development of electronic public procurement systems. This, in the Polish legal system, results from the principle that is in force under the new classical directive, in accordance with which all proceedings concerning awarding contracts carried out by a central contracting body should be performed with the use of the means of electronic communication. The Regulation of the President of the Council of Ministers of 27 June 2017 on the use of means of electronic communication in proceedings concerning awarding public procurement contracts and on the provision of access to and retention of electronic documents entered into force on 4 July 2017.[19] It is interesting that the Regulation is exclusively applicable to a central contracting body in the meaning of Article 15b PPL, while the

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[17] P. Szustakiewicz, *Zasady prawa zamówień publicznych*, Warsaw 2007, pp. 190–191; also compare, Justification for the Bill of the Public procurement law of 7 November 2003, the Sejm paper No. 2218, p. 16.

[18] Compare, I. Ziarniak, *Elektronizacja zamówień publicznych*, Przetargi Publiczne No. 10, 2017, pp. 13–15; moreover, A. Tyniec, I. Wyżgowska, *Centralny zamawiający i oferta elektroniczna*, Przetargi Publiczne No. 10, 2017, pp. 16–19.

[19] Journal of Laws [Dz.U.] of 2017, item 1320.

Act will enter into force and be applicable to other contracting bodies on 17 October 2018. Thus, the domestic legislator took into consideration the requirements imposed by the new classical directive in the amendment to PPL of 22 June 2018. It is an open question whether the obligatory electronic means of communication under proceedings conducted by a central contracting body will not hinder SMEs' access to public procurement. The argument against such a possibility is the fact that the tools used in electronic communications and their technical features should not be discriminating for contractors and they cannot lead to the limitation of fair competition. Moreover, one should agree with a thesis that because of a limited possibility of manipulating electronic materials, the proceedings in question substantially reduce corruption-related threats.[20] On the other hand, the requirement for contractors to have an electronic signature or the necessity to get to know some additional procedures on the part of contracting bodies concerning electronic forms of communication may discourage some SMEs from participating in public procurement proceedings. Those contractors often do not have specialist staff who can help to fulfil the requirements of the proceedings. Such situations may occur especially in the transition period, i.e. till 17 October 2018. Until then, contracting entities shall enable SMEs to take part in procurement proceedings and submit their offers in writing.

At present, there is a much broader opportunity to use central contracting bodies than before the amendment of 22 June 2016. In the present legal state, they may also implement auxiliary purchasing tasks, including especially the right to provide advice concerning conducting or planning public procurement proceedings. These are entitlements which were not envisaged in the former PPL. At present, individual contracting bodies may use the specialist know-how of a central contracting body without the need to purchase goods via this institution.

The provisions of Article 15b(3) to (5) PPL indicate that a central contracting body acts on its own behalf and conducts proceedings for other contracting entities. Individual contracting bodies "covered by the system of central purchases are responsible for fulfilling duties resulting from the PPL provisions within the scope concerning the proceedings they carry out on their own".[21]

3. GOVERNMENT ADMINISTRATION SERVICE CENTRE (COAR)

At present, Centrum Obsługi Administracji Rządowej (COAR, Government Administration Service Centre) plays the role of a central contracting body in the precise meaning of the term. It is a state budget institution founded by the Head of Chancellery of the Prime Minister of Poland in order to ensure the implementation of public tasks of the Chancellery. The Head of Chancellery of the Prime Minister plays the function of a COAR founding body.

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[20] Compare, H. Niedziela's considerations expressed in relation to a dynamic system of purchasing, which is a fully electronic method of awarding contracts, *Nowe podejście do zamówień publicznych*, 1st edition, Warsaw 2011, p. 343.

[21] Compare, M. Jaworska, [in:] M. Jaworska, D. Grześkowiak-Stojek, J. Jarnicka, A. Matusiak, *Prawo zamówień publicznych*, Warsaw 2017, Legalis.

The predecessor of the COAR, Centrum Usług Wspólnych (Shared Services Centre), was founded on 1 January 2017 based on the Regulation No. 16 of the Head of Chancellery of the Prime Minister of 22 October 2010 concerning transformation of an auxiliary economic unit and recognition of its status.

The COAR analyses orders sent by government administration bodies, especially with respect to potential savings in terms of economy of scale. Thus, it is a good practical example proving that one of the basic aims of aggregating contracts is an opportunity to obtain economic benefits by contracting bodies. However, in case the COAR recognises that savings resulting from the process of aggregation are insufficient, the entity may withdraw from participation in the proceedings.[22]

It is interesting that, after the proceedings carried out by a central contracting body, particular entities exercise all rights resulting from concluded contracts. This assumption obviously results in increased responsibility of contracting bodies for failure to fulfil a contract concluded by the COAR on their behalf and for them. It is a right solution because it would be hard to approve of a situation in which, in case of irregularities in the fulfilment of a contract, a contracting body files warranty claims to the COAR and a central contracting body approaches a contractor.

Summing up, the COAR seems to be an institution necessary in the light of the PPL provisions as well as the implementation of public procurement contracts for the most important public administration bodies in Poland. One cannot forget that, apart from the above-mentioned functions, it is involved in administration and management as well as the provision of services to the Chancellery of the Prime Minister, technical services to the government and its bodies: the Council of Ministers, the Standing Committee of the Council of Ministers, and Ministers. However, it is worth drawing attention to the fact that too far-reaching centralisation of purchases may lead to elimination of SMEs from the market, especially local entrepreneurs, which took place temporarily, e.g. in case of the CONSIP's public procurement operations in Italy.[23] Moreover, it can be mentioned that the COAR has its counterparts in other EU Member States. The French UGAP (Union des Groupements d'Achats Publics) or the Italian CONSIP (Concessionaria Servizi Informativi Pubblici) are such examples.[24]

At present, the COAR conducts the first proceedings allowing aggregation of procurement and, at the same time, using exclusively the electronic form of communication with contractors.[25] Thus, it is hard to unambiguously assess the practical activities of the institution at this stage, especially in the context of the obligatory electronic public procurement system.

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[22] Compare, §16(1) Regulation No. 100 of the President of the Council of Ministers of 30 August 2017 concerning indication of a central buyer for government administration bodies and indication of government bodies obliged to purchase goods and services from a central buyer, M.P. 2017, item 832, Vol. 1.

[23] M. Marra, *Innovation in E-Procurement. The Italian Experience*, November 2004, p. 18 ff.

[24] Compare, W. Hartung, M. Bagłaj, T. Michalczyk, M. Wojciechowski, J. Krysa, K. Kuźma, *Dyrektywa 2014/24/UE w sprawie zamówień publicznych, Komentarz*, Warsaw 2015, p. 143.

[25] Compare, A. Tyniec, I. Wyżgowska, *Centralny zamawiający…*, p. 19.

4. CENTRAL CONTRACTING BODY IN LOCAL SELF-GOVERNMENTS

Apart from the activities of the COAR, there is an opportunity to appoint a central contracting body at the local self-government level. The legislator laid down three basic legal bases authorising these administrative units to appoint a central contracting body.

Firstly, the amended PPL of 22 June 2016 does not repeal Article 15a(4) PPL, in accordance with which the President of the Council of Ministers may indicate a central contracting body, inter alia, out of organisational units supervised by public administration bodies.[26] In accordance with this statutory delegation, the President of the Council of Ministers may appoint a commune (*gmina*), county (*powiat*) or voivodeship self-government to act as a central contracting body due to direct supervision over those units.[27]

Thus, the provision entitles a government administration entity to indicate a central contracting body out of local self-government units. However, because of the fact that different provisions regulate the activities of those units and they often have actually conflicting interests, appointing a central contracting body in this way seems to me unrealistic and inefficient in practice.

On the other hand, another opportunity to appoint an entity performing the tasks of a central contracting body at the local self-government level is based on Article 15c PPL, which was introduced as a result of the amendment of 22 June 2016. In accordance with this provision, a legislative body of the local self-government may, by way of a resolution, indicate or appoint an entity to perform tasks of a central contracting body, determine the scope of its activities and specify contracting entities obliged to award contracts via the institution selected in this way. Justifying this way of appointing a central contracting body, the legislator directly stated that, in this case, it is to ensure greater efficiency, professionalization of awarding contracts and increase competition. The last aim of this institution at the local self-government level may raise doubts. Namely, awarding contracts with the use of a central contracting body is generally connected with considerable aggregation of procurement. Such activities together with determination of the requirements for participation in the proceedings, at the level proportional to the contract value, with a lack of division of a contract into parts at the same time, may eliminate from the proceedings many local contractors belonging to SMEs.[28] We may probably speak about an increase in competition with the use of a central contracting body in this area if we assume that local self-government units violate the PPL provisions, especially dividing procurement in an inadmissible way in

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[26] E. Norek, *Prawo zamówień publicznych. Komentarz*, 3rd edition, Warsaw 2009, p. 78.

[27] Compare, Article 86 Act of 8 March 1990 on commune self-government (Journal of Laws [Dz.U.] of 2017, item 1875, uniform text), Article 76 Act of 5 June 1998 on county self-government (Journal of Laws [Dz.U.] of 2017, item 1768, uniform text), Article 78 Act of 5 June 1998 on voivodeship self-government (Journal of Laws [Dz.U.] of 2016, item 486, uniform text, as amended).

[28] As far as the groundless lack of division of a procurement contract into parts is concerned, compare the judgement of the National Appeals Chamber of 8 November 2016, KIO 2018/16, Legalis No. 1546259.

order to be exempt from Article 4(8) PPL. However, then it would be necessary to *a priori* assume that a contracting body, by professional procurement and acting in compliance with law, is to increase contractors' competitiveness, which, in my opinion, is completely unjustified reasoning. On the other hand, one must agree with the thesis that a central contracting body's participation in awarding contracts at the local self-government level may increase efficiency and lead to professionalization.

Unlike in Article 15a(4) PPL, an entity entitled to appoint a central contracting body laid down in Article 15c is a legislative body of the local self-government. This body is a commune council, a county council or a voivodeship assembly (*sejmik województwa*). In my opinion, the legislator should determine a given entity as a legislative and supervisory body, i.e. in accordance with the terms used in the self-government statutes.[29] I also have doubts concerning grounds for appointing a central contracting body by a collective entity that is strictly political in nature and in general does not deal with procurement. A better solution would be to indicate an executive entity as one authorised to appoint a central contracting body. Taking a commune as an example, one can notice that a commune head (*wójt*), a mayor or a president, and not a council, is a body managing current matters of a commune and representing it, in accordance with Article 31 of the Act of 8 March 1990 on a commune self-government. Thus, it seems that it is also an entity which should have competence referred to in Article 15c PPL.[30] Current matters are repetitive and require to be constantly dealt with.[31] In my opinion, conducting public procurement proceedings may be classified as a current and repetitive matter. In this context, it should be pointed out that a legislative body may also determine the way in which an entity performing the tasks of a central contracting body should be appointed, i.e. may in fact partially delegate this entitlement to an executive body.

Because of the fact that the legislator decided to assign a collective body the competence to indicate or appoint an entity performing the tasks of a central contracting body, it is done in the form of a resolution, which of course should not have the status of a local regulation. Also, a resolution should determine the discussed entity's scope of activities. Another important issue to be dealt with is the indication of entities obliged to make purchases, specified in the resolution, from a central contracting body. It seems that in this case, Article 4(11) PPL should be applied. In accordance with it, particular contracting bodies may, without the need to apply the PPL provisions, make purchases of works, supplies and services from a central contracting body. It is interesting that a legislative body may adopt a resolution indicating contracting bodies obliged to award contracts based on framework agreements concluded by a central contracting body or covered by

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[29] Compare, Article 15 Act of 8 March 1990 on commune self-government, Article 9 Act of 5 June 1998 on county self-government, Article 16 Act of 5 June 1998 on voivodeship self-government.

[30] Compare, the interpretation of Article 31 Act on commune self-government provided by the Supreme Administrative Court in its resolution of 13 November 2012, I OPS 3/12, Orzecznictwo NSA i WSA of 2013, No. 2, item 21.

[31] Compare, A. Skoczylas, [in:] R. Hauser, Z. Niewiadomski (ed.), *Ustawa o samorządzie gminnym. Komentarz z odniesieniami do ustaw o samorządzie powiatowym i samorządzie województwa*, Warsaw 2011, p. 388.

a dynamic purchasing system operated by a central contracting body. Therefore, the above-mentioned legal act may oblige particular contracting bodies to use many forms of procurement aggregation. It seems that aggregation, e.g. at a commune level by the obligation to purchase goods from a central contracting body, in addition under a framework agreement, may prevent local contractors, especially those with the smallest potential, from obtaining access to a given market. Such activities are in conflict with the above-mentioned idea laid down in the Preamble to the new classical directive. The above-indicated forms of aggregation of procurement, especially at the self-government level, should be applied very carefully. While centralisation of purchases by the COAR is justified, at the level of particular units of local self-government, one can have fundamental doubts whether the centralisation of purchases will not hinder many smaller local contractors' access to the market.

Moreover, it is also necessary to draw attention to the fact that administrative courts' case law rightly distinguishes cooperation between communes and their organisational units in accordance with Articles 10–10d Act on commune self-government and appointment of a central contracting body in accordance with Article 15c PPL. One judgement indicates that a voivode was right to issue a supervisory adjudication stating invalidity of a town council's resolution which has assigned a commune organisational unit the task of preparing procurement proceedings concerning the purchase of services, supplies and works. According to the Voivodeship Administrative Court in Gliwice, a town council, as a legislative and supervisory body, is not authorised to delegate, in the mode and following the rules laid down in the provisions of Articles 10–10d Act on commune self-government, public procurement tasks to a subordinate unit. In order to enable a unit to perform public procurement-related activities for a commune, a legislative body should, first of all, refer to the PPL provisions as *lex specialis* in relation to the Act on commune self-government. In case of appointing such a unit as a central contracting self-government body, a council resolution should be adopted based on Article 15c(1) PPL and must contain all requirements laid down in this Article.[32] This judgement shows how important detailed provisions of resolutions adopted by local self-governments are, especially in the context of their potential recognition as invalid by a supervisory body.

The third, final opportunity to appoint a central contracting body by a local self-government is regulated in Article 16(4) PPL. However, it is not a central contracting body in its precise meaning, which is confirmed by the fact that the legislator does not use this term in this case. In line with the legal basis indicated above, an executive body of the local self-government is authorised to appoint an organisational unit from among subordinate entities which are competent to conduct proceedings and award procurement contracts. In this case, it has been rightly indicated that an executive body of the local self-government unit is an entity competent to appoint this quasi-central contracting body. The doubts emphasised earlier in relation to Article 15c PPL, concerning the legislative and supervisory bodies' entitlement to appoint a central contracting body, remain up-to-date.

[32] Compare, the judgement of the Voivodeship Administrative Court in Gliwice of 8 March 2017, I SA/Gl 68/17, Legalis No. 1597789.

5. CENTRAL PURCHASING BODY BASED IN ANOTHER EUROPEAN UNION MEMBER STATE

In accordance with Article 15d(1) PPL, a contracting entity may use the services of a central purchasing body based in another Member State of the European Union. Services provided by such an institution are subject to the regulations in force in a Member State concerned.

Thus, in the PPL amendment of 22 June 2016 the domestic legislator took into account the necessity of introducing to PPL a principle directly transposed from the new classical directive, which stipulates that Member States cannot prohibit their contracting institutions from using centralised purchasing systems implemented by central purchasing bodies based in other Member States. As a result of this change in PPL, the limitation of contracting bodies' opportunity to undertake only centralised purchasing activities laid down in Article 2 par. 1(14a) or (14b) of the new classical directive (in relation to purchasing activities implemented through a central purchasing body based in a Member State different from a contracting institution) was not introduced. This means that there is no regulation that would limit the use of centralised purchasing activities which consist in conducting activities in a continuous mode in one of the following forms: purchase of supplies or services for the needs of contracting institutions; awarding public procurement contracts or concluding framework agreements concerning works, supplies or services for the needs of contracting institutions. However, it should be recognised that the legislator's decision is right with respect to the scope of implementation, because the new classical directive only stipulates the Member States' right, not an obligation, to introduce the discussed limitation to their national legislation. Moreover, there is an opportunity to use auxiliary purchasing activities implemented by central contracting bodies based in particular European Union Member States.

The content of Article 15d PPL stipulates that cross-border procurement may be implemented via a central contracting body based in another European Union Member State. Thus, the use of this legal institution may consist in the indication of a central purchasing body by a few entities from particular Member States to conduct proceedings in one of the three cases referred to in Article 15b(1) PPL. It concerns the already mentioned purchase of supplies or services for the needs of contracting bodies; awarding contracts or concluding framework agreements concerning works, supplies and services for the needs of contracting bodies and auxiliary purchasing activities. Therefore, the role of a central contracting body may consist in purchasing services for the needs of particular contracting bodies as well as in providing advice concerning conducting and planning procurement proceedings.

In case a broader use of the above-mentioned legal opportunities by contracting bodies takes place in practice, doubts arise in relation to the provision of access to the procurement market for micro, small and medium-sized enterprises. The regulations directly allow aggregation of procurement on two or more planes under single proceedings. Namely, the procurement may be aggregated because of the use of an opportunity to make cross-border procurement; alternatively, the procurement value may be aggregated as a result of a framework agreement concluded under

a cross-border procurement contract. In case of awarding a contract by a central contracting body based in another EU Member State, it seems, a more frequent (than e.g. in case of the COAR used domestically) solution will be a division of procurement into parts because, otherwise, it would be necessary to assume that there is a joint, indivisible cross-border procurement, which may occur very rarely.

At present, however, it does not seem highly probable that central cross-border procurements may become a broadly used legal tool, even in spite of fundamental regulation of this issue under the new classical directive and PPL.[33] It seems that the issue of different legal systems and practices adopted in particular EU Member States is more important now. The occurrence of those differences does not encourage contracting bodies to undertake broad cooperation in this area. It seems, however, that cross-border procurement may be more frequently used in the future via awarding joint contracts by contracting bodies from particular Member States without the participation of a central purchasing body. Such a conclusion may be drawn from the fact that awarding joint cross-border contracts takes place, in my opinion, through agreements between parties involved, i.e. directly between particular contracting bodies.

6. MINISTERIAL CENTRAL CONTRACTING BODY

Apart from the above-mentioned possibilities of implementing centralised procurement, PPL also stipulates grounds for awarding contracts by the ministerial central contracting bodies. Article 16(3) PPL determines legal grounds for appointing an organisational unit competent to conduct proceedings and award contracts for the needs of those units by a minister managing a particular sector of public administration. It is noted that: "Article 16(3) indicates the form of management in which a representative is appointed by a minister managing a sector of government administration. In other cases, the appointment may take place in any form appropriate for the legal status of a contracting body (e.g. a contract/agreement regulating the rules of awarding a joint procurement contract), provided that it is made in writing, which results from the principle of conducting proceedings in writing and adequate provisions of the Civil Code, including granting authorisation".[34]

The Regulation of the Minister of Justice of 16 September 2014 concerning indication of a contracting body preparing and conducting proceedings to award a procurement contract, awarding contracts and concluding framework agreements for the needs of common courts may be an example of a legal act that enables a minister managing a sector of public administration to indicate an organisational

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[33] For difficulties connected with awarding cross-border procurement contracts, compare a paper prepared for the European Commission entitled *Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States*, available at: http://ec.europa.eu/DocsRoom/documents/22102/. In addition, Z. Raczkiewicz, *Zamówienia ponadgraniczne*, Przetargi Publiczne No. 6, June 2017, p. 47.

[34] Compare, M. Stachowiak, *Komentarz do ustawy…*, p. 173.

unit he manages or supervises to be a competent contracting body conducting proceedings and awarding contracts for the needs of those units.[35] Based on this document, the Appellate Court in Kraków is an entity that conducts and implements procurement for the needs of common courts.

On the other hand, in accordance with the Regulation of the Director of the Appellate Court in Kraków of 11 January 2012, an institution called Centrum Zakupów dla Sądownictwa Instytucja Gospodarki Budżetowej (Purchasing Centre for Courts – Budgetary Institution) was founded and entered in the National Court Register (KRS). The unit belonging to the public finance sector is mainly responsible for central public procurement for the needs of the common courts system.[36] Thus, it is a unit completely different from a central contracting body operating in accordance with Article 15a PPL. Nor is it a ministerial central contracting body, which is a function held by the Appellate Court in Kraków. The Purchasing Centre for Courts mainly plays the role of a unit representing the Appellate Court in Kraków which acts on behalf of common courts in the territory of the Republic of Poland. However, it is not a counterpart of a central purchasing body in the meaning of the new classical directive. The opportunity to award contracts with the use of an institution of a ministerial central contracting body is a special instance of awarding joint contracts by contracting bodies, in this case with the use of an entity that represents other institutions.

Procurement with the participation of the above-mentioned central contracting body may, as practice shows because of a considerable level of aggregation of procurement, prevent SMEs from getting access to the market. Contracts awarded by the Purchasing Centre for Courts on behalf of the Appellate Court in Kraków may be an example of such proceedings. This concerns especially proceedings in which contractors cannot submit partial offers. For example, in the procurement proceedings concerning supplies of stationery for common courts, the ministerial central contracting body established a bid security of PLN 400,000 and a requirement of solvency of PLN 2,000,000, which, in my opinion, was an amount unavailable for many small businesses operating in a given sector.[37] To avoid such unfavourable situations for SMEs, it sufficed to divide the procurement into smaller parts for the needs of particular appellate courts and units subordinate to them.[38]

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[35] Dz.U. MS. of 18 April 2014, item 153.

[36] Compare, Chapter 2 of Statute of the Purchasing Centre for Courts, published at: http://www.czdsigb.gov.pl/attachments/article/119/Zarz%C4%85dzenie%20nr%207.16.IGB%20z%20dn.%2015.07.2016r.%20informuj%C4%85ce%20o%20zmianie%20Statutu%20CZDSIGB.pdf.

[37] The advertisement was published in the Official Journal of the European Union, OJ/S S146 of 30.07.2016, 264396-2016-PL.

[38] In order to make it possible to submit partial offers if the procurement content is divided, compare the judgement of the Arbitrators Team of 11 April 2005, UZP/ZO/0-648/05, Legalis No. 1472188. Moreover, for the analysis of conditions for division of services, compare the Supreme Court judgement of 14 March 2002, IV CKN 821/00, Legalis No. 65083.

7. CONCLUSIONS

The discussed issue regulated in PPL in the wording before the amendment of 22 June 2016 well describes the opinion expressed in literature that: "the legally uncertain role of a central contracting body and the lack of detailed norms in the field of legal relations between a central contracting body and other contracting bodies do not forecast a reduction in prices, which was an idea of the authors of a central contracting body in Polish law. Indeed, the authors of respective provisions in the EU directives adopted a similar assumption. As joint procurement experience shows, the economy of scale has real impact on prices reduction. On the other hand, the scale of procurement hinders and sometimes even prevents small and medium-sized enterprises from bidding. Such limitation of competition produces an effect opposite to the desired one".[39] I fully share the opinion presented in the above quotation. It is hard to resist an impression that an institution of a central contracting body, in the wording being in force in the period 2006–2016, was to serve mainly contracting bodies as parties to public procurement proceedings.

At present, a central contracting body, as a legal institution, has been defined and specified in PPL because of the necessity of implementing the provisions of the new classical directive. Determination of statutory rights and obligations in the field of appointing a central contracting body at the local self-government and central government level requires approval. The institution has been appropriately implemented and the issue is more broadly regulated than the new classical directive required. As far as the influence of new provisions on the practical use of a central contracting body is concerned, it must be noted that the CUW[40] at the governmental level and ministerial central bodies had already been organisers of procurement proceedings before the PPL amendment of 22 June 2016. In this case, one cannot expect radical changes in the frequency or scope of using this method to aggregate procurement.

On the other hand, the situation concerning the appointment of a central contracting body for local self-government units may be different. The detailed regulation of Article 15c PPL may encourage legislative and supervisory bodies of particular units to adopt resolutions concerning indication of a central contracting body. The direct reason for such activities may be the aim to reduce costs and introduce professionalization of purchases. However, I fear that centralisation of procurement may, in this case, be often implemented to the detriment of the local SME contractors. Procuring standardised services, supplies and works jointly by a central contracting body, e.g. for all units in a given commune, may prevent the smallest contractors from being awarded contracts. Thus, competent public administration bodies, especially Urząd Zamówień Publicznych (Polish Public Procurement Office) should monitor the process.

Summing up, it seems justifiable to make a *de lege ferenda* proposal to amend Article 15a(4) PPL by repealing the opportunity to indicate a central contracting body

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[39] J. Pieróg, *Prawo zamówień publicznych, Komentarz*, *art. 15a*, Warsaw 2015, Legalis.

[40] At present, COAR.

by the President of the Council of Ministers from among the local self-government units. As I have mentioned it earlier, such activity is admissible at present but there are no grounds whatsoever for the existence of such a competence typical of a major public administration body. Another amendment that should be considered is the enactment of an articulated principle, i.e. the obligation to divide a procurement contract into parts (under given proceedings) in relation to particular contracting bodies for which a central contracting body conducts the proceedings. It seems that the present mechanism, resulting especially from Article 36aa and Article 96(1.11) PPL, in relation to centralised procurement, is too weak to ensure appropriate protection to SMEs in the process of awarding public procurement contracts.

BIBLIOGRAPHY

Advertisement published in the Official Journal of the European Union, OJ/S S146 of 30.07.2016, 264396-2016-PL.

Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States, available at: http://ec.europa.eu/DocsRoom/documents/22102/.

Hartung W., Bagłaj M., Michalczyk T., Wojciechowski M., Krysa J., Kuźma K., *Dyrektywa 2014/24/UE w sprawie zamówień publicznych. Komentarz*, Warsaw 2015.

Hauser R., Niewiadomski Z. (ed.), Dominowska J., Jaroszyński K., Piątek W., Skoczylas A., Sawczyn W., Złakowski Ł., *Ustawa o samorządzie gminnym. Komentarz z odniesieniami do ustaw o samorządzie powiatowym i samorządzie województwa*, Warsaw 2011.

Jaworska M. (ed.), Grześkowiak-Stojek D., Jarnicka J., Matusiak A., *Prawo zamówień publicznych*, Warsaw 2017, Legalis.

Kuźma M., *Zamówienia publiczne po implementacji dyrektyw 2016*, Warsaw 2016.

Lemke M. (ed.), Sołtysińska A. et al., *Wprowadzenie w zamówienia publiczne w Unii Europejskiej. Sektor użyteczności publicznej*, Urząd Zamówień Publicznych, Warsaw 2000.

Marra M., *Innovation in E-Procurement. The Italian Experience*, November 2004.

Niedziela H., *Nowe podejście do zamówień publicznych*, 1st edition, Warsaw 2011.

Norek E., *Prawo zamówień publicznych. Komentarz*, 3rd edition, Warsaw 2009.

OECD (2011), *Centralised Purchasing Systems in the European Union*, SIGMA Papers, No. 47, OECD Publishing.

Pawelec J., *Dyrektywa Parlamentu Europejskiego i Rady 2014/24/UE w sprawie zamówień publicznych. Komentarz*, Warsaw 2015, Legalis.

Pieróg J., *Prawo zamówień publicznych, Komentarz, art. 15a*, Warsaw 2015, Legalis.

Raczkiewicz Z., *Zamówienia ponadgraniczne*, Przetargi Publiczne No. 6, June 2017.

SMEs' access to public procurement markets and aggregation of demand in the EU, study prepared for the European Commission by PwC, ICF GHK and Ecorys, available at: http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/smes-access-and-aggregation-of-demand_en.pdf.

Stachowiak M., Jerzykowski J., Dzierżanowski W., *Komentarz do ustawy Prawo zamówień publicznych*, Warsaw 2014.

Szustakiewicz P., *Zasady prawa zamówień publicznych*, Warsaw 2007.

Tyniec A., Wyżgowska I., *Centralny zamawiający i oferta elektroniczna*, Przetargi Publiczne No. 10, 2017.

Ziarniak I., *Elektronizacja zamówień publicznych*, Przetargi Publiczne No. 10, 2017.

Legal regulations

International law

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134 of 30.04.2004.

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, OJ L 94 of 28.03.2014.

Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, L 124 PL OJ EU of 20.05.2003.

European Commission Proposal COM(2011), 896 final 2011/0438 (COD) Directive of the European Parliament and of the Council on public procurement; available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0896_/com_com(2011)0896_pl.pdf.

Polish law

Ustawa z dnia 8 marca 1990 r. o samorządzie gminnym [Act of 8 March 1990 on commune self-government], Journal of Laws [Dz.U.] of 2017, item 1875, uniform text.

Ustawa z dnia 10 czerwca 1994 r. o zamówieniach publicznych [Act of 10 June 1994 on public procurement], Journal of Laws [Dz.U.] of 2002, No. 72, item 664, as amended.

Ustawa z dnia 5 czerwca 1998 r. o samorządzie powiatowym [Act of 5 June 1998 on county self-government], Journal of Laws [Dz.U.] of 2017, item 1768, uniform text.

Ustawa z dnia 5 czerwca 1998 r. o samorządzie województwa [Act of 5 June 1998 on voivodeship self-government], Journal of Laws [Dz.U.] of 2016, item 486, uniform text, as amended.

Uzasadnienie do projektu ustawy Prawo zamówień publicznych z dnia 7 listopada 2003 r. [Justification for the Bill of the Public procurement law of 7 November 2003], the Sejm paper No. 2218.

Ustawa z dnia 29 stycznia 2004 r. Prawo zamówień publicznych [Act of 29 January 2004: Public procurement law], Journal of Laws [Dz.U.] of 2017, item 1579, uniform text, as amended.

Ustawa z dnia 7 kwietnia 2006 r. o zmianie ustawy – Prawo zamówień publicznych oraz ustawy o odpowiedzialności za naruszenie dyscypliny finansów publicznych [Act of 7 April 2006 amending the Act: Public procurement law and the Act on liability for infringing public finance discipline], Journal of Laws [Dz.U.] of 2006, No. 79, item 551.

Uzasadnienie do projektu ustawy nowelizującej Prawo zamówień publicznych z dnia 7 kwietnia 2006 r. [Justification for the Bill amending the Public procurement law of 7 April 2006], available at: http://orka.sejm.gov.pl/Druki5ka.nsf/wgdruku/127.

Regulation of the Minister of Justice of 16 September 2014 concerning indication of a contracting body preparing and conducting proceedings to award a procurement contract, awarding contracts and concluding framework agreements for the needs of common courts, Dz.U. MS. of 18 April 2014, item 153.

Ustawa z dnia 22 czerwca 2016 r. o zmianie ustawy – Prawo zamówień publicznych oraz niektórych innych ustaw [Act of 22 June 2016 amending the Act: Public procurement law and some other acts], Journal of Laws [Dz.U.] of 2016, item 1020.

Regulation of the President of the Council of Ministers of 27 June 2017 on the use of means of electronic communication in proceedings concerning awarding public procurement contracts and on the provision of access to and retention of electronic documents, in force on 4 July 2017, Journal of Laws [Dz.U.] 2017, item 1320.

Regulation No. 100 of the President of the Council of Ministers of 30 August 2017 concerning indication of a central buyer for government administration bodies and indication of government bodies obliged to purchase goods and services from a central buyer, M.P. 2017, item 832, Vol. 1.

Other sources of law

Statut Centrum Zakupów dla Sądownictwa [Statute of the Purchasing Centre for Courts], published at: http://www.czdsigb.gov.pl/attachments/article/119/Zarz%C4%85dzenie%20nr%207.16.IGB%20z%20dn.%2015.07.2016r.%20informuj%C4%85ce%20o%20zmianie%20Statutu%20CZDSIGB.pdf.

Court rulings

Supreme Court judgement of 14 March 2002, IV CKN 821/00, Legalis No. 65083.
Judgement of the Arbitrators Team of 11 April 2005, UZP/ZO/0-648/05, Legalis No. 1472188.
Resolution of the Supreme Administrative Court of 13 November 2012, I OPS 3/12, Orzecznictwo NSA i WSA of 2013, No. 2, item 21.
Ruling of the District Court in Warsaw, V Civil Appellate Department, of 19 March 2013, V Ca 3341/12, Legalis No. 1327506.
Judgement of the Voivodeship Administrative Court in Kielce of 21 March 2013, II SA/Ke 119/13, Lex No. 1299528.
Judgement of the National Appeals Chamber of 8 November 2016, KIO 2018/16, Legalis No. 1546259.
Judgement of the Voivodeship Administrative Court in Gliwice of 8 March 2017, I SA/Gl 68/17, Legalis No. 1597789.

INSTITUTIONS FULFILLING THE FUNCTION OF A CENTRAL CONTRACTING BODY IN PUBLIC PROCUREMENT LAW

Summary

The article presents institutions performing functions of a central contracting body in the Polish system of Public Procurement Law. It contains a comparison of particular issues and makes reference to the respective European Union provisions laid down in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. The author presents fundamental aims and results of awarding procurement contracts with the use of a central contracting body and indicates differences depending on whether a given institution has been appointed in central public administration, local self-government or is additionally a cross-border one. The main aim of appointing a central contracting body is to aggregate procurement, which is to ensure economic benefits for contracting parties. On the other hand, the main threat in this context consists in possible difficulties, which micro, small and medium-sized enterprises may have in obtaining access to the procurement market.

Keywords: central contracting body, aggregation of procurement contracts, use of electronic communications in public procurement, SME

INSTYTUCJE WYKONUJĄCE FUNKCJĘ CENTRALNEGO ZAMAWIAJĄCEGO W PRAWIE ZAMÓWIEŃ PUBLICZNYCH

Streszczenie

Niniejszy artykuł przedstawia instytucje wykonujące funkcje centralnego zamawiającego w polskim systemie Prawa zamówień publicznych. Zawarto w nim porównanie poszczególnych zagadnień wraz z odniesieniami do regulacji unijnych, zawartych w Dyrektywie Parlamentu Europejskiego i Rady 2014/24/UE z dnia 26 lutego 2014 r. w sprawie zamówień publicznych. Autor prezentuje podstawowe cele i skutki udzielania zamówień publicznych z wykorzystaniem centralnego zamawiającego, wskazując różnice w zależności od tego, czy dana instytucja została powołana w administracji rządowej, samorządzie terytorialnym czy też ma dodatkowo wymiar transgraniczny. Jako podstawowy cel powołania centralnego zamawiającego uznano zagregowanie zamówienia, które ma zapewnić osiągnięcie korzyści ekonomicznych po stronie zamawiających. Za główne zagrożenie z kolei uznano w tym kontekście wystąpienie możliwości utrudnienia dostępu do zamówienia dla sektora mikro, małych i średnich przedsiębiorstw.

Słowa kluczowe: centralny zamawiający, agregowanie zamówień, elektronizacja zamówień publicznych, MŚP

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TRAVEL OF AN ORGANIZED GROUP OF FANS AND THEIR TRANSPORTATION

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MATEUSZ DRÓŻDŻ*

1. INTRODUCTION

Mass media often provide information about negative events taking place during travel of organised groups of mainly football fans.[1] It tends to be erroneously indicated that the conduct of those people results from the fact that the law does not regulate their travel and they are not subject to any criminal or civil law sanctions.

Travel and transportation of fans, including those to specified mass events, are first of all regulated by the provisions of the Transportation law,[2] the Civil Code[3] and partly also by the provisions enacted by sports associations.[4] The standards concerning the travel of an organised group of participants of a mass event (who are not football fans), after the last amendment to the Act on the security at mass events,[5] were also

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1 See, e.g. M. Sadecki, *Dlaczego kibic jedzie na mecz za darmo, a uczeń do szkoły musi już płacić?*, Gazeta Wyborcza, 29 October 2012; M. Pietraszewski, *Policja chce, by kibicom sprawdzano bilet na przejazd*, Gazeta Wyborcza, 6 June 2013; Kos ab, *Zadyma Widzewiaków z policją w Katowicach*, www.dzienniklodzki.pl, 21 October 2012.

2 Act of 15 November 1984: Transportation law, Journal of Laws [Dz.U.] No. 53, item 272, as amended; hereinafter: Transportation law or TL.

3 Act of 23 April 1964: Civil Code, Journal of Laws [Dz.U.] No. 16, item 93, as amended; hereinafter: Civil Code.

4 Resolution of the Polish Football Association Board of 10 July 2007, No. X/110, concerning adoption of Rules and Regulations for security during competitions organised by the Polish Football Association and Ekstraklasa S.A., Version 2007; Resolution of the Polish Football Association Board of 20 February 2013, No. II/85, concerning rules of participation of fans of the visitors' team in football matches during competitions at the central level organised by the Polish Football Association and Ekstraklasa S.A., available at: www.pzpn.pl.

5 Act amending the Act on the security at mass events and some other acts, Journal of Laws [Dz.U.] of 2015, item 1707.

included in the Misdemeanour Code.[6] The possibility of organising transportation of fans often depends on meeting standards laid down in the Act on road transport[7] or the Act on rail transport[8]. Moreover, obligations connected with such travel very often result from a contract, usually concluded by associations of fans, which thanks to respective provisions of the Law on associations,[9] have legal personhood. The use of adequate means of transport by fans may be also connected with an obligation to comply with respective internal regulations of a given carrier.[10] Some norms related to these issues (however, they determine obligations connected with fans' travel but not directly its course) are laid down in the Act on the security at mass events.[11]

Therefore, it is not true that travel and transportation of participants of a given mass event are informal in nature. Fans' conduct and incidents connected with that are subject to applicable norms. Travel and transportation are very often connected with the use of public transport, which is subject to some obligations, and failure to comply with them may result in criminal or civil liability. It must be emphasised, however, that specific obligations are not only applicable to fans but also to a carrier.

2. THE CONCEPT OF ORGANISED TRAVEL OF FANS

The presentation of the issue of travel of an organised group of fans requires that the term "organised group of fans" be explained. The term is used, e.g. in internal acts of particular sports associations[12] and the Police[13]. However, it is not defined in any of them. A similar term, "organised travel of participants of a mass event", is used in MC, but its definition is left for the doctrine and case law. That is why, the linguistic meaning of the terms "organised group" and "fan" should be presented at the very beginning.

The term "organised", in accordance with the dictionary definition, means arranged, put in some form, subject to some rules, introducing some order.[14] One of the meanings of the term "group" indicates that it is a team of people fulfilling

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[6] Act of 20 May 1971: Misdemeanour Code, Journal of Laws [Dz.U.] of 2015, item 1094, as amended – uniform text; hereinafter: MC.

[7] Act of 6 September 2001 on road transport, Journal of Laws [Dz.U.] of 2001, No. 125, item 1371.

[8] Act of 28 March 2003 on rail transport, Journal of Laws [Dz.U.] of 2003, No. 86, item 789.

[9] Act of 7 April 1989: Law on associations, Journal of Laws [Dz.U.] of 2001, No. 79, item 855 – uniform text.

[10] See, e.g. Rules and Regulations for carriage of people, things and animals by PKP Intercity SA of 21 June 2013, available at: www.intercity.pl.

[11] Act of 20 March 2009 on the security at mass events, Journal of Laws [Dz.U.] of 2013, item 611 – uniform text; hereinafter: ASME.

[12] See, legal acts referred to under footnote 4.

[13] Regulation No. 982 of the Chief Commander of the Police of 21 September 2007 concerning the rules of organisation and the mode of implementing tasks connected with surveillance, prevention and combating crimes and misdemeanours committed in connection with sports events and on the retaining and processing of information concerning security of mass sports events, Dz.Urz. KGP of 2007, No. 17, item 129; hereinafter: Regulation 982.

[14] S. Skorupka, H. Auderska, Z. Łempicka (ed.), *Mały słownik języka polskiego*, Warsaw 1969, p. 1018.

a particular task.[15] A "fan" means, in accordance with the dictionary definition, a spectator watching sports competitions etc., often a supporter or adviser of one of the teams.[16] The compilation of these linguistic meanings of the terms indicates that an "organised group of fans" is a team of persons watching a given sports performance which is characterised by some forms of organisation. Such a definition, however, does not match the practical needs and still requires specification. However, the problem is, as it has been mentioned above, that various legal acts use the terms without their definitions, which very rarely but also happens in the doctrine.

The Supreme Court presented a definition of an organised group in one of its resolutions.[17] The case concerned the issue of the defamation of a group of people. The Supreme Court indicated that a group of people means a team of people gathered together, even temporarily, because of a common aim, interest, features or another separated tie. According to the Supreme Court, a group understood in this way can be formed by, e.g. family members, residents of the same house, employees, people involved in the same business and participants of a trip. In my opinion, in order to supplement this stand, it should be added that the term "organised" should be also understood as a certain process of subordinating to some rules with respect to objective and subjective aspects. The subjective aspect means organisation of a certain group of people and establishing its internal norms and rules. The objective aspect of organisation applies to determination of some forms of action and conduct. Summing up, in my opinion, the necessary element of organisation, as the Supreme Court indicated in its resolution, is the forming of a group that has a set aim, which can be, e.g. a trip to a mass event together.

In order to limit the scope of the above-presented definition, it would be also necessary to refer to a definition of a fan. In my opinion, he does not have to be a participant of a mass event. The concept of a fan is defined neither in ASME nor in any other legal act. The definition of the term is laid down in the Regulation 982. In §1(2.2) of that act, it is indicated that "fans" should be interpreted as all spectators at sports events or moving to take part in those events.

In the doctrine, there are some proposals of defining the term "fan". *Mała encyklopedia sportu* indicates that a fan is: "a spectator watching sports competitions, a visitor to stadiums and sports facilities, a supporter of a club, a team or an athlete. A fan is a bearer of a specific type of conduct called supporting, which differs from conduct approved of in non-sports situations and introducing new forms of implementing sports feelings and emotions."[18] P. Pałaszewski, who also indicated this definition, was right to draw attention to the fact that a football fan or, in other words, a fan, an enthusiast, an adherent of football, is a participant of sports life. He devotes a lot of attention to matches played by his favourite team. He adjusts his free time to the schedule of his team's matches in order to watch them. P. Pałaszewski

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[15] *Ibid.*, p. 212.

[16] *Ibid.*, p. 270.

[17] Resolution of the Supreme Court of 7 April 2006, III CZP 22/06, OSNC 2007, No. 2, item 23.

[18] Z. Głuszek et al., *Mała encyklopedia sportu*, A-K, Wydawnictwo "Sport i Turystyka", Warsaw 1984, p. 268.

rightly points out that a fan is interested in the atmosphere of a meeting, the pitch and events taking place on it; a pseudo-fan is interested in events outside the pitch. Fans compete encouraging their teams as loud as possible and inventing effective framework of the event; pseudo-fans fistfight. The term "fan", as D. Antonowicz, R. Kossakowski and T. Szlendak rightly state, is continually modified and fans can be classified, e.g. as the so-called "fans of the arena" and fanatic fans.[19]

Based on the above-presented definitions, it should be highlighted that the term "fan" does not always mean a participant of a mass event.[20] Fans also include people who support their team, take part in matches or other events and devote their free time to them. A fan may, but does not have to be a participant of a mass event. For example, he may be banned from participating in mass events (and thus should not participate in them), but he may support his team in another way, e.g. taking part in other forms of fans' activity, for instance in his club promotional campaigns organised by the supporters' association.

Having in mind the above-presented definitions, we must indicate that organised travel of fans means such movement of fans (not necessarily participants of mass events) which should be interpreted as a certain process of subjective as well as objective subordination. Undoubtedly, a trip by train or coach is such travel, while it seems that a trip by one's own means of transport is not (it is not organised travel) because there are no common norms or rules to follow (in social, not legal, terms) which would regulate such movement, unless e.g. it is an organised column of vehicles,[21] where the requirement is the participants' submission to single leadership.[22] In case fans form a temporary column of vehicles, the movement cannot be treated as organised travel of fans.[23] In such a situation, it cannot be recognised as transportation of fans, either, which differs from travel, because, as a rule, a carrier performs it. Every case of transportation of fans is also their travel, but not every type of travel (whether organised or individual) is transportation (when fans move with the use of their own means of transport).

[19] D. Antonowicz, R. Kossakowski and T. Szlendak, *Aborygenci i konsumenci. O kibicowskiej wspólnocie, komercjalizacji futbolu i stadionowym apartheidzie*, Warsaw 2015, p. 128.

[20] The term has not been defined in normative acts, either. For more on doubts and controversies concerning this term, see M. Dróżdż, *Ustawa o bezpieczeństwie imprez masowych. Komentarz*, Warsaw 2015, pp. 31–32.

[21] An organised column is a group of vehicles under the leadership of one driver, a person responsible for traffic and order in a column. It should be remembered, however, that a random group of vehicles driving one after another does not constitute a column. R.A. Stefański, *Prawo o ruchu drogowym. Komentarz*, Warsaw 2008, p. 312.

[22] *Ibid*.

[23] R.A. Stefański is right to indicate that a group of vehicles with fans is not a privileged column because coaches and cars used by fans are not privileged vehicles. See, R.A. Stefański, *Prawo o ruchu…*, p. 424. J. Szyposz, *Pojazdy uprzywilejowane*, Policyjne Centrum Informacyjne, 12 January 2006.

3. TRANSPORT OF AN ORGANISED GROUP OF FANS – TYPES OF TRAVEL

The above-presented analysis of the term "organised travel of fans" indicates that in specific situations it may constitute their transportation. The doctrine and case law have not thoroughly analysed the issue of what type of transportation it is in accordance with the norms of public law and, as a result, have not answered the basic question whether this transportation is regulated only by TL or, e.g. by the provisions of the Act on road transport or the Act on rail transport. It seems that the provisions of the Civil Code may mainly regulate transportation of fans in specific situations.

At the very beginning, a question must be answered whether fans' travel should be recognised as regular, shuttle, special-regular or occasional transportation in the meaning of the Act on road transport or the Act on rail transport. These two forms of travel are most frequently chosen by fans to travel with their team mainly in the territory of Poland.

In accordance with Article 4(7) Act of road transport, regular transportation means public transport of persons and their luggage in established time intervals and along determined routes, following rules laid down in TL. In order to recognise given transportation of people as regular, it must be cyclical and available to any potential customer who got to know about this transportation from a commonly available advertisement.[24] Therefore, transportation of fans cannot be recognised as such. Fans usually rent a means of transport exclusively for their group in order to travel to a given mass event and, that is why, it is not regular in nature.

Fans' travel cannot be, as a rule, special-regular, either because it constitutes a special form of regular transportation of people.[25] The main feature differentiating special-regular transportation from regular one is its non-public nature.[26] The special-regular transportation is not commonly available and is offered to a specified group of people with the exclusion of others.[27] Those two types of transportation differ only by the category of people who use this transportation and all the other aspects or requirements are identical. In case of the special-regular transportation, the classification criteria include regularity and transportation of a particular category of people (e.g. students[28] or employees) and, that is why, it is hard to recognise

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[24] R. Strachowska, *Komentarz do art. 4 ustawy o transporcie drogowym*, LEX/el. 2012.

[25] See, e.g. the judgement of the Supreme Administrative Court of 6 May 2008, OSK 1306/06, unpublished; the judgement of the Supreme Administrative Court of 21 August 2007, OSK 1274/06, LEX No. 382714.

[26] R. Strachowska, *Komentarz do art. 4...*

[27] As the Voivodeship Administrative Court in Warsaw rightly stated in the justification to the judgement of 6 June 2006, VI SA/Wa 228/06, Wspólnota 2007, No. 8, p. 31, "services consisting in carriage of a specified category of passengers in specified time intervals and on determined routes, provided that passengers are taken from stops determined in advance and transported to stops determined in advance for a fixed price, are recognised as special-regular services".

[28] For more on the doubts concerning that, see R. Strachowska, *Komentarz do art. 4...* .

occasional travelling, e.g. to a football match.[29] Moreover, the special-regular transportation requires a timetable, which in case of fans' travel is not developed.

As a rule, organised fans' travel is not occasional transportation, either. In accordance with Article 4(11) Act on road transport, occasional transportation means transportation of people not constituting regular or special-regular, or shuttle transportation. The definition raises many doubts in the doctrine.[30] Occasional transportation is performed with the use of a road vehicle designed to transport more than seven persons, including a driver (Article 18(4a) Act on road transport). In accordance with Article 18(4b) Act on road transport, occasional transportation may be performed with the use of a historic vehicle (driven by an entrepreneur who provides transportation services or a driver he employs based on a contract concluded in writing in the company head office after the establishment of charges for transportation before the transportation service starts; the payment for transportation is by transfer but payment in cash in the head office is also admissible), which does not meet the construction criteria for transportation of more than seven persons, including a driver, and is the exclusive property of an entrepreneur or an object of lease from that entrepreneur. I believe that transportation of fans by car cannot be recognised as occasional because the costs incurred by passengers are to cover the expenditure of the driver who gives them a lift when travelling to a match. Therefore, travel by car, e.g. to a volleyball match, will not be usually classified as occasional transportation pursuant to the Act on road transport.[31]

Fans' organised travel, in most cases, might be recognised as shuttle transportation. In accordance with the legal definition of shuttle transportation laid down in Article 4(10) Act on road transport, the term means transportation of people characterised by multiplicity, and return transportation of organised groups between the same points of departure and destination. Moreover, in order to be classified as shuttle transportation in the meaning of the Act on road transport, it must meet two conditions jointly: a group of people transported to the place of destination returns to the place of departure; the place of departure means the place where the transportation service starts and the place of destination means the place where the transportation service ends, taking into account all surrounding towns within 50 kilometres radius.[32] Moreover, it must be highlighted that regularity of providing transportation does not exclude admissibility of changes in the timetable and travel routes. The above stand is reflected in case law of the Supreme Administrative Court,[33] although the issue is very controversial. Nevertheless, it

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[29] See, the judgement of the Supreme Administrative Court of 19 April 2013, II GSK 165/12, unpublished.

[30] See, e.g. R. Strachowska, *Komentarz do art. 4...* .

[31] Judgement of the Voivodeship Administrative Court in Wrocław of 17 June 2014, III SA/Wr 124/14, published at: www.orzeczenia-nsa.pl.

[32] Judgement of the Voivodeship Administrative Court in Olsztyn of 12 February 2015, II SA/Ol 1301/14, LEX No. 1649892; judgement of the Supreme Administrative Court of 28 January 2015, II GSK 2180/13, LEX No. 1769745.

[33] See, e.g. the judgement of the Supreme Administrative Court of 19 April 2013, II GSK 165/12, unpublished; judgement of the Supreme Administrative Court of 27 November 2013, II GSK 1179/12, LEX No. 1558497.

seems that transportation of fans to mass or other events may be recognised as shuttle one because it usually takes place at weekly or fortnightly intervals and a group of people is transported to a place and back from it.

Fans often use hired trains to travel and the classification of such transportation in accordance with the Act on rail transport has also raised doubts. First of all, based on the regulations of this Act, it should be assumed that, unlike in case of road transport, it is occasional transportation. It usually takes place as a result of an order of a non-scheduled (additional) train. The definition of passenger occasional transportation is laid down in Article 4(22a) Act on rail transport. In accordance with this definition, passenger occasional transportation is single transportation within passenger rail transport aimed at meeting transportation needs that are not planned as part of the transportation services offered on a given route based on a contract for the provision of public services or on the decision on providing open access[34] (therefore, it differs considerably from the definition of occasional transportation laid down in the Act on road transport). In accordance with Article 28y Act on rail transport, occasional transportation on a rail line is provided within the limits of available infrastructure capacity. As the President of the Office of Rail Transport (Urząd Transportu Kolejowego, ORT) indicated,[35] the aim of occasional passenger transportation must meet transportation needs that are not scheduled by the organiser of public mass transport in a contract for the provision of public services and not laid down in the decisions on providing a given carrier with open access. As the ORT President indicates, the implementation of such transportation should result from "the need that was noticed by the carrier to ensure transportation of people to a venue of a given event of different nature: a festival, a match, a concert, a congress or any other mass meeting, or result from the implementation of an ordered additional dedicated transportation, e.g. business, integration, holiday or the like. Unlike occasional passenger transportation, regular transportation of people has no precise, specific one-off purpose. Moreover, one-off transportation cannot be treated only as single travel to a place and back. Its repeatability is not important, either, e.g. league matches on the same sports facility. In such a case, it is a group of one-off transportation services because they concern transportation of fans to each match separately, e.g. based on the need reported to the carrier by an organiser of that match".[36] As a result, in my opinion, such organised travel of fans should be recognised as occasional transportation; however, one should remember that such transportation often takes place on a train scheduled within the yearly timetable, although then it is hard to recognise it as organised in nature, especially as it occurs based on individually purchased tickets, unless it takes place based on a contract for group transportation.

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[34] See, A. Celejewska, [in:] P. Wajda (ed.), M. Wierzbowski (ed.), A. Błachnio-Parzych, A. Celejewska, P. Ciszak, E. Grudzień, R. Iwański, M. Karcz-Kaczmarek, R. Lewicka, M. Lewicki, A.K. Modrzejewski, D. Opalska, A. Ostanek, M. Pawełczyk, M. Przybylska, M. Rypina, E. Skorczyńska, R. Stankiewicz, R. Strachowska, M. Szreniawska, T. Warchoł, M. Wasiak, M. Wincenciak, K. Wlaźlak, P.W. Zawadzka, *Komentarz do art. 4 ustawy o transporcie kolejowym*, LEX 2014.

[35] Pasażerski przewóz okazjonalny – ORT President's stand; published at: www.utjk.gov.pl.

[36] *Ibid*.

4. ORGANISED TRAVEL OF FANS – CONTRACT FOR GROUP TRANSPORTATION OR A PASSENGER CHARTER CONTRACT

It should be pointed out that organised groups of fans have travelled in the territory of Poland mainly based on the group transportation contract. In accordance with Article 19 TL, it is concluded between an organiser of such transportation and a carrier, i.e. on the account and in the interest of other persons, participants of group transportation.[37] Thus, it is a contract for the provision of service for the benefit of a third party (*pactum in favorem tertii*). This kind of a contract is advantageous for carriers because, in accordance with Article 21 TL, in group transportation of people, an organiser is obliged to supervise participants' compliance with regulations, and first of all, both an organiser[38] and a participant are liable for any damage to a carrier's property, unless parties decide otherwise. As a result, in the event of damage caused, e.g. on a train, a carrier is entitled to claim respective compensation from the organiser and the participant. However, in practice, a contract is less and less often used. In case of using means scheduled in a yearly timetable, fans usually conclude individual contracts for transportation, which in practice causes many problems because in such a situation, travel is not classified as organised (which obviously does not make a participant exempt from regulations determining his obligations laid down in Article 14 TL). Moreover, in order to separate organised groups of fans' travel from other travellers within the scheduled yearly timetable, carriers more and more often conclude a passenger charter contract with fans' associations (in my opinion, in practice, erroneously called a contract of the lease of a means of transport)[39] instead of a contract for group transportation.

A passenger charter contract covers a specified space of a means of transport, depending on the number of passengers or the type and load weight and the provision of professional staff, suitably prepared to perform transportation. Thus, the contract can be treated as an innominate contract, which contains elements of a contract of lease but, in my opinion, it is also a contract for the provision of services. A contract is concluded for a specified period of time, i.e. for the time of travel from its start to its end. As M. Stec indicates, a passenger charter contract differs from a contract for carriage in the following ways:

1) a charterer takes a risk of failure to use the contracted space of a means of transport, i.e. the charter payment does not depend on the number of persons or the weight or number of pieces of luggage carried; a carrier must only provide a chartered means of transport to a charterer,
2) organisation of transportation is a charterer's not a carrier's job,
3) a charterer manages transportation operation, e.g. decides about the transportation route.[40]

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[37] T. Szanciło, *Prawo przewozowe. Komentarz*, Warsaw 2008, p. 123.

[38] Of course, an organiser has specified rights pursuant to Article 17 and Article 18 TL. For more, see e.g. T. Szanciło, *Prawo przewozowe…*, p. 133.

[39] For more, see E. Turski, *Umowa przewozu a umowa najmu środka transportu*, MoP No. 10, 1999.

[40] M. Stec, [in:] T. Mróz, M. Stec, *Prawo gospodarcze prywatne*, Warsaw 2005.

In practice, a passenger charter contract is concluded with the fans' association board. Based on it, a carrier provides a train or a coach and service staff of this means of transport (e.g. conductors, infrastructure personnel), for which the association is obliged to pay specified remuneration. A contract contains detailed provisions, which determine, e.g. the association's liability for damage or losses as well as how the means of transport should be provided. In my opinion, this contract is the best solution for travel of organised groups of fans because it ensures their determined rights and minimises potential infringement of the legal order by fans.

5. CONCLUSIONS

The issue of organised groups of fans' travel and their transportation is really complex. It requires not only the knowledge of the regulations of public but also private law. Fans usually travel by train or coach in the territory of Poland. The situation requires the use of standards resulting, first of all, from the Act on road transport and the Act on rail transport. In addition, legal relations between participants or an organiser of transportation and a carrier are subject to TL and the Civil Code. It is also necessary to remember that participants of organised transportation must comply with the regulations laid down in the Regulation of the Minister of Infrastructure of 23 November 2004 concerning order-related provisions binding in railway areas, on trains and other rail vehicles,[41] or internal rules and regulations enacted by carriers.[42] Moreover, it should be remembered that organisers of tourism and domestic carriers providing public transport services are also obliged to provide information concerning fans' travel, in accordance with the Act on the security at mass events.[43] Organised groups of fans' travel is also regulated by the Standing Commission for the Security of Sports Events[44] in its resolution No. 3 of 22 January 2013 concerning recommendations for fans' travel. The act contains a series of proposals, which, although they mainly concern rail travel, should be applicable to travel of the organised groups of fans.

Therefore, it is not true, as it is mainly suggested in the mass media, that travel of the organised groups of fans and their transportation are not regulated. Casuistry on this subject is abundant. Therefore, in my opinion, successive attempts to regulate this issue, as it was done by the last amendments to the Act on the security at mass events, lack substantive justification.[45] The issue of ensuring security and elimination of anti-social behaviour of the organised groups of fans' during travel or their transportation, especially football fans, has already been sufficiently regulated also in the civil law.

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[41] Journal of Laws [Dz.U.] of 2015, item 50, uniform text.

[42] See, e.g. the legal act referred to under footnote 10.

[43] For example, an organiser of tourism provides information, e.g. about movement of people participating in mass sports events, including football matches, and their stay in venues of those events and information about the means of transport they use, assembly points, travel routes and the number of participants. Thus, carriers are not obliged to provide this information. See, M. Dróżdż, *Ustawa o bezpieczeństwie…*, p. 321.

[44] It was formed based on §7(2) Regulation No. 84 of the President of the Council of Ministers of 1 October 2012 concerning the Commission for the Security of Sports Events.

[45] For more, see M. Dróżdż, *Ustawa o bezpieczeństwie…*, pp. 392–393.

BIBLIOGRAPHY

Antonowicz D., Szlendak T., Kossakowski R., *Ostatni bastion antykonsumeryzmu? Kibicie industrialni w dobie komercjalizacji sportu*, Studia Socjologiczne No. 3, 2011.

Antonowicz D., Kossakowski R., Szlendak T., *Aborygenci i konsumenci. O kibicowskiej wspólnocie, komercjalizacji futbolu i stadionowym apartheidzie*, Warsaw 2015.

Celejewska A., [in:] P. Wajda (ed.), M. Wierzbowski (ed.), A. Błachnio-Parzych, A. Celejewska, P. Ciszak, E. Grudzień, R. Iwański, M. Karcz-Kaczmarek, R. Lewicka, M. Lewicki, A.K. Modrzejewski, D. Opalska, A. Ostanek, M. Pawełczyk, M. Przybylska, M. Rypina, E. Skorczyńska, R. Stankiewicz, R. Strachowska, M. Szreniawska, T. Warchoł, M. Wasiak, M. Wincenciak, K. Wlaźlak, P.W. Zawadzka, *Komentarz do art. 4 ustawy o transporcie kolejowym*, LEX 2014.

Dróżdż M., *Ustawa o bezpieczeństwie imprez masowych. Komentarz*, Warsaw 2015.

Kos ab, *Zadyma Widzewiaków z policją w Katowicach*, www.dzienniklodzki.pl, 21 October 2012.

Pałaszewski P., *Przekaz medialny a rzeczywistość stadionowa. Rozważania nt. wizerunku kibica piłkarskiego w mediach*, [in:] M. Gołda (ed.), J. Sobczak, W. Machura, *Media czwarta władza?*, Vol. II, Poznań–Opole 2011.

Pietraszewski M., *Policja chce, by kibicom sprawdzano bilet na przejazd*, Gazeta Wyborcza, 6 June 2013.

Sadecki M., *Dlaczego kibic jedzie na mecz za darmo, a uczeń do szkoły musi już płacić?*, Gazeta Wyborcza, 29 October 2012.

Skorupka S., Auderska H., Łempicka Z. (ed.), *Mały słownik języka polskiego*, Warsaw 1969.

Stec M., [in:] T. Mróz, M. Stec, *Prawo gospodarcze prywatne*, Warsaw 2005.

Stefański R.A., *Prawo o ruchu drogowym. Komentarz*, Warsaw 2008.

Strachowska R., *Komentarz do art. 4 ustawy o transporcie drogowym*, LEX/el. 2012.

Szanciło T., *Prawo przewozowe. Komentarz,* Warsaw 2008.

Szyposz J., *Pojazdy uprzywilejowane*, Policyjne Centrum Informacyjne, 12 January 2006.

Turski E., *Umowa przewozu a umowa najmu środka transportu*, MoP No. 10, 1999.

Legal regulations and other sources of law

Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Act of 23 April 1964: Civil Code], Journal of Laws [Dz.U.] No. 16, item 93, as amended.

Ustawa z dnia 20 maja 1971 r. Kodeks wykroczeń [Act of 20 May 1971: Misdemeanour Code], Journal of Laws [Dz.U.] of 2015, item 1094, as amended – uniform text.

Ustawa z dnia 15 listopada 1984 r. Prawo przewozowe [Act of 15 November 1984: Transportation law], Journal of Laws [Dz.U.] No. 53, item 272, as amended.

Ustawa z dnia 7 kwietnia 1989 r. Prawo o stowarzyszeniach [Act of 7 April 1989: Law on associations], Journal of Laws [Dz.U.] of 2001, No. 79, item 855 – uniform text.

Ustawa z dnia 6 września 2001 r. o transporcie drogowym [Act of 6 September 2001 on road transport], Journal of Laws [Dz.U.] of 2001, No. 125, item 1371.

Ustawa z dnia 28 marca 2003 r. o transporcie kolejowym [Act of 28 March 2003 on rail transport], Journal of Laws [Dz.U.] of 2003, No. 86, item 789.

Ustawa z dnia 20 marca 2009 r. o bezpieczeństwie imprez masowych [Act of 20 March 2009 on the security at mass events], Journal of Laws [Dz.U.] of 2013, item 611 – uniform text.

Ustawa z dnia 11 września 2015 r. o zmianie ustawy o bezpieczeństwie imprez masowych oraz niektórych innych ustaw [Act of 11 September 2015 amending the Act on the security at mass events and some other acts], Journal of Laws [Dz.U.] of 2015, item 1707.

Regulation of the Minister of Infrastructure of 23 November 2004 concerning order-related provisions binding in railway areas, on trains and other rail vehicles, Journal of Laws [Dz.U.] of 2015, item 50, uniform text.
Regulation No. 84 of the President of the Council of Ministers of 1 October 2012 concerning the Commission for the Security of Sports Events.
Regulation No. 982 of the Chief Commander of the Police of 21 September 2007 concerning the rules of organisation and the mode of implementing tasks connected with surveillance, prevention and combating crimes and misdemeanours committed in connection with sports events and on the retaining and processing of information concerning security at mass sports events, Dz.Urz. KGP of 2007, No. 17, item 129.
Resolution of the Polish Football Association Board of 10 July 2007, No. X/110, concerning adoption of Rules and Regulations for security during competitions organised by the Polish Football Association and Ekstraklasa S.A., Version 2007.
Resolution of the Polish Football Association Board of 20 February 2013, No. II/85, concerning rules of participation of fans of the visitors' team in football matches during competitions at the central level organised by the Polish Football Association and Ekstraklasa S.A., available at: www.pzpn.pl.

Court rulings
Supreme Court resolution of 7 April 2006, III CZP 22/06, OSNC 2007, No. 2, item 23.
Judgement of the Voivodeship Administrative Court in Warsaw of 6 June 2006, VI SA/Wa 228/06, Wspólnota No. 8, 2007.
Judgement of the Supreme Administrative Court of 21 August 2007, OSK 1274/06, LEX No. 382714.
Judgement of the Supreme Administrative Court of 6 May 2008, OSK 1306/06, unpublished.
Judgement of the Supreme Administrative Court of 19 April 2013, II GSK 165/12, unpublished.
Judgement of the Supreme Administrative Court of 27 November 2013, II GSK 1179/12, LEX No. 1558497.
Judgement of the Voivodeship Administrative Court in Wrocław of 17 June 2014, III SA/Wr 124/14, published at: www.orzeczenia-nsa.pl.
Judgement of the Supreme Administrative Court of 28 January 2015, II GSK 2180/13, LEX No. 1769745.
Judgement of the Voivodeship Administrative Court in Olsztyn of 12 February 2015, II SA/Ol 1301/14, LEX No. 1649892.

TRAVEL OF AN ORGANIZED GROUP OF FANS AND THEIR TRANSPORTATION

Summary

The article describes the most important, in the author's opinion, regulations governing the travel and transportation of organized groups of fans. The paper describes the statutory provisions of public and private law which regulate the issue, but also proposes a definition of the term "travel of an organized group of fans". This article aims at clarifying doubts that arise from the interpretation of the aforementioned regulations. The article also highlights that the travel and transportation are comprehensively regulated by different standards, and hence the drafting of other provisions in this area may be pointless.

Keywords: transportation, transportation law, organized group of fans, means of transport, carrier

PRZEJAZD ZORGANIZOWANEJ GRUPY KIBICÓW ORAZ ICH PRZEWÓZ

Streszczenie

Artykuł opisuje najważniejsze, zdaniem autora, regulacje dotyczące przejazdu oraz przewozu zorganizowanych grup kibiców. W pracy opisano przepisy ustaw z zakresu prawa publicznego, jak i prywatnego, które regulują przedmiotową kwestię, ale także zaproponowano definicję terminu „przejazd zorganizowanej grupy kibiców". Celem artykułu jest także wyjaśnienie wątpliwości, jakie wiążą się z omawianymi przepisami. W pracy podkreślono, że przejazd i przewóz są kompleksowo regulowane przez różne normy i stąd tworzenie w tym zakresie kolejnych przepisów może być niezasadne.

Słowa kluczowe: przewóz, prawo przewozowe, zorganizowana grupa kibiców, środek transportu, przewoźnik

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AUTONOMY OF INSTITUTIONS OF HIGHER EDUCATION VERSUS INTERVENTION OF SERVICES RESPONSIBLE FOR MAINTAINING PUBLIC ORDER AND SECURITY

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1. INTRODUCTION

University autonomy is discussed mainly from the point of view of constitutional law in order to present its essence, and from the perspective of the law on higher education, which is a branch of administrative law, in order to explain various aspects of its functioning in relation to external entities. So far, scientific cognition has missed the issue of the relationship between this autonomy and the scope of intervention of security and public order services, which is undoubtedly so important that it deserves an attempt to make a relatively complex presentation of the binding regulations and proposals *de lege ferenda*. The scope of such intervention, which is the research topic of the present text, is not transparent for interpretation, although it seems to be legally defined. As a result, it should be examined whether it is right to state that university autonomy limits considerably the scope of intervention of security and public order services.

According to K. Zaradkiewicz, the broadly interpreted concept of "autonomy" applies to organised groups of people that have an internal structure and their own aims, and assumes relative independence in the field of conducted activity and implemented competences from other entities, including in particular all public authority bodies. Thus, the essence of autonomy consists in the right to individually solve internal

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problems of the given group.[1] Independence is an important element, although it is not complete but relative, i.e. existing within the entitlements that the state provides for the concerned group. The instrument within which this provision takes place is the law that precisely determines the subjective and objective scope of autonomy.

University autonomy is a university's institutional right, a constitutional value. Article 70(5) of the Constitution of the Republic of Poland[2] stipulates that "the autonomy of the institutions of higher education shall be guaranteed in accordance with principles specified by statute". K. Zaradkiewicz believes that the organisational and functional model of the institutions of higher education used in the Polish legal system provides universities with legal personality, the possibility of enacting internal regulations, the right to appoint the university authorities and their bodies and the lack of the state's interference in the internal university matters, and the freedom of education and science. It directly refers to those aspects of autonomy within which the doctrine distinguishes, first of all, institutional and personal aspects but also educational, scientific and financial ones.[3] However, the issue discussed in the present paper deals with the institutional aspect, which concerns the scope of a university's independence from external entities that are special in nature because they are responsible for security and public order. And this aspect has been typical of Polish universities since the beginning of their operation.

Founding the University of Kraków in 1364, King Casimir III the Great made all "scholars, masters, bedels and stationers" exempt from the jurisdiction of courts and subjected them to the jurisdiction of a rector. Thus, a rector was a judge in case of minor offences from pulling hair (*zawłoski*) to assault and battery up to spilled blood. Crimes like theft, lechery, adultery and murder committed by clerics were tried in a bishop's court and those committed by laymen in a crown court. A student could be arrested only with the rector's prior consent and by the authorised crown service.[4] At present, the autonomy does not consist in the exemption from courts' jurisdiction or the police intervention but in the creation of space protected constitutionally and ensuring independence of scientific thought and research work that is an attribute of university autonomy.

2. SECURITY AND PUBLIC ORDER AT A UNIVERSITY

In accordance with the wording of Article 227(1) Act of 27 July 2005: Law on higher education (hereinafter referred to as LHE),[5] "a rector shall take care of maintaining order and security in a university area".[6] This statutory rector's duty results from the broader regulation of Article 66(2.5) LHE which stipulates that a rector "shall

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[1] K. Zaradkiewicz, *Wolności i prawa ekonomiczne, socjalne i kulturalne*, [in:] M. Safjan, L. Bosek (ed.), *Konstytucja RP. Komentarz do art. 1–86*, Warsaw 2016, pp. 1598–1599.

[2] Journal of Laws [Dz.U.] of 1997, No. 78, item 483, as amended.

[3] K. Zaradkiewicz, *Wolności i prawa…*, pp. 1599–1600.

[4] F. Piekosiński, *Sądownictwo w Polsce wieków średnich*, Kraków 1898, p. 33.

[5] Journal of Laws [Dz.U.] of 2005, No. 164, item 1365, as amended.

[6] *Ibid*.

take care of compliance with law and the provision of security in a university area".[7] The obligations are connected with the status of a rector as a body managing a university's operations.[8]

However, the legislator does not specify the meaning of taking care of order and security and taking care of compliance with law. According to the Polish language dictionary, "to take care" means "to look after something, pay attention to something".[9] On the other hand, "security" should be understood as a state with no threat to whatever human right, which enables an individual to function normally in the community, especially to maintain life, health, property as well as the freedom to use all rights to which an individual is entitled.[10] Apart from the obligation to ensure security, a rector has to maintain order. "Public order" *sensu largo* means actually existing social relations regulated by a set of legal norms and other socially accepted rules guaranteeing undisturbed and peaceful functioning of individuals in the community.[11] W. Czapiński interprets public order as an internal state consisting in the compliance with certain principles, forms and obligations, which non-complied with in the conditions of people's collective coexistence would expose them to danger and difficulties.[12] According to T. Nowicki, maintaining order means preventing every man's conduct that makes it difficult or impossible for people to work or normally be together in a certain area and is unlawful in nature.[13]

However, looking just through the prism of the presented issue, E. Ura believes that the concept of security is analysed in the doctrine as a protected value (in this case, it is university students, doctoral students and employees' security) as well as a real state that is subject to protection, i.e. the state at a university that enables the university to function normally and achieve its aims, as well as the users to exercise their rights guaranteed by law without being exposed to damage from any source.[14] Thus, the objective scope is very important, i.e. indicating the circle of entities that this security concerns. Undoubtedly, these are first of all university students, doctoral students and employees. These are also other people who are there legally, i.e. for instance candidates in the period of enrolment, invited guests, or reviewers of doctoral dissertations from other universities.

As far as a university area is concerned, in accordance with Article 227(2) LHE, a rector in agreement with a competent local self-government must determine it.[15] This agreement is usually concluded with a city mayor or president, or in case of the

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[7] *Ibid*.

[8] M. Czuryk, *Utrzymanie porządku i bezpieczeństwa na terenie uczelni*, [in:] M. Czuryk, M. Karpiuk, J. Kostrubiec (ed.), *Prawo o szkolnictwie wyższym po nowelizacji, komentarz praktyczny*, Warsaw 2015, p. 313.

[9] *Popularny słownik języka polskiego PWN*, Warsaw 2001, p. 125.

[10] A. Misiuk, *Administracja porządku i bezpieczeństwa publicznego, zagadnienia prawno-ustrojowe*, Warsaw 2008, pp. 16–18.

[11] *Ibid*.

[12] J. Gierszewski, *Bezpieczeństwo wewnętrzne. Zarys systemu*, Warsaw 2013, p. 20.

[13] Z.T. Nowicki, *Ochrona osób i mienia*, Toruń 1999, p. 160.

[14] E. Ura, *Utrzymanie porządku i bezpieczeństwa na terenie uczelni*, [in:] W. Sanetra, M. Wierzbowski (ed.), *Prawo o szkolnictwie wyższym. Komentarz*, Warsaw 2013, pp. 515–516.

[15] Journal of Laws [Dz.U.] of 2005, No. 164, item 1365, as amended.

area that is the property of the State Treasury, with a regional governor (*starosta*).[16] It is worth drawing attention to the fact that a university area is the one that a rector must protect and the one that has been excluded from the group of places where other bodies are statutorily obliged to protect security and public order.[17] In fact, the scope of autonomy depends on the actually assigned area that should be reflected in the cartographic documents. The area should be determined unambiguously in order to avoid free interpretation. It would be absolutely inappropriate to assume what a university area is, e.g. based on what the fence around the main building suggests because it may turn out that the green area in front of the fence also belongs to the legally determined university area.

Ensuring security and order in a university area as well as compliance with law must be implemented with the use of some instruments. A chancellor is often a body assisting a rector in the fulfilment of this task. This is a solution adopted at Nicolaus Copernicus University in Toruń, where pursuant to §23(5) Regulation No. 173 of the Rector of 7 December 2009 on the University Organisational Rules, the Chancellor for Administrative Matters is obliged to ensure maintenance of security in the university area with the use of internal and external security services.[18] Delegation of this task to a chancellor does not make a rector exempt from the responsibility for ensuring security and order in the university area but is an attempt to optimise the efficiency of undertaken steps with the use of specialist supervision thereof.

The issue of order and security in a university area is also regulated in the internal university regulations, including various internal provisions. The Rules and Regulations of the University of Warmia and Mazury in Olsztyn introduced by Regulation No. 100/2016 of the University Rector can be an example. Paragraph 2 of the document stipulates: "In its area, the University shall have autonomy in the field of enacting internal regulations". However, para. 11 deserves special attention. It stipulates: "Regardless of bans laid down in para. 10, the provisions of the commonly binding administrative and criminal law are applicable in the University area". As it is stated in the document, the university area is protected by a security service, the employees of which are entitled to check whether people who break order in the area are entitled to be at the university facilities, request that they comply with regulations or leave the area, or they call the Municipal Police or the Police in accordance with the binding procedure.[19]

The above-mentioned services may operate as internal university security services or an external agency offering specialist security services. Thus, an internal university security service, which a rector is entitled to establish,[20] is appointed pursuant to the Act of 22 August 1997 on the protection of persons and property.[21]

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[16] H. Izdebski, J.M. Zieliński, *Prawo o szkolnictwie wyższym. Komentarz*, Warsaw 2015, p. 613.

[17] P. Nowik, *Utrzymanie porządku i bezpieczeństwa na terenie uczelni*, [in:] M. Pyter (ed.), *Prawo o szkolnictwie wyższym*, Warsaw 2012, p. 1064.

[18] http://www.umk.pl/uczelnia/dokumenty/biuletyn/prawo/?akcja=dokument&typ=Z_Rektora&nr=173&bp=0&rok=2009 [accessed on 20/12/2017].

[19] http://bip.uwm.edu.pl/files/Regulaminporzadkowy.pdf [accessed on 18/12/2017].

[20] P. Nowik, *Utrzymanie porządku i bezpieczeństwa…*, p. 1065.

[21] Journal of Laws [Dz.U.] of 1997, No. 114, item 740, as amended.

Chapter 3 of the Act deals with internal security services, which the legislator defines in Article 2(8) as “armed and uniformed teams of employees of businesses or organisational units appointed for their protection”. An internal security service constitutes an organisational unit of a university administration responsible for ensuring security in its area, especially protecting people at the university and the university property, as well as intervening if necessary. As it has been stated above, optionally, a state university (in compliance with the procurement regulations) and a private university (based on a relevant contract) may buy the service from licenced specialist entities, namely security agencies.[22]

Security provided by internal services and by external security agencies undoubtedly is a solution supporting the implementation of tasks in the field of order and security. Internal security services, however, should be recognised as a better tool because it is closer to the principle of university autonomy. This is because of the fact that in accordance with Article 9 Act on the protection of persons and property, internal security services are directly subordinate to the rector,[23] while in case of services provided by external security agencies, “subordination of the officers of such services to the rector is weaker”.[24]

A. Jakubowski does not approve of the solutions presented above. He criticizes both the idea of internal security services because their establishment depends on an administrative decision of the Chief Commander of the Voivodeship Police Forces and the services provided by external security agencies as they depend on a licence issued by the state administration. Moreover, this author says that the university guards are dependent on the state authorities since they are obliged to have a security guard licence, which is issued, suspended and withdrawn by the Chief Commander of the Voivodeship Police Forces.[25] It should be mentioned that on 1 January 2014 an entry onto the list of qualified security guards substituted for the licence. It seems that this author’s opinion excessively extends the concept of university autonomy because the provision of security by internal and external services is to serve as a tool of assistance in ensuring security and public order in a university area. The assistance, however, should be provided based on commonly binding legal regulations guaranteeing efficiency of methods and tools used. Departure from such a regulation would not only violate the principle of the rule of law but also might develop “security entities” deprived of professional supervision and control.

Undoubtedly, *de lege ferenda* one can propose a provision regulating the formation of university guards but it is hard to approve of A. Jakubowski’s opinion that the lack of such a regulation violates Article 70(5) of the Constitution of the Republic of Poland, which guarantees autonomy to higher education institutions.[26] Criticising this stand, it is necessary to mention that the already cited Act on the protection

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[22] P. Nowik, *Utrzymanie porządku i bezpieczeństwa…*, p. 1065.

[23] Journal of Laws [Dz.U.] of 1997, No. 114, item 740, as amended.

[24] A. Jakubowski, *Utrzymanie porządku i bezpieczeństwa na terenie uczelni wyższej*, [in:] J. Pakuła (ed.), *Współczesne problemy nauki i szkolnictwa wyższego. Continuum*, Toruń 2015, p. 169.

[25] *Ibid.*, pp. 169–170.

[26] *Ibid.*, p. 168.

of persons and property and the Regulation of the Minister of the Interior and Administration on internal security services ensure complex regulation of internal security services. If the idea of developing separate regulations on university guards proposed by A. Jakubowski supporting it with, inter alia, a need to adjust their education level "to the relations with people acquiring higher education" were recognised as justified, it would require a concept totally changing the present legal system, which, in my opinion, is not necessary for security guards' efficient operation.

What is important, both solutions are used in practice at universities. The institutions of higher education as, e.g. the University of Gdańsk,[27] Cardinal Stefan Wyszynski University in Warsaw[28] or the University of Warmia and Mazury in Olsztyn[29] established their own university guards. On the other hand, an external security agency provides the service, for instance, for Poznań University of Economics and Business.[30]

3. STATE SERVICES' INTERVENTION IN A UNIVERSITY AREA

What is sometimes reflected in practice, it happens that the instruments a rector has cannot fully ensure security and public order, especially the obligation to comply with the law. Responding to such a possibility, the legislator provides the adequate state's assistance in the form of state services' intervention pursuant to Article 227(3) LHE. The provision stipulates: "(…) the state services responsible for ensuring public order and internal security may enter a university area only on a rector's request. However, the services may enter the area on their own initiative in the event of direct threat to human life or a natural disaster, notifying a rector about the fact without delay".[31] Firstly, the solution ensures that a rector may rely on the support in the implementation of the obligation to provide security and order. Secondly, the university autonomy in this scope is not unconditional in nature because it cannot be. It is due to the proportion of rights: on the one hand, the university autonomy, on the other hand, human life and a natural disaster, in which the latter obviously have greater value.

The term "state services" used in the provision does not have a legal definition, which raises interpretational difficulties. As a result, there is no definite catalogue of state services responsible for ensuring public order and internal security, which may enter a university area in extraordinary situations, in accordance with the cited provision. E. Ura believes that the catalogue may include the Police, the Military Police, the Border Guard as well as the Internal Security Agency or the Central

27 http://www.mpd.ug.edu.pl/pl/dz_org/prawo/zda/2011/zal_K_2_11.pdf [accessed on 20/12/2017].

28 https://monitor.uksw.edu.pl/docs/3465 [accessed on 20/12/2017].

29 http://bip.uwm.edu.pl/files/Reg_str_uniw.pdf [accessed on 20/12/2017].

30 http://ue.poznan.pl/pl/wspolpraca,c10/zamowienia-publiczne,c115/ogloszenia,c127/zp-025 16,a48714.html [accessed on 20/12/2017].

31 Journal of Laws [Dz.U.] of 2005, No. 164, item 1365, as amended.

Anticorruption Bureau.[32] Apart from the above-listed institutions, A. Jakubowski also indicates the Armed Forces, the Fire Brigade and the Prison Service. However, the Government Protection Bureau is excluded from the catalogue[33] as the state services' body responsible for ensuring security and public order in relation with the statutory obligation to protect other persons in the interest of the state or facilities and equipment of special importance.[34]

H. Izdebski and J. Zieliński indicate that as the Act applies to the state services, the catalogue cannot include municipal police forces,[35] which seems not to be right if the provision *ratio legis* is taken into account. However, in accordance with its literal content, such interpretation is justified. Municipal police forces play an auxiliary role in the community fulfilling tasks in the field of public order protection, in accordance with Article 1 of the Act of 29 August 1997 on municipal police forces,[36] however, they do not have the status of the state institutions because these are self-government entities that commune councils can appoint. As a result, *de lege ferenda* it is necessary to propose an amendment of Article 227(3) LHE consisting in deleting the term "state services". This would let municipal police intervene in a university area, which would have a positive impact on ensuring security and public order.

The above-mentioned catalogue should include the Military Police because, in accordance with Article 4(1.2) of the Act of 24 August 2001 on the Military Police and military order bodies,[37] they are responsible, inter alia, for the protection of public order in public places. It should also include special services, like for instance the Internal Security Agency the tasks of which are laid down in Article 1 of the Act of 24 May 2002 on the Internal Security Agency and the Intelligence Agency,[38] which stipulates the service has competence in the field of protection of internal security of the state and its constitutional order. The Military Counterintelligence Service should also be taken into account. In accordance with Article 1 of the Act of 9 June 2006 on the Military Counterintelligence Service and the Military Intelligence Service,[39] the service has competence in matters related to the protection against internal threats to defence and security of the state.

However, the Police are the main institution responsible for ensuring public order and security. Article 1 of the Act of 6 April 1990 on the Police[40] stipulates: "the Police shall be organised as a uniformed and armed institution serving the community and destined to protect security of people and maintain security and public order". The Police, within the scope of their tasks concerning surveillance, prevention and detection of crimes and misdemeanours, perform operational-surveillance, investigative, administrative and order-related activities.

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[32] E. Ura, *Utrzymanie porządku i bezpieczeństwa…*, p. 515.

[33] A. Jakubowski, *Utrzymanie porządku i bezpieczeństwa na terenie uczelni…*, p. 176.

[34] Act of 16 March 2001 on the Government Protection Bureau, Journal of Laws [Dz.U.] of 2001, No. 27, item 298, as amended.

[35] H. Izdebski, J.M. Zieliński, *Prawo o szkolnictwie…*, p. 613.

[36] Journal of Laws [Dz.U.] of 1997, No. 123, item 779, as amended.

[37] Journal of Laws [Dz.U.] of 2001, No. 123, item 1353, as amended.

[38] Journal of Laws [Dz.U.] of 2002, No. 74, item 676, as amended.

[39] Journal of Laws [Dz.U.] of 2006, No. 104, item 709, as amended.

[40] W. Kotowski, *Ustawa o Policji. Komentarz*, Warsaw 2012, p. 142.

The main tasks of the Police laid down in Article 1(2) Act on the Police[41] include "the protection of people's life and health, and property against unlawful attempts to violate those rights, the protection of security and public order, initiation and organisation of activities aimed at prevention of crimes, misdemeanours and criminogenic phenomena, and cooperation with the state, self-government and social bodies in this field, and also detection of crimes and misdemeanours and pursuit of their perpetrators". It should be emphasised that Article 227 LHE lays down only one of the Police's duties, which is the maintenance of public order and security. Still, the legislator does not restrain the Police from performing other tasks in a university area, e.g. detection of crimes and misdemeanours and pursuit of their perpetrators.

In the context of the LHE provisions, the Police cannot be assigned an obligation to maintain public order and internal security in a university area. In practice, as P. Nowik notes, the Police have no real obligation to patrol a university area.[42] Such obligation, however, may be imposed based on an agreement between a rector and the Police, which will be discussed below.

P. Nowik emphasises that the Police's omission to take action in a university area, regardless of the knowledge of a crime committed and a perpetrator of the act, would result not only in disciplinary but also criminal liability of a police officer who would fail to take action aimed at detection of a crime, protection of evidence and apprehension of perpetrators.[43] Based on the regulation laid down in Article 9 §1 of the Criminal Procedure Code of 6 June 1997 (hereinafter CPC), a prosecution body is obliged to take action *ex officio*, on one's own initiative, in cases prosecuted in this mode, if there is justified suspicion that a crime was committed. This obligation applies to the initiation of proceedings as well as to the performance of specified procedural activities, the need of which results from an actual situation in a given case.[44] Thus, in fact, the regulation is in conflict with the provision of Article 227(3) LHE, which admits only two situations when the state services responsible for the maintenance of public order and security may enter a university area, namely a direct threat to human life and a natural disaster.

As it has been mentioned above, in specified situations, a prosecution body is obliged to start proceedings and perform certain procedural activities. This is, e.g. the right to detain a suspect, i.e. a person who is suspected of committing a crime but who has not been charged with it yet. Suspicion should be understood as a belief based on real evidence that indicates that a given person might commit a given crime.[45] To take such action, direct contact with the detained person is necessary. Thus, there is no doubt that the LHE regulations make it impossible to perform some procedural activities in a university area because, pursuant to

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[41] Journal of Laws [Dz.U.] of 1990, No. 30, item 179, as amended.

[42] P. Nowik, *Dział V, Utrzymanie porządku i bezpieczeństwa…*, p. 1064.

[43] *Ibid*.

[44] J. Grajewski, S. Steinborn, *Dział I, Przepisy wstępne*, [in:] L.K. Paprzycki (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw 2013, pp.75–76.

[45] A.M. Tęcza-Paciorek, *Pojęcie osoby podejrzanej i jej uprawnienia*, Prokuratura i Prawo No. 11, 2011, p. 60.

its provisions, a prosecution body cannot enter a university area in cases other than those defined in statute. In practice, it is not possible to apprehend a person suspected of committing a crime other than against life, e.g. theft.

The limitation under Article 227(3) LHE, in fact, precludes the Police from undertaking any activities in a university area without a rector's prior consent, unless these constitute a response to a threat to life or a natural disaster. Thus, one can imagine a situation in which a perpetrator commits a prohibited act penalised by criminal law in accordance with Article 278 of the Criminal Code (hereinafter CC), i.e. theft of property in a university area. A direct analysis of Article 227 LHE suggests that in such a case the intervention of the Police is not possible. The situation is especially peculiar if a perpetrator of a prohibited act formally stays in a university area but in practice he/she is in an open space, often a public place like a car park, a path or passage between buildings, a green area, a park, etc. It will be the same in case a student hostel resident possesses paedophile material, which carries a penalty under Article 202 §3 CC. The search of a student's room in accordance with Article 219 CPC requires, apart from formal conditions, a rector's consent.

This does not mean, however, what A. Jakubowski rightly highlights, that perpetrators of prohibited acts in a university area are exempt from consequences, inter alia, criminal liability. According to this author, prosecution of such persons and their apprehension becomes a rector's task but he may refrain from apprehension and prosecution of a person facing charges of a crime or committing a punishable act.[46] Therefore, until such a person remains in a university area, he/she cannot be arrested by the state services, provided there is no condition that is laid down in statute (threat to life and a natural disaster).

It should be emphasised that this "autonomous protection" covers all persons staying in a university area, regardless of whether they are affiliated with the university in any way, e.g. employees and students, or not. Thus, e.g. if a serious criminal, who is neither a student nor an employee, hid in a university area, his pursuit resulting in the Police entry into a university area would require a rector's consent.

Human life constitutes the highest value, which is reflected in its legal protection. That is why, threat to it creates special circumstances that allow undertaking steps and measures, which in typical situations (not involving a threat to life or health) would not be applicable because of, e.g. the imposed criminal and legal sanctions. As a result, the provision of Article 227(3) LHE authorising specified services to enter a university area not on a rector's request seems to be groundless because intervention in case of a direct threat to human life or a natural disaster does not require additional regulations and anybody who notices such a threat is entitled to intervene.

At the same time, it is necessary to highlight that in accordance with Article 3 of the Act of 18 April 2002 on the state of natural disasters,[47] a natural disaster "shall be understood as a natural catastrophe or a technical failure the results of which pose

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46 A. Jakubowski, *Utrzymanie porządku i bezpieczeństwa na terenie uczelni…*, p. 177.

47 Journal of Laws [Dz.U.] of 2002, No. 62, item 558, as amended.

a threat to life and health of a great number of people, a big amount of property or the environment in extensive areas, and assistance and protection may be efficient only if undertaken with the use of extraordinary measures, in cooperation with different bodies and institutions and specialist services and entities operating under a single integrated control".

In the discussed situation, the Law on higher education also determines a requirement to notify without delay a rector of the fact of the services' entry into a university area.[48] The term "without delay" means immediately, without undue postponement. An example of the specification of notification without delay is laid down in the agreement between the Rector of the Jagiellonian University and the Chief Commander of the City Police Force in Kraków on the prevention of drug addiction and terrorist threats, and the procedures in case the Police are called and enter the area of the Jagiellonian University.[49] Paragraph 3(2) of this agreement stipulates: "(…) in conditions laid down in §3(1) herein, the Chief Commander of the City Police Force in Kraków or a person authorised by him is obliged to notify without delay the Rector, and in case of his absence the Chancellor, about the entry into the University area via a telephone or electronic mail and additionally in a written form within 24 hours (on non-working days, not later than within 48 hours) and indicate at least the reason for the entry and undertaken steps".

However, a direct threat to life and a natural disaster do not constitute the only circumstances that entitle some services to enter a university area. In Article 227(4) LHE, the legislator authorises a rector to enter into agreements with specified bodies and determine other circumstances connected with the maintenance of order and security in which the adequate services' entry into a university area is admissible. Such an agreement constitutes a type of non-authoritative administrative action. A rector and competent bodies of the state services, based on a concluded agreement, determine its aim, form of implementation, conditions and circumstances of the services, stay in a university area and the time limit for the agreement.[50] A. Jakubowski is right to propose *de lege ferenda* that an agreement should be approved of by a university senate in a specified time in the form of a resolution, which would guarantee, in the author's opinion, appropriate quality of agreements entered into.[51] The conclusion of such an agreement constitutes a typical form of additional assistance to a rector in the field of security and order maintenance, and compliance with the law in a university area.

For example, pursuant to the above-mentioned agreement, the Rector of the Jagiellonian University is required to give consent to the Police officers to enter the university area when they are not called to come only in case: "there is a direct threat to human life or health or a natural disaster, in order to take urgent action aimed at apprehension of a perpetrator of a crime, to undertake necessary steps ordered by

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[48] Journal of Laws [Dz.U.] of 2005 No. 164, item 1365, as amended.

[49] Porozumienie w sprawie przeciwdziałania narkomanii i zagrożeniom terrorystycznym oraz zasad postępowania w przypadku wezwania i wkroczenia Policji na teren Uniwersytetu Jagiellońskiego, www.uj.edu.pl, Kraków 2012, pp. 2–3 [accessed on 02/12/2016].

[50] E. Ura, *Utrzymanie porządku i bezpieczeństwa…*, pp. 516–517.

[51] A. Jakubowski, *Utrzymanie porządku i bezpieczeństwa na terenie uczelni…*, p. 180.

a court, a prosecutor or public administration in writing, there is justified suspicion that there is a person possessing narcotic drugs, trafficking in drugs, providing other people with drugs or inducing others to use them, there is a facility used to produce narcotic drugs or equipment prepared to produce drugs, there are substances that may be used to produce drugs, there is a person or persons acting in the way that indicates terrorist activities".[52]

A. Jakubowski rightly emphasises that definiteness of the regulations laid down in such agreements must match the standard of enacting criminal law provisions. That is why, in this author's opinion, it is inadmissible to determine cases (Article 227(4) LHE) in the way that is "too general, imprecise (unclear), requiring complicated interpretation or making references".[53] Therefore, it seems necessary to additionally determine cases mainly in order to avoid the possibility of conflicting interpretation of various potential situations justifying intervention of the state services responsible for security and public order.

Appropriate services may also enter a university area on a rector's request. It should be assumed that, in each case of suspicion that a crime has been committed in a university area, a rector will report it to the appropriate services so that they can take necessary steps within their competence.

4. CONCLUSIONS

According to A. Jakubowski, Article 227(3) LHE constitutes *lex specialis* in relation to the Criminal Procedure Code and legal acts regulating the operation of particular services responsible for the maintenance of public order and security.[54] P. Nowik refers to the issue, but his opinion is totally different. He emphasises that autonomy of a university area cannot be interpreted extensively, regardless of the legal regulations that constitute the legal order in the state.[55] The tradition of university autonomy started in the 14th century should not be treated in the same way as at the time of its introduction. In the course of time, bodies specialising in ensuring an appropriate level of security and public order were established, also in the field of specific areas such as universities.

Nevertheless, the linguistic interpretation of the provisions of Article 227 LHE unambiguously indicates considerable limitations with regard to intervention of services responsible for the maintenance of security and public order in a university area. However, interpreting the aim of the provision, one should state that apart from ensuring the constitutional right to university autonomy, the legislator mainly seeks the maintenance of order and security in a university area. Paradoxically, the idea of autonomy hampers it.

De lege ferenda one may propose such changes in the legislation that will possibly best rationalise the system of security and public order in a university area with

52 Porozumienie w sprawie …, pp. 2–3.
53 A. Jakubowski, *Utrzymanie porządku i bezpieczeństwa na terenie uczelni…*, p. 181.
54 *Ibid.*, p. 177.
55 P. Nowik, *Utrzymanie porządku i bezpieczeństwa…*, p. 1063.

the use of specialist state bodies. The introduction of more detailed provisions in LHE, e.g. in the way adopted in the above-mentioned agreement, might create such an opportunity. Such a solution would not only be in compliance with commonly binding law concerning the state services responsible for the maintenance of broadly understood security and public order but would also follow the multi-century tradition of university autonomy, which must be, however, understood adequately to the current circumstances. These are changing and bringing new threats, as a result of which autonomy cannot be a value more important than those which are subject to protection by the law, including security and public order. Whatever intervention of services responsible for ensuring them it cannot reduce autonomy even if a rector has been informed about it *post factum*. The areas of institutions of higher education should not be enclaves limiting and hampering the application of law.

BIBLIOGRAPHY

Czuryk M., *Utrzymanie porządku i bezpieczeństwa na terenie uczelni*, [in:] M. Czuryk, M. Karpiuk, J. Kostrubiec (ed.), *Prawo o szkolnictwie wyższym po nowelizacji, komentarz praktyczny*, Warsaw 2015.

Gierszewski J., *Bezpieczeństwo wewnętrzne, zarys systemu*, Warsaw 2013.

Grajewski J., Steinborn S., *Dział I, przepisy wstępne*, [in:] L.K. Paprzycki (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw 2013.

Izdebski H., Zieliński J.M., *Prawo o szkolnictwie wyższym. Komentarz*, Warsaw 2015.

Jakubowski A., *Utrzymanie porządku i bezpieczeństwa na terenie uczelni wyższej*, [in:] J. Pakuła (ed.), *Współczesne problemy nauki i szkolnictwa wyższego. Continuum*, Toruń 2015.

Kotowski W., *Ustawa o Policji. Komentarz*, Warsaw 2012.

Misiuk A., *Administracja porządku i bezpieczeństwa publicznego, zagadnienia prawno-ustrojowe*, Warsaw 2008.

Nowicki Z.T., *Ochrona osób i mienia*, Toruń 1999.

Nowik P., *Utrzymanie porządku i bezpieczeństwa na terenie uczelni*, [in:] M. Pyter (ed.), *Prawo o szkolnictwie wyższym*, Warsaw 2012.

Piekosiński F., *Sądownictwo w Polsce wieków średnich*, Kraków 1898.

Popularny słownik języka polskiego PWN, Warsaw 2001.

Tęcza-Paciorek A.M., *Pojęcie osoby podejrzanej i jej uprawnienia*, Prokuratura i Prawo No. 11, 2011.

Ura E., *Utrzymanie porządku i bezpieczeństwa na terenie uczelni*, [in:] W. Sanetra, M. Wierzbowski (ed.), *Prawo o szkolnictwie wyższym. Komentarz*, Warsaw 2013.

Zaradkiewicz K., *Wolności i prawa ekonomiczne, socjalne i kulturalne*, [in:] M. Safjan, L. Bosek (ed.), *Konstytucja RP. Komentarz do art. 1–86*, Warsaw 2016.

Legal regulations

Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [Constitution of the Republic of Poland of 2 April 1997], Journal of Laws [Dz.U.] of 1997, No. 78, item 483, as amended.

Ustawa z dnia 6 kwietnia 1990 r. o Policji [Act of 6 April 1990 on the Police], Journal of Laws [Dz.U.] of 1990, No. 30, item 179, as amended.

Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny [Act of 6 June 1997 – Criminal Code], Journal of Laws [Dz.U.] of 1997, No. 88, item 553, as amended.

Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego [Act of 6 June 1997 – Criminal Procedure Code], Journal of Laws [Dz.U.] of 1997, No. 89, item 555, as amedned.

Ustawa z dnia 22 sierpnia 1997 r. o ochronie osób i mienia [Act of 22 August 1997 on the protection of persons and property], Journal of Laws [Dz.U.] of 1997, No. 114, item 740, as amended.
Ustawa z dnia 29 sierpnia 1997 r. o strażach gminnych [Act of 29 August 1997 on municipal police forces], Journal of Laws [Dz.U.] of 1997, No. 123, item 779, as amended.
Ustawa z dnia 16 marca 2001 r. o Biurze Ochrony Rządu [Act of 16 March 2001 on the Government Protection Bureau], Journal of Laws [Dz.U.] of 2001, No. 27, item 298, as amended.
Ustawa z dnia 24 sierpnia 2001 r. o Żandarmerii Wojskowej i wojskowych organach porządkowych [Act of 24 August 2001 on the Military Police and military order control bodies], Journal of Laws [Dz.U.] of 2001, No. 123, item 1353, as amended.
Ustawa z dnia 18 kwietnia 2002 r. o stanie klęski żywiołowej [Act of 18 April 2002 on the state of natural disasters], Journal of Laws [Dz.U.] of 2002, No. 62, item 558, as amended.
Ustawa z dnia 24 maja 2002 r. o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu [Act of 24 May 2002 on the Internal Security Agency and the Intelligence Agency], Journal of Laws [Dz.U.] of 2002, No. 74, item 676, as amended.
Ustawa z dnia 27 lipca 2005 r. Prawo o szkolnictwie wyższym [Act of 27 July 2005: Law on higher education], Journal of Laws [Dz.U.] of 2005, No. 164, item 1365, as amended.
Ustawa z dnia 9 czerwca 2006 r. o Służbie Kontrwywiadu Wojskowego oraz Służbie Wywiadu Wojskowego [Act of 9 June 2006 on the Military Counterintelligence Service and the Military Intelligence Service], Journal of Laws [Dz.U.] of 2006, No. 104, item 709, as amended.

Internal university rules and regulations

Porozumienie w sprawie przeciwdziałania narkomanii i zagrożeniom terrorystycznym oraz zasad postępowania w przypadku wezwania i wkroczenia Policji na teren Uniwersytetu Jagiellońskiego [Agreement on the prevention of drug addiction and terrorist threats, and the procedures in case the Police are called and enter the area of the Jagiellonian University], www.uj.edu.pl, Kraków 2012 [accessed on 02/12/2016].
Protection of people and property of the Poznań University of Economics and Business, http://ue.poznan.pl/pl/wspolpraca,c10/zamowienia-publiczne,c115/ogloszenia,c127/zp-025 16,a48714.html [accessed on 20/12/2017].
Regulation No. 2/K/11 of the Chancellor of the University of Gdańsk: Rules and Regulations of Internal University Guards, http://www.mpd.ug.edu.pl/pl/dz_org/prawo/zda/2011/zal_K_2_11.pdf [accessed on 20/12/2017].
Regulation No. 173 of the Rector of Nicolaus Copernicus University in Toruń of 7 December 2009 on the University Organisational Rules, http://www.umk.pl/uczelnia/dokumenty/biuletyn/prawo/?akcja=dokument&typ=Z_Rektora&nr=173&bp=0&rok=2009 [accessed on 20/12/2017].
Regulation No. 100/2016 of the Rector of the University of Warmia and Mazury in Olsztyn of 24 October 2016: Rules and Regulations concerning order and security at the University, http://bip.uwm.edu.pl/files/Regulaminporzadkowy.pdf [accessed on 18/12/2017].
Appendix to the Regulation No. 115/2016 of the Rector of the University of Warmia and Mazury in Olsztyn of 29 November 2016: Rules and Regulations of the University Guards, http://bip.uwm.edu.pl/files/Reg_str_uniw.pdf [accessed on 20/12/2017].
Regulation No. 11/2017 of the Rector of Cardinal Stefan Wyszynski University in Warsaw of 23 February 2017 on establishing of the University Guards, https://monitor.uksw.edu.pl/docs/3465 [accessed on 20/12/2017].

AUTONOMY OF INSTITUTIONS OF HIGHER EDUCATION VERSUS INTERVENTION OF SERVICES RESPONSIBLE FOR MAINTAINING PUBLIC ORDER AND SECURITY

Summary

The autonomy of institutions of higher education, especially in its territorial aspect, to some extent limits intervention of services responsible for ensuring security and public order. This results from the provisions of the Law on higher education which limit the services' activity. It is in conflict with the real need for such activities performed by those services and, as a consequence, legal regulations in this area should be changed so that, without affecting university autonomy, it would be possible to extend the sphere of required intervention.

Keywords: autonomy, university, public security, public order

AUTONOMIA SZKÓŁ WYŻSZYCH A INTERWENCJA SŁUŻB ODPOWIEDZIALNYCH ZA UTRZYMANIE BEZPIECZEŃSTWA I PORZĄDKU PUBLICZNEGO

Streszczenie

Autonomia szkół wyższych, zwłaszcza w jej wymiarze terytorialnym, w pewnym zakresie ogranicza interwencje służb odpowiedzialnych za zapewnianie bezpieczeństwa i porządku publicznego. Wynika to z przepisów Prawa o szkolnictwie wyższym, które ograniczają taką ich aktywność. Stoi to w pewnej opozycji do realnych potrzeb działalności analizowanych służb, a w konsekwencji regulacje prawne w tym zakresie powinny być zmienione, aby bez wpływania na autonomię uczelni, zwiększyć pole wymaganych interwencji.

Słowa kluczowe: autonomia, uczelnia, bezpieczeństwo publiczne, porządek publiczny

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REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER CONCERNING CRIMINAL PROCEDURE LAW FOR 2016

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CRIMINAL PROCEDURE CODE

1. THE CONCEPT OF THE AGGRIEVED (ARTICLE 49 §1 CPC)

1.1. In the light of the crime of obtaining financial means from a bank account by deception (Article 286 §1 Criminal Code, hereinafter: CC), there is some doubt about who the aggrieved is, i.e. the bank where the account is held or the account owner. It results from the fact that, in accordance with the Civil Code, the means deposited on bank accounts constitute the bank's property, and the owner only has the right to claim its payment (Article 726 CC). The judicature assumes that:

1) causing the payment of financial means by an unauthorised person and, as a consequence, emptying a bank account results in the loss in the owner's property because, in case there are no means on the account, a debt claim cannot be settled. This results in the owner's right to have claims arising from inappropriate fulfilment of a contractual obligation, and in special cases from responsibility for a prohibited act;[1]
2) since the money paid to an unauthorised person is the bank's property, such a disposal does not debit the account of the owner, who maintains the right to

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[1] Supreme Court judgement of 8 December 2010, V CSK 163/10, LEX No. 784297; Supreme Court judgement of 4 October 2007, V CSK 255/07, LEX No. 435625; Supreme Court judgement of 16 January 2008, IV CSK 380/07, LEX No. 371419.

claim back the means deposited as the actual fulfilment of the contract obliging each of the parties.[2]

In the former situation, the account owner should be recognised as the aggrieved in accordance with Article 49 §1 Criminal Procedure Code (henceforth: CPC) and in the latter one, he does not have such a status.

In its ruling of 28 April 2016, I KZP 3/16,[3] the Supreme Court rightly stated: "**The payment of financial means to an unauthorised person, disadvantageous for a bank, may be recognised *in concerto* as a disadvantageous disposal, in accordance with Article 286 §1 CC, also for an account owner. His legal right resulting from a bank account contract is directly infringed when the right to get back the deposited financial means on demand is not exercised before the account balance is altered. Until then, an account owner cannot dispose of the means paid to an unauthorised person, and this can have negative consequences for his property, also in terms of *lucrum cessans*. Thus, there are no grounds for *a limine* depriving an account owner of the status of the aggrieved in accordance with Article 49 §1 CPC and, as a result, the right to file an indictment under Article 55 §1 CPC when an unauthorised person, acting to gain financial benefits, caused the payment of financial means from an account by deceiving a bank representative**."

The opinion has been partly approved of[4] and partly criticised[5] in the literature.

In its justification, the Supreme Court assumed that the conclusion of a bank account contract (Title XX Civil Code) results in the owner's money transfer to a bank's property. In accordance with Article 726 Civil Code, a bank may temporarily deal with free financial means deposited on a bank account being under an obligation to return them in full or partial amount on demand, unless the contract determines an obligation to terminate the account.[6] The account owner gets back the possession and ownership of them or another property or obligation right that was connected with them before the deposit the moment his claim is settled by the payment of financial means concerned. Pursuant to Article 50(1) and (2) Act of 29 August 1997: Banking law (henceforth: BL),[7] a bank account owner may freely dispose of financial means deposited on the account, unless there are clauses in the contract limiting the disposal freedom and the bank is especially diligent to ensure safe-keeping

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[2] Supreme Court judgement of 16 January 2001, II CKN 344/00, LEX No. 52688; Supreme Court judgement of 21 June 2001, IV CKN 362/00, LEX No. 121982; Supreme Court judgement of 9 July 2008, V CSK 56/08, LEX No. 551054; Supreme Court judgement of 3 December 2008, V CSK 230/08, LEX No. 484686; judgement of the Appellate Court in Poznań of 18 April 2007, I ACa 201/07, LEX No. 446233.

[3] OSNKW 2016, No. 6, item 37.

[4] D. Krakowiak, Gloss on this ruling, LEX/el. 2016.

[5] A. Jezusek, gloss on this ruling, OSP 2017, No. 2, item 15; Sz. Tarapata, P. Zakrzewski, OSP 2017, No. 2, item 15.

[6] E. Niezbecka, [in:] A. Kidyba (ed.), *Kodeks cywilny. Komentarz*, Vol. III, Warsaw 2014, pp. 704–705; Z. Ofiarski, *Prawo bankowe. Komentarz*, Warsaw 2013, p. 384; Supreme Court judgement of 13 February 2004, IV CK 40/03, LEX No. 151636; judgement of the Appellate Court in Kraków of 5 February 2014, I ACa 917/12, LEX No. 1540886; judgement of the Appellate Court in Poznań of 27 October 2010, I ACa 733/10, LEX No. 756715.

[7] Journal of Laws [Dz.U.] of 2017, item 1876, as amended.

of financial means. Thus, a crime against property in the form of financial means deposited on a bank account constitutes a crime against a bank, which is entitled to the status of the aggrieved.

Making payments from a bank account, a bank is obliged to check the genuineness and formal appropriateness of a document used to authorise the payment and the identity of a claimant (Article 65 BL). This ensures the safety of deposits as a bank takes the responsibility for payments from bank accounts at its own risk.

On the other hand, in accordance with Article 61(2) BL, it is possible to include a clause in a contract determining that an account owner shall be charged for money payments from an account resulting from an account owner's failure to report the loss of a document authorising to withdraw money from the account. However, even then a bank is not exempt from responsibility for payments if it had failed to be especially diligent.[8]

The Supreme Court drew attention to the fact that a credit entry on a bank account constitutes grounds for the account owner's claim to settle debts by a bank. In case of differences between an entry and the balance registered on the account, taking into consideration all legal action changing the balance, an account owner may effectively claim the payment of debts up to the amount entered on the account. In the event he/she challenges the appropriateness of an entry, he/she may demand that the bank changes it. However, until the balance is altered *ex tunc*, the claim to return financial means is not settled in the amount exceeding the account balance.[9] Insufficient amount of means on the account also stops the settlement of a claim when an entry has been understated as a result of payment made to an unauthorised person. In such a case, until the account balance is altered after the differences were reported (Article 728 §3 Civil Code), an account owner cannot exercise his/her right and thus take the possession of the financial means that a bank paid to an unauthorised person or dispose of them in a different way. This means that, as a result of payment to an unauthorised person, a bank account owner has a loss in his/her obligation rights. He/she continues to possess all means deposited or obtained from other disposals. After it is proved that the payment was made to an unauthorised person and the balance is altered, the bank is obliged to settle the claim to pay the amount in accordance with the updated balance, including interest resulting from the delay, which should be recognised as equivalent to inappropriate performance of obligation (Article 471 Civil Code). Therefore, an account owner has no loss in accordance with civil law because his obligation based on a contract with a bank is not infringed. However, the object of payment temporarily remains outside the reach of an account owner's disposal, and thus outside the possibility

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[8] Supreme Court judgement of 22 November 2002, IV CKN 1526/00, OSNC 2004, No. 3, item 46; Supreme Court judgement of 9 November 2005, II CK 201/2005, LEX No. 311307; judgement of the Appellate Court in Białystok of 3 July 2003, I ACa 350/03, Orz.SA w Białymstoku 2003, No. 4, item 8; A. Kawulski, *Prawo bankowe. Komentarz*, Warsaw 2013, p. 306.

[9] Supreme Court resolution of 29 December 1994, III CZP 162/94, OSNC 1995, No. 4, item 60; Supreme Court judgement of 8 December 2010, V CSK 163/10, OSNC-ZD 2011, No. 2, item 48; Supreme Court judgement of 4 October 2007, V CSK 255/07, OSNC-ZD 2008, No. 3, item 79; Supreme Court judgement of 9 July 2008, V CSK 56/08, LEX No. 551054; Z. Ofiarski, *Prawo bankowe…*, p. 384.

of taking possession of it until the account balance is restored by an entry reversal of the payment made to an unauthorised person. In a situation in which a bank disposed of financial means deposited on an owner's account for the benefit of an unauthorised person, the balance is changed and thus, as the Supreme Court rightly notices, an account owner loses the entitlement to efficiently settle debts equivalent to the amount paid to that person. His/her right to freely dispose of financial means within the amount in question is suspended. The payments of financial means to an unauthorised person are disadvantageous for an account owner's property rights because his/her possibilities of using financial means are suspended until the account balance is altered by an entry reversal of a payment made to an unauthorised person or consequences of other disposals he/she made and the bank settled.

It is hard to approve of the criticism of the Supreme Court's stand that, due to the fact that the interpretation of the features of crimes against property, including those concerning an attempt on legal rights, is not determined by the provisions of civil law, because criminal law has autonomy and it is admissible to attribute a different meaning to terms the legislator uses in criminal regulations from those established in civil law.[10] The interpretation directives are for taking into consideration consequences of a bank account contract in the interpretation of criminal law terms connected with a bank account, and the criminal policy that motivated the legislator's developing criminal law regulations does not justify breaking this relationship.

1.2. In the context of Article 270 §1 CC, a question was raised whether the person whom a falsified document concerns has the status of the aggrieved. The Supreme Court, in its ruling of 24 August 2016, I KZP 5/16,[11] stated that: "**The crime specified in Article 270 §1 CC as such does not directly infringe the right of a person whose signature was falsified on a document**."

Such a description of the object of protection under Article 270 §1 CC means that a person whom a falsified or altered document concerns cannot be treated as the aggrieved. The Supreme Court's opinion is right and was approved of in the literature.[12] It is fully justified in the substantive definition of the aggrieved. As the Supreme Court rightly indicated: "The group of the aggrieved, in accordance with Article 49 §1 CPC, is limited to the set of features of an act that is subject to proceedings and concurrent acts".[13] A person whose right, even the legally protected

[10] A. Jezusek, *Glosa do postanowienia SN z dnia 28 kwietnia 2016 r., I KZP 3/16*, OSP 2017, No. 2, item 15.

[11] OSNKW 2016, No. 10, item 66.

[12] D. Krakowiak, gloss on this ruling, LEX/el. 2016; R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego za 2015 r.*, Ius Novum No. 3, 2017, pp. 212–213.

[13] Supreme Court resolution of 15 September 1999, I KZP 26/99, OSNKW 1999, No. 11–12, item 69 with a gloss of approval by B. Mik, WPP No. 2, 2000, pp. 164–170 and a critical one by J. Długozimy, GS No. 12–1, 1999/2000, pp. 24–26, and positive comments by S. Zabłocki, *Przegląd orzecznictwa Sądu Najwyższego – Izba Karna*, Pal. No. 11–12, 1999, pp. 165–166, and R.A. Stefański, *Przegląd uchwał Izby Karnej i Wojskowej Sądu Najwyższego w zakresie prawa karnego procesowego*

one, was endangered or infringed by an act that is a crime but its protection does not belong to its statutory features is not the aggrieved. Appropriate recognition of a person who is entitled to the status of the aggrieved requires an analysis of a particular event from the point of view of the main and secondary object of protection as well as the possibility of the seeming and real concurrence of crimes and cumulative legal classification.[14]

Justifying this opinion, the Supreme Court rightly noticed that there is uniform case law indicating that Article 270 §1 CC protects only general rights, i.e. reliability of documents and not individual interests and related rights.[15] The act harms social trust in a document as a formal method of establishing a legal relation. The provision guards that trust and threatens to punish every case of impairing social certainty that a given document belongs to the person whose signature is on it and represents his/her real will.[16]

At the same time, the Supreme Court pointed out that in the preparatory proceedings, the person has the procedural rights protecting his/her interests which a person reporting crime is entitled to (Article 306 §1a(3) CPC). It is because, according to Article 306 §1a(3) CPC, a complaint about a decision to discontinue an investigation can be filed by a person who reported a crime laid down in Articles 228–231, Article 233, Article 235, Article 236, Article 245, Articles 270–277, Articles 278–294 or in Articles 296–306 CC, if criminal proceedings were initiated as a result of this notification and the crime resulted in the infringement of his/her rights.

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za 1999 r., WPP No. 2, 2000, pp. 88–91; Supreme Court resolution of 21 December 1999, I KZP 43/99, LEX No. 585234; Supreme Court resolution of 21 October 2003, I KZP 29/03, OSNKW 2003, No. 11–12, item 94; S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warsaw 2016, p. 188; W. Posnow, *Sytuacja pokrzywdzonego w postępowaniu przygotowawczym w polskim procesie karnym*, Wrocław 1991, p. 18; K. Dudka, *Skuteczność instrumentów ochrony praw pokrzywdzonego w postępowaniu przygotowawczym w świetle badań empirycznych*, Lublin 2006, p. 21; by this author, *Wpływ prawa karnego materialnego na ustawową definicję pokrzywdzonego*, [in:] Z. Ćwiąkalski, G. Artymiak (ed.), *Współzależność prawa karnego materialnego i procesowego w świetle kodyfikacji karnych z 1997 r. i propozycji ich zmian*, Warsaw 2009, pp. 138–146.

[14] W. Posnow, *Sytuacja pokrzywdzonego…*, pp. 12–18 and 21.

[15] Supreme Court judgement of 26 March 1960, V K 243/60, LEX No. 169746; Supreme Court judgement of 3 June 1996, II KKN 24/96, LEX No. 26352; Supreme Court judgement of 9 September 2002, V KKN 29/01, LEX No. 55220; Supreme Court judgement of 4 December 2002, III KKN 370/00, LEX No. 74375; Supreme Court judgement of 4 August 2005, II KK 163/05, Biul. PK 2005, No. 4, item 1.2.3; Supreme Court ruling of 21 June 2007, III KK 122/07, LEX No. 310185; Supreme Court judgement of 1 April 2008, V KK 26/08, Prok. i Pr. – supplement 2008, No. 7–8, item 10; Supreme Court judgement of 4 September 2008, V KK 171/08, Prok. i Pr. – supplement 2009, No. 1, item 6 with a gloss of approval by P. Iwaniuk, Prokurator 2009, No. 3–4, pp. 126–134; Supreme Court judgement of 26 November 2008, IV KK 164/08, Prok. i Pr. – supplement 2009, No. 5, item 11 with a gloss of approval by D. Jagiełło, Palestra No. 3, 2010, pp. 271–277; Supreme Court judgement of 12 January 2010, WK 28/09, OSNwSK 2010, No. 1, item 31; Supreme court ruling of 24 May 2011, II KK 13/11, Biul. PK 2011, No. 10, item 1.2.9. with a critical gloss by M. Gabriel-Węglowski, LEX/el. 2012; Supreme Court ruling of 25 March 2015, II KK 302/14, LEX No. 1666887; Supreme Court judgement of 3 October 2013, II KK 117/13, Prok. i Pr. – supplement 2014, No. 1, item 10; Supreme Court judgement of 8 January 2009, WK 24/08, OSNwSK 2009, No. 1, item 47 with a gloss of approval by D. Jagiełło, Palestra No. 3, 2010, pp. 271–277.

[16] Supreme Court judgement of 17 October 1935, II K 1022/35, OSN(K) 1936, No. 5, item 182; Supreme Court judgement of 31 December 1935, III K 1493/35, OSN(K) 1936, No. 7, item 270; Supreme Court judgement of 4 March 1935, III K 1892/34, OSN(K) 1935, No. 10, item 433.

On the other hand, he/she gains the status of a party in the judicial phase of the proceedings when he/she is the aggrieved under Article 49 §1 CPC, i.e. only when the perpetrator's act also matches the features laid down in another criminal law provision classifying a crime, concurrent with or characteristic of a concurrent crime that directly endangered or infringed the person's legal right.

Therefore, in the right opinion of the Supreme Court, the conjunction of Article 306 §1 and 1a CPC and Article 49 §1 CPC unambiguously indicates that the crime consisting in falsifying a signature on a document or its use as genuine does not directly violate the legal right of a person whose signature was forged.

2. APPOINTMENT OF A DEFENCE COUNSEL ON REQUEST (ARTICLE 80A §2 CPC)

In accordance with the non-binding Article 80a §1 and 2 CPC,[17] a court president, a court or a judicial officer used to appoint defence counsel in the course of court proceedings on a motion filed by the accused who had no counsel of choice, unless Article 79 §1 or §2 or Article 80 was applicable, i.e. when a defence counsel was to be appointed *ex officio* due to the circumstances justifying obligatory defence. It was also applicable to the appointment of a counsel in order to perform specified procedural activities in the course of the judicial proceedings. In the context of that provision, the Supreme Court solved the problem of the running of the strict time limit to lodge an appeal by a counsel appointed based on it.

In the ruling of 24 August 2016, I KZP 4/16,[18] the Supreme Court rightly explained that: "**The appointment of a counsel *ex officio* in accordance with Article 80a §2 CPC in order to lodge an appeal (Article 444 §2 CPC) – in the wording of the provisions binding in the period from 1 July 2015 till 14 April 2016 – imposes on a court an obligation to deliver the counsel a copy of a sentence with its justification, from which moment the running of the strict time limit to lodge an appeal starts, even if the appointment took place after the deadline for lodging an appeal by the accused**."

The problem, regardless of the fact that Article 80a CPC was repealed, remains up-to-date because it also concerns the appointment of a defence counsel *ex officio* in case of the attorney-at-law obligation. The opinion of the Supreme Court is in compliance with the case law concerning a cassation appeal. The Court stated that in case of the appointment of a counsel *ex officio* to lodge a cassation appeal, the 30-day time limit started from the moment when the appellate court judgement with its justification was delivered to him.[19]

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[17] The provision was repealed by Article 1(15) Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts, Journal of Laws [Dz.U.] of 2016, item 437.

[18] OSNKW 2016, No. 10, item 65.

[19] Supreme Court ruling of 11 September 1996, II KZ 45/96, OSNKW 1996, No. 11–12, item 86; Supreme Court ruling of 26 February 2002, III KZ 87/01, LEX No. 51806; Supreme Court ruling of 12 December 2008, IV KZ 82/08, OSNKW 2009, No. 3, item 22; Supreme Court

The Supreme Court rightly referred to the grammatical interpretation of Article 140 and Article 445 §1 CPC. In accordance with the former, judgements which statute stipulates should be delivered to the parties are also delivered to a defence counsel, proxies and statutory representatives. In accordance with the latter, the time limit to lodge an appeal accounts for 14 days and runs for every entitled person from the date of delivery of the sentence with its justification. It is logical that the appointment of a counsel in order to develop an appeal results in the counsel's entitlement to lodge it and it is possible only when a copy of the first instance court's sentence with its justification is delivered to him.

3. COMPLAINT ABOUT SEIZURE OF THINGS VS THE COURSE OF PREPARATORY PROCEEDINGS (ARTICLE 236 §1 CPC)

In its ruling of 29 November 2016, I KZP 7/16,[20] the Supreme Court assumed that: "**Incidental proceedings initiated by a complaint pursuant to Article 236 §1 CPC about seizure of things, being heard pursuant to Article 329 §1 CPC and Article 467 §2 CPC, do not give rise to a possibility of blocking the initiation of preparatory proceedings or stopping their course**."

The opinion is justified. The Court rightly noticed that the hearing of a complaint pursuant to Article 236 §1 CPC about a decision made or an activity performed in preparatory proceedings is an incidental court activity in these proceedings. The main criminal proceedings run independent of the adjudication on a complaint.

4. CONDITIONAL TEMPORARY DETENTION (ARTICLE 257 §2 CPC)

Applying temporary detention in accordance with Article 257 §2 CPC, a court may make a proviso that the measure will be changed the moment bail is pledged, no later than in a specified deadline. On a substantiated motion lodged by the accused or his defence counsel by the last day of the given time limit at the latest, a court may extend the time limit. It is called conditional temporary detention because its change depends on the bail.[21]

It is a subsequent condition; the moment the bail is pledged, at a given deadline at the latest, temporary detention ends and is changed into bail. This moment a preventive measure changes *ex lege* from temporary detention into bail.

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ruling of 18 November 2009, II KZ 54/09, OSNKW 2010, No. 1, item 9; Supreme Court ruling of 12 December 2012, V KZ 84/12, LEX No. 1235919.

[20] OSNKW 2016, No. 12, item 83.

[21] R.A. Stefański, *Środki zapobiegawcze w nowym kodeksie postępowania karnego*, Warsaw 1998, p. 44; K. Eichstaedt, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warsaw 2013, p. 782; T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz*, Vol. I, Warsaw 2014, p. 920; K.T. Boratyńska, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw 2016, p. 631; J. Skorupka, [in:] J. Skorupka (ed.), *Kodeks postepowania karego. Komentarz*, Warsaw 2018, p. 579.

In the light of this provision, there is a doubt whether it is admissible, in accordance with Article 462 §1 CPC, to cease the implementation of a decision on conditional temporary detention after the payment of a sum determined in this decision.

The Supreme Court, solving the problem in its seven judges' ruling of 25 February 2016, I KZP 18/15,[22] expressed an opinion that: "**The implementation of a proviso laid down in Article 257 §2 CPC may be ceased, in accordance with Article 462 §1 *in fine* CPC, also after the bail bond is posted (specified sum payment, security deposit, mortgage establishment or another form of encumbrance) until the bail is pledged, i.e. the bail is accepted in the form laid down in Article 143 §1(9) CPC**."

The opinion was both criticised[23] and approved of[24] in the literature.

Prima vista, it might seem that the Supreme Court opinion is inaccurate because Article 257 §2 CPC refers to the moment of bail pledging and this phrase is associated with payment of a specified sum or another bail bond posting. However, justifying its opinion, the Supreme Court pointed out important reasons for its interpretation of the provision. It highlighted that Article 257 §2 CPC lays down that the change of temporary detention takes place "the moment (…) specified bail is pledged" and its appropriate interpretation constitutes the core of the problem because this is the moment when a protective measure in the form of temporary detention changes *ipso iure* into bail.

In the literature, the moment is specified in different ways as it is assumed that it refers to:

– bail acceptance;[25]
– bail pledging, without detailed determination of the moment;[26]
– a specified sum payment with emphasis placed on the release of the accused from a remand prison;[27]
– bail bond posting.[28]

In case law, it is also assumed that the moment bail starts to substitute for temporary detention is, in accordance with Article 257 §2 CPC, the time when the bail sum is paid.[29]

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[22] OSNKW 2016, No. 4, item 24.

[23] J. Izydorczyk, gloss on this ruling, OSP No. 11, 2016, item 101, T. Kanty, gloss on this ruling, OSP No. 9, 2017, item 84; M. Borodziuk, OSP No. 11, 2017, item 114.

[24] K. Eichstaedt, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego*, Vol. I: *Komentarz aktualizowany*, LEX/el. 2017, thesis 10 to Article 257.

[25] L.K. Paprzycki, [in:] L.K. Paprzycki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warsaw 2013, p. 809; T. Grzegorczyk, *Kodeks…*, p. 920.

[26] R.A. Stefański, *Środki zapobiegawcze…*, pp. 44–45; J. Izydorczyk, *Stosowanie tymczasowego aresztowania w polskim postępowaniu karnym*, Kraków 2002, pp. 145, 147; W. Grzeszczyk, *Kodeks postępowania karnego. Komentarz*, Warsaw 2014, p. 331.

[27] K. Eichstaedt, [in:] B. Augustyniak, M. Kurowski, D. Świecki, *Kodeks…*, Vol. I, p. 782.

[28] R.A. Stefański, [in:] R.A. Stefański, S. Zabłocki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warsaw 2004, pp. 89–90; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz*, Warsaw 2007, p. 1159; K.T. Boratyńska, [in:] A. Sakowicz (ed.), *Kodeks…*, p. 631; J. Skorupka, [in:] J. Skorupka (ed.), *Kodeks…*, p. 579; K.J. Pawelec, *Środki zapobiegawcze – nowe uregulowania w Kodeksie postępowania karnego. Zagadnienia podstawowe*, Monitor Prawniczy No. 17, 2015, pp. 910–911.

[29] Ruling of the Appellate Court in Lublin of 1 October 2008, II AKz 432/08, LEX No. 500260.

The Supreme Court approved of the opinion in the above-mentioned ruling and pointed out that in case of such bail, the provisions of Articles 266–270 CPC are applicable, and as a result, the phrases "bail pledging" (Article 257 §2 CPC) and "bail bond passing" (Article 266 §2 CPC), because of the ban on a synonymous interpretation,[30] cannot be given the same meaning. In addition, the comparison of the content of Article 257 §2 and Article 266 §2 CPC indicates that the term "bail bond passing" consists in a real act of the accused or a third person that is an expression of their will constituting an element of bail and being a condition *sine qua non* for establishing a preventive measure in the form of bail. Due to the fact that bail withdrawal is effective the moment new bail is accepted, the application of another preventive measure or abandonment of such a measure (Article 269 §3 CPC), the requirement should be referred to the act of "bail pledging", which is also preceded by a typical declaration of will in the form of "bail bond passing". Its acceptance by legal bodies, which must be formally recorded (Article 143 §1(9) CPC), is such an act. The moment of "specified bail pledging" is the end of the procedure of writing a report on bail pledging, which, what is really of key importance in this case, all the persons involved must sign (Article 150 §1 CPC). Another argument, in the Supreme Court's opinion, is that bail ensures an appropriate course of the proceedings. It may be efficient only when there is a possibility of ruling that there should be forfeiture or collection of financial values or liabilities being the bail bond in case the accused impedes criminal proceedings (Article 268 §1 CPC or Article 269 §2 sentence 2 CPC). To make it possible, it is required, in accordance with Article 268 §2 CPC, that the person pledging bail be informed about the circumstances justifying the forfeiture of the bail bond or the collection of the bail sum (Article 268 §1, Article 269 CPC). Only when the person released on bail flees or hides, impedes the criminal proceedings or fails to serve punishment, the person pledging bail must face the risk of losing the bail bond. The lack of such information does not allow ruling that there should be forfeiture of the bail bond, even if an adjudicating court had grounds for assuming the person pledging bail knew the adequate regulations.[31]

Therefore, the Supreme Court is right that bail, adjudicated in accordance with Article 257 §2 CPC, may constitute a real guarantee of an appropriate course of criminal proceedings in case there is a legally admissible possibility of ruling that there should be the forfeiture of the bail bond. It is possible not at the moment when the bail bond is passed but at the moment of its acceptance, the element of which is informing the person pledging bail.

In this state of things, it is possible to cease the execution of the decision, unless bail is accepted. Thus, it is rightly indicated in case law that: "When an appellate court hears a prosecutor's complaint about a decision on conditional extension of temporary detention after the fulfilment of the condition stated therein, i.e. after the payment of the specified bail sum by the accused or a third person in accordance

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[30] L. Morawski, *Wykładnia w orzecznictwie sądów. Komentarz*, Toruń 2002, pp. 144–145; by this author, *Zasady wykładni prawa*, Toruń 2006, pp. 103–104.

[31] Supreme Court ruling of 2 March 2001, V KKN 543/00, LEX No. 51924.

with Article 257 §2 CPC, the need to revoke the condition referred to in Article 257 §2 CPC, which an appellate court perceives, may result in the issue of a ruling that temporary detention of the accused should be applied again”.[32]

5. COMPLAINT AGAINST A PROSECUTOR'S DECISION INCLUDING A REQUEST THAT A BANK PROVIDE INFORMATION CONSTITUTING BANK SECRECY (ARTICLE 301 §2 CPC)

A bank is obliged to provide information constituting bank secrecy on a prosecutor's request in connection with criminal proceedings concerning an offence or fiscal offence (Article 105(1.2b) BL[33]). In the context of this provision, there is an issue concerning the possibility of a bank's complaining against this decision. It resulted from an opinion presented in the literature that it is non-appealable,[34] and the judicature admitted it.[35] The Supreme Court, in its resolution of 30 March 2016, I KZP 21/15,[36] explained that: "**A prosecutor's decision including a request that a bank, in accordance with Article 105(1.2b) Act of 29 August 1997: Banking law (uniform text, Journal of Laws [Dz.U.] of 2015, item 128, as amended), provide information constituting bank secrecy referred to in Article 104(1) of this Act is subject to a bank's complaint, provided a bank questions the imposition of obligations going beyond the scope that the prosecutor was entitled to impose in accordance with the above-mentioned legal grounds (Article 302 §1 CPC). The direct superior of that prosecutor is competent to deal with the complaint (Article 302 §3 CPC)**."

The stand was criticised in the literature.[37] However, the Supreme Court's opinion is right and was substantiated in detail in its abundant and careful justification.

6. APPELLATE COURTS' LEGAL QUESTIONS (ARTICLE 441 §1 CPC)

Before adjudicating on a legal matter referred to it in accordance with Article 441 §1 CPC, the Supreme Court in general examines admissibility of the question and expresses its opinion on the grounds for referring a specific legal question by an appellate court. The Supreme Court rightly highlighted that:

– "In the criminal procedure doctrine and the abundant Supreme Court case law, pursuant to Article 441 CPC, it is pointed out that referring a legal issue to the Supreme Court for fundamental interpretation depends on the fulfilment of a few conditions. Firstly, it must occur in the course of adjudicating an appeal

[32] Ruling of the Appellate Court in Wrocław of 10 June 2011, II AKz 230/11, LEX No. 821162.

[33] Journal of Laws [Dz.U.] of 2017 item 1876, as amended.

[34] M. Gabriel-Węglowski, *Glosa do postanowienia SA w Katowicach z dnia 2 września 2009 r., II AKz 590/09*, LEX/el. 2013; M. Siwek, *Glosa do postanowienia SA w Katowicach z dnia 2 września 2009 r., II AKz 590/09*, LEX/el. 2011.

[35] Ruling of the Appellate Court in Katowice of 2 September 2009, II AKz 590/09, LEX No. 519635.

[36] OSNKW 2016, No. 5, item 28.

[37] M. Gabriel-Węglowski, gloss on this resolution, LEX/el. 2016.

measure by a court. Secondly, the issue must include a significant problem concerning the interpretation of a provision that is interpreted in different ways in the judicial practice, or a provision that is formulated in a defective or unclear way. Thirdly, in the given case, there must be a necessity of "a fundamental interpretation of statute", i.e. a situation in which a provision allows various interpretations, which might be disadvantageous for the operation of law in practice. Fourthly, there must be a relationship between the legal issue and facts established in the case, which means that the explanation of interpretational doubts is indispensable for judging in the case (…). The referring of a legal question as an exception to the rule laid down in Article 8 §1 CPC, i.e. the principle of a criminal court's judicial independence, must be preceded by a court's attempt to eliminate the interpretational doubts raised in the course of operational interpretation (…). The mode laid down in Article 441 CPC does not serve appellate courts as a means to check if their interpretation is right with the assistance of the Supreme Court";[38]

– "The provision of Article 441 §1 CPC constituting the grounds for an appellate court's question to the Supreme Court concerns a procedural measure, which is an exception to the rule concerning an appellate court's judicial independence. An appellate court should, first of all, interpret the provisions concerned on its own, and only then, in the event it cannot resolve interpretational doubts, it can ask the Supreme Court to provide a fundamental interpretation of statute. However, if the request is to result in a resolution, certain conditions laid down in Article 441 §1 CPC must be fulfilled in accordance with the interpretation of this provision presented in the literature and expressed in numerous Supreme Court judgements. First of all, the referred legal question should arise in the course of adjudication on an appeal measure. Secondly, it must require the fundamental interpretation of statute, which means that the issue is strictly legal in nature and concerns an essential interpretation problem, i.e. a provision or provisions that are or may be differently interpreted in judicial practice, are defectively or unclearly formulated and in addition concern important issues that are of key importance for the appropriate understanding and application of law. Finally, there must be a direct relationship between the issue referred to and the case adjudicated on by an appellate court. In other words, even important and real issues requiring fundamental interpretation must also be important for the adjudication on an appeal measure. Therefore, these cannot be issues important for the functioning of law in practice but abstract in nature";[39]
– "The provision of Article 441 §1 CPC is exceptional in nature in comparison to Article 8 §1 CPC laying down the principle of an adjudicating court's judicial independence. Thus, it must be precisely interpreted. It is evidently inadmissible to apply this instrument when a question does not concern the reality of a given case, especially if an appellate court fails to sufficiently examine all related objective problems from the sphere of facts and law. The questions referred to the

[38] Supreme Court ruling of 30 March 2016, I KZP 23/15, OSNKW 2016, No. 3, item 19.
[39] Supreme Court ruling of 28 April 2016, I KZP 24/15, OSNKW 2016, No. 7, item 4.

Supreme Court in accordance with Article 441 §1 CPC cannot include even those problems that are extremely important for the operation of law in practice but are abstract in nature";[40]

- "In the consistent and well-established case law concerning this subject matter, the Supreme Court repeatedly indicated grounds for admissibility of legal questions referred to the Supreme Court in accordance with Article 441 §1 CPC, assuming that the efficient referring of a legal question by an appellate court takes place only when all the conditions laid down in the provision are jointly fulfilled. Therefore, legal questions should be formulated only when a legal issue arises in the course of adjudicating on an appeal measure, i.e. there is an important problem connected with the interpretation of a provision that is differently interpreted or the provision is defectively or unclearly formulated".[41]

7. VALID COURT'S RULING CONCLUDING PROCEEDINGS (ARTICLE 521 §1 CPC)

The Minister of Justice-Prosecutor General, the Ombudsman or the Children's Ombudsman, in accordance with Article 521 §1 and §2 CPC, may file a cassation appeal against every valid court's ruling concluding proceedings, however the last body may do this only in case the ruling violates children's rights. The appeal may be against a "valid court's ruling concluding proceedings", which raises doubts whether it covers a court's ruling to maintain in force a decision on discontinuing an investigation or enquiry.

There is no doubt that a court's ruling to maintain in force a prosecutor's decision to discontinue preparatory proceedings in the *in personam* phase has such a nature because due to the *ne bis in idem* ban, it is not possible to carry out proceedings in connection with the same act committed by the same person (Article 17 §1(11) CPC).[42] Such discontinuance makes it impossible to prosecute a person if the proceedings are resumed (Article 327 §2 CPC) or to quash a valid decision by the Prosecutor General (Article 328 CPC)[43]; this results in *actio popularis* assumption (Article 17

[40] Supreme Court ruling of 24 August 2016, I KZP 5/16, OSNKW 2016, No. 10, item 66.

[41] Supreme Court ruling of 28 January 2016, I KZP 12/15, OSNKW 2016, No. 4, item 25.

[42] R.A. Stefański, [in:] R.A. Stefański (ed.), *System Prawa Karnego Procesowego. Postępowanie przygotowawcze*, Vol. X, Warsaw 2016, pp. 1376–1377.

[43] Supreme Court judgement of 6 November 2003, II KK 5/03, OSNwSK 2003, item 2360; Supreme Court ruling of 26 August 2004, I KZP 11/04, OSNKW 2004, No. 7–8, item 84; Supreme Court judgement of 18 January 2006, IV KK 378/05, OSNwSK 2006, item 163; also M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne*, Warsaw 1984, pp. 305–313; by this author: *Glosa do wyroku SN z dnia 17 lipca 1973 r., V KRN 264/73*, OSPiKA No. 7–8, 1974, pp. 362–364; Z. Doda, A. Gaberle, *Kontrola odwoławcza w procesie karnym. Orzecznictwo Sądu Najwyższego. Komentarz*, Vol. II, Warsaw 1997, pp. 184–185; R.A. Stefański, *Podstawy i przyczyny umorzenia postępowania przygotowawczego*, Prok. i Pr. No. 2–3, 1996, p. 31; J. Tylman, [in:] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne*, Warsaw 2014, p. 190; M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, K. Kempisty, M. Siewierski, *Kodeks postępowania karnego. Komentarz*, Warsaw 1971, p. 55; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks…*, Vol. I, 2007, p. 152; M. Rogalski, *Wygaśnięcie prawa do oskarżenia na skutek prawomocnego umorzenia postępowania przygotowawczego*,

§1(1) CPC).[44] It differs in case of discontinuation of preparatory proceedings into a case (*in rem*) because then it is possible to resume discontinued proceedings at any time, although the decision on the discontinuation has been maintained in force by a court.[45] The Supreme Court expressed the opinion that: "A valid court's ruling to maintain in force a prosecutor's decision to discontinue an investigation at the *in rem* phase is a ruling concluding preparatory proceedings, which opens the possibility to appeal against a court's ruling by way of extraordinary cassation appeal, in accordance with Article 521 §1 CPC".[46] According to the justification, a valid decision to discontinue preparatory proceedings issued at the *in rem* phase creates a specific legal state and has impact on the situation of various entities involved in the concluded proceedings. It constitutes a formal obstacle to undertaking further procedural activities and continuation of preparatory proceedings. Therefore, until the given decision is present in legal relations, it cannot be treated as lacking legal significance and not binding on a prosecutor.

However, the resolution of seven judges of the Supreme Court of 29 November 2016, I KZP 6/16,[47] does not share this opinion and rightly provides that: "**A court's ruling issued in accordance with Article 306 §1a CPC in conjunction with Article 325a §2 CPC maintaining in force a prosecutor's decision to discontinue preparatory proceedings at the *in rem* phase is not a valid court's ruling concluding the proceedings in the meaning of Article 521 §1 CPC**."[48]

The opinion was criticised in the literature[49] with a comment that in case of discontinuance of preparatory proceedings at the *in rem* phase, the only point is formal validity, i.e. the ruling cannot be challenged by way of an appeal measure.[50]

Justifying its opinion, the Supreme Court rightly pointed out that in the light of the regulation included in Chapter 11 CPC, it is obvious that a ruling maintaining in force a prosecutor's decision to discontinue an investigation or enquiry has the form of a decision that concludes preparatory proceedings, and thus is a court's ruling referred to in Article 521 §1 CPC, regardless of the fact whether the proceedings were discontinued at the *in rem* or *in personam* phase. However, it is doubtful whether it is valid in the meaning of this provision. Considering this issue, the Supreme Court, first of all, referred to the concept of "validity" as such and mentioned that validity is treated in the literature as a factor determining procedural decisions' strength, which results in ensuring legal stability[51] and means a legal situation characterised

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[in:] T. Grzegorczyk, J. Izydorczyk, R. Olszewski (ed.), *Z problematyki funkcji procesu karnego*, Warsaw 2013, p. 189; R.A. Stefański, [in:] *System*…, Vol. X, p. 1405.

44 For more see, R.A. Stefański, [in:] *System*…, Vol. X, pp. 1405–1407.

45 J. Skorupka, [in:] J. Skorupka (ed.), *Kodeks*…, p. 73; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks*…, Vol. I, 2007, p. 152; Supreme Court ruling of 4 May 2006, V KK 384/05, LEX No. 294295; Supreme Court judgement of 9 October 2008, V KK 252/08, OSNwSK 2008, No. 1, item 1992.

46 Supreme Court judgement of 3 December 2015, II KK 272/15, LEX No. 1938676.

47 OSNKW 2017, No. 1, item 1.

48 Thus, in the ruling of the Supreme Court of 26 January 2017, V KK 63/16, LEX No. 2195675.

49 A. Jezusek, gloss on this resolution, OSP 2017, No. 6, item 61.

50 M. Rogalski, *Stan rzeczy osądzonej*, [in:] M. Jeż-Ludwichowska, A. Lach (ed.), *System Prawa Karnego Procesowego. Dopuszczalność procesu*, Vol. IV, Warsaw 2015, pp. 632–633.

51 A. Murzynowski, *Prawomocność orzeczeń sądowych jako przesłanka kasacji*, [in:] S. Waltoś, A. Gaberle (ed.), *Środki zaskarżenia w procesie karnym. Księga pamiątkowa ku czci prof. Zbigniewa*

by unchallengeable procedural decisions.[52] Taking into consideration the division of validity into the formal one, consisting in inability to challenge a procedural decision by way of proceedings continuation, and the substantive one, expressed as inability to challenge a decision meaning a ban on conducting new proceedings in the same matter (*ne bis in idem*),[53] the Supreme Court decided that the issue of potential reversibility of rulings becomes especially significant. In its opinion, only irreversible decisions can become valid in the relevant meaning from the point of view of provisions concerning extraordinary appeal measures. Rulings that a procedural body is entitled to change or quash at any time, regardless of the fact whether they are subject to ordinary appeal measures, are characterised by such considerable instability that it is difficult to assign to them the quality of validity.[54]

In jurisprudence, it is assumed that the decisions to discontinue preparatory proceedings *in rem* have incomplete validity,[55] only formal validity,[56] limited validity[57] or defective validity, which does not result in all their effects.[58] The Supreme Court drew attention to the fact that if formal validity is to express the principle of certainty and inability to challenge rulings, it is necessary to exclude from the category of a prosecutor's decisions that may become valid those that the body responsible for this stage of the proceedings can quash or modify independently at any time, regardless of the right to appeal against them in general and even in a particular case. This only means that the adjudication is not impossible to be appealed against and does not constitute a ban *ne bis in idem* or does not produce an effect in the sphere of "internal" validity, since it is not an obstacle to conducting proceedings that have formerly been discontinued.[59] This is so because a prosecutor, in accordance with Article 327 §1 CPC, may restart such proceedings as he is not bound by the flow of time and is not dependent on the occurrence of new facts or law-related circumstances. In the Supreme Court's opinion, a decision to discontinue proceedings does not put an end to preparatory proceedings and a criminal trial in a given case. Just a decision to discontinue preparatory proceedings at the *in rem* phase as well as a court's ruling maintaining in force such a decision do not constitute even a relatively stable obstacle to continue proceedings and they do not implement a guarantee function of the ruling that has been issued as a result of examination of an appeal measure.

A practical argument may be added to this: there is no sense in initiating an extraordinary cassation procedure if the same effect may be achieved in a simpler way, i.e. by restarting preparatory proceedings that have formerly been discontinued.

Dody, Kraków 2000, p. 193; M. Rogacka-Rzewnicka, *Kasacja w polskim procesie karnym*, Warsaw 2001, p. 159.

[52] S. Waltoś, P. Hofmański, *Proces karny*…, p. 62.

[53] M. Cieślak, *Polska procedura*…, p. 370.

[54] R. Kmiecik, *O reasumpcji wadliwych decyzji nie kończących postępowania przygotowawczego*, NP No. 7–8, 1980, p. 100 ff.

[55] J. Tylman, [in:] J. Tylman, T. Grzegorczyk, *Polskie postępowanie*…, pp. 190–191.

[56] A. Gaberle, *Umorzenie postępowania przygotowawczego w polskim procesie karnym*, Warsaw 1972, p. 164.

[57] E. Skrętowicz, [in:] R. Kmiecik, E. Skrętowicz, *Proces karny. Część ogólna*, Warsaw 2009, p. 230.

[58] S. Steinborn, *Prawomocność części orzeczenia w procesie karnym*, Warsaw 2011, p. 40.

[59] *Ibid.*, p. 92.

8. AWARDING PARTIAL COST IN CASES INITIATED BY PUBLIC PROSECUTION (ARTICLE 630 CPC)

In accordance with Article 630 CPC, in cases initiated by public prosecution, if the accused has not been sentenced for all crimes with which he was charged, the State Treasury should cover the expenditures connected with the prosecution for the crime that the accused has been acquitted of or which has been subject to proceeding discontinuation.

In case law, it was assumed that the provision refers only to expenditures, and expenditures incurred by the State Treasury, in accordance with Article 616 §2 CPC, are classified as court costs. On the other hand, Article 616 §1 CPC stipulates that the trial costs are court costs and justified expenditures of the parties, including those connected with the appointment of a single defence counsel. As a result, the expenditures incurred by the accused for the defence counsel are not classified as court costs, to a partial refund of which the accused is entitled pursuant to Article 630 CPC in case of his partial acquittal. Therefore, in case of a partial acquittal, the accused is not entitled to a refund of expenditures incurred for defence.[60]

There was also an opinion that: "Article 630 CPC should constitute grounds for adjudicating justified expenditures incurred by the accused, including the appointment of the counsel, in case of acquittal of the accused of some of the charges or partial discontinuation of proceedings".[61] It is emphasised that in Article 632 *in principio* CPC, the legislator laid down the proviso that refers to acquittal of the accused of all the charges or discontinuation of the whole proceedings, and thus there are no rational grounds for such narrowing interpretation of this provision.[62]

In the resolution of seven judges of 28 January 2016 r., I KZP 16/15,[63] the Supreme Court held that: "**Expenditures connected with prosecution referred to in Article 630 CPC are also expenditures incurred by the accused in connection with the appointment of a single counsel of choice. In case of partial acquittal of the accused or partial discontinuation of proceedings against him, he may claim from the State Treasury a partial return of these costs**."[64]

It is a justified opinion and was rightly approved of in the literature.[65]

Justifying this opinion, the Court pointed out that a phrase used in Article 630 CPC "expenditures connected with prosecution" covers the costs the accused

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[60] Judgement of the Appellate Court in Katowice of 14 September 2011, II AKz 613/11, LEX No. 1102938; ruling of the Appellate Court in Szczecin of 20 October 2010, akt II AKa 104/10, Orz. SA w Szczecinie 2011, No. 3, pp. 44–46. Also S. Steinborn, [in:] L.K. Paprzycki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warsaw 2013, pp. 1532–1533; K. Eichstaedt, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warsaw 2013, p. 1481.

[61] Ruling of the Appellate Court in Szczecin of 20 May 2015, II AKz 163/15, Prok. i Pr. – supplement 2016, No. 7–8, item 44.

[62] Ruling of the Appellate Court in Wrocław of 16 December 2011, II AKz 523/11, Prok. i Pr – supplement 2013, No. 9, item 36.

[63] OSNKW 2016, No. 2, item 10.

[64] Also, judgement of the Appellate Court in Katowice of 1 December 2016, II AKa 375/16, LEX No. 2202526.

[65] Z. Rudzińska-Bluszcz, gloss on this resolution, Palestra No. 4, 2016, pp. 117–120; M. Kolendowska-Matejczuk, gloss on this resolution, OSP No. 5, 2016, item 46.

incurred for defence in connection with charges which have been incurred in the proceedings later discontinued or of which the accused has been acquitted. The purpose-related interpretation is for the assumption that in such a case it is justified to reimburse the costs incurred by the accused in order to appoint a single defence counsel within the scope in which he has been acquitted or the proceedings against him discontinued.

ACT OF 6 APRIL 1990 ON THE POLICE

9. FILING A WRITTEN MOTION TO A DISTRICT COURT TO ORDER SURVEILLANCE (ARTICLE 19(1) OR (3) OF THE ACT ON THE POLICE)

In urgent cases, if it might result in the loss of information or removal of or damage to traces of crime, in accordance with Article 19(3) Act of 6 April 1990 on the Police,[66] the Chief Commander of the Police, the Commander of the Central Investigation Bureau of the Police, or a Commander of the Voivodeship Police Force, having obtained a prosecutor's consent, may decide to initiate surveillance and file a motion to a competent district court to issue a ruling concerning thereof. The provision gives authorisation to the Chief Commander of the Police, the Commander of the Central Investigation Bureau or a Commander of the Voivodeship Police Force; however, there is no information whether they can delegate that entitlement to their deputies.

In its ruling of 28 January 2016, I KZP 12/15,[67] the Supreme Court expressed the opinion that: "**The statutory entitlement of the Chief Commander of the Police to file a written motion to a district court to order surveillance, in accordance with Article 19(1) or (3) Act of 6 April 1990 on the Police (uniform text, Journal of Laws [Dz.U.] of 2015, item 355, as amended), may be exercised by his deputies (Article 5 item 4, Article 6g and Article 7 item 4 Act on the Police)**."

The opinion should be approved of and it is how it is actually assessed in the literature.[68]

In the justification, the Court emphasised that following only the instruments of linguistic interpretation, one should assume that, e.g. only the Chief Commander of the Police is authorised to file an effective motion referred to in the discussed provision. However, the Supreme Court pointed out that it had already expressed its opinion that the entitlement to file written motions to a court to order or prolong surveillance is not only the Chief Commander's and the Border Guard Units Commanders' power but also their deputies' and the Border Guard officers', provided they are authorised to act on their behalf.[69] The Court also stated that:

– the statutory entitlement of the Minister of Justice to delegate a judge, with his consent, to perform his duties in another court may be exercised by his deputy

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66 Journal of Laws [DZ.U.] of 2017, item 2067, as amended; hereinafter: Act on the Police.

67 OSNKW 2016, No. 4, item 25.

68 J. Kudła, gloss on this ruling, LEX/el. 2016.

69 Supreme Court ruling of 4 September 2015, III KK 76/15, OSNKW 2015, No. 11, item 91.

or the Secretary of State or the Undersecretary of State, provided the Minister has authorised them;[70]

– it is admissible that all functions of the Prosecutor General, including the filing of a cassation appeal and an extraordinary appeal, are performed by his deputies because it directly results not only from the Act on Public Prosecution but also the essence of the function of a deputy who always acts on behalf of a single--person body, which the Prosecutor General is, and not on their own;[71]
– a person is authorised to sign a cassation on the Ombudsman's behalf in his absence, i.e. as a substitute for him.[72]

The Supreme Court rightly pointed out that the opinions are also applicable to the Chief Commander of the Police and his deputies because the Act on the Police lays down permanent posts of a Deputy Commander and Assistant Commanders of the Police. Thus, the Act on the Police is the basis of the deputies' powers to act on behalf of the Chief Commander of the Police and perform tasks within his competences.[73]

ACT OF 13 OCTOBER 1995: HUNTING LAW

10. PROVISIONS BINDING IN CASES CONCERNING REQUESTS THAT A RESOLUTION EXCLUDING A PLANTIFF FROM MEMBERSHIP IN A HUNTING ORGANISATION BE QUASHED (ARTICLE 33(6) HUNTING LAW)

In accordance with Article 33(6) Act of 13 October 1995: Hunting law,[74] in cases concerning exclusion from membership in a hunting organisation, becoming a member or losing the status of a member of the Polish Hunting Association, after the exhaustion of internal procedures or with regard to rulings and decisions conclu-

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[70] Resolution of the full bench of the Supreme Court of 14 November 2007, BDA-4110-5/07, OSNKW 20007, No. 12, item 85, OSNKW 2008, No. 3, item 23 with a gloss of approval by B. Mik, Prok. i Pr. No. 6, 2008, pp. 164–176; Supreme Court judgement of 23 November 2007, WA 46/07, OSNKW 2008, No. 1, item 11 with a gloss of approval by W. Marcinkowski, WPP No. 2, 2008, pp. 131–137.

[71] Judgement of seven judges of the Supreme Court of 25 September 1992, WRN 97/92, OSP 1993, No. 11, item 219; judgement of seven judges of the Supreme Court of 22 January 2003, WK 48/02, OSNKW 2003, No. 3–4, item 31 with a gloss of approval by A. Bojańczyk, Prok. i Pr. No. 6, 2004, pp. 116–124; Supreme Court judgement of 2 December 2010, II KK 236/10, LEX No. 694540; R.A. Stefański, *Podmioty uprawnione do wnoszenia kasacji nadzwyczajnych w sprawach karnych*, WPP No. 2, 2000, pp. 28–39. Differently, in case of the Chief Military Prosecutor (Supreme Court ruling of 8 October 2002, WK 33/02, PiP 2003, No. 2, p. 127 with critical glosses by S.M. Przyjemski and M. Rogacka-Rzewnicka, PiP No. 2, 2003, pp. 127–130, J. Krawiec, WPP No. 1, 2003, pp. 127–133, R.A. Stefański, OSP No. 6, 2003, pp. 343–346).

[72] Supreme Court ruling of 30 June 2004, III KK 63/04, LEX No. 110555; J. Kulesza, *Przegląd orzecznictwa sądowego w sprawach należących do właściwości IPN – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu (prawo karne procesowe)* (part II), No. 5–6, Palestra 2006, pp. 333–342.

[73] Thus, also A. Łyżwa, M. Tokarski, [in:] A. Świerczewska-Gąsiorowska, M. Tokarski, Ł. Czebotar, A. Michałek, Z. Gądzik, A. Łyżwa, *Ustawa o Policji. Komentarz*, Warsaw 2015, p. 246.

[74] Journal of Laws [DZ.U.] of 2017, item 1295; hereinafter: Hunting law.

ding disciplinary proceedings, parties to the proceedings have the right to appeal to a regional court within the period of 14 days from the date of the decision receipt. Since statute does not determine the type of proceedings to be applied to hear the appeal, a doubt was raised whether the provisions of the civil or criminal procedure law should be applied to deal with the appeal against the loss of membership in a hunting organisation, becoming a member or losing the status of a member of the Polish Hunting Association, and with regard to rulings and decisions concluding disciplinary proceedings.

In the ruling of 30 March 2016, I KZP 22/15,[75] the Supreme Court stated that: "**In the judicial proceedings initiated by an appeal filed to a regional court, in accordance with Article 33(6) Act of 13 October 1995: Hunting law (uniform text, Journal of Laws [Dz.U.] of 2015, item 2168, as amended), concerning the loss of membership in a hunting organisation, becoming a member or losing the status of a member in the Polish Hunting Association resulting from a resolution of a competent hunting organisation, the provisions of the Act of 17 November 1964: Code of Civil Procedure (Journal of Laws [Dz.U.] No. 43, item 296, as amended) are applicable. On the other hand, in the judicial proceedings initiated by an appeal against a ruling or a decision concluding disciplinary proceedings, the provisions of the Act of 6 June 1997: Criminal Procedure Code (Journal of Laws [Dz.U.] No. 89, item 555, as amended) are applicable**."

The opinion should be approved of, however, it is partially criticised in the literature.[76]

Justifying his opinion, the Supreme Court assumed that the acquisition or loss of membership in the Polish Hunting Association, provided it does not result from a disciplinary court ruling, as well as the loss of membership in a hunting organisation are cases having the features of civil ones, and thus a court should hear them pursuant to the provisions of the Code of Civil Procedure.

On the other hand, the application of the criminal procedure to hear the appeal against a ruling or a decision issued by a disciplinary hunting court results from Article 35s(2) Hunting law, in accordance with which, in cases not regulated in Chapter 6a concerning disciplinary liability, the regulations of the Criminal Procedure Code are applied, respectively. Since numerous issues are not regulated in statute, many provisions of the Criminal Procedure Code are applicable in proceedings conducted by disciplinary bodies and hunting courts.

Proceedings before a district court initiated by an appeal against a ruling issued by a hunting court, the Supreme Court states, are a follow-up of the formerly started disciplinary proceedings and they should also be conducted with the application of the criminal procedure regulations.

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[75] OSNKW 2016, No. 6, item 35.

[76] M. Kościelniak-Marszał, gloss on this ruling, OSP 2017, No. 6, item 62.

ACT OF 23 NOVEMBER 2002 ON THE SUPREME COURT

11. SPECIFIC QUESTIONS OF THE SUPREME COURT (ARTICLE 59 ACT ON THE SUPREME COURT)

If the Supreme Court, hearing a cassation appeal or any other appeal measure, has doubts concerning interpretation of law, it may adjourn the case hearing and refer a legal question to the bench of seven judges of the Supreme Court (Article 59 Act on the Supreme Court).[77] The Supreme Court adjudicating the legal question asked in this mode often points out the conditions that must be fulfilled to answer it.

In the resolution of 29 November 2016, I KZP 6/16,[78] the Court rightly highlighted that: "**In the light of the provision of Article 59 Act on the Supreme Court, in order to refer a legal question to the enlarged bench of this Court, it is necessary for it to have serious doubts concerning the interpretation of law while hearing a cassation appeal by an ordinary bench and to indicate that eliminating those doubts by an enlarged bench is essential for adjudicating on a cassation appeal (…). In accordance with the provision of Article 59 Act on the Supreme Court, one of the grounds for referring a legal question to an enlarged bench of the Court is a serious doubt concerning the interpretation of law**."

12. ABSTRACT QUESTIONS (ARTICLE 60 §1 AND §2 ACT ON THE SUPREME COURT)

In case there are differences in interpretation of law in common courts, military courts or the Supreme Court case law, in accordance with Article 60 §1 Act on the Supreme Court, the First President of the Supreme Court may refer a motion to a bench of seven judges of the Supreme Court to adjudicate on them. Also, the Ombudsman and the Prosecutor General as well as the General Counsel to the Republic of Poland (Prokuratoria Generalna Rzeczypospolitej Polskiej), the Children's Ombudsman, the President of the Social Dialogue Council, the Chairman of the Polish Financial Supervision Authority (KNF) and the Financial Ombudsman may file such a motion (Article 60 §2 Act on the Supreme Court).

In the context of this provision, the Supreme Court draws attention to the following:

– "**The basic condition for asking the Supreme Court an abstract legal question and then adopting a resolution is not just the occurrence of a difference in case law, especially that resulting from different application of law as such, but exclusively a difference in the interpretation of a particular provision or provisions**";[79]

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[77] Journal of Laws [(DZ.U.] of 2016, item 1254, as amended; hereinafter: Act on the Supreme Court.

[78] OSNKW 2017, No. 1, item 1.

[79] Ruling of seven judges of the Supreme Court of 25 February 2016, I KZP 18/15, OSNKW 2016, No. 4, item 24.

– **"Therefore, it does not concern a difference in case law resulting from different application of law, i.e. the establishment of legal consequences of specific facts and their classification from the point of view of a particular sanctioned norm, but a difference in the interpretation of the provisions of law, i.e. activities aimed at appropriate establishment of the meaning of particular provisions by decoding different norms resulting from them**";[80]
– "**In order to effectively refer the abstract legal question, it is necessary to show not only a difference occurring in case law but also that the difference results from different interpretation of law by courts. Possible differences between case law and the doctrine are of minor importance**."[81]

ACT OF 17 JUNE 2004 ON COMPLAINTS ABOUT VIOLATION OF A PARTY'S RIGHT TO A HEARING IN PREPARATORY PROCEEDINGS CONDUCTED OR SUPERVISED BY A PROSECUTOR AND JUDICIAL PROCEEDINGS WITHOUT UNDUE DELAY

13. COMPLAINT OF A PARTY WHOSE RIGHT TO A HEARING WITHOUT UNDUE DELAY HAS BEEN INFRINGED AS A RESULT OF ACTION OR INACTION OF A PROSECUTOR SUPERVISING PREPARATORY PROCEEDINGS (ARTICLE 1(1) ACT ON COMPLAINTS)

Pursuant to Article 2(1a) in conjunction with (1) of the Act of 17 June 2004 on complaints about violation of a party's right to a hearing in preparatory proceedings conducted or supervised by a prosecutor and judicial proceedings without undue delay,[82] a party may file, inter alia, a motion to establish that the preparatory proceedings complained about have infringed the right to a hearing without undue delay in case the proceedings aimed at issuing a decision concluding the proceedings in the case last longer than necessary to determine important factual and legal circumstances. In order to establish whether lengthiness of the proceedings really took place, it is especially necessary to assess punctuality and appropriateness of activities undertaken by a prosecutor conducting or supervising preparatory proceedings aimed at concluding the preparatory proceedings (Article 2(2) Act on complaints). Article 1(1) of the above Act stipulates that a complaint is applicable when a party's right to a hearing without undue delay has been infringed as a result of action or inaction of a court or a prosecutor conducting or supervising preparatory proceedings. Therefore, a condition for admissibility of a complaint about lengthiness of preparatory proceedings conducted by a financial body for preparatory proceedings is its supervision by a prosecutor. Thus, it is important to determine the moment

[80] Resolution of seven judges of the Supreme Court of 28 January 2016, I KZP 13/15, OSNKW 2016, No. 3, item 17.

[81] Resolution of seven judges of the Supreme Court of 29 November 2016, I KZP 10/16, OSNKW 2016, No. 12, item 79.

[82] Journal of Laws [DZ.U.] of 2016, item 1259 as amended; hereinafter: Act on complaints.

when the supervision starts, especially whether the prolongation of proceedings by a prosecutor is his supervisory action.

It was assumed in case law that a prosecutor's decision to prolong an investigation in accordance with Article 153 §1 sentence 3 Fiscal Penal Code (henceforth: FPC) is not an activity of a technical nature only, but a basic supervisory activity, because a refusal to prolong an investigation would conclude the preparatory proceedings, while a decision to prolong it has an impact on the efficiency of the proceedings, determines its lengthiness and, as a result, the right to a hearing without undue delay. The speed of proceedings and the concentration of procedural activities is a key factor in preparatory proceedings, and omissions in this field may result in annihilation of the aims of criminal proceedings laid down in Article 2 CPC, thus, such development of proceedings that results in adjudication in a reasonable time.[83]

It is assumed in the literature that:

– prolonging an investigation conducted by a financial body for preparatory proceedings, a prosecutor should limit his action to this activity and determine a period when the proceedings should finish, unless he recognises a necessity of being involved in prolonging the investigation and can take it over;[84]
– in fiscal penal proceedings, until they are supervised by superior financial authorities, not a prosecutor, one cannot speak about his supervision over such proceedings;[85]
– such a complaint is not updated, however, in a situation when a prosecutor has not been informed about the conducted proceedings;[86]
– all preparatory proceedings concerning fiscal crimes are, pursuant to the Act on complaints, proceedings supervised by a prosecutor.[87]

In the resolution of seven judges of the Supreme Court of 28 January 2016, I KZP 13/15,[88] the Court adjudicated on this issue and explained that: "**Prolongation of an investigation concerning fiscal crimes conducted by a financial body for preparatory proceedings and supervised by a superior authority with respect to this body, in accordance with Article 153 §1 third sentence FPC, for a period of six months, means the prosecutor takes supervision over the proceedings, which obliges him to exercise his entitlements under Article 298 §1 and Article 326 CPC in conjunction with Article 113 §1 FPC. With the moment of such prolongation, one can speak about the fulfilment of the requirement laid down in Article 1(1) of the Act of 17 June 2004 on complaints about the violation of a party's right to a hearing in preparatory**

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[83] Ruling of the Appellate Court in Katowice of 27 November 2013, II AKz 717/13, LEX No. 1488978.

[84] M. Świetlicka, *Glosa do postanowienia Sądu Apelacyjnego w Katowicach z dnia 27 listopada 2013 r.*, LEX/el. 2014; by this author, *Metodyka pracy prokuratora w postępowaniu w sprawach o przestępstwa skarbowe i wykroczenia skarbowe*, Kraków 2014, pp. 33–37.

[85] G. Łabuda, T. Razowski, *Zakres przedmiotowy skargi na przewlekłość postępowania*, Prok. i Pr. No. 1, 2012, pp. 72–76.

[86] J. Kasiński, *Skarga na przewlekłość postępowania przygotowawczego – wybrane zagadnienia*, Palestra No. 11–12, 2009, p. 47.

[87] J. Skorupka (ed.), *Skarga na naruszenie prawa strony do rozpoznania sprawy bez nieuzasadnionej zwłoki. Komentarz*, Warsaw 2010, pp. 102–104.

[88] OSNKW 2016, No. 3, item 17.

proceedings conducted or supervised by a prosecutor and judicial proceedings without undue delay when a prosecutor at least should supervise such an investigation as a condition for admissibility of a complaint about lengthiness of proceedings, provided that this lengthiness occurs within the period of such supervision."

The opinion was partly criticised in the doctrine,[89] but it is right.

In the justification of its resolution, the Supreme Court emphasised that Act of 17 June 2004 admits a complaint about lengthiness of preparatory proceedings only when a prosecutor conducts or supervises it and if it is his action or inaction that results in the lengthiness of this stage of the proceedings. Preparatory proceedings supervised by a prosecutor is such as the one that occurs in common criminal proceedings, the provisions of which are applied in fiscal penal proceedings, respectively. The provision of Article 122 FPC, making the cession of prosecutor's powers to financial bodies for preparatory proceedings (§1(1)) and their superior authorities (§1(2)) by indicating that the term "prosecutor" used in the CPC provisions also means a financial body for preparatory proceedings and its superior authority. It also assumes that some activities laid down in the Criminal Procedure Code (Article 113 §1 FPC) may only be performed by a prosecutor, to whom a financial body for preparatory proceedings conducting fiscal preparatory proceedings must file a motion (Article 122 §2 FPC). The Supreme Court drew attention to the fact that in accordance with Article 151c FPC, a prosecutor must supervise:

- an investigation conducted by a financial body for preparatory proceedings (§1);
- an investigation into a fiscal crime conducted by this body when there are circumstances justifying obligatory defence counsel laid down in Article 79 §1 CPC, a prosecutor appointed expert psychiatrists to examine the psychical health of the accused, a court applied temporary detention of the suspect, and when the case is under supervision because of its importance or complexity (§2). In other cases, supervision over an investigation conducted by a financial body for preparatory proceedings is the competence of an authority that is the body's superior (Article 151c §3 FPC).

ACT OF 18 OCTOBER 2006 ON REVEALING INFORMATION ABOUT DOCUMENTS OF THE STATE SECURITY BODIES OF 1944–1990 AND THE CONTENT OF THOSE DOCUMENTS

14. COURT BENCH COMPOSITION IN CASES CONCERNING TRUTHFULNESS OF LUSTRATION DECLARATIONS (ARTICLE 17)

In cases concerning truthfulness of lustration declarations, in accordance with Article 17 of the Act of 18 October 2006 on revealing information about documents of the state security bodies of 1944–1990 and the content of those documents,[90] a bench of three judges of a district court having jurisdiction over the place of residence of a person filing a

[89] J. Zagrodnik, gloss on this resolution, OSP 2017, No. 7–8, item 81.

[90] Journal of Laws [DZ.U.] of 2017, item 2186; hereinafter: Lustration Act.

lustration declaration adjudicate. This provision does not indicate whether a three-judge bench district court has the obligation to adjudicate in all proceedings before the court conducted in accordance with this legal act or only in case the adjudication concerns essentially the subject matter of truthfulness of lustration declarations.

In case law, it was assumed that such a bench composition applies to:

– all adjudications issued by a district court in proceedings conducted pursuant to the Lustration Act, thus also to rulings that these proceedings should be initiated or refused to be initiated, or discontinued;[91]
– only those district court rulings which adjudicate on the issue of truthfulness of lustration declarations.[92]

The Supreme Court, in the resolution of seven judges of 24 August 2016, I KZP 2/16,[93] rightly decided that: "**In proceedings conducted in accordance with the Act of 18 October 2006 on revealing information about documents of the state security bodies of 1944–1990 and the content of those documents (uniform text, Journal of Laws [Dz.U.] of 2013, item 1388, as amended), a district court bench composed of three judges shall issue all rulings**."

The Supreme Court, after an in-depth analysis of the concept of "a case" discussed in the case law of the Constitutional Tribunal and the Supreme Court as well as in the literature, drew the right conclusion that it concerns not only the main proceedings but also auxiliary, incidental and supplementary proceedings. Moreover, the Court carried out a detailed interpretation of the provisions of the Act following the linguistic, system-related, historical and functional directives demonstrating that a three-judge bench of a district court should adjudicate in lustration proceedings, regardless of the type of the judgement issued and the form of adjudication.

ACT OF 27 SEPTEMBER 2013 AMENDING THE ACT: CRIMINAL PROCEDURE CODE AND SOME OTHER ACTS

15. COURT BENCH (ARTICLE 30)

In accordance with Article 30 of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts,[94] if pursuant to the act a court's competence or bench composition has changed, a court that was originally competent and its original bench will continue to adjudicate in the given instance until the

[91] Ruling of the Appellate Court in Katowice of 15 January 2014, II AKz 763/13, KZS 2014, No. 4, item 103; ruling of the Appellate Court in Kraków of 3 February 2011, II AKz 20/11, KZS 2011, No. 10, item 43; ruling of the Appellate Court in Kraków of 23 February 2011, II AKz 2/11, KZS 2011, No. 6, item 53.

[92] Supreme Court resolution of 23 March 2011, I KZP 31/10, OSNKW 2011, No. 3, item 23; ruling of the Appellate Court in Katowice of 11 April 2011, II AKz 667/10, LEX No. 846511; ruling of the Appellate Court in Białystok of 22 March 2013, II AKz 73/13, LEX No. 1294887; judgement of the Appellate Court in Łódź of 18 January 2011, II AKa 216/10, OSA 2011, No. 11, pp. 60–66.

[93] OSNKW 2016, No. 10, item 64.

[94] Journal of Laws [DZ.U.] of 2013, item 1247, as amended; hereinafter: Act of 27 September 2013.

end of the proceedings. This regulation raised doubts whether the term "a court's original bench" means a court's bench determined in the provisions binding at the moment when the proceedings started in a given instance or a court's bench in terms of its personal composition appointed in accordance with the provisions binding before the discussed Act entered into force and which started adjudicating at the main trial before 1 July 1015.

It is assumed in the judicature and literature that it concerns:

– the initiation of the main trial,[95]
– the initiation of proceedings in a given instance because the stage of its progress does not matter.[96]

The Supreme Court, in the ruling of 29 November 2016, I KZP 9/16,[97] decided that: "**The phrase 'a court's original bench' used in Article 30 of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts, Journal of Laws [Dz.U.] of 2013, item 1247, means a court's bench determined by the provisions binding at the moment when proceedings in a given instance started**."[98]

It is a right opinion and does not deserve the criticism it faced.[99]

In the justification of the decision, the Court emphasised that the legislator specified only the moment when petrification of a court's competence or of a bench composition resulting from the provisions binding before 1 July 2015 takes place; it is the "conclusion of proceedings in a given instance". In the Supreme Court's opinion, a conclusion can be drawn *a contrario* that the initiation of proceedings in a given instance is the starting point for petrification of a court's bench. Therefore, it is a court's bench composed in accordance with the legal regulations and not a particular personal composition of a bench appointed pursuant to the regulations that had been in force before the amendment of September 2013 entered into force. The justification presents the stand that Article 30 Act of 27 September 2013 stipulates that a court's bench under former regulations should be petrified. This is confirmed by the wording of the provision, which in its initial part refers to a change of a court's bench composition resulting from the new act.

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[95] Judgement of the Appellate Court in Lublin of 26 January 2016, II AKa 295/15, LEX No. 1994424; judgement of the Appellate Court in Katowice of 17 February 2016, II AKa 12/16, KZS 2016, No. 5, item 87; M. Świetlicka, *Komentarz do art. 30 ustawy z dnia 27 września 2013 roku o zmianie ustawy Kodeks postępowania karnego i niektórych innych ustaw (Dz.U. z 2013 r., poz. 1247)*, Lex/el. 2015.

[96] Supreme Court ruling of 15 June 2016, V KK 114/16, LEX No. 2080107; Supreme Court ruling of 29 June 2016, II KK 180/16, LEX No. 2062819; Supreme Court ruling of 23 September 2016, III KK 41/16, LEX No. 2122061; judgement of the Appellate Court in Wrocław of 5 May 2016, II AKa 95/16, LEX No. 2052587; judgement of the Appellate Court in Wrocław of 7 April 2016, II AKa 93/16, Orz. SA we Wrocławiu 2016, No. 2, item 340; D. Świecki, [in:] B. Augustyniak, D. Świecki (ed.), M. Wąsek-Wiaderek, *Postępowanie odwoławcze, nadzwyczajne środki zaskarżenia, postępowanie po uprawomocnieniu się wyroku i postępowanie w sprawach karnych ze stosunków międzynarodowych*, Kraków 2015, p. 16.

[97] OSNKW 2016, No. 12, item 85.

[98] Thus, also in the Supreme Court ruling of 6 February 2017, V KK 395/16, LEX No. 2255444; Supreme Court ruling of 10 January 2017, II KK 183/16, LEX No. 2261738.

[99] W. Jasiński, *Petryfikacja składu sądu w przepisach intertemporalnych – uwagi na tle postanowienia Sądu Najwyższego z dnia 29 listopada 2016 r.*, I KZP 9/216, Ius Novum No. 3, 2017, pp. 21–36.

ACT OF 11 MARCH 2016 AMENDING THE ACT: CRIMINAL PROCEDURE CODE AND SOME OTHER ACTS

16. TRANSITIONAL PROVISIONS

The Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts[100] introduces numerous changes to the Criminal Procedure Code, which mainly consist in reversing changes introduced by the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts.[101] The Act does not provide a general rule stipulating that the provisions amended by the Act are applicable to cases initiated before the date when it enters into force, unless it is stipulated otherwise in statute; it only contains transitional provisions applicable to some issues. As a result, a practical problem arose which provisions should be applied in cases conducted after the Act entered into force in which an indictment, a motion to issue a conviction, a motion to conditionally discontinue proceedings or a motion to discontinue preparatory proceedings and order a preventive measure were filed before 1 July 2015, i.e. before the Act of 27 September 2013 entered into force.

The Supreme Court, in the resolution of seven judges of 29 November 2016, I KZP 10/16,[102] which was awarded the power of a legal principle, assumed that: "**In cases conducted after 14 April 2016, in which an indictment, a motion to issue a conviction, a motion to conditionally discontinue proceedings or a motion to discontinue preparatory proceedings and order a preventive measure were filed in a court before 1 July 2015, the provisions regulating criminal procedure introduced by the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts (Journal of Laws [Dz.U.] of 2016, item 437), i.e. in general new provisions, shall be applied**."

It is a right opinion, properly and convincingly justified. However, it faced partial criticism in the literature.[103]

It is not possible to quote all the arguments even briefly. However, it is sufficient to point out that the Court rightly approved of the application of the basic form of solving inter-temporal problems in accordance with criminal procedure law, namely the principle of applying the new law (*lex nova*), which is called the principle of direct application of a new legal act or the principle of "catching in the flight".[104] In general, it is assumed that in case of amendments to the rules of proceedings, the law binding at the moment when the procedural action or an assessment of an actual situation, entitlement or obligation were made should be applied (*tempus regit actum*).[105] The rule as a basic principle of transitional law is applied in an analogous way when, amending law, the legislator does not lay down transitional

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[100] Journal of Laws [DZ.U.] of 2016, item 437; hereinafter: Act of 11 March 2016.

[101] Journal of Laws [Dz.U.] of 2013, item 1247, as amended.

[102] OSNKW 2016, No. 12, item 79.

[103] D. Krakowiak, gloss on this resolution, LEX/el. 2017.

[104] H. Paluszkiewicz, *Studia z zakresu problematyki intertemporalnej w prawie karnym procesowym*, Warsaw 2016, pp. 3, 15 and 19.

[105] *Ibid.*, p. 17.

provisions.[106] This means that from the moment a new law enters into force, it is necessary to apply it in general in all the situations that occur in the course of the already initiated criminal proceedings.[107]

The Court was right to point out in the discussed resolution that the dominating nature of this principle in relation to the provisions of criminal procedure law also makes it possible to eliminate doubts concerning the need to derogate from the former transitional provisions, especially Article 27 Act of 27 September 2013, in accordance with which the provisions of amended acts in the wording of this act are applicable to cases initiated before the date it entered into force, unless it is stipulated otherwise in statute. Since the later act lays down its own transitional provisions containing exceptions, the former regulations of transitional issues lose their power without the need to indicate that in particular provisions.

BIBLIOGRAPHY

Bojańczyk A., *Glosa do wyroku 7 sędziów SN z dnia 22 stycznia 2003 r.*, WK 48/02, Prok. i Pr. No. 6, 2004.

Boratyńska K.T., [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw 2016.

Borodziuk M., *Glosa do postanowienia 7 sędziów SN z dnia 25 lutego 2016 r., I KZP 18/15*, OSP No. 11, 2017, item 114.

Cieślak M., *Glosa do wyroku SN z dnia 17 lipca 1973 r., V KRN 264/73*, OSPiKA No. 7–8, 1974.

Cieślak M., *Polska procedura karna. Podstawowe założenia teoretyczne*, Warsaw 1984.

Długozima J., *Glosa do uchwały SN z 15 września 1999 r., I KZP 26/99*, GS No. 12–1, 1999/2000.

Doda Z., Gaberle A., *Kontrola odwoławcza w procesie karnym. Orzecznictwo Sądu Najwyższego. Komentarz*, Vol. II, Warsaw 1997.

Dudka K., *Skuteczność instrumentów ochrony praw pokrzywdzonego w postępowaniu przygotowawczym w świetle badań empirycznych*, Lublin 2006.

Dudka K., *Wpływ prawa karnego materialnego na ustawową definicję pokrzywdzonego*, [in:] Z. Ćwiąkalski, G. Artymiak (ed.), *Współzależność prawa karnego materialnego i procesowego w świetle kodyfikacji karnych z 1997 r. i propozycji ich zmian*, Warsaw 2009.

Eichstaedt K., [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warsaw 2013.

Eichstaedt K., [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warsaw 2013.

Eichstaedt K., [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego*, Vol. I: *Komentarz aktualizowany*, LEX/el. 2017.

Gaberle A., *Umorzenie postępowania przygotowawczego w polskim procesie karnym*, Warsaw 1972.

Gabriel-Węglowski M., *Glosa do postanowienia SN z dnia 24 maja 2011 r., II KK 13/11*, LEX/el. 2012.

Gabriel-Węglowski M., *Glosa do postanowienia SA w Katowicach z dnia 2 września 2009 r., II AKz 590/09*, LEX/el. 2013.

Gabriel-Węglowski M., *Glosa do uchwały SN z dnia 30 marca 2016 r., I KZP 21/15*, LEX/el. 2016.

Grzegorczyk T., *Kodeks postępowania karnego. Komentarz*, Vol. I, Warsaw 2014.

Grzeszczyk W., *Kodeks postępowania karnego. Komentarz*, Warsaw 2014.

Hofmański P., Sadzik E., Zgryzek K., *Kodeks postępowania karnego. Komentarz*, Warsaw 2007.

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[106] Supreme Court ruling of 24 August 2016, IV KZ 38/16, LEX No. 2151441.

[107] H. Paluszkiewicz, [in:] K. Dudka, H. Paluszkiewicz, *Postępowanie karne*, Warsaw 2017, p. 32.

Iwaniuk P., *Glosa do wyroku SN z dnia 4 września 2008 r., V KK 171/08*, Prokurator No. 3–4, 2009.
Izydorczyk J., *Stosowanie tymczasowego aresztowania w polskim postępowaniu karnym*, Kraków 2002.
Izydorczyk J., *Glosa do postanowienia 7 sędziów SN z dnia 25 lutego 2016 r., I KZP 18/15*, OSP No. 11, 2016, item 101.
Jagiełło D., *Glosa do wyroku SN z dnia 26 listopada 2008 r., IV KK 164/08*, Palestra No. 3, 2010.
Jagiełło D., *Glosa do wyroku SN z dnia 8 stycznia 2009 r., WK 24/08*, Palestra No. 3, 2010.
Jasiński W., *Petryfikacja składu sądu w przepisach intertemporalnych – uwagi na tle postanowienia Sądu Najwyższego z dnia 29 listopada 2016 r., I KZP 9/216*, Ius Novum No. 3, 2017.
Jezusek A., *Glosa do postanowienia SN z dnia 28 kwietnia 2016 r., I KZP 3/16*, OSP No. 2, 2017, item 15.
Jezusek A., *Glosa do uchwały 7 sędziów SN z dnia 29 listopada 2016 r., I KZP 6/16*, OSP No. 6, 2017, item 61.
Kanty T., *Glosa do postanowienia 7 sędziów SN z dnia 25 lutego 2016 r., I KZP 18/15*, OSP No. 9, 2017, item 84.
Kasiński J., *Skarga na przewlekłość postępowania przygotowawczego – wybrane zagadnienia*, Palestra No. 11–12, 2009.
Kawulski A., *Prawo bankowe. Komentarz*, Warsaw 2013.
Kmiecik R., *O reasumpcji wadliwych decyzji nie kończących postępowania przygotowawczego*, NP No. 7–8, 1980.
Kolendowska-Matejczuk M., *Glosa do uchwały 7 sędziów SN z dnia 28 stycznia 2016 r., I KZP 16/15*, OSP No. 5, 2016, item 46.
Kościelniak-Marszał M., *Glosa do postanowienia SN z dnia 30 marca 2016 r., I KZP 22/15*, OSP No. 6, 2017, item 62.
Krakowiak D., *Glosa do postanowienia SN z dnia 28 kwietnia 2016 r., I KZP 3/16*, LEX/el. 2016.
Krakowiak D., *Glosa do postanowienia SN z dnia 24 sierpnia 2016 r., I KZP 5/16*, LEX/el. 2016.
Krakowiak D., *Glosa do uchwały 7 sędziów SN z dnia 29 listopada 2016 r., I KZP 10/16*, LEX/el. 2017.
Krawiec J., *Glosa do postanowienia SN z dnia 8 października 2002 r., WK 33/02*, WPP No. 1, 3003.
Kudła J., *Glosa do postanowienia SN z dnia 28 stycznia 2016 r., I KZP 12/15*, LEX/el. 2016.
Kulesza J., *Przegląd orzecznictwa sądowego w sprawach należących do właściwości IPN – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu (prawo karne procesowe)*, part II, Palestra No. 5–6, 2006.
Łabuda G., Razowski T., *Zakres przedmiotowy skargi na przewlekłość postępowania*, Prok. i Pr. No. 1, 2012.
Łyżwa A., Tokarski M., [in:] A. Świerczewska-Gąsiorowska, M. Tokarski, Ł. Czebotar, A. Michałek, Z. Gądzik, A. Łyżwa, *Ustawa o Policji. Komentarz*, Warsaw 2015.
Marcinkowski W., *Glosa do wyroku SN z dnia 23 listopada 2007 r., WA 46/07*, WPP No. 2, 2008.
Mik B., *Glosa do uchwały SN z 15 września 1999 r., I KZP 26/99*, WPP No. 2, 2000.
Mik B., *Glosa do uchwały pełnego składu SN z dnia 14 listopada 2007 r., BDA-4110-5/07*, Prok. i Pr. No. 6, 2008.
Morawski L., *Wykładnia w orzecznictwie sądów. Komentarz*, Toruń 2002.
Morawski L., *Zasady wykładni prawa*, Toruń 2006.
Murzynowski A., *Prawomocność orzeczeń sądowych jako przesłanka kasacji*, [in:] S. Waltoś, A. Gaberle (ed.), *Środki zaskarżenia w procesie karnym. Księga pamiątkowa ku czci Prof. Zbigniewa Dody*, Kraków 2000.
Niezbecka E., [in:] A. Kidyba (ed.), *Kodeks cywilny. Komentarz*, Vol. III, Warsaw 2014.
Ofiarski Z., *Prawo bankowe. Komentarz*, Warsaw 2013.
Paluszkiewicz H., *Studia z zakresu problematyki intertemporalnej w prawie karnym procesowym*, Warsaw 2016.

Paluszkiewicz H., [in:] K. Dudka, H. Paluszkiewicz, *Postępowanie karne*, Warsaw 2017.
Paprzycki L.K., [in:] L.K. Paprzycki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I, Warsaw 2013.
Pawelec K.J., *Środki zapobiegawcze – nowe uregulowania w Kodeksie postępowania karnego. Zagadnienia podstawowe*, Monitor Prawniczy No. 17, 2015.
Posnow W., *Sytuacja pokrzywdzonego w postępowaniu przygotowawczym w polskim procesie karnym*, Wrocław 1991.
Przyjemski S.M., Rogacka-Rzewnicka M., *Glosa do postanowienia SN z dnia 8 października 2002 r., WK 33/02*, PiP No. 2, 2003.
Rogacka-Rzewnicka M., *Kasacja w polskim procesie karnym*, Warsaw 2001.
Rogalski M., *Wygaśnięcie prawa do oskarżenia na skutek prawomocnego umorzenia postępowania przygotowawczego*, [in:] T. Grzegorczyk, J. Izydorczyk, R. Olszewski (ed.), *Z problematyki funkcji procesu karnego*, Warsaw 2013.
Rogalski M., *Stan rzeczy osądzonej*, [in:] M. Jeż-Ludwichowska, A. Lach (ed.), *System Prawa Karnego Procesowego. Dopuszczalność procesu*, Vol. IV, Warsaw 2015.
Rudzińska-Bluszcz Z., *Glosa do uchwały składu 7 sędziów SN z dnia 28 stycznia 2016 r., I KZP 16/15*, Palestra No. 4, 2016.
Siewierski M., [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, K. Kempisty, M. Siewierski, *Kodeks postępowania karnego. Komentarz*, Warsaw 1971.
Siwek M., *Glosa do postanowienia SA w Katowicach z dnia 2 września 2009 r., II AKz 590/09*, LEX/el. 2011.
Skorupka J. (ed.), *Skarga na naruszenie prawa strony do rozpoznania sprawy bez nieuzasadnionej zwłoki. Komentarz*, Warsaw 2010.
Skorupka J., [in:] J. Skorupka (ed.), *Kodeks postepowania karego. Komentarz*, Warsaw 2018.
Skrętowicz E., [in:] R. Kmiecik, E. Skrętowicz, *Proces karny. Część ogólna*, Warsaw 2009.
Stefański R.A., *Podstawy i przyczyny umorzenia postępowania przygotowawczego*, Prok. i Pr. No. 2–3, 1996.
Stefański R.A., *Środki zapobiegawcze w nowym kodeksie postępowania karnego*, Warsaw 1998.
Stefański R.A., *Podmioty uprawnione do wnoszenia kasacji nadzwyczajnych w sprawach karnych*, WPP No. 2, 2000.
Stefański R.A., *Przegląd uchwał Izby Karnej i Wojskowej Sądu Najwyższego w zakresie prawa karnego procesowego za 1999 r.*, WPP No. 2, 2000.
Stefański R.A., *Glosa do postanowienia SN z dnia 8 października 2002 r., WK 33/02*, OSP No. 6, 2003.
Stefański R.A., [in:] R.A. Stefański, S. Zabłocki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warsaw 2004.
Stefański R.A., [in:] R.A. Stefański (ed.), *System Prawa Karnego Procesowego. Postępowanie przygotowawcze*, Vol. X, Warsaw 2016.
Stefański R.A., *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego za 2015 r.*, Ius Novum No. 3, 2017.
Steinborn S., *Prawomocność części orzeczenia w procesie karnym*, Warsaw 2011.
Steinborn S., [in:] L.K. Paprzycki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. II, Warsaw 2013.
Świecki D., [in:] B. Augustyniak, D. Świecki (ed.), M. Wąsek-Wiaderek, *Postępowanie odwoławcze, nadzwyczajne środki zaskarżenia, postępowanie po uprawomocnieniu się wyroku i postępowanie w sprawach karnych ze stosunków międzynarodowych*, Kraków 2015.
Świetlicka M., *Glosa do postanowienia Sądu Apelacyjnego w Katowicach z dnia 27 listopada 2013 r.*, LEX/el. 2014.

Świetlicka M., *Metodyka pracy prokuratora w postępowaniu w sprawach o przestępstwa skarbowe i wykroczenia skarbowe*, Kraków 2014.

Świetlicka M., *Komentarz do art. 30 ustawy z dnia 27 września 2013 roku o zmianie ustawy Kodeks postępowania karnego i niektórych innych ustaw (Dz.U. z 2013 r., poz. 1247)*, Lex/el. 2015.

Tarapata Sz., Zakrzewski P., *Glosa do postanowienia SN z dnia 28 kwietnia 2016 r., I KZP 3/16*, OSP No. 2, 2017, item 15.

Tylman J., [in:] T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne*, Warsaw 2014.

Waltoś S., Hofmański P., *Proces karny. Zarys systemu*, Warsaw 2016.

Zabłocki S., *Przegląd orzecznictwa Sądu Najwyższego – Izba Karna*, Pal. No. 11–12, 1999.

Zagrodnik J., *Glosa do uchwały 7 sędziów SN z dnia 28 stycznia 2016 r., I KZP 13/15*, OSP No. 7–8, 2017, item 81.

Legal regulations

Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Act of 23 April 1964: Civil Code], Journal of Laws [Dz.U.] No. 16, item 93, as amended.

Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego [Act of 17 November 1964: Code of Civil Procedure], Journal of Laws [Dz.U.] No. 43, item 296, as amended.

Ustawa z dnia 6 kwietnia 1990 r. o Policji [Act of 6 April 1990 on the Police], Journal of Laws [DZ.U.] of 2017, item 2067, as amended.

Ustawa z dnia 13 października 1995 r. Prawo łowieckie [Act of 13 October 1995: Hunting law], Journal of Laws [DZ.U.] of 2017, item 1295; uniform text, Journal of Laws [Dz.U.] of 2015, item 2168, as amended.

Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny [Act of 6 June 1997: Criminal Code], Journal of Laws [Dz.U.] No. 88, item 553, as amended.

Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego [Act of 6 June 1997: Criminal Procedure Code], Journal of Laws [Dz.U.] No. 89, item 555, as amended.

Ustawa z dnia 29 sierpnia 1997 r. – Prawo bankowe [Act of 29 August 1997: Banking law], Journal of Laws [Dz.U.] of 2017, item 1876, as amended.

Ustawa z dnia 10 września 1999 r. Kodeks karny skarbowy [Act of 10 September 1999: Fiscal Penal Code], Journal of Laws [Dz.U.] No. 83, item 930, as amended.

Ustawa z dnia 23 listopada 2002 r. o Sądzie Najwyższym [Act of 23 November 2002 on the Supreme Court], Journal of Laws [DZ.U.] of 2016, item 1254, as amended.

Ustawa z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki [Act of 17 June 2004 on complaints about violation of a party's right to a hearing in preparatory proceedings conducted or supervised by a prosecutor and judicial proceedings without undue delay], Journal of Laws [DZ.U.] of 2016, item 1259 as amended.

Ustawa z dnia 18 października 2006 r. o ujawnianiu informacji o dokumentach organów bezpieczeństwa państwa z lat 1944–1990 oraz treści tych dokumentów [Act of 18 October 2006 on revealing information about documents of the state security bodies of 1944–1990 and the content of those documents], Journal of Laws [Dz.U.] of 2017, item 2186; uniform text, Journal of Laws [Dz.U.] of 2013, item 1388, as amended.

Ustawa z dnia 27 września 2013 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw [Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts], Journal of Laws [Dz.U.] of 2013, item 1247, as amended.

Ustawa z dnia 11 marca 2016 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw [Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts], Journal of Laws [DZ.U.] of 2016, item 437.

Court rulings

Supreme Court judgements

Supreme Court judgement of 4 March 1935, III K 1892/34, OSN(K) 1935, No. 10, item 433.
Supreme Court judgement of 17 October 1935, II K 1022/35, OSN(K) 1936, No. 5, item 182.
Supreme Court judgement of 31 December 1935, III K 1493/35, OSN(K) 1936, No. 7, item 270.
Supreme Court judgement of 26 March 1960, V K 243/60, LEX No. 169746.
Judgement of seven judges of the Supreme Court of 25 September 1992, WRN 97/92, OSP 1993, No. 11, item 219.
Supreme Court resolution of 29 December 1994, III CZP 162/94, OSNC 1995, No. 4, item 60.
Supreme Court judgement of 3 June 1996, II KKN 24/96, LEX No. 26352.
Supreme Court ruling of 11 September 1996, II KZ 45/96, OSNKW 1996, No. 11–12, item 86.
Supreme Court resolution of 15 September 1999, I KZP 26/99, OSNKW 1999, No. 11–12, item 69.
Supreme Court resolution of 21 December 1999, I KZP 43/99, LEX No. 585234.
Supreme Court judgement of 16 January 2001, II CKN 344/00, LEX No. 52688.
Supreme Court ruling of 2 March 2001, V KKN 543/00, LEX No. 51924.
Supreme Court judgement of 21 June 2001, IV CKN 362/00, LEX No. 121982.
Supreme Court ruling of 26 February 2002, III KZ 87/01, LEX No. 51806.
Supreme Court judgement of 9 September 2002, V KKN 29/01, LEX No. 55220.
Supreme Court judgement of 22 November 2002, IV CKN 1526/00, OSNC 2004, No. 3, item 46.
Supreme Court judgement of 4 December 2002, III KKN 370/00, LEX No. 74375.
Judgement of seven judges of the Supreme Court of 22 January 2003, WK 48/02, OSNKW 2003, No. 3–4, item 31.
Supreme Court resolution of 21 October 2003, I KZP 29/03, OSNKW 2003, No. 11–12, item 94.
Supreme Court judgement of 6 November 2003, II KK 5/03, OSNwSK 2003, item 2360.
Supreme Court judgement of 13 February 2004, IV CK 40/03, LEX No. 151636.
Supreme Court ruling of 30 June 2004, III KK 63/04, LEX No. 110555.
Supreme Court ruling of 26 August 2004, I KZP 11/04, OSNKW 2004, No. 7–8, item 84.
Supreme Court judgement of 4 August 2005, II KK 163/05, Biul. PK 2005, No. 4, item 1.2.3.
Supreme Court judgement of 9 November 2005, II CK 201/2005, LEX No. 311307.
Supreme Court judgement of 18 January 2006, IV KK 378/05, OSNwSK 2006, item 163.
Supreme Court ruling of 4 May 2006, V KK 384/05, LEX No. 294295.
Supreme Court ruling of 21 June 2007, III KK 122/07, LEX No. 310185.
Supreme Court judgement of 4 October 2007, V CSK 255/07, LEX No. 435625.
Resolution of the full bench of the Supreme Court of 14 November 2007, BDA-4110-5/07, OSNKW 20007, No. 12, item 85, OSNKW 2008, No. 3, item 23.
Supreme Court judgement of 23 November 2007, WA 46/07, OSNKW 2008, No. 1.
Supreme Court judgement of 16 January 2008, IV CSK 380/07, LEX No. 371419.
Supreme Court judgement of 1 April 2008, V KK 26/08, Prok. i Pr. – supplement 2008, No. 7–8, item 10.
Supreme Court judgement of 9 July 2008, V CSK 56/08, LEX No. 551054.
Supreme Court judgement of 4 September 2008, V KK 171/08, Prok. i Pr. – supplement 2009, No. 1, item 6.
Supreme Court judgement of 9 October 2008, V KK 252/08, OSNwSK 2008, No. 1, item 1992.
Supreme Court judgement of 26 November 2008, IV KK 164/08, Prok. i Pr. – supplement 2009, No. 5, item 11.
Supreme Court judgement of 3 December 2008, V CSK 230/08, LEX No. 484686.
Supreme Court ruling of 12 December 2008, IV KZ 82/08, OSNKW 2009, No. 3, item 22.
Supreme Court judgement of 8 January 2009, WK 24/08, OSNwSK 2009, No. 1, item 47.

Supreme Court ruling of 18 November 2009, II KZ 54/09, OSNKW 2010, No. 1, item 9.
Supreme Court judgement of 12 January 2010, WK 28/09, OSNwSK 2010, No. 1, item 31.
Supreme Court judgement of 2 December 2010, II KK 236/10, LEX No. 694540.
Supreme Court judgement of 8 December 2010, V CSK 163/10, LEX No. 784297.
Supreme Court resolution of 23 March 2011, I KZP 31/10, OSNKW 2011, No. 3, item 23.
Supreme Court ruling of 24 May 2011, II KK 13/11, Biul. PK 2011, No. 10, item 1.2.9.
Supreme Court ruling of 12 December 2012, V KZ 84/12, LEX No. 1235919.
Supreme Court judgement of 3 October 2013, II KK 117/13, Prok. i Pr. – supplement 2014, No. 1, item 10.
Supreme Court ruling of 25 March 2015, II KK 302/14, LEX No. 1666887.
Supreme Court ruling of 4 September 2015, III KK 76/15, OSNKW 2015, No. 11, item 91.
Supreme Court judgement of 3 December 2015, II KK 272/15, LEX No. 1938676.
Supreme Court ruling of 28 January 2016, I KZP 12/15, OSNKW 2016, No. 4, item 25.
Ruling of seven judges of the Supreme Court of 25 February 2016, I KZP 18/15, OSNKW 2016, No. 4, item 24.
Resolution of seven judges of the Supreme Court of 28 January 2016, I KZP 13/15, OSNKW 2016, No. 3, item 17.
Resolution of seven judges of the Supreme Court of 28 January 2016, I KZP 16/15, OSNKW 2016, No. 2, item 10.
Supreme Court resolution of 30 March 2016, I KZP 21/15, OSNKW 2016, No. 5, item 28.
Supreme Court ruling of 30 March 2016, I KZP 23/15, OSNKW 2016, No. 3, item 19.
Supreme Court Ruling of 28 April 2016, I KZP 3/16, OSNKW 2016, No. 6, item 37.
Supreme Court ruling of 28 April 2016, I KZP 24/15, OSNKW 2016, No. 7, item 4.
Supreme Court ruling of 15 June 2016, V KK 114/16, LEX No. 2080107.
Supreme Court ruling of 29 June 2016, II KK 180/16, LEX No. 2062819.
Resolution of seven judges of the Supreme Court of 24 August 2016, I KZP 2/16, OSNKW 2016, No. 10, item 64.
Supreme Court ruling of 24 August 2016, I KZP 5/16, OSNKW 2016, No. 10, item 66.
Supreme Court ruling of 24 August 2016, IV KZ 38/16, LEX No. 2151441.
Supreme Court ruling of 23 September 2016, III KK 41/16, LEX No. 2122061.
Supreme Court resolution of 29 November 2016, I KZP 6/16, OSNKW 2017, No. 1, item 1.
Resolution of seven judges of the Supreme Court of 29 November 2016, I KZP 6/16, OSNKW 2017, No. 1, item 1.
Resolution of seven judges of the Supreme Court of 29 November 2016, I KZP 10/16, OSNKW 2016, No. 12, item 79.
Supreme Court ruling of 29 November 2016, I KZP 7/16, OSNKW 2016, No. 12, item 83.
Supreme Court ruling of 29 November 2016, I KZP 9/16, OSNKW 2016, No. 12, item 85.
Supreme Court ruling of 10 January 2017, II KK 183/16, LEX No. 2261738.
Supreme Court judgement of 26 January 2017, V KK 63/16, LEX No. 2195675.
Supreme Court ruling of 6 February 2017, V KK 395/16, LEX No. 2255444.

Appellate court judgements

Judgement of the Appellate Court in Białystok of 3 July 2003, I ACa 350/03, Orz. SA w Białymstoku 2003, No. 4, item 8.
Judgement of the Appellate Court in Poznań of 18 April 2007, I ACa 201/07, LEX No. 446233.
Ruling of the Appellate Court in Lublin of 1 October 2008, II AKz 432/08, LEX No. 500260.
Ruling of the Appellate Court in Katowice of 2 September 2009, II AKz 590/09, LEX No. 519635.
Ruling of the Appellate Court in Szczecin of 20 October 2010, akt II AKa 104/10, Orz. SA w Szczecinie 2011, No. 3.

Judgement of the Appellate Court in Poznań of 27 October 2010, I ACa 733/10, LEX No. 756715.
Judgement of the Appellate Court in Łódź of 18 January 2011, II AKa 216/10, OSA 2011, No. 11.
Judgement of the Appellate Court in Kraków of 3 February 2011, II AKz 20/11, KZS 2011, No. 10, item 43.
Ruling of the Appellate Court in Kraków of 23 February 2011, II AKz 2/11, KZS 2011, No. 6, item 53.
Ruling of the Appellate Court in Katowice of 11 April 2011, II AKz 667/10, LEX No. 846511.
Ruling of the Appellate Court in Wrocław of 10 June 2011, II AKz 230/11, LEX No. 821162.
Judgement of the Appellate Court in Katowice of 14 September 2011, II AKz 613/11, LEX No. 1102938.
Ruling of the Appellate Court in Wrocław of 16 December 2011, II AKz 523/11, Prok. i Pr – supplement 2013, No. 9, item 36.
Ruling of the Appellate Court in Białystok of 22 March 2013, II AKz 73/13, LEX No. 1294887.
Ruling of the Appellate Court in Katowice of 27 November 2013, II AKz 717/13, LEX No. 1488978.
Ruling of the Appellate Court in Katowice of 15 January 2014, II AKz 763/13, KZS 2014, No. 4, item 103.
Judgement of the Appellate Court in Kraków of 5 February 2014, I ACa 917/12, LEX No. 1540886.
Ruling of the Appellate Court in Szczecin of 20 May 2015, II AKz 163/15, Prok. i Pr. – supplement 2016, No. 7–8, item 44.
Judgement of the Appellate Court in Lublin of 26 January 2016, II AKa 295/15, LEX No. 1994424.
Judgement of the Appellate Court in Katowice of 17 February 2016, II AKa 12/16, KZS 2016, No. 5, item 87.
Judgement of the Appellate Court in Wrocław of 7 April 2016, II AKa 93/16, Orz. SA we Wrocławiu 2016, No. 2, item 340.
Judgement of the Appellate Court in Wrocław of 5 May 2016, II AKa 95/16, LEX No. 2052587.
Judgement of the Appellate Court in Katowice of 1 December 2016, II AKa 375/16, LEX No. 2202526.

REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER CONCERNING CRIMINAL PROCEDURE LAW FOR 2016

Summary

The review presents the analysis of resolutions and rulings of the Criminal Chamber of the Supreme Court adopted in the course of solving legal issues concerning criminal procedure in 2016. The following issues are discussed: the concept of the aggrieved (Article 59 §1 CPC), the appointment of a defence counsel on request (Article 80a §2 CPC), a compliant about the seizure of things versus the course of preparatory proceedings (Article 236 §1 CPC), conditional temporary detention (Article 257 §2 CPC), a complaint about a prosecutor's decision containing a request that a bank provide information constituting bank secrecy (Article 301 §2 CPC), legal questions asked by appellate courts (Article 441 §1 CPC), valid court ruling concluding proceedings (Article 521 §1 CPC), awarding partial costs in cases initiated by public prosecution (Article 630 CPC), a complaint of a party whose right to a hearing without undue delay has been infringed as a result of action or inaction of a prosecutor supervising preparatory proceedings (Article 1(1) Act of 17 June 2004 on complaints about the

violation of a party's right to a hearing in preparatory proceedings conducted or supervised by a prosecutor and in judicial proceedings without undue delay), filing a written motion to a district court to order surveillance (Article 19(1) or (3) Act of 6 April 1990 on the Police), provisions binding in cases concerning requests that a resolution excluding a plaintiff from membership in a hunting organisation be quashed (Article 33(6) Act of 13 October 1995: Hunting law), transitional provisions (Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts), a court bench (Article 30 Act of 11 March 2016), a court bench composition in cases concerning truthfulness of lustration declarations (Article 17 Act of 18 October 2006 on revealing information about documents of the state security bodies of 1944–1990 and the content of those documents), specific questions of the Supreme Court (Article 59 Act of 23 November 2002 on the Supreme Court), abstract questions (Article 60 §1 and §2 Act on the Supreme Court).

Keywords: surveillance, defence counsel, lustration declaration, the accused, hunting law, transitional provisions, legal question, Supreme Court, court bench, bank secrecy, complaint

PRZEGLĄD UCHWAŁ IZBY KARNEJ SĄDU NAJWYŻSZEGO W ZAKRESIE PRAWA KARNEGO PROCESOWEGO ZA 2016 R.

Streszczenie

Przedmiotem opracowania jest analiza uchwał i postanowień Izby Karnej Sądu Najwyższego podejmowanych w ramach rozstrzygania zagadnień prawnych z zakresu postępowania karnego w 2016 r. Omówione zostały takie zagadnienia, jak: pojęcie pokrzywdzonego (art. 59 §1 k.p.k.), wyznaczenie obrońcy z urzędu na wniosek (art. 80a §2 k.p.k.), zażalenie na czynność zatrzymania rzeczy a bieg postępowania przygotowawczego (art. 236 §1 k.p.k.), warunkowe tymczasowe aresztowanie (art. 257 §2 k.p.k.), zażalenie na postanowienie prokuratora zawierające żądanie udzielenia przez bank informacji stanowiących tajemnicę bankową (art. 301 §2 k.p.k.), pytania prawne sądów odwoławczych (art. 441 §1 k.p.k.), prawomocne orzeczenie sądu kończące postępowanie (art. 521 §1 k.p.k.), częściowe zasądzenie kosztów w sprawach z oskarżenia publicznego (art. 630 k.p.k.), skarga strony, której prawo do rozpoznania sprawy bez nieuzasadnionej zwłoki zostało naruszone na skutek działania lub bezczynności prokuratora nadzorującego postępowanie przygotowawcze (art. 1 ust. 1 ustawy z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki), wystąpienie z pisemnym wnioskiem do sądu okręgowego o zarządzenie kontroli operacyjnej (art. 19 ust. 1 lub 3 ustawy z dnia 6 kwietnia 1990 r. o Policji), przepisy właściwe w sprawach dotyczących żądania uchylenia uchwał wykluczających powoda z grona członków koła łowieckiego (art. 33 ust. 6 ustawy z dnia 13 października 1995 r. – prawo łowieckie), przepisy intertemporalne (ustawa z dnia 11 marca 2016 r. o zmianie ustawy – kodeks postępowania karnego oraz niektórych innych ustaw), skład sądu (art. 30 ustawy z dnia 11 marca 2016 r.), skład sądu w sprawach zgodności z prawdą oświadczeń lustracyjnych (art. 17 ustawy z dnia 18 października 2006 r. o ujawnianiu informacji o dokumentach organów bezpieczeństwa państwa z lat 1944–1990 oraz treści tych dokumentów), pytania konkretne Sądu Najwyższego (art. 59 ustawa z dnia 23 listopada 2002 r. o sądzie najwyższym), pytania abstrakcyjne (art. 60 §1 i 2 ustawy o Sądzie Najwyższym).

Słowa kluczowe: kontrola operacyjna, obrońca, oświadczenie lustracyjne, pokrzywdzony, prawo łowieckie, przepisy intertemporalne, pytanie prawne, Sąd Najwyższy, skład sądu, tajemnica bankowa, zażalenie

Cytuj jako:

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INTERNATIONAL COOPERATION IN CRIMINAL MATTERS VERSUS EUROPEANISATION OF CRIMINAL PROCEDURE

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1. INTERNATIONAL COOPERATION MODEL IN THE CRIMINAL PROCEDURE CODE OF 1997 VS THE EUROPEAN MODELS

International legislation, including mainly that resulting from the European Union legislative activity, is among many factors that have considerable influence on the shape of the current criminal procedure. The process of adopting the EU law leads to many important changes in the Polish legal system, especially, to some extent, it causes modification of the way of conducting criminal proceedings.[1] The changes in this sphere are mainly based on the adoption of the new EU models of international cooperation in criminal matters. It should be highlighted that the phenomenon of such cooperation occurred relatively not long ago, in fact, in the period of the last two decades. As a result, the models of cooperation between Member States in the field of criminal procedure are still not completely defined because this process is just at the stage of formulating and organising its practical institutional framework. It is still a dynamic phenomenon intensely shaping procedures of cooperation between the states.

In general, the issue of Europeanisation[2] can be defined as a process of the European Union legislation's influencing, in a broad meaning, the shape of law in

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[1] For more, see A. Górski, *Europeizacja procesu karnego*, [in:] P. Hofmański (ed.), *System Prawa Karnego Procesowego*, Vol. I, part 2, Warsaw 2013, pp. 166–192.

[2] The institutional and functional grounds for the development and functioning of cooperation are laid down in Article 82 Treaty on the functioning of the European Union of 30 April 2004 (*ex* Article 31 TEU), OJ EU C 202 of 7.06.2016/Journal of Laws [Dz.U.] of 2004,

Member States.[3] The process of enacting the norms of proceedings "going beyond limits" is taking place based on the constitutional delegation of legislative competence of the state to the European institutions, thus in a way it is different from the situation typical of forming international law, where the principle of sovereignty prevails.[4]

The transformation of the criminal model that took place as a result of the Europeanisation of the Polish legal system, first of all, constitutes slow abandonment of the territorial principle in favour of adopting the universalism of criminal prosecution.[5] Although the proceedings in criminal matters in international relations is not a new phenomenon in the binding model of the procedure developed on the basis of the Criminal Procedure Code of 1997,[6] successive changes in this area, developed in the EU forum, contribute to the regulations being gradually made more specific and elaborate, which results in the development of a new, complex and, at the same time, non-uniform system of cooperation with other Member States.

The model of the procedure developed in CPC of 1997 included the instruments of judicial assistance and international cooperation in criminal matters.[7] The above issue was comprehensively regulated in Section XIII entitled "Cooperation in criminal matters in international relations",[8] which provides bases for cross-border criminal proceedings.[9] It concerned such issues as exclusion of persons granted with diplomatic immunity from Polish jurisdiction, including searches of venues belonging to diplomatic facilities (provisions of Chapter 61, Articles 578 to 584 CPC).[10] Moreover, CPC regulated the issue of judicial assistance in criminal matters, including necessary activities in criminal proceedings (provisions of Chapter 62, Articles 585 to 589 CPC).[11]

No. 90, item 862/2, which stipulates that it is based on the principle of mutual recognition of judgements and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in the Treaty.

[3] For the basis for the definition and the distinction, compare: T. Biernat (ed.), *Europeizacja prawa*, Kraków 2008; and A. Pacześniak, R. Riedel, *Europeizacja – mechanizmy, wymiary, efekty*, Toruń 2010.

[4] A. Górski, *Europeizacja procesu karnego…*, pp. 166–167.

[5] S. Waltoś, *Proces karny. Zarys sytemu*, Warsaw 2009, p. 597.

[6] Act of 6 June 1997: Criminal Procedure Code, Journal of Laws [Dz.U.] of of 1997, No. 89, item 555, as amended; hereinafter: CPC of 1997.

[7] Compare, M. Płachta, *Status i pojęcie międzynarodowego prawa karnego*, Prok. i Pr. No. 5, 2009, pp. 5–16.

[8] For more on this instrument, see H. Paluszkiewicz, B. Janusz, *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Materiały do konwersatoriów*, Vol. 3, Poznań 2006.

[9] *Ibid.*, p. 597.

[10] For more, see: M. Jachimowicz, *Immunitet zakrajowości w procesie karnym*, PS No. 11–12, 2004, pp. 102–123; by the same author: *Immunitet dyplomatyczny w procesie karnym*, WPP No. 3, 2007, pp. 33–47; *Przeszukanie pomieszczeń przedstawicielstw dyplomatycznych i placówek konsularnych*, Jur. No. 8, 2007, pp. 25–26; D. Tarnowska, *Immunitety zakrajowości jako wyłączenie jurysdykcji polskich sądów karnych wobec przedstawicieli dyplomatycznych i konsularnych państw obcych (art. 578–584 k.p.k.)*, [in:] T. Grzegorczyk (ed.), *Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tylmana*, Warsaw 2011, pp. 197–207; J. Sutor, *Immunitet dyplomatyczny i immunitet państwa*, PS No. 4, 2008, pp. 81–96.

[11] For more, see: A. Walczak-Żochowska, *Współpraca sądowa w sprawach karnych*, [in:] B.T. Bieńkowska, D. Szafrański (ed.), *Europeizacja prawa polskiego – wybrane aspekty*, Warsaw 2007, pp. 159–179; B. Kolasiński, *Pomoc prawna i doręczenia w postępowaniu karnym przeciwko cudzoziemcom*, [in:] A.J. Szwarc (ed.), *Przestępczość przygraniczna. Postępowanie karne przeciwko cudzoziemcom w Polsce*, Poznań 2000, pp. 59–81; P. Kołodziejski, *Doręczenia w obrocie międzynarodowym w sprawach karnych*, Prok. i Pr. No. 4, 2012, pp. 73–94.

Cooperation and provision of judicial assistance took place in horizontal relations by mutual contacts of law enforcement bodies without the need to obtain whatever decisions of the executive power bodies (Article 588 CPC).[12]

In the original proceedings model of CPC of 1997, there was also an instrument of taking over prosecution from abroad in case of crimes committed there in the event they were not yet validly tried (provisions of Chapter 63, Articles 590 to 592 CPC).[13] The regulation did not envisage a possibility of filing a motion to the competent body of a foreign state to take over criminal prosecution. The initiative in this matter is the competence of the Minister of Justice and is subject to the principle of reciprocity.[14] The group of entities that may be subject to a motion includes Polish citizens, persons who have a permanent domicile in the territory of the Republic of Poland, persons who serve or will serve an imprisonment sentence in the Republic of Poland, and persons against whom criminal proceedings have been initiated in the Republic of Poland. The criterion for filing a motion includes an important interest of the law enforcement, and a competent body of a foreign state must be notified about the outcome of the proceedings concluded in Poland (Article 590 CPC). The procedure of taking over the prosecution of a foreigner for crimes committed in the territory of Poland was developed in a similar way (Article 591 CPC).[15] In this area, the principle of reciprocity is also applicable, however, if the aggrieved is a citizen of Poland, surrendering a perpetrator requires the consent of the aggrieved (Article 591 §2 CPC). Moreover, the procedure model envisaged one more instrument, i.e. taking over and surrendering convicts to serve a sentence, which was laid down in Chapter 66 CPC.[16] In the event of a valid conviction of a Polish citizen by a foreign court to a penalty of deprivation of liberty, the Minister of Justice may file a motion to a competent body of that state to take over the convict in order to execute the penalty of deprivation of liberty in the Republic of Poland (Article 608 CPC).

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12 Compare, D. Tarnowska, *Udzielanie pomocy prawnej organom procesowym państw obcych przez polskie sądy i prokuratorów (art. 588 k.p.k.) jako przejaw suwerenności państwa polskiego*, [in:] I. Gawłowicz, I. Wierzchowiecka (ed.), *Koncepcja suwerenności. Zbiór studiów*, Warsaw 2005, pp. 267–272.

13 For more, see: Z. Gostyński, *Przekazanie i przejęcie ścigania karnego*, [in:] A.J. Szwarc (ed.), *Przestępczość przygraniczna. Postępowanie karne przeciwko cudzoziemcom w Polsce*, Poznań 2000, pp. 82–93; A. Górski, K. Michalak, *Przejęcie i przekazanie ścigania karnego jako instrumenty rozstrzygania konfliktów jurysdykcyjnych – uwagi do regulacji k.p.k.*, EP No. 6, 2015, pp. 33–37; E. Janczur, *Przejęcie i przekazanie ścigania karnego*, Prok. i Pr. No. 5, 1999, pp. 61–85. A. Nepera, *Przekazanie ścigania karnego – sposób realizacji karnej jurysdykcji państwa bądź odstąpienia od niej*, Acta UWr. Prz. Prawa i Admin. No. 66, 2005, pp. 151–165.

14 The principle was discussed in detail in S. Steinborn, *Zasady międzynarodowej i europejskiej współpracy w sprawach karnych*, [in:] P. Hofmański (ed.), *System Prawa Karnego Procesowego*, Vol. III, part 2, Warsaw 2014, pp. 1721–1731.

15 See, K.A. Kruk, *Zgoda pokrzywdzonego na przekazanie ścigania*, Prok. i Pr. No. 3, 2002, pp. 60–67.

16 See, M. Hudzik, *Przejęcie skazania – węzłowe zagadnienia i problemy w stosowaniu instrumentów prawnomiędzynarodowych*, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Interpretacja prawa międzynarodowego i unijnego w sprawach karnych*, Jachranka 2006, pp. 129–142; R. Kierzynka, *Przekazywanie skazanych na karę pozbawienia wolności w Europie*, Ius Novum No. 2, 2009, pp. 94–112; H. Kuczyńska, *Wybrane problemy przekazywania skazanych na tle orzecznictwa Sądu Najwyższego*, Pal. No. 9–10, 2006, pp. 47–67.

It must be firmly emphasised that extradition, both active and passive one,[17] was also known in the Polish system of criminal procedure, that is why, the changes in the procedure after the country's accession to the European Union are not a novelty. Both instruments were regulated under Chapter 64 "Motion to surrender or transport of requested or convicted persons residing abroad and to deliver goods", and Chapter 65 "Motions from foreign states to surrender or transport persons requested or convicted or to deliver goods". What is important, the regulation has its place in the legal system and has not been derogated because of the dynamic process of implementing the procedure of the European arrest warrant (EAW).

In case of the former regulation, courts and prosecutors file motions via the Minister of Justice to a foreign state to surrender a person against whom criminal proceedings have been initiated, to surrender a person in order to conduct judicial proceedings or to execute a valid imprisonment sentence. Such motion can also be filed to make it possible to transport a requested or convicted person from the territory of a foreign state and to deliver substantive evidence or objects obtained by a perpetrator as a result of crime from the territory of a foreign state (Article 593 CPC). The motions are initiated by the Polish bodies and addressed to a foreign state's bodies, which is called active extradition.[18]

In the latter case, a foreign state's body files a motion to surrender a requested person in order to conduct criminal proceedings against him/her or execute a penalty or an adjudicated preventive measure. The motion filed by a foreign state initiates proceedings, which is called passive extradition.[19]

Leaving aside the doubts whether the provisions concerning EAW are in conformity with the Constitution,[20] the instrument of extradition was known in the Polish procedure model and international cooperation in criminal matters. Changes resulting from the accession to the European Union consisted in the introduction of a detailed specification or implementation of the new forms of instruments already known in our legal system. It is true that the instruments such as EAW were not in force to the extent known at present but the origins were present, though those were laborious and time-consuming procedures requiring political decisions. However, their existence provided solid foundations of the future instruments and resulted in their easy adaptation to our legal system.

It is necessary to emphasise that, although the mechanisms of international cooperation in criminal matters were known in our legal system, they proved to be insufficient to meet the needs resulting from the necessity of combating criminality in the 21st century.[21] The classical mechanisms seemed to be too heavy, lengthy and formalised to the European legislator. That is why, each change resulting from

17 S. Waltoś, *Proces karny…*, pp. 608–661.

18 *Ibid.*, p. 607.

19 *Ibid*.

20 Constitutional Tribunal judgement of 27 April 2005, P1/05, Journal of Laws [Dz.U.] 2005, No. 77, item 680.

21 A. Górski, *Sądząc europejski nakaz aresztowania. O konstytucyjnych granicach integracji europejskiej w sprawach karnych*, [in:] P. Hofmański (ed.), *Aktualne problemy procesu karnego*, Warsaw 2009, p. 585.

the obligation to transpose the European Union law did not serve the change of the existing regulations but the introduction of new mechanisms simplifying and de-formalising the existing ones.

2. EUROPEANISATION OF CRIMINAL PROCEEDINGS: REPORTING APPROACH

The shape of current norms regulating international cooperation framework in criminal matters is the result of several amendments to the Criminal Procedure Code transposing forms of cooperation proposed by the European legislator. The development of regulations in this area underwent a process based on a typical evolution of patterns and concepts. First of all, there was a need to develop a mechanism of efficient cooperation, which resulted in the development of the European arrest warrant (EAW) as an instrument increasing the quality and efficiency of combatting criminality.[22] The implementation of this instrument into the Polish legal system was based on the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States,[23] and came into force on the basis of the Act of 18 March 2004 amending Act: Criminal Code, the Act: Criminal Procedure Code and the Act: Misdemeanour Code.[24] EAW is defined in the Act introducing it as a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order (Article 1(1) Council Framework Decision 2002/584/JHA).

By the way, it is worth adding that several years' period of being in force shows that this instrument has firmly rooted in our legal system and become a frequently used instrument. Almost a third of all EAWs in the period 2005–2009 were issued in Poland.[25]

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[22] J. Trzcińska, *Europejski nakaz aresztowania a ekstradycja*, Prok. i Pr. No. 6, 2004, p. 89.

[23] OJ EU L 190 of 18.07.2002. For more on the issue of the nature of the Framework Decision in the light of its binding power and transposition to domestic criminal regulations, see A. Górski, *Sądząc europejski nakaz aresztowania…*, pp. 585–590; and for general information, compare A. Grzelak, *Unia Europejska a prawo karne*, Warsaw 2002.

[24] Journal of Laws, [Dz.U.] of 2004, No. 69, item 626. Apart from changes in the model of criminal procedure, the Act also amends the Misdemeanour Code by the introduction of a description of a new type of prohibited acts, capital fraud, and a change in the scope of penalisation of the types of prohibited acts featured in Articles 200 and 202 Criminal Code, concerning child pornography and abuse of minors under the age of 15, as well as introduces a new crime of "interference of the work of a computer system"; moreover, the amendment of 18 March 2004 serves the implementation of the Convention on cybercrime adopted in Budapest on 23 November 2001 (signed by Poland on the same day) and ratified directly (Journal of Laws [Dz.U.] of 2014, item 1514), and the Convention on the protection of the European Communities' financial interests adopted in Brussels on 26 July 1995, directly ratified by Poland (Journal of Laws [Dz.U.] of 2009, No. 208, item 1603).

[25] In the period 2005–2009, Polish courts issued a European arrest warrant 17 thousand times, which constitutes 31% of all EAWs issued in the entire EU; compare, M. Tomkiewicz,

Further strengthening of the process of cooperation between states resulted in the introduction of provisions concerning the development and functioning of investigation teams within conducted criminal proceedings. The mechanisms originate from the provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters adopted in Brussels and the regulations of the Second Protocol to the Convention on Mutual Assistance in Criminal Matters, adopted in Strasbourg on 20 June 1959, and, first of all, the Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams.[26]

The new form of assistance is to be an alternative to the present one, based on the Polish model of procedure, classical instrument of legal assistance internationally.[27] However, a joint investigation team alone was not known to our legal system before.[28] Moreover, the changes applied to the regulations concerning substantive criminal law.[29]

Further evolution of the process of cooperation resulted from the Council Framework Decision 2003/577/JHA of 23 July 2003 on the execution in the European Union of orders freezing property and evidence.[30] It resulted in the introduction of seizure of property or evidence based on a motion filed by other states' bodies.[31] Although the instrument was known in the Polish model of procedure, because the former regulation envisaged such a possibility based on legal assistance laid down in Chapter 62 CPC, the introduced regulation improves this procedure. Earlier, all activities were conducted on a motion of a court or a prosecutor via the Minister of Justice and the decision issued by an applicant state's body was subject to the approval of a Polish judicial body in the form of a ruling (Article 588 CPC).[32] The new mechanism stipulates that a decision issued by an applicant state's body, and not a motion and a decision of a Polish court or a prosecutor as it was before, constitutes direct grounds for the provision of legal assistance in freezing property or evidence.

The intensified process of Europeanisation led to the development of a series of successive mechanisms of cooperation. The new provisions of the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the

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Zarządzenie wykonania kary za przestępstwa stanowiące podstawę przekazania osoby ściganej w ramach Europejskiego Nakazu Aresztowania, Prok. i Pr. No. 5, 2013, p. 106.

[26] OJ EU L 162 of 20.06.2002. Its transposition to the Polish legal system took place on the basis of the Act of 16 April 2004 amending the Act: Criminal Code and some other acts, Journal of Laws [Dz.U.] of 2004, No. 93, item 889.

[27] Justification for the Bill, paper no. 2407, IV term, p. 15.

[28] For more on the teams, especially their nature, in the Polish law, see Cz.P. Kłak, *Międzynarodowe zespoły śledcze. Wybrane uregulowania międzynarodowe a ustawodawstwo polskie,* [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego,* Warsaw 2010, pp. 595–627.

[29] Especially, by the introduction of a definition of terrorist crime to Polish law and establishing a stricter penalty for organising illegal border crossing as well as the introduction of punishment for facilitating illegal stay of foreigners in the territory of the Republic of Poland in order to obtain financial or personal benefits.

[30] OJ EU L 196 of 2.08.2003.

[31] On the basis of the Act of 7 July 2005 amending the Act: Criminal Procedure Code and the Act: Misdemeanour Procedure Code, Journal of Laws [Dz.U.] of 2005, No. 143, item 1203.

[32] For more, see D. Tarnowska, *Udzielanie pomocy prawnej…*, pp. 267–272.

principle of mutual recognition to financial penalties,[33] implemented by the Act of 24 October 2008 amending the Act: Criminal Code and some other acts,[34] laid down procedural grounds for the European Union Member State's application for execution of a ruling issued in another state of the Community. A similar regulation was known in our model of criminal procedure in the form of adoption and delegation of rulings to be executed (Chapter 66 CPC). However, the former regulation stipulated that in case of receipt of a valid ruling issued in another state, the Minister of Justice, serving as a go-between in the operation, applied to a Polish court to issue a decision concerning admissibility of execution of a ruling in the territory of Poland (Article 609 CPC). A court determined in its decision the legal classification of an act in accordance with Polish law and a penalty or measure that was subject to execution and other possible solutions such as recognition of penalties or measures executed abroad.

The new mechanism introduced pursuant to the amendment is a little different in nature. It simplifies the procedure and imposes an obligation on a judicial body to execute a ruling of another state without the need to issue a formal decision determining criminal classification as well as a penalty and penal measures, while the former regulation stipulated that grounds for the execution of such a ruling in Poland should be in fact a ruling of a Polish court. The introduced solution serves de-formalisation of mechanisms in force in relation to rulings originating from the European Union Member States. The regulation concerning the execution of rulings laid down in Chapter 66 remains unchanged, thus the procedural model did not suffer from the amendment, but in addition, a new justified de-formalised instrument is now in force.[35]

Further development of cooperation resulted in the introduction of such mechanisms to the legal system that make it possible to execute confiscation orders directly based on competent courts' rulings in other European Union Member States. It was the effect of the provisions of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.[36]

As it has already been mentioned above, at the time of discussing the directives of the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, a dichotomy occurred in our legal system consisting in the simultaneous functioning of two mechanisms: the traditional one (Chapter 66) and the improved one (Chapters 66a

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[33] OJ EU L 76 of 22.03.2005, L 159M of 13.06.2006. For comparison of the above act and other framework decisions concerning mutual recognition, see S. Buczma, *Zasada wzajemnego uznawania orzeczeń między państwami członkowskimi Unii Europejskiej. Etapy kształtowania, zakres funkcjonowania i podstawowe cele*, Ius Novum No. 2, 2009, pp. 64–93.

[34] Journal of Laws [Dz.U.] 2008, No. 214, item 1344.

[35] For more, see G. Krysztofiak, *Zasada wzajemnego uznawania orzeczeń w sprawach karnych w Traktacie Lizbońskim*, Prok. i Pr. No. 7–8, 2011, pp. 190–212.

[36] OJ EU L 328 of 24.11.2006. It was implemented on the basis of the Act of 19 December 2008 amending the Act: Criminal Procedure Code and some other acts, Journal of Laws [Dz.U.] 2009, No. 8, item 39.

and 66b).[37] Until the adoption of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, the maintenance of the former model resulted in the fact that "Polish courts are obliged to ensure the implementation of an order to confiscate the property of the accused based on mutual recognition to confiscation orders, while the execution of valid and final judgements concerning confiscation of property is subject to traditional procedure of international law, for which there are no rational grounds".[38]

Moreover, in order to implement the Council Framework Decision 2006/783/JHA, Chapter 66b was added. It concerns the procedure of Polish courts application to competent courts or competent bodies of other Member States for direct execution of valid confiscation orders.

A noticeable increase in activity of the European Union legislator in the field of tightening cooperation between Member States in criminal matters resulted in the development and adoption of the Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.[39] The transposition of the provisions of the above regulation into the Polish system required, first of all, that the substantive criminal law be amended.[40]

In accordance with the regulation of judicial proceedings, it was necessary to enable a Polish court adjudicating on the execution of an EAW issued in order to execute the penalty of deprivation of liberty not only to determine legal classification of an act in accordance with Polish law but also, in some situations, to administer a penalty subject to execution.[41]

The adopted regulation stipulates that in a situation when a penalty or a measure adjudicated by a judicial body of a state of EAW issue exceeds the maximum statutory penalty pursuant to the Polish law, a court determines a penalty or measure to be executed in accordance with the Polish law and the maximum statutory level taking into consideration the period of actual deprivation of liberty abroad and the penalty or measure served there (Article 607s CPC). The adoption of such a solution is not in conflict with the provision of the Council Framework Decision of 2002.[42]

Regular development of mechanisms of cooperation resulted, however, in considerable differences in the way of their application. Improvement of some aspects of international cooperation in criminal matters required some adjustment because judgements in the absence of one state that were subject to execution in another state were not always binding on the latter. Thus, on 26 February 2009, the Council issued Framework Decision 2009/299/JHA amending Council Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and

[37] See, R. Kierzynka, *Wzajemne uznawanie kar o charakterze pieniężnym*, Europejski Przegląd Sądowy No. 8, 2009, pp. 13–19.

[38] Justification for the Bill, paper no. 894, VI term, p. 6.

[39] OJ EU L 220 of 15.08.2008.

[40] Inter alia, Articles 92a, 107a, 114a Criminal Code were amended.

[41] Justification for the Bill, paper no. 3597, VI term, p. 2.

[42] For more, see *ibid.*, pp. 29–45.

2008/947/JHA, thereby enhancing procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.[43]

It is necessary to remind that in accordance with the assumptions of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States constituting Chapters 65a and 65b CPC, in a situation when a judgement is issued in the absence (called *in absentia*), recognition of the judgement in another state depends on the guarantees of the state of issue that it will ensure an opportunity to file a motion to re-examine a matter and to be present when the judgement is issued in that state.

On the other hand, the Council Framework Decision 2005/214/JHA of 24 February 2005 on the mutual recognition to financial penalties and the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders contained a regulation in accordance with which the issue of a decision in the absence of the accused constituted facultative grounds for refusal to recognise the final decisions issued in other Member States because of the failure to ensure procedural guarantees. Thus, the conditions for the issue of a judgement *in absentia* were regulated in a different way.[44] That is why, the adopted regulation aimed at standardising the provisions in force so that it established a rule that the issue of a judgement in the absence of the accused constitutes facultative conditions for refusal to recognise such a decision. At the same time, the criteria for precluding the issue of a judgement *in absentia* were consolidated.

Further activity in the field of strengthening cooperation resulted in other legal changes. Those were the addition of two new chapters to the Criminal Procedure Code: Chapter 66f concerning a Polish court request that another Member State execute a custodial sentence; and Chapter 66g regulating the matter of another Member State requesting execution of a custodial sentence in the territory of Poland, in accordance with the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty.[45]

Next, pursuant to the Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements and probation decisions with a view to the suspension of probation measures and alternative sanctions,[46] two successive chapters were introduced to the procedure

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[43] OJ EU L 81 of 27.03.2009. It was implemented to the Polish legal system on the basis of the Act of 29 July 2011 amending the Act: Criminal Code, the Act: Criminal Procedure Code and the Act on liability of collective entities for prohibited acts carrying a penalty, Journal of Laws [Dz.U.] of 2011, No. 191, item 1135.

[44] Justification for the Bill, paper no. 3597, VI term, p. 6.

[45] OJ EU L 327 of 5.12.2008. It was implemented on the basis of the Act of 16 September 2011 amending the Act: Criminal Procedure Code, the Act on the Public Prosecution Service and the Act on the National Criminal Record, Journal of Laws [Dz.U.] 2011, No. 240, item 1430.

[46] OJ EU L 337 of 16.12.2008. It was implemented on the basis of the Act of 16 September 2011 amending the Act: Criminal Procedure Code, the Act on the Public Prosecution Service and the Act on the National Criminal Record, Journal of Laws [Dz.U.] 2011, No. 240, item 1430.

of international cooperation: Chapter 66h regulating proceedings in case a Polish court requests a Member State to execute a custodial sentence with a conditional suspension of its execution, a penalty of limitation of liberty, an independent penal measure and a decision on conditional release and conditional discontinuation of criminal proceedings; and Chapter 66i regulating the procedure of a Polish court in case of requesting a Member State to execute a judgement on probation.[47] The former model of adopting and referring judgements to execution based on the provisions of Chapter 66 CPC did not ensure full implementation of standards laid down in the Council Framework Decisions of 27 November 2008: 2008/783/JHA and 2008/947/JHA. The European regulation requests a change in the method of surrendering convicts from the traditional legal assistance to mutual recognition to judgements. A potential refusal to execute a decision to surrender a convict, although it is admissible, was possible only in enumerated cases. An additional proposal, which was not adopted in the Polish procedure before, resulted from the necessity of eliminating the intermediary role of an executive body, the Minister of Justice. Courts and other competent bodies should contact each other independently of central authorities. This way, the successive proposal of the European regulation to eliminate a state's consent to execute a sentence is indirectly approved of. However, it is not an absolute condition because the necessity of obtaining a state's consent is admitted in case of surrendering a convict to another state different from the state of which a convict is a citizen and in which he resides or to which he would be expelled (Article 611ta CPC). The efficiency of the whole procedure also requires that the conditions for a convict's consent be limited (Article 611t §5 CPC), and binding deadlines be determined for taking a decision on a sentence recognition and execution of a penalty, which was laid down to be 90 days (Article 611tj §3 CPC), and in case of a convict's transfer, to be 30 days (Article 611tf §1 CPC).[48]

The development of close cooperation in the field of criminal prosecution requires new instruments ensuring its efficient implementation, also in situations of potential conflicts between proceeding bodies. In accordance with the assumptions adopted in autumn 2009,[49] the mechanism of preventing and solving jurisdictional disputes, first of all, consists in the rule of mandatory liaison and an obligation to respond to a request and start direct consultations.[50] Very often, former contacts with other states' law enforcement bodies may help to avoid unnecessary concentration.

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[47] Moreover, the amendment aimed to introduce directives concerning cooperation between the Polish Prosecution Service and the European Union body, Eurojust, which on the basis of the Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending the Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, was strengthened and obtained a new extended structure based on coordinated activities in the European Union Member States.

[48] Justification for the Bill, paper no. 4583, VI term, pp. 5–8.

[49] On the basis of the Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (OJ EU L 328 of 15.12.2009), and the Council Framework decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ EU L 294 of 11.11.2009), which were transposed to the Polish legal system on the basis of the Act of 31 August 2012 amending the Act: Criminal Procedure Code, Journal of Laws [Dz.U.] of 2012, item 1091.

[50] Justification for the Bill, paper no. 492, VII term, pp. 4–5.

Former Polish provisions of Chapter 63 CPC concerning the procedure of taking over and forwarding prosecution did not envisage the above-mentioned mechanism preceding this stage of taking over and forwarding.[51] The change introduced by the amendment of 31 August 2012 consists in the introduction of a new instrument that makes it possible to establish contacts between judicial bodies of Member States before the stage of taking over and forwarding prosecution.[52]

With this solution, it was decided to accept the earlier proposals concerning procedural cooperation between Member States, i.e. the obligatory go-between function of the Minister of Justice was abolished and a court or a prosecutor was authorised to deal with the matter directly (Article 592a §1 CPC). A relatively short time limit for a response was also established as it was laid down that it must be done without delay, unless it was stipulated otherwise (Article 592b §1 CPC) and the possibility of refusing to provide information was limited to two situations: a breach of security of the Republic of Poland or exposure of a party to the proceedings to a threat to one's life or health (Article 592c §3 CPC).

Apart from the consultation mechanism, a new instrument of judicial cooperation in criminal matters was introduced to the Polish legal system, which made it possible to forward supervision over non-custodial preventive measures to the state of permanent residence of the accused. To that end, two new Chapters were introduced: 65c entitled "Requesting the European Union Member State to administer a preventive measure" and 65d enabling the EU Member State to request the execution of a decision issued in order to ensure an appropriate course of proceedings. The regulation of Chapter 65c applies to a situation in which a Polish court or a prosecutor strive for the administration of a preventive measure and the judicial bodies of a Member State are the addressees of that request. On the other hand, the next Chapter 65d contains norms regulating a Member State competent body's request to administer a preventive measure in Poland. The above instruments make it possible to efficiently monitor the movement of the accused who, residing in one state and being accused in another state, may be monitored by competent bodies of that state. At the same time, they promote non-custodial preventive measures making it possible to mutually monitor undertaken means of supervision.[53]

Summing up, most of a dozen amendments to the Criminal Procedure Code resulting from the influence of the EU legislation were aimed at introducing new mechanisms to the Polish legal system. These include, first of all, the European arrest warrant (Chapters 65a and 65b CPC), legal assistance through the establishment of joint investigation teams (Articles 589b to 589f CPC), assistance in evidence-related proceedings (Chapters 62a and 62b CPC), assistance in the administration of a preventive measure (Chapters 65c and 65d CPC), and cooperation in the execution of judgements, especially a penalty of deprivation of liberty (Chapters 66f and 66g CPC), execution of penalties with view to probation (Chapters 66h and 66i CPC), and execution of financial sentences (Chapters 66a and 66b CPC) and forfeiture sentences (Chapters 66c and 66d CPC).

[51] *Ibid.*, p. 5.

[52] See, A. Górski, K. Michalak, *Przejęcie i przekazanie ścigania karnego…*, pp. 33–37.

[53] See, Preamble to the Council Framework Decision 2009/829/JHA, OJ EU L 294 of 11.11.2009.

Each of the above mechanisms, with some exceptions established because of a given instrument's purposefulness, is characterised by the same features aimed at improving and de-formalising cooperation between the European Union Member States. Classical instruments of the Polish criminal law regulation are insufficient to implement those features. That is why, there is a need to introduce new mechanisms of the EU cooperation to the former procedural model.

The proposal to eliminate the executive power as a go-between in cooperation and authorising proceeding bodies, i.e. a court and a prosecutor, to act directly should be treated as a feature of the discussed instruments. Excluding the Minister of Justice from this cooperation, on the one hand, releases justice administration bodies from potential political pressure (because their activities depend on the decisions made by the executive power) and, on the other hand, considerably accelerates cooperation of judicial bodies from different Member States.

A successive proposal concerns the speed of acting within the cooperation. Each mechanism requires that another state's body requested to implement a particular task or to provide assistance implement it without delay, within the bounds of possibility in 24 hours (e.g. Article 589g §3 CPC, Article 589n §1, Article 589p §1, Article 611fu §3 CPC) or within another determined time limit (e.g. Articles 607m, 607n, 607zj §§1 and 3). Such a solution facilitates and accelerates cooperation and results in other benefits, e.g. by eliminating lengthiness of proceedings protects the interests of the parties to the proceedings.

The EU legislator also aims at the most complete improvement of assistance possible. Although, in general, it thoroughly enumerates the method, aim and nature of the undertaken activities in every mechanism, it uses instruments that make it possible to deal with a matter in a reliable and appropriate way, and quickly at the same time. The obligation to add information allowing appropriate performance of an activity or provision of assistance to a motion filed to a foreign state's body (e.g. Articles 611fn §5, 611fu § 2, 611ff §2, 611fa §3, 607zh §2, 607zd §4 CPC) and an obligation to translate the documents into the official language of the state where the activity is performed or assistance provided or another language indicated by this state (e.g. Articles 589g §6, 607zd §5, 611fa §4, 611fn §6 CPC) may serve as examples.

The limitation of a possibility of refusing to perform an activity or provide assistance is an additional advantage improving the functioning of the mechanisms introduced to the Polish legal system. Most of the mechanisms have enumerated obligatory conditions for refusal to undertake action (e.g. Articles 589m §1, 607zk §1, 611b §1, 611fw §1 CPC). Apart from them, there are usually conditions for facultative contestation of assistance (e.g. Articles 607zk §3, 611fg, 611fw §§2 and 3 CPC). Positive conditions for undertaking activities are also established with the application of a general condition, which is the interest of the administration of justice (Articles 592c §1, 592d §2, 607b CPC).[54]

[54] The application of a general condition of the interest of the administration of justice was known in the former statutory model, especially in relation to international cooperation (Article 590 §1(4), 591 §2, 592 §§1 and 3 CPC), so it is not a novelty in the Polish procedure model.

The above-presented instruments, on the one hand, facilitate the mode of assistance provided, because they protect against total freedom and arbitrariness of a state in its refusal to perform activities or provide assistance and, on the other hand, serve a state that is requested to perform given activities so that it can refuse other countries' requests that pose a threat to the interest of justice or act against the interest of this state.

3. THE ISSUE OF SYSTEMIC PLACEMENT OF THE PROVISIONS CONCERNING INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

The analysis of the normative impact of cooperation between Member States in criminal matters shows that the EU legislator has serious problems with systemic reasoning, while developing the institutional basis for cooperation. The lack of regularity and succumbing to political pressure[55] as well as short-term temporary aims resulted in a considerable bewilderment in the whole system of cooperation in criminal matters. As a result of the latest transposition of the EU legislative outcomes, non-homogenous regulation within Section XIII CPC was developed, which cannot be described in terms of systemic coherence. It is absolutely necessary to come back to proposals put forward some time ago to exclude the regulation concerning international cooperation in criminal matters from the regulations of the Criminal Procedure Code and develop a separate legal act.[56]

A comparative analysis of the place of regulations concerning international cooperation in Europe conducted by S. Steinborn[57] shows that we deal with three different models of approach to the considered problem. The first model, typical of inter alia Poland, Lithuania or Russia, assumes placement of regulations concerning international relations within a criminal procedure code. It is the most common model in Europe. The second one assumes that the matter of international cooperation is regulated, as a rule, in one single legal act of national law,[58] however, separate from a criminal procedure code. It is especially typical of German-speaking countries: Germany, Switzerland and Austria. The third model, most popular with the EU Member States, including Belgium, the UK and Scandinavian countries, assumes regulation of international cooperation, as a rule, outside a criminal procedure

[55] A. Górski, *Europeizacja procesu karnego…*, p. 186.

[56] Compare, M. Płachta, *Status i pojęcie…*, p. 14 ff; P. Hofmański, A. Sakowicz, *Reguły kolizyjne w obszarze międzynarodowej współpracy w sprawach karnych*, PiP No. 11, 2006, p. 42; S. Steinborn, *O potrzebie uchwalenia ustawy o międzynarodowej współpracy w sprawach karnych*, [in:] J. Jakubowska-Hary, C. Nowak, J. Skupiński (ed.), *Reforma prawa karnego. Propozycje i komentarze. Księga pamiątkowa Profesor Barbary Kunickiej-Michalskiej*, Warsaw 2008, pp. 436–450.

[57] S. Steinborn, *O potrzebie uchwalenia ustawy…*, pp. 439–445.

[58] In Hungary, belonging to this group, there are two legal acts regulating international cooperation in criminal matters: one general in nature, and the other regulating cooperation between the European Union Member States; a similar situation is observed in Austria, where there is an additional third act regulating cooperation with international courts. See, S. Steinborn, *O potrzebie uchwalenia ustawy…*, p. 442.

code,[59] but differs from the second model because each instrument is transposed to the national system in a separate legal act developed *ad hoc.*

The choice of an optimal model for our domestic regulation requires, first of all, determining whether the whole regulation of international cooperation should be kept within a criminal procedure code or whether it would be purposeful to transfer it to a separate act.

First of all, the nature of criminal proceedings in matters related to international relations must be determined. It is necessary to make a certain distinction that will help to determine it. The nature of proceedings typical of a state requesting assistance is different from proceedings typical of a state requested to provide assistance. While in case of the former, the proceedings under international cooperation will be auxiliary, ancillary, in relation to the main proceedings,[60] in case of the latter they will be the main proceedings. However, as M. Płachta indicates, it does not mean that they will be assigned a status of criminal proceedings.[61] Recognition of the proceedings in matters concerning international assistance provided by a state requested as criminal ones requires Article 1 CPC in the Polish legal system. As the legislator decided to incorporate international cooperation in criminal matters into CPC, the cooperation is subject to general provisions, thus also Article 1, the literal interpretation of which requires that it be assumed that matters subject to judicial proceedings and proceeded pursuant to the CPC provisions belong to the category of criminal proceedings. Thus, it is each time necessary to meet procedural guarantees typical of criminal procedure. However, the Constitution of the Republic of Poland indicates in Article 91 that a ratified international agreement after promulgation thereof in the Journal of Laws (Dziennik Ustaw, Dz.U.) constitutes part of the domestic legal system and must be applied directly, and moreover, it has precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. In addition, CPC itself, in Article 615 §1, gives the application of the provisions of ratified international agreements precedence in the event of a conflict with statutory regulations.

In the face of the above facts, it is necessary to place the proceedings in criminal matters within international relations in the category of criminal proceedings. However, because of their specificity, one should warn against "applying criminal procedure regulations automatically".[62] Such an approach to the issue makes it possible to exclude the provisions concerning international cooperation in criminal matters from the Criminal Procedure Code because if one warns against applying criminal procedure provisions automatically, it is not necessary to include this type of matters in codified systems.

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[59] It is different in the Netherlands where the regulation of cooperation is partly done by the criminal procedure code and, partly, it is introduced to the national legal system by separate acts in the course of development of new forms of cooperation. See, S. Steinborn, *O potrzebie uchwalenia ustawy…*, p. 443.

[60] S. Steinborn, *O potrzebie uchwalenia ustawy…*, p. 445.

[61] M. Płachta, *Przekazywanie skazanych pomiędzy państwami*, Kraków 2003, pp. 209–210.

[62] S. Steinborn, *O potrzebie uchwalenia ustawy…*, p. 446.

Secondly, the increase in legislative activity of the European Union legislative bodies and the resulting process of better adaptation of many new solutions within cooperation between Member States in criminal matters caused enormous growth of the provisions of Section XIII CPC. At the same time, unfortunately for the general coherence of the act, the provisions concerning exclusive cooperation between the EU Member States were placed within the former regulations concerning classical assistance. This way, the regulations on classical assistance were mixed up with the regulations involving exclusively the European Union Member States. It is in conflict with the ideas behind cooperation in criminal matters within the process of Europeanisation, i.e. abandonment or considerable limitation of classical methods of international cooperation.[63]

Thirdly, the structure of the present Section XIII CPC inspires introduction of fundamental changes. Before the beginning of the process of transposition of the European Union law, the provisions regulating the procedure in criminal matters in international relations were laid down in the total of seven chapters, including 37 articles. At present, there are 24 chapters composed of almost 200 articles. Moreover, the regulation is inconsistent and lacks systemic coherence. In fact, it constitutes a group of provisions gathered together in a chaotic way. Its incoherence is mainly reflected in the arrangement of Section XIII, where as many as four successive chapters use the same marking of Article 607 with one or two-letter symbols added to it, and the twelve successive chapters use the marking of Article 607 with one, two or three-letter symbols added. This results in considerable editorial difficulties and is in conflict with a call for clarity and systemic coherence of regulations.[64] As a consequence, the text is not clearly legible and raises interpretational doubts. In addition, as it has already been indicated, the majority of the instruments of international cooperation between the European Union Member States have some features in common, which, in case of every chapter regulating a separate mechanism of proceedings under international assistance, are duplicated automatically, which leads to excessive growth of the normative content. The lack of organised arrangement within the system of international cooperation becomes a key argument for the exclusion of the regulation from the Criminal Procedure Code and its transfer to a separate legal act. This step would make it possible to formulate a general part, common for all mechanisms of cooperation, based on the features enumerated in this paper, which would allow the segregation of particular instruments and give them the features of model coherence.

Fourthly, the rules of the legislative technique formulated by the legislator constitute a key motive for the exclusion of the regulation of international relations in criminal matters from the Criminal Procedure Code. The principle of a democratic state governed by the rule of law results in the legislator's obligations expressed in the necessity of saturating the enacted law with democratic values, on the one hand, and basing the whole process of development, interpretation and application

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[63] *Ibid.*, p. 447.

[64] Compare, §60(1) Annex to the Regulation of the President of the Council of Ministers of 20 June 2002 on "Rules of legislative technique", Journal of Laws [Dz.U.] 2016, item 283, uniform text.

of law on democratic regimes, on the other hand.[65] In this context, it is extremely important to comply with the rules defined as the principles of decent legislation. The starting point is the principle of the protection of citizens' trust in the state, sometimes called a rule of the state's loyalty towards citizens.[66] It requires that a state body treat citizens with the minimum rules of honesty.[67] The Constitutional Tribunal abundant case law helps to precisely define the rules of the principle of trust as well as ones of decent legislation.[68]

Apart from the above-mentioned rules, there are rules of the legislative technique connected with them,[69] which should be understood as a set of purposefulness-related directives indicating a proper way of editing a legal text.[70] The rules are referred to in connection with other issues, including the principle of legal certainty (well-defined law), the principle of decent legislation, editing provisions delegating powers, law interpretation and validation.[71] Thus, referring to all those rules, i.e. the principle of citizens' trust in the state bodies, the principle of good law and the principle and rules of the legislative technique, is absolutely necessary in this context. The way in which Section XIII CPC should be amended must be based on the above observations because the maintenance of the legal system coherence is absolutely indispensable.[72] Thus, changes aimed at organised arrangement of the area of international cooperation in criminal matters must be recognised as imperative. Drafting a separate legal act and transferring the provisions of Section XIII CPC to it seems to be the only step to achieve the indicated aim. Concern about the legal system coherence is a priority,[73] and the transfer of the regulations to a separate act is possible and even desired if it leads to undisturbed transformation.

The idea of a new codification is right because of a considerable number of amendments to the regulation of Section XIII CPC of 1997 and it would be nothing else but the implementation of legal provisions, i.e. §84 of Annex to Regulation

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[65] T. Górzyńska, *Zasada praworządności i legalności*, [in:] W. Sokolewicz (ed.), *Zasady podstawowe polskiej Konstytucji*, Warsaw 1998, p. 94.

[66] L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warsaw 2002, p. 63.

[67] *Ibid*., p. 63.

[68] For more on the influence of case law on the shape of those rules see, inter alia: Z. Czeszejko-Sochacki, *Zasady techniki prawodawczej w orzecznictwie Trybunału Konstytucyjnego,* PL No. 2, 1997, p. 103 ff; K. Działocha, T. Zalasiński, *Zasada prawidłowej legislacji jako podstawa kontroli konstytucyjności prawa*, PL No. 3, 2006; S. Wronkowska, *Zasady przyzwoitej legislacji w orzecznictwie Trybunału Konstytucyjnego*, [in:] *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, Warsaw 2006; T. Zalasiński, *Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego*, Warsaw 2008; J. Zaleśny, *Zasady prawidłowej legislacji*, [in:] J. Błuszkowski, J. Zaleśny (ed.), *Oblicza polityki*, Warsaw 2009, and others.

[69] The rules were defined in the Constitutional Tribunal case law as "a praxeological canon which should be respected in a democratic state governed by the rule of law"; see, Constitutional Tribunal judgement of 21 March 2001, K 24/00, OTK 2001/3/51.

[70] O. Bogucki, A. Choduń, *Zasady techniki prawodawczej w orzecznictwie Trybunału Konstytucyjnego w odniesieniu do zasady demokratycznego państwa prawnego*, [in:] M. Aleksandrowicz, A. Jamróz, L. Jamróz (ed.), *Demokratyczne państwo prawa. Zagadnienia wybrane*, Białystok 2014, pp. 46–47.

[71] *Ibid*., p. 46.

[72] For more, see Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Warsaw 2003, p. 332 ff.

[73] *Ibid*., p. 440 ff.

of the President of the Council of Ministers of 20 June 2002 concerning "Rules of legislative technique".[74] The act lays down conditions for the requirement of a new statute in case amendments to the existing one are numerous or damage its structure or coherence, or in the event the statute has been already amended many times.

As far as the first point is concerned, it concerns limitation of the frequency of amendments to an act. Over the period of 20 years of the CPC of 1997 being in force, the provisions of Section XIII have been amended 18 times, including the adoption of the EU rules of cooperation 12 times. However, what is important, each amendment resulting from the necessity of transposing the EU law served not the change in the provisions in force but enactment of new mechanisms simplifying and de-formalising the existing ones. The original 37 editorial units were extended by over 500%, which is an unprecedented phenomenon in case of the whole Code.

The second condition laid down in §84 of "Rules of legislative technique" concerns the issue of a new statute in a situation when the introduction of amendments damages coherence of an act. The above-mentioned arguments concerning the lack of systemic coherence correspond to the indicated condition. The difficulty with looking through Section XIII CPC caused by multi-letter marking of articles, numerous repetitions of a matter in relation to many mechanisms, the lack of clearly distinguished general part of Section XIII show serious limitation to coherence of the regulation concerned.

In addition, the above-mentioned rules of the legislative technique require abandonment of amendments and development of a new statute in a situation when the former has been amended many times. It should be indicated that until the moment the latest amendment to Section XIII CPC was made,[75] CPC had been amended 79 times.[76] This number in relation to the whole statute meets the condition of numerous amendments as this means that there were on average five amendments per year, which S. Waltoś rightly summed up pointing out that: "systemic reasoning was not the strongest side of Polish legislation".[77] With respect to Section XIII originally having 37 articles, with 18 amendments, the number of changes unambiguously advocates the development of a new statute.

Apart from that, it is necessary to determine whether it is purposeful to develop one act or to transpose the provisions of individual framework decisions in single acts. In a situation where 12 acts of the EU law were transposed to our legal system, it becomes purposeful to propose a uniform common act. Firstly, this will make it possible to systematise the norms that were put together in a chaotic way and develop a coherent system of law on international cooperation in criminal matters,

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[74] Journal of Laws [Dz.U.] of 2002, No. 100, item 908.

[75] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings transposed to the Polish legal system by the Act of 31 August 2012 amending the Act: Criminal Procedure Code, Journal of Laws [Dz.U.] of 2012, item 1091.

[76] From the moment the Act: Criminal Procedure Code of 1997 entered into force till 31 August 2012 there were 63 amendments to it and the Constitutional Tribunal judged 16 times that its provisions were in conflict with the Constitution.

[77] S. Waltoś, *W dziesięciolecie obowiązywania kodeksu postępowania karnego*, PiP No. 4, 2009, p. 18.

which will allow formulating a coherent, legible regulation that would limit potential problems with interpretation. A comprehensive and uniform collection of rules of cooperation may turn out to be especially helpful for judicial bodies, which either must provide or obtain assistance and, at the same time, will simplify the whole procedure. Secondly, the solution will allow transformation of the former regulation so that it will be possible to determine a general part common for the whole subject matter and special detailed provisions for each of the instruments concerned. Thirdly, it will be useful in the implementation of potential new rules of cooperation creating an obvious place for their transposition.

In the above context, it is necessary to determine whether it is essential to enact a separate statute regulating cooperation with the European Union Member States exclusively or whether it is purposeful to develop a complex statute regulating international cooperation as a whole. As it has been indicated, international cooperation in criminal matters between the European Union Member States is governed by different rules from classical cooperation, although, undoubtedly, both concern the same scheme of providing assistance. The general rule, Article 615 §2 CPC, based on the Constitution,[78] laying down the principle of subsidiarity covering the whole Section XIII CPC,[79] gives primacy to the provisions of international agreements in case of their collision with the provisions of this section. This leads to certain inconsistency because the area of instruments of international cooperation within the EU, based on framework decisions which cannot be recognised as international agreements, matches, as it has been mentioned above, the mechanisms of classical cooperation that originate from international agreements adopted by the Council of Europe. Article 615 §2 stipulates that, in case of a conflict between the two systems of assistance, the EU one and the classical one, the classical cooperation has primacy, provided that it is based on an international agreement.[80] It is hard to reconcile it with the general assumption that the EU mechanisms should depart from or even abandon classical instruments of cooperation for the purpose of creating "more efficient and advanced forms".[81]

However, the above is not an obstacle to regulating the classical and EU cooperation in one statute. The only condition is the application of adequate taxonomy taking into consideration the conditions of proper selection and use of appropriate forms of cooperation. Otherwise, i.e. in the event of enacting the regulations in two separate statutes, it would be necessary to duplicate some provisions, which in the future might trigger additional conflicts resulting from concurrence of a regulation of the two forms of cooperation.[82]

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[78] See, the Supreme Court ruling of 14 January 2004, V KK 319/03, OSNKW 2004, issue 3, item 27.

[79] S. Steinborn, *O potrzebie uchwalenia ustawy…*, p. 447.

[80] For more on the inconsistency, see P. Hofmański, A. Sakowicz, *Reguły kolizyjne…*, pp. 29–43.

[81] Justification for the government Bill amending the Act: Criminal Code, the Act: Criminal Procedure Code and the Act: Misdemeanour Code, paper no. 2031.

[82] S. Steinborn, *O potrzebie uchwalenia ustawy…*, p. 448.

Moreover, the features of cooperation instruments indicated in this paper perfectly match the above-proposed process of excluding the regulations of Section XIII CPC and transferring them to a separate statute. They may constitute an outline of a general part of the future act specifying a general model of cooperation, supplemented with detailed constructions of adopted mechanisms.

The exclusion of regulations of Section XIII from CPC and transferring them to a separate statute is a perfect proposal for the legislator. Although such steps will not stop accruing problems,[83] they will certainly contribute to unification of the existing regulations and make it possible to systematise the whole scope of the EU legislation implemented to the Polish legal system in a coherent and orderly system. Otherwise, if the nature and pace of changes remain the same, as M. Płachta predicts, "with time, the amount of Section XIII CPC will account for the volume of the rest of the Code".[84]

BIBLIOGRAPHY

Biernat T. (ed.), *Europeizacja prawa*, Kraków 2008.

Bogucki O., Choduń A., *Zasady techniki prawodawczej w orzecznictwie Trybunału Konstytucyjnego w odniesieniu do zasady demokratycznego państwa prawnego*, [in:] M. Aleksandrowicz, A. Jamróz, L. Jamróz (ed.), *Demokratyczne państwo prawa. Zagadnienia wybrane*, Białystok 2014.

Buczma S., *Zasada wzajemnego uznawania orzeczeń między państwami członkowskimi Unii Europejskiej. Etapy kształtowania, zakres funkcjonowania i podstawowe cele*, Ius Novum No. 2, 2009.

Czeszejko-Sochacki Z., *Zasady techniki prawodawczej w orzecznictwie Trybunału Konstytucyjnego,* PL No. 2, 1997.

Czeszejko-Sochacki Z., *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Warsaw 2003.

Działocha K., Zalasiński T., *Zasada prawidłowej legislacji jako podstawa kontroli konstytucyjności prawa*, PL No. 3, 2006.

Garlicki L., *Polskie prawo konstytucyjne. Zarys wykładu*, Warsaw 2002.

Gostyński Z., *Przekazanie i przejęcie ścigania karnego*, [in:] A.J. Szwarc (ed.), *Przestępczość przygraniczna. Postępowanie karne przeciwko cudzoziemcom w Polsce*, Poznań 2000.

Górski A., *Sądząc europejski nakaz aresztowania. O konstytucyjnych granicach integracji europejskiej w sprawach karnych*, [in:] P. Hofmański (ed.), *Aktualne problemy procesu karnego*, Warsaw 2009.

Górski A., *Europeizacja procesu karnego*, [in:] P. Hofmański (ed.), *System Prawa Karnego Procesowego*, Vol. I, part 2, Warsaw 2013.

Górski A., Michalak K., *Przejęcie i przekazanie ścigania karnego jako instrumenty rozstrzygania konfliktów jurysdykcyjnych – uwagi do regulacji k.p.k.*, EP No. 6, 2015.

Górzyńska T., *Zasada praworządności i legalności*, [in:] W. Sokolewicz (ed.), *Zasady podstawowe polskiej Konstytucji*, Warsaw 1998.

Grzelak A., *Unia Europejska a prawo karne*, Warsaw 2002.

Hofmański P., Sakowicz A., *Reguły kolizyjne w obszarze międzynarodowej współpracy w sprawach karnych*, PiP No. 11, 2006.

Hudzik M., *Przejęcie skazania – węzłowe zagadnienia i problemy w stosowaniu instrumentów prawnomiędzynarodowych*, [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (ed.), *Interpretacja prawa międzynarodowego i unijnego w sprawach karnych*, Jachranka 2006.

[83] Compare, P. Hofmański, A. Sakowicz, *Reguły kolizyjne…*, p. 30 ff.

[84] M. Płachta, *Status i pojęcie…*, p. 14 (see, footnote no. 18).

Jachimowicz M., *Immunitet zakrajowości w procesie karnym*, PS No. 11–12, 2004.
Jachimowicz M., *Immunitet dyplomatyczny w procesie karnym*, WPP No. 3, 2007.
Jachimowicz M., *Przeszukanie pomieszczeń przedstawicielstw dyplomatycznych i placówek konsularnych*, Jur. No. 8, 2007.
Janczur E., *Przejęcie i przekazanie ścigania karnego*, Prok. i Pr. No. 5, 1999.
Kierzynka R., *Przekazywanie skazanych na karę pozbawienia wolności w Europie*, Ius Novum No. 2, 2009.
Kierzynka R., *Wzajemne uznawanie kar o charakterze pieniężnym*, Europejski Przegląd Sądowy No. 8, 2009.
Kłak Cz.P., *Międzynarodowe zespoły śledcze. Wybrane uregulowania międzynarodowe a ustawodawstwo polskie*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warsaw 2010.
Kolasiński B., *Pomoc prawna i doręczenia w postępowaniu karnym przeciwko cudzoziemcom*, [in:] A.J. Szwarc (ed.), *Przestępczość przygraniczna. Postępowanie karne przeciwko cudzoziemcom w Polsce*, Poznań 2000.
Kołodziejski P., *Doręczenia w obrocie międzynarodowym w sprawach karnych*, Prok. i Pr. No. 4, 2012.
Kruk K.A., *Zgoda pokrzywdzonego na przekazanie ścigania*, Prok. i Pr. No. 3, 2002.
Krysztofiak G., *Zasada wzajemnego uznawania orzeczeń w sprawach karnych w Traktacie Lizbońskim,* Prok. i Pr. No. 7–8, 2011.
Kuczyńska H., *Wybrane problemy przekazywania skazanych na tle orzecznictwa Sądu Najwyższego,* Pal. No. 9–10, 2006.
Nepera A., *Przekazanie ścigania karnego – sposób realizacji karnej jurysdykcji państwa bądź odstąpienia od niej*, Acta UWr. Prz. Prawa i Admin. No. 66, 2005.
Pacześniak A., Riedel R., *Europeizacja – mechanizmy, wymiary, efekty*, Toruń 2010.
Paluszkiewicz H., Janusz B., *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Materiały do konwersatoriów*, Vol. 3, Poznań 2006.
Płachta M., *Przekazywanie skazanych pomiędzy państwami*, Kraków 2003.
Płachta M., *Status i pojęcie międzynarodowego prawa karnego*, Prok. i Pr. No. 5, 2009.
Steinborn S., *O potrzebie uchwalenia ustawy o międzynarodowej współpracy w sprawach karnych*, [in:] J. Jakubowska-Hary, C. Nowak, J. Skupiński (ed.), *Reforma prawa karnego. Propozycje i komentarze. Księga pamiątkowa Profesor Barbary Kunickiej-Michalskiej*, Warsaw 2008.
Steinborn S., *Zasady międzynarodowej i europejskiej współpracy w sprawach karnych*, [in:] P. Hofmański (ed.), *System Prawa Karnego Procesowego*, Vol. III, part 2, Warsaw 2014.
Sutor J., *Immunitet dyplomatyczny i immunitet państwa*, PS No. 4, 2008.
Tarnowska D., *Udzielanie pomocy prawnej organom procesowym państw obcych przez polskie sądy i prokuratorów (art. 588 k.p.k.) jako przejaw suwerenności państwa polskiego*, [in:] I. Gawłowicz, I. Wierzchowiecka (ed.), *Koncepcja suwerenności. Zbiór studiów*, Warsaw 2005.
Tarnowska D., *Immunitety zakrajowości jako wyłączenie jurysdykcji polskich sądów karnych wobec przedstawicieli dyplomatycznych i konsularnych państw obcych (art. 578–584 k.p.k.)*, [in:] T. Grzegorczyk (ed.), *Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tylmana*, Warsaw 2011.
Tomkiewicz M., *Zarządzenie wykonania kary za przestępstwa stanowiące podstawę przekazania osoby ściganej w ramach Europejskiego Nakazu Aresztowania*, Prok. i Pr. No. 5, 2013.
Trzcińska J., *Europejski nakaz aresztowania a ekstradycja*, Prok. i Pr. No. 6, 2004.
Walczak-Żochowska A., *Współpraca sądowa w sprawach karnych*, [in:] B.T. Bieńkowska, D. Szafrański (ed.), *Europeizacja prawa polskiego – wybrane aspekty*, Warsaw 2007.
Waltoś S., *Proces karny. Zarys sytemu*, Warsaw 2009.
Waltoś S., *W dziesięciolecie obowiązywania kodeksu postępowania karnego,* PiP No. 4, 2009.

Wronkowska S., *Zasady przyzwoitej legislacji w orzecznictwie Trybunału Konstytucyjnego*, [in:] *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, Warsaw 2006.
Zalasiński T., *Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego*, Warsaw 2008.
Zaleśny J., *Zasady prawidłowej legislacji*, [in:] J. Błuszkowski, J. Zaleśny (ed.), *Oblicza polityki*, Warsaw 2009.

Legal regulations

European law

Convention on the protection of the European Communities' financial interests adopted in Brussels on 26 July 1995, directly ratified by Poland, Journal of Laws [Dz.U.] of 2009, No. 208, item 1603.
Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, adopted in Brussels, 2000/C 197/01.
Convention on cybercrime adopted in Budapest on 23 November 2001, signed by Poland and ratified directly, Journal of Laws [Dz.U.] of 2014, item 1514.
Treaty on the functioning of the European Union of 30 April 2004, OJ EU C 202 of 7.06.2016, Journal of Laws [Dz.U.] of 2004, No. 90, item 862/2.

Council of the European Union decisions

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, OJ EU L 190 of 18.07.2002.
Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, OJ EU L 162 of 20.06.2002.
Council Framework Decision 2003/577/JHA of 23 July 2003 on the execution in the European Union of orders freezing property and evidence, OJ EU L 196 of 2.08.2003.
Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ EU L 76 of 22.03.2005, L 159M of 13.06.2006.
Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ EU L 328 of 24.11.2006.
Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ EU L 220 of 15.08.2008.
Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty, OJ EU L 327 of 5.12.2008.
Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements and probation decisions with a view to the suspension of probation measures and alternative sanctions, OJ EU L 337 of 16.12.2008.
Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending the Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ EU L 138/14 of 4.06.2009.
Council Framework Decision 2009/299/JHA of 26 February 2009 amending Council Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ EU L 81 of 27.03.2009.
Council Framework decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to deci-

sions on supervision measures as an alternative to provisional detention, OJ EU L 294 of 11.11.2009.

Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ EU L 328 of 15.12.2009.

Polish law

Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego [Act of 6 June 1997: Criminal Procedure Code], Journal of Laws [Dz.U.] of 1997, No. 89, item 555.

Ustawa z dnia 18 marca 2004 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy – Kodeks wykroczeń [Act of 18 March 2004 amending the Act: Criminal Code, the Act: Criminal Procedure Code and the Act: Misdemeanour Code], Journal of Laws, [Dz.U.] of 2004, No. 69, item 626.

Ustawa z dnia 16 kwietnia 2004 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw [Act of 16 April 2004 amending the Act: Criminal Code and some other acts], Journal of Laws [Dz.U.] of 2004, No. 93, item 889.

Ustawa z dnia 7 lipca 2005 r. o zmianie ustawy – Kodeks postępowania karnego oraz ustawy – Kodeks postępowania w sprawach o wykroczenia [Act of 7 July 2005 amending the Act: Criminal Procedure Code and the Act: Misdemeanour Procedure Code], Journal of Laws [Dz.U.] of 2005, No. 143, item 1203.

Ustawa z dnia 24 października 2008 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw [Act of 24 October 2008 amending the Act: Criminal Code and some other acts], Journal of Laws [Dz.U.] 2008, No. 214, item 1344.

Ustawa z dnia 19 grudnia 2008 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw [Act of 19 December 2008 amending the Act: Criminal Procedure Code and some other acts], Journal of Laws [Dz.U.] 2009, No. 8, item 39.

Ustawa z dnia 29 lipca 2011 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary [Act of 29 July 2011 amending the Act: Criminal Code, the Act: Criminal Procedure Code and the Act on liability of collective entities for prohibited acts carrying a penalty], Journal of Laws [Dz.U.] of 2011, No. 191, item 1135.

Ustawa z dnia 16 września 2011 r. o zmianie ustawy – Kodeks postępowania cywilnego, ustawy o prokuraturze oraz ustawy o Krajowym Rejestrze Karnym [Act of 16 September 2011 amending the Act: Criminal Procedure Code, the Act on the Public Prosecution Service and the Act on the National Criminal Record], Journal of Laws [Dz.U.] 2011, No. 240, item 1430.

Ustawa z dnia 31 sierpnia 2012 r. o zmianie ustawy – Kodeks postępowania karnego [Act of 31 August 2012 amending the Act: Criminal Procedure Code], Journal of Laws [Dz.U.] of 2012, item 1091.

Regulation of the President of the Council of Ministers of 20 June 2002 on "Rules of legislative technique", Journal of Laws [Dz.U.] Journal of Laws [Dz.U.] of 2002, No.100, item 908; [Dz.U.] of 2016, item 283, uniform text.

Justification for the government Bill amending the Act: Criminal Code, the Act: Criminal Procedure Code and the Act: Misdemeanour Code, paper no. 2031.

Court rulings

Judgement of the Constitutional Tribunal of 21 March 2001, K 24/00, OTK 2001/3/51.

Ruling of the Supreme Court of 14 January 2004, V KK 319/03, OSNKW 2004, issue 3, item 27.

INTERNATIONAL COOPERATION IN CRIMINAL MATTERS VERSUS EUROPEANISATION OF CRIMINAL PROCEDURE

Summary

The paper presents the issues of cooperation in criminal matters analysed in the context of the process of Europeanisation. In the Polish legal system, the process mainly results in the development and implementation of new and varied forms of cooperation in criminal matters with the European Union Member States. The mechanisms of cooperation transposed to the Criminal Procedure Code are, in fact, nothing new for the current model of proceedings developed in accordance with the Code of 1997, because it envisaged most of the already operating forms of international cooperation. The institutions of cooperation, although already regulated on the basis of Polish law, lacked some important basic features and were mainly based on political decisions of the executive power. That was the reason for the necessity of implementing the EU models increasing the framework of cooperation in criminal matters by gradually making the regulations more specific and elaborate. This, as a result, has led to the development of a new, complex and at the same time inconsistent system of cooperation with Member States.

The creation of a completely composite regulation within Section XIII CPC, about which it is difficult to speak in terms of the system coherence, was a side effect of the implementation of provisions concerning the development of cooperation in criminal matters. The removal of the regulation of Section XIII from the Criminal Procedure Code and enacting it as a separate legal act may be a remedy for the present situation.

Keywords: Criminal Procedure Code, international cooperation in criminal matters, Europeanisation of criminal procedure, rules of legislative technique

MIĘDZYNARODOWA WSPÓŁPRACA W SPRAWACH KARNYCH A PROCES EUROPEIZACJI POSTĘPOWANIA KARNEGO

Streszczenie

Przedmiotem opracowania jest problematyka współpracy w sprawach karnych, analizowana w kontekście procesu europeizacji. Proces ten skutkuje dla polskiego porządku prawnego przede wszystkim opracowaniem i wdrożeniem nowych i różnorodnych form współpracy między państwami członkowskimi Unii Europejskiej w sprawach karnych. Transponowane do Kodeksu postępowania karnego mechanizmy współpracy nie są w istocie niczym nowym dla obowiązującego modelu procesu, ukształtowanego na gruncie kodeksu z 1997 roku, który przewidywał większość z wypracowanych już form współdziałania międzynarodowego. Instytucje współpracy, choć już uregulowane na gruncie prawa polskiego, pozbawione były jednak pewnych zasadniczych własności, a opierały się przede wszystkim na decyzji politycznej władzy wykonawczej, stąd konieczność implementacji wzorców unijnych zwiększających ramy kooperacji w sprawach karnych poprzez stopniowe uszczegóławianie i pogłębianie regulacji. W rezultacie poskutkowało to powstaniem nowego, złożonego i równocześnie niejednolitego systemu współpracy z państwami członkowskimi.

Efektem ubocznym implementacji przepisów dotyczących rozwoju współpracy w sprawach karnych okazało się powstanie w obrębie działu XIII Kodeksu regulacji zupełnie niejednorodnej,

o której trudno jest mówić w perspektywie spójności systemowej. Receptą na zaistniałą sytuację staje się wyłączenie unormowania działu XIII poza Kodeks postępowania karnego, przenosząc normy współpracy międzynarodowej w sprawach karnych do odrębnej ustawy.

Słowa kluczowe: kodeks postępowania karnego, współpraca międzynarodowa w sprawach karnych, europeizacja procesu karnego, zasady techniki prawodawczej

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IMPOSSIBLE ATTEMPT VERSUS VOLUNTARY WITHDRAWAL OR PREVENTION OF PERPETRATION: COMMENTS ON THE SUPREME COURT RESOLUTION OF 19 JANUARY 2017 (I KZP 16/16)

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On 19 January 2017, in the resolution of seven judges, the Supreme Court once again[1] expressed its opinion on distinguishing between possibility and impossibility of an attempt and interpreted the features of "the object that can be subject to commission of a prohibited act" and the way of understanding a condition for voluntariness to abandon the commission. Unfortunately, one cannot fail to notice that the ruling did not eliminate doubts concerning the issue, accumulated in connection with the former resolution,[2] but even strengthened them, mainly due to ambiguity of the stand and its unsatisfactory justification. However, the main thesis of the resolution became an incentive to conduct the analysis presented below and it will certainly be the subject matter of many critical glosses, but the issue discussed by the Court to some extent in passing and which, as it seems, raises substantive

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[1] The Supreme Court former resolution concerning the same issue was adopted on 20 November 2000, I KZP 36/00. In case of a complex nature of a crime, such as robbery, the construction of an impossible attempt refers to a perpetrator's conduct treated as a whole within the limits of features laid down in Article 280 CC.

[2] See, glosses and comments on the above resolution by: K. Daszkiewicz, *Usiłowanie nieudolne (ze szczególnym uwzględnieniem uchwały Sądu Najwyższego z dnia 20 listopada 2000 r.)*, Prok. i Pr. No. 9, 2001, p. 19; J. Giezek, *Glosa do uchwały Sądu Najwyższego z dnia 20 listopada 2000 r., sygn. I KZP 36/2000 (dot. usiłowania nieudolnego)*, Prok. i Pr. No. 9, 2001, p. 105; E. Markowska, *Glosa do uchwały Sądu Najwyższego z dnia 20 listopada 2000 r., sygn. I KZP 36/2000*, Prok. i Pr. No. 9, 2005, p. 125; J. Biederman, *Glosa do uchwały Sądu Najwyższego z 20 listopada 2000 r. I KZP 36/2000*, Pal. No. 7–8, 2001, p. 212.

doubts, should be thoroughly analysed. Namely, it concerns admissibility of referring "active regret" to impossible attempt.

Differences in the scope of a perpetrator's legal liability are indicated as the basic argument emphasising the practical importance of the issue of classification of conduct as an effective (ordinary) or impossible attempt in all cases, which – like in the real state constituting the background to the above-mentioned judgement – ended in withdrawal from committing a prohibited act. A perpetrator who discontinues a criminal act, which has features of effectiveness, may – in case of the assumption of voluntariness of his withdrawal – refer to the advantage of the regulation under Article 15 §1 Criminal Code (hereinafter: CC), while a perpetrator who ineffectively attempts to commit a crime would be deprived of this opportunity in the same circumstances. Moreover, this was the justification presented by the First President of the Supreme Court, who requested adjudication on the differences in the interpretation and emphasised that assuming an impossible attempt in a situation in which a perpetrator fails to commit a prohibited act and there is no object of this intended act entitles one only to extraordinary mitigation of punishment or renouncement of its imposition. On the other hand, approval of an objective approach and assuming that the existence of any suitable objects that can be seized proves effectiveness of an attempt makes it possible to apply Article 15 §1 CC, stipulating that a perpetrator is not subject to punishment. At the same time, "application of active regret, even in case of objective examination of the provision laid down in Article 13 §2 CC, may result in some differences" in connection with the interpretation of the condition of voluntariness and influence of external circumstances on it.[3] Quoting the above opinion, the Supreme Court seems to fully share it as it states that: "the comparison of these legal consequences depending on the classification of an act as an effective or impossible attempt increases the significance of the issue".[4] This is the impression one can have based on these fragments of the resolution, in which the Court is for an effective attempt and only in this context discusses voluntariness of withdrawal from perpetration.[5] However, even those, by the way, general arguments provoke a question whether voluntary withdrawal from perpetration of a prohibited act may take place only in case of an effective attempt and what factors are decisive in exclusion of impossible attempts from the scope of application of the provision regulating active regret. At least three separate problems occur in connection with that issue and they can be provisionally presented as follows: firstly, whether active regret is possible in case of an impossible attempt and if so, what its form is; secondly, whether such a potential construction can be justified from the point of view of criminal policy, because this constitutes the essence of the privilege that we are ready to reward a perpetrator with for abandoning his criminal intent; and finally, whether even general approval of active regret in case of an impossible attempt would equal a possibility of adopting this construction in a case similar to the one referred to

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[3] Justification for a motion of the First President of the Supreme Court of 2 November 2016, p. 8.

[4] Justification for the Supreme Court resolution of 19 January 2017, I KZP 16/16, p. 5.

[5] *Ibid.*, p. 18.

in the above-mentioned judgements. Admissibility of active regret in case of an impossible attempt and adopting it to such a specific form of an impossible attempt undoubtedly constitute two totally different issues.

Although statute does not clearly resolve the problem,[6] for years authors of the literature on criminal issues have not seen fundamental obstacles to apply Article 15 §1 CC in cases of impossible attempts and have stated that "the fact that a perpetrator objectively could not perpetrate an act and cause a punishable result does not mean that he cannot abandon his intent".[7] Therefore, it is assumed that active regret in the form of voluntary withdrawal remains absolutely possible for an ineffectively attempting perpetrator as long as he remains unaware of a lack of possibility of committing a prohibited act. A different opinion, as e.g. the one expressed in the judgement of the Appellate Court in Kraków of 4 March 1999,[8] indicating that settlement of an objective possibility of achieving the aim is the essence of the dispute, does not deserve approval because it omits the subjective aspect, i.e. the fact that a perpetrator is unaware of the lack of possibility of achieving the aim in the course of its implementation. There are no arguments whatsoever that might be against potential voluntariness of withdrawal from an attempt, which was objectively, not in the conscience of a perpetrator, impossible in accordance with Article 13 §2 CC.[9] The emphasis placed on the requirement for a perpetrator's unawareness is connected with the interpretation of the statutory condition of voluntariness, which may exist only until a perpetrator realises that commission of an act is impossible.[10] On the other hand, adopting an objective perspective, like in the above-mentioned judgement, is usually thought to be equivalent to negating admissibility of active regret in case of an impossible attempt.[11]

However, can active regret in case of an impossible attempt take only the form of withdrawal from perpetration? Inadmissibility of another conclusion seems to result, necessarily and obviously, from the condition of objective inability to perpetrate, which is constitutive for an impossible attempt, because if perpetration (which, in case of property-related crimes, takes the form of a result occurred) from the very beginning is impossible, a perpetrator cannot prevent it.[12] Prevention

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[6] D. Gajdus has already drawn attention to the lack of a legal act in Polish legislation similar to the regulation of §24(1) II StGB, making direct reference to impossible attempt (precisely, completed impossible attempt); D. Gajdus, *Czynny żal w polskim prawie karnym,* Toruń 1984, p. 98.

[7] D. Gajdus, *Czynny żal…*, p. 99; thus, also R. Zawłocki, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część ogólna*, Vol. I: *Komentarz do art. 1–31,* Warsaw 2011, p. 665.

[8] II AKa 22/99, KZS 1999, No. 3, item 14.

[9] J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warsaw 2012, pp. 135–136; thus also: A. Liszewska, *Komentarz online do art. 15 k.k.*, [in:] J. Stefański (ed.), *Kodeks karny. Komentarz,* ed. 17, Legalis.

[10] A. Liszewska, *Formy stadialne popełnienia czynu zabronionego*, [in:] R. Dębski (ed.), *System Prawa Karnego,* Vol. III: *Nauka o przestępstwie. Zasady odpowiedzialności*, Warsaw 2013, p. 793; by the same author, *Komentarz online do art. 15 k.k.…*; T. Sroka, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Komentarz. Część ogólna*, Vol. I: *Komentarz do art. 1–31,* Warsaw 2015, p. 388; A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna*, Vol. I: *Komentarz do art. 1–52*, Warsaw 2016, pp. 308–309; W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna,* Kraków 2013, p. 243.

[11] J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny…*, p. 136.

[12] Similarly, like in case of an impossible attempt, he cannot directly strive to perpetration; compare, J. Majewski, *O różnicy i granicy między usiłowaniem udolnym a usiłowaniem nieudolnym*,

means reversal of a process, which without such a perpetrator's interference into its course would imply particular results that thanks to this undertaken reaction do not occur.[13] However, one cannot prevent something that objectively does not exist. When a perpetrator's conduct does not start any process that would cause changes in reality, he cannot reverse this reality to its former state. His conduct is not cable to causally influence this reality because, simply speaking, one cannot reverse a threat when there was no threat from the start.[14] Such a solution raises doubts concerning justice, though. Why should a perpetrator of an impossible completed attempt be in a situation drastically worse than a perpetrator of an impossible incomplete attempt? It is easy to illustrate this doubt with, e.g. a description of an actual state, in which a perpetrator with an intent to kill a leader of a political party he does not like, and at the same time not realising that the commission of this act is not possible because the politician went away on a month holiday to a spa a few days ago, places a bomb in the cellar under his study, sets a time-fuse, however, an hour before the scheduled explosion, he changes his mind and decides that dissatisfaction should be expressed in a different way in a democratic system, turns the device off and removes the mechanism completely preventing the explosion. Even intuitively, we would be ready to give this perpetrator a privilege of impunity in the same way

[in:] J. Majewski (ed.), *Formy stadialne i postacie zjawiskowe popełnienia przestępstwa. Materiały III Bielańskiego Kolokwium Karnistycznego,* Toruń 2007, p. 28; thus, also D. Gajdus, *Czynny żal…*, p. 99.

[13] According to a Polish language dictionary, "prevent" means "not allow to happen, hamper", W. Doroszewski (ed.), *Słownik języka polskiego.* Vol. 10, Warsaw 1968, p. 700.

[14] In the doctrine, to explain the essence of active regret, a formula is used that "voluntary prevention of a result takes place when a perpetrator, realising a possibility of a result, abandons his intent to commit a prohibited act and undertakes action aimed at reversing it". Thus, the prevention of a result is interpreted as "striving to reverse a result", "counteracting a result", "reversing the danger to a legal interest" and also as "counteraction" (compare, K. Wiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warsaw 2014, p. 131; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 119). All these terms introduced as synonyms are characterised by the expression of causality, and thus the requirement for a perpetrator to "cause" non-occurrence of a result. As J. Giezek indicates: "this means that it is necessary for a perpetrator to interfere into the causal chain, the already implemented link of which was an activity undertaken earlier within an attempt, while the potential result is a predicted link, the occurrence of which should be prevented", see J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny…*, p. 134. L. Tyszkiewicz also directly writes about the necessity of a causal relation, L. Tyszkiewicz, [in:] M. Filar (ed.), *Kodeks karny. Komentarz,* Warsaw 2016, p. 87. Also see, the judgement of the Appellate Court in Kraków of 19 May 2016, II AKa 65/16, in which the court additionally refers to the criteria of decreasing the risk by a perpetrator. German jurisprudence expresses this element of causally relevant influence even in a clearer way and introduces not only a requirement that "preventing a result" should mean initiation of a new causal chain that might imply failure to commit. Thus, it is characterised by the preventive causality (*Verhinderungskausalität*), but, in addition, it should be objectively attributed to a perpetrator as his work, thus the rationale of normative attribution is taken into account (compare, K. Hoffmann-Holland, [in:] B. v. Heintschel-Heinegg (ed.), *Münchener Kommentar zum Strafgesetzbuch. Band 1, §§1–37,* München 2017, pp. 1194–1195, and the literature referred to therein, and abundant BGH case law; Ch. Jäger, *Der Rücktritt vom Versuch als zurechenbare Gefährdungsumkehr,* München 1996). Similar opinions, by the way under the influence of German doctrine, can be found in the Polish literature; see O. Sitarz, *Czynny żal związany z usiłowaniem w polskim prawie karnym. Analiza dogmatyczna i kryminalnopolityczna,* Katowice 2015.

as a perpetrator who abandoned his plans at earlier stages of his attempt, i.e. when it was incomplete, e.g. when he was carrying that bomb to the cellar, or when he was programming the fuse. However, how to conciliate a similar, probably right,[15] belief with indisputability of a statement that one cannot prevent a result where this result will never occur and with commonly repeated, especially in case law, dogma that it is not possible to voluntarily abandon the conduct that entered the stage of a completed attempt?[16]

In this light, it seems that the following possibility of solving the problem appears. Firstly, an assumption, which can be found in literature, although without broad justification, that the provision of Article 15 §1 CC must be applied to an impossible completed attempt, contrary to the incomplete one, *per analogiam*.[17] This, however, does not solve all the problems and does not explain this necessity alone. As it seems, it would be more appropriate to start from an assumption that strict division of the form of active regret into voluntary withdrawal, admissible always and exclusively in case of an incomplete attempt, and voluntary prevention of a result, always and exclusively in case of a completed attempt, fully refers to an effective attempt, and does not find equal transfer to the construction of an impossible attempt. The opinion may be justified when we take into consideration the issue, which is often ignored in case law and is not fully trusted by part of the doctrine, however, convincingly enough justified so that it raises no doubts, i.e. that the provision of Article 13 §2 CC is fully self-standing, independent of the provision of Article 13 §1 CC.[18] Thus, an impossible attempt is characterised by a separate set of changes, which is absolutely not a specification of the features of an effective attempt. It is composed of: an intent to commit a prohibited act, conduct that in a perpetrator's opinion is to lead to the implementation of this intent and, finally, an objective lack of a possibility of perpetrating an act because there is no adequate object or means, about which a perpetrator remains unaware and in error. Therefore, it is proposed to interpret Article 13 §2 CC as follows: "An attempt also takes place when a perpetrator with an intent to commit a prohibited act starts to conduct himself in the way that, in his opinion, will lead to perpetration of that act but he does not realise that this perpetration is not possible because of the lack of an

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[15] D. Gajdus calls this situation paradoxical, see D. Gajdus, *Czynny żal…*, p. 99. Thus, also A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny...*, p. 310. Also see, the judgement of the Appellate Court in Wrocław of 10 June 2015, II AKa 136/15, Legalis: "The impunity clause under Article 15 §1 CC should be applied also in relation to such a perpetrator of attempted murder who, being convinced that a result in the form of death of the aggrieved is a real threat, in his desire to prevent this result, undertakes rational activities to do that referred to in Article 15 §1 CC, not being aware that, in fact, there was no threat to the life of the aggrieved."

[16] Compare, e.g. the Supreme Court ruling of 8 September 2005, II KK 10/05, OSNwSK 2005, No. 1, item 1614; the Supreme Court judgement of 20 November 2007, III KK 254/07, Prok. i Pr. – supplement, 2008, No. 7–8, item 3; judgement of the Appellate Court in Kraków of 10 July 2013, II AKa 131/13, Legalis; judgement of the Appellate Court in Szczecin of 23 October 2014, II AKa 172/14.

[17] Thus, A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny…*, p. 310; followed by T. Sroka, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 384.

[18] J. Majewski, *O różnicy…*, p. 30, also approving, inter alia, A. Liszewska, [in:] R. Dębski (ed.), *System…*, pp. 766–767.

object suitable to perpetrate a prohibited act on it or because of the use of a means unsuitable to commit a prohibited act".[19] In particular, the features of this form of an attempt do not contain "direct striving to perpetration"; however, the feature of the lack of possibility of perpetration plays an important role.[20] The above causes that the distinction between a completed attempt and an incomplete one based on the contrast between all the features leading directly to perpetration, except the feature of an effect, and their non-implementation, i.e. remaining at the stage of a direct intent, stops matching the features of an impossible attempt. As a result, in case of an impossible attempt, it is hard to assume that we deal with a completed attempt in a situation when a perpetrator did everything that was necessary to commit a prohibited act, i.e. completed the last activity aimed at perpetration but, despite that, a perpetration did not take place, while an incomplete attempt takes place when a perpetrator did not finish the last activity aimed at the commission of a prohibited act so he is still "in the course".[21] Trying to match the features of an impossible attempt with the above-mentioned distinction leads to rather absurd solutions; and a statement that the feature "in one's opinion" may be a link between those two spheres as it makes it possible to move to the sphere of a perpetrator's own assessment and perception would have to lead to the approval of a thesis that the features of an impossible attempt contain "direct striving to perpetration", however, also "in a perpetrator's opinion".[22] In fact, the distinction between a completed attempt and an incomplete one in case of an impossible attempt does not make sense in the same way as the distinction between two forms of active regret does not make sense. It is not possible to describe the difference between the two forms of an impossible attempt in a satisfactory way. This lack of possibility of a result occurrence and the lack of possibility of direct striving to perpetration

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[19] A. Liszewska, [in:] R. Dębski (ed.), *System…*, p. 772.

[20] J. Majewski, *O różnicy…*, p. 28.

[21] A. Liszewska, [in:] R. Dębski (ed.), *System …*, p. 782. The division of attempts into completed and incomplete results from "their nature as a perpetrator's conduct consisting in direct striving to commit the main act"; after K. Tkaczyk, *Instytucja czynnego żalu w prawie karnym w aspekcie prawnoporównawczym*, Przemyśl 2008, p. 134.

[22] Thus, as a result, the features of an impossible attempt would constitute the repetition of the features of an effective attempt preceded by an additional feature: "in a perpetrator's opinion". The conception cannot be defended in our legal system, although it is close to the solution adopted in the German Criminal Code, in which §22 StGB, regulating an attempt stipulates that "he attempts to commit a prohibited act, **in accordance with his perception** of an act, who strives directly to implement the features of the type", which causes, each time thanks to the reference to the feature of "in a perpetrator's opinion", that the reference is made also to an impossible attempt (a perpetrator of an impossible attempt, in his opinion, also directly strives), with a reservation that inefficiency because of inadequacy of an object or a means always remains punishable within the limits of a standard attempt (with regard to impossibility of an attempt resulting from the features of an object, more and more often calls can be found against former unanimous belief that this type of impossible attempts should be subject to impunity, see e.g. K. Hoffmann-Holland, [in:] B. v. Heintschel-Heinegg, *Münchener Kommentar…*, pp. 1135–1137) and impossibility resulting from serious misunderstanding in accordance with the provision of §23 (III) gives a court a possibility of imposing extraordinary punishment. (In case of a successive one, the level of attempting, i.e. the unreal attempt, it is commonly indicated that there is a lack of reasons that may justify its penalisation); see, K. Kühl, *Strafrecht. Allgemeiner Teil,* München 2017, p. 530.

characterising this self-standing form cause that a perpetrator who – like in the already mentioned example, following his own plan and his basically erroneous perception – did everything to make the planned effect occur (in case of an efficient attempt, he might only reverse this initiated cause-result sequence at the most) still remains, in fact, at the stage in which nothing really happened to make it necessary to influence the reality in a special way. The necessity to prevent perpetration is this classified form of voluntary withdrawal[23] in which, because of an advanced stage of the causal course, it is necessary to do "something more" than just refrain from further criminal activity. Thus, from the point of view of the real causal value of his conduct, it is absolutely unimportant in what way he will demonstrate his definitive change of his intent to commit a prohibited act.[24] This connection of active regret with the conditions of causality introduces those two forms, however, in case of an impossible attempt, the issue of causality may be referred to only by analogy because a perpetrator does not have a causal influence on his surroundings and, that is why, his attempt is *ex ante* impossible.[25]

It must also be noticed that the former statement concerning inability to prevent a result in case of an objective lack of possibility of perpetration is to the same extent for the exclusion of admissibility of active regret in the form of voluntary withdrawal from perpetration. Indeed, an argumentative consequence, following an identical way, would make us assume that it is not possible to abandon something that does not exist in fact. This way of reasoning does not lead to limiting active regret in case of an impossible attempt only to a formula of voluntary withdrawal but totally eliminates active regret as a normative form in case of this type of an attempt. To be more precise, it eliminates a possibility of applying Article 15 CC directly not only in relation to preventing a result but also in relation to voluntary withdrawal. This does not mean, however, that active regret in case of an impossible attempt cannot or should not take place. Just the opposite, there is a lack of the only adequate statutory regulation directly determining such cases, and thus, with the significance of arguments that allow to reject a possibility of active regret also on the part of the person attempting ineffectively, the whole provision of Article 15 CC[26]

[23] P. Kardas, M. Rodzynkiewicz, *Projekt kodeksu karnego w świetle opinii sądów i prokuratur*, WPP No. 2, 1995, p. 53; J. Raglewski, *Czynny żal w części ogólnej k.k.*, Jur. No. 1, 2000, p. 15; A. Liszewska, *Komentarz online do art. 15 k.k.…*

[24] Because it is an attempt *ex ante* impossible, there is no special need for a perpetrator's conduct to constitute the reflection of such a model of behaviour, which in case of an effective attempt we would perceive as "reversal of danger". Besides, the necessity of determining the attribution of this seeming, existing only in a perpetrator's imagination, "reversal of danger" as his work would be rather complicated because of its somewhat double hypothetical nature. One cannot exclude, however, that some elements close to similar findings will continue to be required in order to prove that a perpetrator really abandoned his intent.

[25] The author is of a different opinion than O. Sitarz, although she also indicates inadequacy of the classical division of the forms of active regret; see, O. Sitarz, *Usiłowanie ukończone i nieukończone (próba nowego spojrzenia)*, PiP No. 6, 2011, p. 88 ff.

[26] The whole provision, because in case of a court's failure to find a possibility of extraordinary mitigation of punishment due to the features of an attempt, not every impossible attempt deserves automatically the abandonment of imposing punishment or its extraordinary mitigation; a court always can apply extraordinary mitigation of punishment based on this striving.

should be applied to this inchoate form by analogy. A perpetrator who does not realise that from the very beginning the perpetration was beyond his possibilities because of the lack of an object or because of the lack of a means suitable to commit a prohibited act and voluntarily abandons the intent to continue it, and adequately demonstrates this change of his attitude to his former proceeding, is fully entitled to expect that a court will treat his conduct in the same way as in case of active regret of a perpetrator of an effective attempt.

Does it mean that the only argument for this construction would be the need to ensure certain expected symmetry of legal consequences concerning an effective and impossible attempt? This is based on the assumption that if an impossible attempt remains in general punishable in the same way as an effective attempt, the legislator should also regulate exclusion of its penalisation at least in the same circumstances. Thus, it would be flagrantly unjust if a perpetrator of conduct of incomparably greater potential of a threat to legal interests, might benefit, under some conditions, from the privilege of impunity, while a perpetrator whose conduct, even before he abandoned the initiated activity, could never enter even an approximate phase of danger, meeting similar conditions, was deprived of this specific benefit. Contenting ourselves with this justification, although it may be in a way convincing, would not be sufficient, though. The assumption of impunity of an effective attempt in case of active regret depends on particular criminal policy factors which should also be updated to some extent in case of an impossible attempt. Paradoxically, the general lack of danger connected with this inchoate form may be an argument against awarding a perpetrator of an abandoned impossible attempt with the benefit of impunity. A perpetrator's conduct resulting from the abandonment of a criminal intent, in the same way as earlier it could not infringe legal interests, cannot protect them against infringement. In case of a perpetrator voluntarily withdrawing from the commission of an efficient attempt or a perpetrator of such an attempt who efficiently prevented a result, we can speak about measurable positive effects in terms of the protection of legal interests. Thus, his conduct leads to a certain real benefit, which balances the former loss in the form of a created threat.[27] The response to this benefit is a similar benefit at the level of punishment. However, where, especially in the context of what has been stated earlier, could a benefit be established from the perspective of the protection of interests connected with counteracting a perpetrator of an impossible attempt?

Firstly, and it is probably rather trivial at the subjective level, as long as a perpetrator is convinced that his attempt is effective, i.e. that there is every chance that he will commit a prohibited act, but despite that he decides to voluntarily abandon the chosen way, the termination of his criminal intent itself should be perceived as a positively assessed change. This argument is actually important for an impossible attempt. Contrary to criminalisation of an effective attempt, subjective elements will always remain the basic source of any negative assessment of this

[27] As A. Spotowski states, "withdrawal from an attempt constitutes a fact that is socially positive and, thanks to that, it balances the social negative assessment of an attempt perpetrated earlier"; see, A. Spotowski, *O odstąpieniu od usiłowania*, PiP No. 6, 1980, p. 90.

inchoate form, allowing application of a criminal ban on it.[28] Z. Jędrzejewski rightly notes that even if the same conduct is not definitely dangerous, from the perspective of lawlessness, the intent must be characterised by certain implementation ability or directional "dangerousness" that goes beyond purely motivational elements and can be subject to criminal-law assessment. What constitutes it includes a certain implementation potential of a perpetrator, his skills, abilities, aptitude for managing a causal process,[29] the termination of which as such is a guarantee of inviolability of legal interests. Therefore, abandonment of a will to continue an act or outright substitution of the intent for it in order not to commit an act deserves a positive assessment by analogy, and it should take place on the plane of legal, not moral, assessment of a perpetrator's "inner change".

Reference made to a form of "dangerousness" also allows extracting a certain minimum of blameworthiness of conduct for an impossible attempt. That is why, it is used by some authors who indicate a need and grounds for integration of objective and subjective elements when justifying the above inchoate form.[30] From this point of view, active regret of a perpetrator of an impossible attempt becomes a positive fact in the same way as voluntary withdrawal or prevention of a result in case of an effective attempt,[31] which ensures identical justification for abandonment of punishment. It is also worth expressing a reservation about an erroneous impression that the above would lead to contradiction with the former comments because it would require an assumption that a perpetrator's conduct is distinguished by a feature of causal influence on legal interests if one can say, at least in some cases, that it is generally and potentially dangerous. The problem is that there is a fundamental and unquestionable difference between general danger and creating danger. It is even not the difference between a possibility of a fact and its occurrence because there is no possibility of endangering interests from the very beginning. Thus, potentiality or generality of danger should be set somewhere not far away from possibility

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[28] Which does not mean that it is the only or sufficient source. However, attention is commonly drawn to the fact that in case of an impossible attempt, the subjective factor is of the greatest importance; compare, T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warsaw 2010, p. 60; J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny…*, pp. 127–128; A. Marek, *Kodeks karny*, Warsaw 2010, p. 66; K. Wiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny…*, p. 129.

[29] Z. Jędrzejewski, *Bezprawie usiłowania nieudolnego*, Warsaw 2000, p. 194; Z. Jędrzejewski, *Granica karalności usiłowania nieudolnego*, WPP No. 2, 2007, p. 77.

[30] Compare, A. Zoll, *Odpowiedzialność karna za czyn niesprowadzający zagrożenia dla dobra prawnego w świetle Konstytucji*, [in:] J. Majewski (ed.), *Formy stadialne i postacie zjawiskowe popełnienia przestępstwa. Materiały III Bielańskiego Kolokwium Karnistycznego,* Toruń 2007, p. 18; R. Dębski, *Karalność usiłowania nieudolnego,* RPEiS issue 2, 1999, pp. 114–117; J. Giezek, *Formy stadialne popełnienia czynu zabronionego w polskim prawie karnym,* Annales UMCS Vol. LX, 2013, pp. 49–50; J. Majewski, *O (braku) karalności usiłowań „nierealnych", „absolutnie nieudolnych" i im podobnych*, [in:] Ł. Pohl, *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca,* Poznań 2009, p. 357; H.-H. Hirsch, *Problematyka regulacji nieudolnego usiłowania w polskim i niemieckim kodeksie karnym*, [in:] J. Giezek (ed.), *Przestępstwo – kara – polityka kryminalna. Problemy tworzenia i funkcjonowania prawa. Księga Jubileuszowa z okazji 70. urodzin Profesora Tomasza Kaczmarka,* Kraków 2006, p. 262; also see, D. Gruszecka, *Ochrona dobra prawnego na przedpolu jego naruszenia. Analiza karnistyczna,* Warsaw 2012, p. 272 ff.

[31] Compare the stands indicating grounds for the division of attempts not into effective and impossible ones but into dangerous attempts and those which are not dangerous.

because it contains a certain chance or probability, while the subjective element of an impossible attempt may only be characterised by similarity to possibility consisting in the fact that, referring to A. Zoll's description, if the system of circumstances changed, a perpetrator on this road might lead to commission.[32] A perpetrator who perceives causal relations properly, although he is erroneous in the area of real circumstances, in which they can be updated, undoubtedly initiates some kind of causal chain with his attempt, so that we can say that his attempt is in general dangerous.[33] However, both danger and speaking about suitability to causal influence take place only in the sense that it would suffice to eliminate the initial error and the same conduct in the implementation sphere might really endanger interests. As long as an error exists, it excludes the initiation of this causal chain, a link of which will be formed by a threat to legal interests. However, even if conduct, which has all features of active regret for a perpetrator of an unconscious impossible attempt, is not able to causally influence reality implying a reversal of a threat to legal interests, like it was not able to create any real danger to those interests at the time before a perpetrator abandoned his intent, the already mentioned similarity of an impossible attempt to conduct creating a threat on the way to violate a rule of dealing with a legal interest justifies the application of Article 15 CC by analogy.

The above-presented comments, which are an attempt to unambiguously determine applicability of the construction of voluntary withdrawal or prevention of a result of impossible attempts as well as their usefulness and criminal policy rationalisation, do not have to mean the same as falsification of a statement that, in case a perpetrator abandoned criminal action because the aggrieved did not possess an object of his interest, it would not be possible to consider the application of Article 15 §1 CC. One can agree that reference to this instrument would be groundless in such cases, however, the problem is that this lack of justification is based on completely different grounds from those the Supreme Court quotes in its resolution. Just to recapitulate, it is worth adding that the whole argumentation of the Court oscillates around the interpretation of the term "voluntariness" of active regret. However, regardless of whether we agree with the interpretation presented in the resolution or not, it is necessary to firmly indicate that "voluntariness" understood in any way has nothing to do with similar cases. Moreover, because of the same reason, the objectivist perspective that is to determine particular specification of voluntariness is not what determines the lack of possibility of classifying a perpetrator's conduct under Article 15 CC in the discussed system of conditions, as well as in general in case of an impossible attempt of any other course. In other words, it is not the issue of objectivist determination or subjectivist perception of an attempt effectiveness.[34]

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[32] In this sense, S. Tarapata rightly writes that the construction of an impossible attempt is composed of an element being a typical surrogate of the feature covered by a collective name of the attack on the legal interest; S. Tarapata, *Dobro prawne w strukturze przestępstwa. Analiza teoretyczna i dogmatyczna,* Warsaw 2016, pp. 532 and 534.

[33] J. Giezek, *Formy stadialne…*, p. 49.

[34] Contrary to how it is usually presented, the indications of which are visible even in the content of the above-mentioned motion of the First President of the Supreme Court in case

The whole issue, in fact, amounts to careful differentiation of cases in which a perpetrator of an attempt abandons the commission of a prohibited act from cases in which he gives up further activities because he believes that the commission of crime is no longer possible, and thus to referring to a special construction distinguished in the doctrine, namely a failed attempt. In this context, in relation to the right comments A. Wąsek and A. Spotowski made some time ago, it should be said that in case of a failed attempt, analysing the issue whether a perpetrator who knows he cannot continue his proceeding abandons it voluntarily or involuntarily has no grounds whatsoever.[35] "In a situation in which a perpetrator believes that implementation of his criminal intent is not possible, one cannot speak about withdrawal from an act at all. One cannot abandon something that cannot be done. If a perpetrator draws a conclusion that, in spite of all his skills and efforts, he is not able to effectuate his intent, we deal with a failed attempt, which cannot be voluntarily or involuntarily abandoned. Therefore, it is necessary to distinguish attempt-related situations in which withdrawal is possible and those in which it is not."[36] The reason for which those two completely different cases are mixed up, it seems, results from the attachment to the formula explaining the essence of voluntariness: "if a perpetrator thinks that he can commit an act, his withdrawal is voluntary". Unfortunately, it is very easy to draw a conclusion *a contrario* that if a perpetrator draws a conclusion that he cannot continue the commission of an act, this means he abandons it involuntarily.[37] Logical correctness of this reasoning is only seemingly maintained. It is based on an assumption that all withdrawals from an attempt are either voluntary or involuntary. It is a mistake resulting in omission of a big group of withdrawals which are not included in this dichotomy. All withdrawals from an attempt are, first of all, suitable or unsuitable to refer active regret (voluntariness) to them. Only then, are those suitable ones diversified into those matching the features of voluntary withdrawal or not. As a result, on the logical plane, it is not possible to assume that all the other cases, i.e. those not included in

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I KZP 16/16, in which it is clearly stated that the adoption of an objectivist approach to the concept of a lack of an object, in accordance with Article 13 §2 CC, must lead to recognition that withdrawal in the above-mentioned case results from an external situation, and because of that eliminates voluntariness and active regret (compare, justification for the motion of the First President of the Supreme Court of 2 November 2016, p. 5.)

[35] See, A. Wąsek, *Glosa do wyroku z dnia 22 stycznia 1985 r., IV KR 336/84,* PiP No. 6, 1986, p. 146; by the same author, *Z problematyki usiłowania nieudolnego*, PiP No. 7–8, 1985, p. 80; A. Spotowski, *O odstąpieniu…*, p. 92.

[36] A. Spotowski, *O odstąpieniu…*, p. 92. It is also necessary to agree with the proposed sequence of examining an attempt with respect to application of the provisions concerning active regret proposed by A. Spotowski, who writes that "determination whether in a given situation withdrawal is possible or not should constitute the first stage of the assessment of the possibile application of Article 13 CC [*ex* CC]. If withdrawal is possible, it is not necessary to analyse the issue of voluntariness." The author's opinion is also approved of by A. Liszewska, who also draws attention to the fact in how many cases in case law, also of the Supreme Court, the indicated difference and its consequences are not noticed, with a praiseworthy exception of the judgement of the Appellate Court in Białystok of 20 December 2012, II AKa 213/12, Legalis.

[37] A. Spotowski notes that the way of distinguishing possibility from impossibility of withdrawal is identified with the way of distinguishing voluntariness from involuntariness of withdrawal; A. Spotowski, *O odstąpieniu…*, p. 92.

the formula quoted at the beginning of this paragraph, when a perpetrator stops his criminal action, should be treated as involuntary, especially as they would be automatically treated as involuntary withdrawals. Such a stand is also wrong from the normative and constructive point of view. Firstly, in accordance with the meaning of the provisions regulating active regret, and what needs emphasising only this kind of "withdrawal", not any other "withdrawal" used in the colloquial sense, may be the subject matter of significant criminal-law considerations in this context, one can abandon as long as one attempts. The moment this inchoate form ends, withdrawal is no longer possible. By the way, in order to eliminate whatever doubts, it should be added that the completed attempt remains an attempt. In this scope, active regret does not take place somewhere, to quote A. Wąsek's well-known expression, on "no man's land" between perpetration and an attempt because criminal law doctrine does not know such an area.[38] In accordance with the way of decoding the features of an impossible attempt presented earlier and approved of in the doctrine, it takes place when a perpetrator with the intent to commit a prohibited act conducts himself in the way that he believes will lead him to commit this act but does not realise that this commission is not possible. The lack of a perpetrator's awareness of no possibility of commission not only determines the conditions for the content, i.e. the features of this inchoate form, but also establishes its limits. Thus, the moment a perpetrator realises that the commission is not possible, his inefficient attempt ends; and because the lack of commission is also always a feature of an inefficient attempt, a prohibited act a perpetrator ineffectively wanted to commit ends at this moment, too. For a perpetrator acting ineffectively, *iter delicti* "breaks off" at an impossible attempt. In the discussed cases, it breaks off when a perpetrator realises objective impossibility and inefficiency of his action.[39] Therefore, whatever his conduct continues to be, it should be treated as conduct occurring after the commission of a crime rather than withdrawal from it.

The basic difference between the categories of an impossible attempt and a failed attempt, despite the fact that they have an element of a criminal activity failure in common, is especially evident, however, when we draw attention to the fact that those categories constitute derivatives of the two contradictory assessment perspectives. Inability to perpetrate characterising an inefficient attempt is undoubtedly subject to objective assessment from the *ex ante* perspective. On the other hand, inability to perpetrate that a perpetrator of a failed attempt realises exists only in his perception of the state of things; only a subjectivist perspective is important for its existence.

[38] On the other hand, if it knew, the passage of a crime would have to resemble a surprising construction composed of consecutive occurrence of punishable and non-punishable conduct starting with usually non-punishable preparation, through a generally punishable attempt, again a non-punishable and not prohibited behaviour "in between", and again punishable perpetration.

[39] A perpetrator may, of course, draw a conclusion that he will continue his proceeding, although with the use of a little different methods or measures (e.g. a perpetrator, noticing that his gun has jammed, instead of shooting, decides to attack and strangle the victim), however, a question is raised here to what extent in relation to a perpetrator's change of the intent we would classify this conduct in terms of one or many acts. Still, the issue of assessment of various cases of an impossible attempt in case of a possibility of continuation goes far beyond the framework of this paper.

A perpetrator's opinion may match the reality and then he notices objective impossibility of his attempt but, equally well, it can result from his erroneous assumption of objective impossibility in a situation, which can absolutely lead to full implementation of the features of a given type of act. Then, a failed attempt may occur also in case of an impossible attempt. Thus, as a failed attempt does not depend on whether a perpetrator is right or wrong in his assessment of his chances, i.e. whether we are eager to classify his conduct as possible or not, while a perpetrator's personal opinion about impossibility of his intentions remains its feature, the dispute about subjectivist and objectivist perception of adequacy of an object, and so also effectiveness (or not) of an attempt, does not find translation into the discussed issue. In case of the discussed issue, i.e. whether a perpetrator may take advantage of the privilege of active regret in some situations, the dispute is pointless and its result irrelevant.

The attitude to the issue of a failed attempt that has been presented in German literature and case law for quite a long time, especially as a case in many points identical to the one analysed by the Supreme Court[40] also became the subject of an important judgement of the Federal Court of Justice, may be an interesting supplement to these considerations. Recognising that a perpetrator attempted robbery, the BGH stated in its judgement that – because of the intent of the perpetrator, and it was an intent to seize a cyclist's bag and appropriation of cash from it – from the very beginning a perpetrator did not take into account appropriation of any other objects, e.g. trainers of the aggrieved. "The perpetrator also did not want to appropriate the bag alone but its content, however, this contained things worthless for him, things that he was not focused on during the act. Thus, there was only an attempt of a robbery but, of course, the accused could not abandon it in a way that would make him exempt from a penalty (§24 StGB) because the attempt from his subjective point of view was failed."[41] It is commonly assumed that in case of a failed attempt, withdrawal does not take place at all because any features of active regret under §24 StGB such as: "refraining from implementation of an act", "prevention of commission" or "serious striving for preventing perpetration" impose a condition on a perpetrator to recognise an act as still possible to be committed.[42] "Therefore, in accordance with §24 StGB,

[40] BGH ruling of 26 November 2003, 3 StR 406/03, NStZ 2000, 531. The factual state of the above-mentioned case concerned a perpetrator of attempted robbery, who attacked a cyclist, seized her linen bag but when he realised that there was nothing in it, especially money he expected, but only trainers, he threw the bag back to the bicycle basket.

[41] BGH ruling justification of 26 November 2003, 3 StR 406/03, NStZ 2000, 531, p. 2.

[42] Thus, K. Hoffmann-Holland, [in:] B. v. Heintschel-Heinegg (ed.), *Münchener Kommentar...*, p. 1162; also compare, V. Krey, R. Esser, *Deutsches Strafrecht. Allgemeiner Teil*, Stuttgart 2012, p. 528; T. Fischer, *Strafgesetzbuch mit Nebengesetzen. Beck'ische Kurzkommentare*, München 2017, pp. 230–231. A perpetrator who assumes a failure of his attempt does not need to give it up or prevent the result; see, K. Kühl, *Strafrecht...*, p. 546, it is also rightly indicated that there is no possibility of considering voluntariness of choice or not where, first of all, there is no choice at all, p. 212; H. Kudlich, J.C. Schur, [in:] H. Satzger, B. Schmitt, G. Widmaier (ed.), *StGB. Strafgezetzbuch Kommentar*, Köln 2009, p. 212; similarly, W. Mitsch, [in:] J. Baumann, U. Weber, W. Mitsch, *Strafrecht. Allgemeiner Teil*, Bielefeld 2003, p. 631; R. Zaczyk, [in:] U. Kindhäuser, U. Neumann, H.-U. Paeffgen (ed.), *Nomoskommentar. Strafgezetzbuch, Band 1*, Baden-Baden 2013,

withdrawal is possible as long as a perpetrator does not treat it as failed."[43] This, however, occurs when "for a perpetrator, who is aware of it, it is really impossible to achieve a result directly following the events",[44] "if a perpetrator recognises, or at least assumes, that in direct time and substantive connection with means he disposes of, he cannot lead to perpetration",[45] "if a perpetrator recognises, especially believes, that he cannot lead to perpetration"[46] or "if, in a perpetrator's perception, a particular project of an act cannot be led to commission because of the object of an act or means used to commit a prohibited act".[47] Regardless of some differences in the proposed definitions, they emphasise especially subjective element of the perpetrator's perception of effectiveness of an attempt. "A failed attempt is not an attempt that is objectively failed, the failure of which a perpetrator does not realise. A perpetrator may abandon such an attempt, in accordance with clear regulation of §24(1). It concerns a subjective, i.e. in a perpetrator's imagination, failed attempt."[48] Therefore, a perpetrator's exclusive perspective is the only reliable point of reference, regardless of its accuracy or justifiability.

The concept of a failed attempt covers cases of "a perpetrator's recognition of unavailability of a particular object of his influence" as well as the "senseless" attempts, in which a perpetrator in fact realises that he may achieve a result constituting a feature of a prohibited act, however, it is so different from what was the object of his initial intent that the whole formerly developed criminal plan is, in this perpetrator's opinion, deprived of any sense.[49] In the first group, inability to implement the features of a particular prohibited act, from a perpetrator's point of view, may be connected with an inadequate means, e.g. a skeleton key, which

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pp. 1006–1007; H. Lilie, D. Albrecht, [in:] H.W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (ed.), *Strafgezetzbuch. Leipziger Kommentar, Erster Band,* Berlin 2007, p. 1684; M. Heger, [in:] H. Matt, J. Renzikowski (ed.), *Strafgesetzbuch. Kommentar,* München 2013, p. 300; J. Wessels, W. Beulke, H. Satzger, *Strafrecht. Allgemeiner Teil,* Heidelberg 2016, pp. 318–320; however, a partly different opinion is presented by H. Frister, who referring to the concept of "psychological-real possibility of matching the features of the type" assumes that in case of a failed attempt based on the lack of further sense in continuing the act, we should confine ourselves to determining voluntariness, as it was done in former case law; H. Frister, *Strafrecht. Allgemeiner Teil*, München 2013, p. 353; BGH NStZ 2010, 690.

[43] U. Kindhäuser, *Strafrecht. Allgemeiner Teil*, Baden-Baden 2013, p. 255.

[44] BGH judgement of 10 April 1986, 4 StR 89/86, BGHSt 34, 53.

[45] W. Mitsch, [in:] J. Baumann, U. Weber, W. Mitsch, *Strafrecht…*, p. 631.

[46] R. Zaczyk, [in:] U. Kindhäuser, U. Neumann, H.-U. Paeffgen (ed.), *Nomoskommentar…*, p. 1006.

[47] F. Zieschang, *Strafrecht. Allgemeiner Teil*, Stuttgart 2014, p. 145.

[48] K. Kühl, *Strafrecht…*, p. 547. Thus, K. Hoffmann-Holland, [in:] B. v. Heintschel-Heinegg (ed.), *Münschener Kommentar…*, p. 1163; U. Kindhäuser, *Strafrecht…*, p. 256; M. Heger, [in:] H. Matt, J. Renzikowski (ed.), *Strafgesetzbuch…*, p. 301; M. Heger, *Die neuere Rechtsprechung zum strafbefreienden Rücktritt vom Versuch (§24 StGB),* Strafverteidiger issue 6, 2010, p. 320.

[49] K. Kühl, *Strafrecht…*, p. 546. According to another definition: "It should be assumed that there is a failed attempt when an object really attacked by a perpetrator does not match particular expectations and, therefore, he has no interest in the commission of an act so the perpetration becomes senseless for him"; F. Zieschang, *Strafrecht…*, p. 145; also see, H. Lilie, D. Albrecht, [in:] H.W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (ed.), *Strafgezetzbuch…*, pp. 1695–1702; A. Eser, [in:] A. Schönke, H. Schröder, P. Cramer (ed.), *Strafgezetzbuch. Kommentar,* München 2007, pp. 455–456.

is unsuitable to open the door, or inadequate object of an act, e.g. a jewellery or cash box, which turns out to be empty.[50] Recognition that it concerns classical cases of an impossible attempt is, however, negated by the fact that the assessment of unsuitability is left to a perpetrator. In other words, the above attempt would be impossible as long as a perpetrator did not realise that the commission was objectively impossible because the box was empty and vice versa. An attempt would remain failed also in case a perpetrator did not realise that, objectively, it was effective but only the totally counterfactual method assumed inadequacy of a means or an object (the box has a double bottom and is full in fact, which a perpetrator failed to notice). However, because of the indicated difference between the objective and subjective planes, one more subgroup of cases occurs, which are characterised by a perpetrator's recognition of inability to achieve a particular form of a result, which are the features of a given type of act with the simultaneous presence of chances, which a perpetrator also realises, to implement another form of it, e.g. seizure of thing A instead of thing B. These factual states, like in the BGH judgement of 26 November 2003, or in another mutation, a burglary into a safe where a perpetrator expected to find considerable amount of money and valuables but he finds only a few coins, which do not match his expectations at all,[51] also belong to the category of failed attempts, provided that from the very beginning a perpetrator's intent included this particular form of a result, the unavailability of which he realises. The difference between the result that is planned but recognised as unavailable and one that is available but initially unwanted may cause a complete termination of the sense of an act commission for a perpetrator,[52] which results in the classification of his conduct as a failed attempt that is not subject to the provisions concerning active regret.

However, with the full clarity of the above solution, a more sceptical reader might ask a question whether it does not constitute, by any chance, another way leading to the same final result, i.e. the recognition that impossibility of an attempt should be assessed from a perpetrator's subjective perspective, and thus, whether it does not deserve criticism equal to the concept presented by the Supreme Court in the former resolution of 20 November 2000.[53] The basic difference and unquestionable

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[50] Compare, BGH ruling of 1 February 2000, 4 StR 564/99, NStZ 2000, 531–532, in which perpetrators of attempted robbery returned a box when they saw there was no money in it, which they expected to obtain, and did not continue their proceeding. The BGH also recognised this form of a failed attempt when there was a lack of "a victim suitable to commit a prohibited act against her" in a situation, in which a perpetrator of attempted rape walked out of it because the aggrieved menstruated, BGH ruling of 5 October 1965, 1 StR 389/65, NJW 1965, 2410; K. Hoffmann-Holland, [in:] B. v. Heintschel-Heinegg (ed.), *Münchener Kommentar…*, p. 1169.

[51] U. Kindhäuser, *Strafrecht…*, p. 265; K. Kühl, *Strafrecht…*, p. 255, M. Heger, *Die neuere Rechtsprechung…*, p. 321; J. Wessels, W. Beulke, H. Satzger, *Strafrecht…*, p. 319; H. Lilie, D. Albrecht, [in:] H.W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (ed.), *Strafgezetzbuch…*, p. 1700.

[52] Which is often described by reference to the German civil law concept of *Wegfall der Geschäftsgrudlage*, closest to the clause *rebus sic stantibus*; compare, M. Heger, *Die neuere Rechtsprechung…*, p. 321. It also worth emphasising that it concerns complete, absolute senselessness of continuing an act, not only the recognition whether it will be less profitable; T. Fischer, *Strafgesetzbuch…*, p. 232.

[53] Compare, J. Giezek, *Glosa…*, p. 105 ff.

advantage of a failed attempt lies in the organisation of fundamental issues, i.e. determination that a division into an effective and a failed attempt is made following different criteria which cannot be identified with one another.[54] Because of that, the primary problem of overlapping various assessment perspectives is eliminated. This results in the dilemma to what extent the elements of an objective assessment and to what extent the elements of a subjective assessment should be reliable for the evaluation of suitability of an object or a means and the possibility of perpetration, which cannot be unambiguously solved.[55] Nor does the conception lead to "an absurd conclusion" that for the subjectivist perspective, a perpetrator's inability to implement a particular aim, must mean an impossible attempt.[56] Just the opposite, an attempt would be a failed one which would not result in any privileges connected with imposing punishment. The only weak point may be the requirement to reconstruct a particular stage of the original specification of a perpetrator's intent within it. The problem is not impossible to overcome, though. It should be even noted that it is much smaller than, e.g. the one connected with determination of subjective conditions for a continuous act, because in order to basically determine whether an attempt was failed or not, it is not enough to determine whether a perpetrator himself treated given objects as in general suitable to commit an intended act, i.e. in conformity with his criminal plan of a prohibited act. More thorough examination of details of his psychical processes is no longer necessary. A perpetrator's conviction that objects are completely unsuitable to commit a prohibited act to obtain them results in the occurrence of a failed attempt. On the other hand, in case of general conscience of suitability, it is not possible to exclude the elimination of the sense of acting and, thus, also a possibility of classifying conduct as a failed attempt. This way, only in case a perpetrator had a most general intention to commit a particular category of prohibited acts and with it he covered all actual changes in reality, which matched the feature of a result (e.g. seizure of whatever somebody else's moveable property characterised by these three minimum requirements: a thing, moveable and somebody else's), we might in advance exclude a failed attempt and would have to confine ourselves to determination of voluntariness of withdrawal. However, such a general intent would accompany a perpetrator rather rarely and its declaration at the stage of a trial would have to be carefully verified in the context of the whole evidence.[57]

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[54] This does not concern an answer to the question whether we deal with an object objectively suitable to commit a prohibited act against it and whether the decision should be based on the objective features of the object or a perpetrator's expectations concerning its features; compare, J. Giezek, *Glosa…*, p. 107, because this issue was discussed in the introduction.

[55] All the mixed conceptions are the most complete expression of the lack of satisfactory solution to the dilemma.

[56] J. Giezek, *Glosa…*, pp. 109–110.

[57] The unquestionable advantage of the concept of a failed attempt lies in its efficiency. Therefore, it was, first of all, approved of and developed in case law. Despite all the difficulties that are always connected with trial-related determination of subjective elements, it ensures a rather clear division of the attempt assessment perspective: for impossibility of an attempt – objective inability of perpetration; for the classification of an attempt as failed – always subjective from the point of view of a perpetrator, which eliminates the basic problem the Supreme Court faced and tried to solve in the successive resolution. It does not seem that it would be more

BIBLIOGRAPHY

Biederman J., *Glosa do uchwały Sądu Najwyższego z 20 listopada 2000 r. I KZP 36/2000*, Pal. No. 7–8, 2001.

Bojarski T., [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warsaw 2010.

Brand Ch., Wostry T., *Kein Rücktritt vom beendeten "fehlgeschlagenen" Versuch*, Goltdammer's Archiv für Strafrecht No. 155, 2008.

Daszkiewicz K., *Usiłowanie nieudolne (ze szczególnym uwzględnieniem uchwały Sądu Najwyższego z dnia 20 listopada 2000 r.)*, Prok. i Pr. No. 9, 2001.

Dębski R., *Karalność usiłowania nieudolnego*, RPEiS issue 2, 1999.

Doroszewski W. (ed.), *Słownik języka polskiego*. Vol. 10, Warsaw 1968.

Eser A., [in:] A. Schönke, H. Schröder, P. Cramer (ed.), *Strafgezetzbuch. Kommentar*, München 2007.

Fischer T., *Strafgesetzbuch mit Nebengesetzen. Beck'ische Kurzkommentare*, München 2017.

Frister H., *Strafrecht. Allgemeiner Teil*, München 2013.

Gajdus D., *Czynny żal w polskim prawie karnym*, Toruń 1984.

Giezek J., *Glosa do uchwały Sądu Najwyższego z dnia 20 listopada 2000 r., sygn. I KZP 36/2000 (dot. usiłowania nieudolnego)*, Prok. i Pr. No. 9, 2001.

Giezek J., [in:] J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warsaw 2012.

Giezek J., *Formy stadialne popełnienia czynu zabronionego w polskim prawie karnym*, Annales UMCS Vol. LX, 2013.

Gropp W., *Strafrecht. Allgemeiner Teil*, Berlin, Heidelberg 2015.

Gruszecka D., *Ochrona dobra prawnego na przedpolu jego naruszenia. Analiza karnistyczna*, Warsaw 2012.

Heger M., *Die neuere Rechtsprechung zum strafbefreienden Rücktritt vom Versuch (§24 StGB)*, Strafverteidiger issue 6, 2010.

Heger M., [in:] H. Matt, J. Renzikowski (ed.), *Strafgesetzbuch. Kommentar*, München 2013.

Hirsch H.-H., *Problematyka regulacji nieudolnego usiłowania w polskim i niemieckim kodeksie karnym*, [in:] J. Giezek (ed.), *Przestępstwo – kara – polityka kryminalna. Problemy tworzenia i funkcjonowania prawa. Księga Jubileuszowa z okazji 70. urodzin Profesora Tomasza Kaczmarka*, Kraków 2006.

Hoffmann-Holland K., [in:] B. v. Heintschel-Heinegg (ed.), *Münchener Kommentar zum Strafgesetzbuch. Band 1, §§1–37*, München 2017.

Jäger Ch., *Der Rücktritt vom Versuch als zurechenbare Gefährdungsumkehr*, München 1996.

Jędrzejewski Z., *Bezprawie usiłowania nieudolnego*, Warsaw 2000.

Jędrzejewski Z., *Granica karalności usiłowania nieudolnego*, WPP No. 2, 2007.

Kardas P., Rodzynkiewicz M., *Projekt kodeksu karnego w świetle opinii sądów i prokuratur*, WPP No. 2, 1995.

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sensible and, especially, simpler to bring the two-stage examination of conduct concerning the possibility of recognising active regret, which is composed of preliminary determination whether we deal with a failed attempt, and only then, as a result of negative answer to the above question, a transfer of assessment onto the plane of examining voluntariness of withdrawal, to the criterion of voluntariness. Only because of that, does this make an impression that it can be referred to all cases of a perpetrator's withdrawal from the commission, which remains very unclear. Thus, it is hard to agree with a similar proposal of L. Wörner, *Der fejlgeschlagene Versuch zwischen Tatplan und Rücktrittshorizont*, Baden-Baden 2009, pp. 117–120 or W. Gropp, *Strafrecht. Allgemeiner Teil*, Berlin, Heidelberg 2015, pp. 369–370; also critically, assuming uselessness of the concept of a failed attempt, F.Ch. Schroeder, *Rücktrittsunfähig und fehlerträchtig: der fehlgeschlagene Versuch*, NStZ issue 1, 2009, p. 9 ff (with right polemics by C. Roxin, *Der fehlgeschlagene Versuch – eine kapazitätsvergeudende, überflüssige Rechtsfigur?* NStZ issue 6, 2009, p. 319 ff); exclusively against the form of a failed completed attempt, see in: Ch. Brand, T. Wostry, *Kein Rücktritt vom beendeten "fehlgeschlagenen" Versuch*, Goltdammer's Archiv für Strafrecht No. 155, 2008, p. 611.

Kindhäuser U., *Strafrecht. Allgemeiner Teil,* Baden-Baden 2013.
Konarska-Wrzosek V., [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warsaw 2016.
Krey V., Esser R., *Deutsches Strafrecht. Allgemeiner Teil,* Stuttgart 2012.
Kudlich H., Schur J.C., [in:] H. Satzger, B. Schmitt, G. Widmaier (ed.), *StGB. Strafgezetzbuch Kommentar,* Köln 2009.
Kühl K., *Strafrecht. Allgemeiner Teil,* München 2017.
Lilie H., Albrecht D., [in:] H.W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (ed.), *Strafgezetzbuch. Leipziger Kommentar, Erster Band*, Berlin 2007.
Liszewska A., *Komentarz online do art. 15 k.k.*, [in:] J. Stefański (ed.), *Kodeks karny. Komentarz,* ed. 17, Legalis.
Liszewska A., *Formy stadialne popełnienia czynu zabronionego*, [in:] R. Dębski (ed.), *System Prawa Karnego*, Vol. III: *Nauka o przestępstwie. Zasady odpowiedzialności,* Warsaw 2013.
Majewski J., *O różnicy i granicy między usiłowaniem udolnym a usiłowaniem nieudolnym*, [in:] J. Majewski (ed.), *Formy stadialne i postacie zjawiskowe popełnienia przestępstwa. Materiały III Bielańskiego Kolokwium Karnistycznego,* Toruń 2007.
Majewski J., *O (braku) karalności usiłowań „nierealnych", „absolutnie nieudolnych" i im podobnych*, [in:] Ł. Pohl, *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca,* Poznań 2009.
Marek A., *Kodeks karny*, Warsaw 2010.
Markowska E., *Glosa do uchwały Sądu Najwyższego z dnia 20 listopada 2000 r., sygn. I KZP 36/2000*, Prok. i Pr. No. 9, 2005.
Mitsch W., [in:] J. Baumann, U. Weber, W. Mitsch, *Strafrecht. Allgemeiner Teil*, Bielefeld 2003.
Raglewski J., *Czynny żal w części ogólnej k.k.*, Jur. No. 1, 2000.
Roxin C., *Der fehlgeschlagene Versuch – eine kapazitätsvergeudende, überflüssige Rechtsfigur?* NStZ issue 6, 2009.
Schroeder F.Ch., *Rücktrittsunfähig und fehlerträchtig: der fehlgeschlagene Versuch*, NStZ issue 1, 2009.
Sitarz O., *Usiłowanie ukończone i nieukończone (próba nowego spojrzenia),* PiP No. 6, 2011.
Sitarz O., *Czynny żal związany z usiłowaniem w polskim prawie karnym. Analiza dogmatyczna i kryminalnopolityczna,* Katowice 2015.
Spotowski A., *O odstąpieniu od usiłowania*, PiP No. 6, 1980.
Sroka T., [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Komentarz. Część ogólna*, Vol. I: *Komentarz do art. 1–31*, Warsaw 2015.
Tarapata S., *Dobro prawne w strukturze przestępstwa. Analiza teoretyczna i dogmatyczna,* Warsaw 2016.
Tkaczyk K., *Instytucja czynnego żalu w prawie karnym w aspekcie prawnoporównawczym,* Przemyśl 2008.
Tyszkiewicz L., [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warsaw 2016.
Wąsek A., *Z problematyki usiłowania nieudolnego*, PiP No. 7–8, 1985.
Wąsek A., *Glosa do wyroku z dnia 22 stycznia 1985 r., IV KR 336/84*, PiP No. 6, 1986.
Wessels J., Beulke W., Satzger H., *Strafrecht. Allgemeiner Teil*, Heidelberg 2016.
Wiak K., [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warsaw 2014.
Wörner L., *Der fejlgeschlagene Versuch zwischen Tatplan und Rücktrittshorizont*, Baden-Baden 2009.
Wróbel W., Zoll A., *Polskie prawo karne. Część ogólna*, Kraków 2013.
Zaczyk R., [in:] U. Kindhäuser, U. Neumann, H.-U. Paeffgen (ed.), *Nomoskommentar. Strafgezetzbuch, Band 1*, Baden-Baden 2013.
Zawłocki R., [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część ogólna*, Vol. I: *Komentarz do art. 1–31*, Warsaw 2011.
Zieschang F., *Strafrecht. Allgemeiner Teil*, Stuttgart 2014.

Zoll A., *Odpowiedzialność karna za czyn niesprowadzający zagrożenia dla dobra prawnego w świetle Konstytucji*, [in:] J. Majewski (ed.), *Formy stadialne i postacie zjawiskowe popełnienia przestępstwa. Materiały III Bielańskiego Kolokwium Karnistycznego,* Toruń 2007.
Zoll A., [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna,* Vol. I: *Komentarz do art. 1–52*, Warsaw 2016.

Polish court rulings

Judgement of the Appellate Court in Kraków of 4 March 1999, II AKa 22/99, KZS 1999, No. 3, item 14.
Supreme Court resolution of 20 November 2000, I KZP 36/00.
Supreme Court ruling of 8 September 2005, II KK 10/05, OSNwSK 2005, No. 1, item 1614.
Supreme Court judgement of 20 November 2007, III KK 254/07, Prok. i Pr. – supplement, 2008, No. 7–8, item 3.
Judgement of the Appellate Court in Białystok of 20 December 2012, II AKa 213/12, Legalis.
Judgement of the Appellate Court in Kraków of 10 July 2013, II AKa 131/13, Legalis.
Judgement of the Appellate Court in Szczecin of 23 October 2014, II AKa 172/14.
Judgement of the Appellate Court in Wrocław of 10 June 2015, II AKa 136/15, Legalis.
Judgement of the Appellate Court in Kraków of 19 May 2016, II AKa 65/16.
Justification for the motion of the First President of the Supreme Court of 2 November 2016, I KZP 16/16.
Justification for the Supreme Court resolution of 19 January 2017, I KZP 16/16.

German case law

BGH ruling of 5 October 1965, 1 StR 389/65, NJW 1965, 2410.
BGH judgement of 10 April 1986, 4 StR 89/86, BGHSt 34, 53.
BGH ruling of 1 February 2000, 4 StR 564/99, NStZ 2000, 531–532.
BGH ruling of 26 November 2003, 3 StR 406/03, NStZ 2000, 531.
BGH ruling justification of 26 November 2003, 3 StR 406/03, NStZ 2000, 531.

IMPOSSIBLE ATTEMPT VERSUS VOLUNTARY WITHDRAWAL OR PREVENTION OF PERPETRATION: COMMENTS ON THE SUPREME COURT RESOLUTION OF 19 JANUARY 2017 (I KZP 16/16)

Summary

Impossible attempt, as a special form of inchoate offences, where the offender fails to realise that the attempt could under no circumstances lead to the completion of the offence due to the nature of its object or the means by which it was to be committed, is a source of many unsolved dogmatic dilemmas, with the justification of its criminalization in the first place. One of such issue is the admissibility of applying the institution of "active regret" to behavior which, even if the perpetrator did not prevent its completion would never cause any danger to the legal good. This issue has once again appeared in connection with the last Supreme Court's resolution of 19 January 2017, in which the Court analysed the criteria of the impossible attempt and the voluntariness of withdrawal. The author attempts to prove that, firstly, there are no reasons preventing one from treating an offender, who in his or her vision voluntarily gives up further execution of an offence or prevents its completion as the offender of effective (ordinary) attempt, although the application of Article 15 of the Criminal Code is

possible only by analogy. Secondly, the objective of the paper is to explain in more detail the institution of failed attempt, which allows the outlined problems to be solved more effectively and in a more theoretically correct way.

Keywords: inchoate offences, criminal attempt, impossible attempt, failed attempt, voluntary withdrawal, "active regret", criminal liability for attempt

NIEUDOLNOŚĆ USIŁOWANIA A DOBROWOLNE ODSTĄPIENIE LUB ZAPOBIEŻENIE DOKONANIU. UWAGI NA MARGINESIE UCHWAŁY SĄDU NAJWYŻSZEGO Z DNIA 19 STYCZNIA 2017 R. (I KZP 16/16)

Streszczenie

Usiłowanie nieudolne, jako szczególna forma stadialna popełnienia przestępstwa, przy której sprawca nie zdaje sobie sprawy, że dokonanie jest *ex ante* niemożliwe z uwagi na brak przedmiotu lub brak środka nadającego się do popełnienia przestępstwa, stanowi źródło wielu – jak dotąd nierozwiązanych – dogmatycznych dylematów, z uzasadnieniem jego karalności na czele. Jednym z takich właśnie zagadnień jest dopuszczalność stosowania instytucji czynnego żalu wobec zachowania, które nawet gdyby sprawca go nie zaniechał, i tak nigdy nie sprowadziłoby niebezpieczeństwa dla dobra prawnego. Kwestia ta po raz kolejny pojawiła się w związku z ostatnią uchwałą Sądu Najwyższego z dnia 19.01.2017 r., w której Sąd analizował kryteria udolności usiłowania oraz dobrowolności odstąpienia. Autorka stara się wykazać, że po pierwsze nie ma żadnych przeszkód, by sprawca, który w swoim wyobrażeniu dobrowolnie odstąpił od dokonania lub zapobiegł skutkowi stanowiącemu znamię czynu zabronionego, mógł korzystać z takich samych przywilejów w zakresie odpowiedzialności karnej, co sprawca usiłowania udolnego (zwykłego), choć stosowanie przepisu art. 15 k.k. możliwie jest jedynie na zasadzie analogii. Po drugie, celem artykułu jest przybliżenie konstrukcji usiłowania chybionego, która pozwala na efektywniejsze i teoretycznie poprawniejsze rozwiązanie zarysowanych problemów.

Słowa kluczowe: formy stadialne popełnienia przestępstwa, usiłowanie, usiłowanie nieudolne, usiłowanie chybione, dobrowolne odstąpienie od dokonania, czynny żal, odpowiedzialność karna za usiłowanie

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CRIME OF DESECRATION OF A MONUMENT OR ANOTHER PUBLIC PLACE ARRANGED TO COMMEMORATE A HISTORIC EVENT OR TO HONOUR A PERSON (ARTICLE 261 CC)

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1. INTRODUCTION

Offences under Article 261 of the Criminal Code[1] are relatively rare in Poland. According to the Police statistics, there were 36 such offences reported in 2010, 46 in 2011, 52 in 2012, 64 in 2013, 72 in 2014, 54 in 2015 and 53 in 2016.[2] Looking at the cases reported in recent years, an event worth mentioning is the desecration of the Monument of Rotmistrz Witold Pilecki 2017 on Promenada Staomiejska in Wrocław[3] by a group of young people who lay on flower wreaths in front of that monument,[4] and a photo of their act was posted on the Internet. In April 2017 in Gdańsk, a drunken 21-year-old man broke a memorial with information, part of the Monument of Danuta Siedzikówna, alias Inka.[5] In October 2014, a female perpetrator desecrated the Monument Commemorating Jews of Częstochowa pouring nail polish on

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[1] Act of of 6 June 1997: Criminal Code, Journal of Laws [Dz.U.] of 1997, No. 88, item 553, as amended; henceforth: CC.

[2] http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-13/63617,Znieważenie-obiektow-o-znaczeniu-symbolicznym-art-261.html [accessed on 20/12/2017].

[3] https://www.wprost.pl/kraj/10072297/Zniewazenie-pomnika-Pileckiego-Pieta-i-Tarczynski-donosza-do-prokuratury-i-zadaja-scigania-sprawcow.html [accessed on 20/12/2017].

[4] There are six persons in the photo. They lie on the wreaths. Two women hold flowers in their teeth, and another one wears a ribbon made of a wreath on her head.

[5] https://www.tvn24.pl/pomorze,42/gdansk-zniszczyl-pomnik-inki-bo-byl-pijany,734630.html [accessed on 20/12/2017].

it.[6] A minor perpetrator of a prohibited act carrying a penalty was charged with desecration of a monument after he climbed the Monument of Pope John Paul II in Stargard in 2016, took a picture and posted it on a social networking website.[7] In June 2017 in Gdańsk, a perpetrator broke and removed one of the figures of the Kindertransport Monument, stood in its place and took photographs.[8] Such situations, often reported by means of mass communication, especially the Internet, are usually met with very strong negative social assessment, sometimes triggering lively discussions concerning the culture of the society and the need for adequate legal response to the conduct of the perpetrators of those acts.

2. DESECRATION OF MONUMENTS UNDER THE POLISH LAW

In the CC of 1932, there was no provision like Article 261 CC of 1997.[9] It seems that we can find the first instance of criminalisation of desecration of a monument in the Decree of 13 June 1946 on offences especially dangerous in the period of rebuilding the country (referred to as Small Criminal Code). And so, Article 25 (in Chapter II – Crimes against public order) stipulated that who desecrates, damages or removes the publicly displayed: (1) national emblem, flag or another state sign of Poland or Poland's ally, (2) a monument or another work raised to commemorate or honour events or persons shall be subject to a penalty of imprisonment or detention for up to five years.[10] The construction used in the CC Bill of 1956 was more casuistic and Article 241 §1 criminalised conduct in the form of desecration, destruction or damage to a monument or another work displayed publicly in order to honour or commemorate events or persons deserving special praise for their distinguished service to the Polish nation or international workers' movement (carrying a penalty of one to five years' imprisonment). Article 241 §2 laid down the

[6] https://slask.onet.pl/skazana-za-zniewazenie-pomnika-pamieci-zydow-czestochowian/wzxg3z [accessed on 20/12/2017].

[7] http://www.stargard.policja.gov.pl/zst/dzialania-policji/aktualno/7047,Uslyszal-zarzut-za-zniewazenie-pomnika-Papieza.html [accessed on 20/12/2017].

[8] http://gdansk.naszemiasto.pl/artykul/uszkodzil-pomnik-kindertransportow-w-gdansku-zostal,4160020,artgal,t,id,tm.html [accessed on 20/12/2017].

[9] According to A. Błachnio, in such a case, the conduct of a perpetrator who desecrating a monument at the same time insulted or derided the Polish nation or the state, or desecrated the national emblem, flag, banner, ensign or any other Polish state sign, or destroyed or removed such a sign publicly displayed was the only ground for filing an indictment (Article 153 CC of 1932). A. Błachnio, *Przestępstwo znieważenia pomnika na gruncie kodeksu karnego*, PS No. 3, 2017, p. 103.

[10] For more on those offences, compare M. Siewierski, [in:] J. Bafia. L. Hochberg, M. Siewierski, *Ustawy karne PRL. Komentarz*, Warsaw 1965, p. 52. M. Siewierski wrote: "Article 25(2) provides legal protection to monuments raised in the Polish People's Republic by the authorities, state bodies or social organisations to commemorate events or persons deserving it in the public opinion. The same applies to monuments raised formerly. On the other hand, e.g. private grave monuments are not subject to protection under that Article. Their damage is subject to Article 263 CC as damage to a thing or Article 168 CC if it concerns desecration of a grave". M. Siewierski, [in:] *Ustawy karne...*, p. 52, by this author, *Kodeks karny. Przestępstwa przeciwko porządkowi publicznemu. Zaoczny kurs: „Prawo karne – nowe kodeksy"*, script no. 16, Warsaw 1970, p. 19.

same penalty for a perpetrator desecrating a grave of a soldier of the Polish Army or an ally's army or a person deserving special praise for their distinguished service to the Polish nation or international workers' movement. The prohibited acts under Article 241 were laid down in Chapter XIX of the CC Bill of 1956 (Crimes against public order). Article 412 §2 of the CC Bill of 1963 (included in Chapter XXXIII – Crimes against public order) penalised desecration, damage or removal of a monument, an image or another similar work displayed publicly by the state or society in order to commemorate historic events or a person's merits (carrying a penalty of imprisonment of up to two years). On the other hand, Article 412 §1 criminalised desecration of the national emblem, flag, banner, ensign or another state sign determined by the Polish legislator or damage to or removal of such a sign displayed publicly. One should mention the fact that, in accordance with Article 412 §3 Bill, an attempt to commit offences under §1 and §2 was penalised.[11] In the CC Bill of 1966, the analysed offence was laid down in Article 280 §2 concerning desecration of a monument or another work displayed publicly in order to commemorate a historic event or honour a person, and carried a penalty of imprisonment of up to three years. Article 280 §1 criminalised desecration, damage or removal of the publicly displayed national emblem, flag, banner, ensign or another Polish state sign or a symbol of international workers' movement. Prohibited acts under Article 280 were covered by Chapter XXXII (Crimes against public order). The CC Bill of 1968 adopted exactly the same solutions as the Bill of 1966. And so, Article 291 §2 dealt with desecration of a monument or another work displayed publicly in order to commemorate a historic event or honour a person (carrying a penalty of imprisonment of up to three years) and Article 292 §1 criminalised desecration, damage or removal of the publicly displayed national emblem, flag, banner, ensign or any other Polish state sign or symbol of international workers' movement. Prohibited acts under Article 292 were included in Chapter XXXVII (Crimes against public order). They can be found used in the same wording in the CC of 1969, yet in Article 284[12] (Crimes against public order were laid down in Chapter XXXVI[13]). In the CC Bill of 5 March 1990, desecration of a monument was laid down in Article 283 (Chapter XXXVII – Crimes against public order), in the same wording as in the CC of 1969 ("Who desecrates a monument or another work displayed publicly in order

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[11] In accordance with Article 29 §1 of the Bill, an attempt to commit an offence was penalised provided that an act carried a penalty of deprivation of liberty exceeding three years or if a special provision stipulated penalisation of an attempt.

[12] Article 284 §1. Who desecrates, damages or removes the publicly displayed national emblem, flag, banner, ensign or another state sign of Poland or Poland's ally, or a symbol of international workers' movement is subject to a penalty of deprivation of liberty of up to three years. §2. Who desecrates a monument or another work displayed publicly in order to commemorate a historic event or honour a person is subject to a penalty of deprivation of liberty of up to two years, limitation of liberty or a fine. §3. The provision of §1 is applicable in case an act is committed to the detriment of an allied state, provided the allied state assures reciprocity. Article 284 §3 was added by means of Article 1(6) of the Act of 29 May 1989 amending some provisions of criminal law, misdemeanour law and some other acts (Journal of Laws [Dz.U.] of 1989, No. 34, item 180) which entered into force on 6 June 1989.

[13] For more on the issue, compare M. Siewierski, *Kodeks karny...*, pp.18–19.

to commemorate a historic event or honour a person is subject to a penalty of a fine or limitation of liberty");[14] the difference consists in the sanction.

In accordance with the CC of 1997, the analysed offence was given a very similar wording as in Article 284 §2 CC of 1969. Thus, pursuant to Article 261, "Who desecrates a monument or another public place arranged in order to commemorate a historic event or honour a person is subject to a penalty of a fine or limitation of liberty". Thus, it is clear that the differences consist in the object of an act; while in Article 284 §2 CC of 1969 it was "a monument or a work publicly displayed", in Article 261 it applies to "a monument or another public place". In the same way as in all the former criminal codes (and bills), it was laid down in the chapters on offences against public order (Chapter XXXII). What draws attention is very clear mitigation of the sanction in the analysed provision; a penalty of deprivation of liberty was abandoned and a penalty of a fine and limitation of liberty remained. As far as an equivalent of Article 284 §1 CC of 1969 (desecration, damage or removal of the national emblem, flag, banner, etc.) is concerned, it can be found in Article 137 CC 1969[15] (Chapter XVII – Offences against the Republic of Poland).

3. THE OBJECT OF PROTECTION

Public order, including "its manifestations that are associated with the occurrence of monuments and places of remembrance in public space, which should be perceived as an expression of common will to honour some people and events, constitutes the type of an object of protection."[16] Homage paid to people and historic events commemorated by monuments or specially arranged places constitutes an individual object of protection.[17] According to another opinion, respect to places commemorating events important in the history of the country and people deserving special remembrance is an individual object of protection.[18] It is emphasised in jurisprudence that "also the feelings of people for whom a given place or object has a symbolic significance are subject to protection. An attempt on these extremely important symbols, at least for a part of the community, may lead to great anxiety and even unrest. That is why, it is justifiable to include this provision in the Chapter

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[14] The Criminal Code Bill (submitted for expert discussion), edition of 5 March 1990, Warsaw 1990, p. 87.

[15] §1. Who publicly desecrates, destroys or damages, or removes the national emblem, flag, banner, ensign or another state sign is subject to a penalty of a fine, limitation of liberty or deprivation of liberty of up to one year. §2. Who desecrates, destroys, damages or removes an emblem, flag, banner, ensign or another sign of another state publicly displayed by the embassy of that state or on demand of a Polish authority is subject to the same penalty.

[16] A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część szczególna*, Vol. II: *Komentarz*, Warsaw 2017, p. 418.

[17] J. Lach, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 1121.

[18] Z. Ćwiąkalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny. Część szczególna*, Vol. II: *Komemtarz do art. 117–211a*, Warsaw 2017, p. 571; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warsaw 2017, p. 797; D. Gruszecka, [in:] J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warsaw 2014, p. 942.

devoted to public order."[19] As R. Krajewski notices, it mainly concerns "patriotic feelings often connected with individual experiences of Polish people, especially of the older generation. People honoured by a monument or another symbol of remembrance usually did something extremely important to the state, nation, local communities, due to their activities in various fields: social, political, scientific, educational or charitable. There are many places of remembrance devoted to fight and suffering for the Nation and its independent existence. As a result, although Article 261 CC refers desecration to a monument or another place, in fact, it is to protect the feelings of people for whom such objects and places have symbolic significance."[20] M. Flemming is right to say that neither artistic nor material value of an object or place is important but the level of hurting people's feelings.[21]

4. THE CONCEPTS OF MONUMENT AND ANOTHER PLACE ARRANGED IN ORDER TO COMMEMORATE A HISTORIC EVENT OR TO HONOUR A PERSON

The terms used in the provision of Article 261 CC, namely "monument" and "another public place arranged in order to commemorate a historic event or to honour a person" need explaining. It is necessary to start with the term "monument". It must be pointed out that there is no formal definition of this term, although the word appears in many legal acts (and is used in different contexts). In accordance with the definition cointained in *Słownik Języka Polskiego* (Dictionary of the Polish language), a monument is "a sculpture or a sculpture-like architectural work in the form of a statue, an obelisk, a plaque, a building, etc. raised to honour a person or to commemorate an event".[22] The dictionary indicates some other contexts in which the word is used in Polish (monument of nature, monument of construction, monument of culture, monument of the Polish language). The word "monument" (*pomnik*) originates from an old Polish form of the verb "to remember" (*pomnieć*).[23] Coming back to legal acts using the term "monument", it is worth pointing out, inter alia, the Act of 23 July 2003 on the protection of antiquities and care for them,[24] which refers to a monument of history in Article 15;[25] the Act of 7 May 1999 on the protection of the

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[19] D. Gruszecka, [in:] J. Giezek (ed.), *Kodeks karny...*, p. 942.

[20] R. Krajewski, *Prawnokarna ochrona pomników i innych miejsc publicznych powstałych dla upamiętnienia zdarzenia historycznego lub uczczenia osoby*, WPP No. 3, 2010, p. 97.

[21] M. Flemming, [in:] M. Flemming, W. Kutzman, *Przestępstwa przeciwko porządkowi publicznemu. Rozdział XXXII Kodeksu karnego. Komentarz*, Warsaw 1999, p. 99.

[22] M. Szymczak (ed.), *Słownik Języka Polskiego*, Vol. II, Warsaw 1984, p. 795. Compare also, W. Szolginia, *Architektura*, Sigma NOT, Warsaw 1992, p. 126.

[23] https://pl.wikipedia.org/wiki/Pomnik#cite_note-1 [accessed on 20/12/2017].

[24] Journal of Laws [Dz.U.] of 2003, No. 162, item 1568; uniform text of 24 October 2014, item1446.

[25] 1. The President of the Republic of Poland, on a motion filed by a minister of culture and protection of national heritage, by means of a regulation, may recognise a registered antiquity or a cultural park of special value for culture as a monument and establish its borders.
2. Having obtained an opinion of the Council for the Protection of Antiquities, a minister of culture and protection of national heritage may file a motion referred to in (1).

former Nazi death camps,[26] which refers to monuments of holocaust in Article 2;[27] the Act of 16 April 2004 on the protection of nature,[28] which defines a monument of nature in Article 40[29]. One should also mention that many other buildings or institutions function (or used to function) in Poland as monuments (*pomniki*), e.g. Pomnik – Centrum Zdrowia Dziecka in Warszawie (Monument – Centre of Child Health in Warsaw); Zamek Królewski w Warszawie – Pomnik Historii i Kultury Narodowej (Royal Castle in Warsaw – Monument of National History and Culture).[30] Moreover, in accordance with the building regulations in force (Act of 7 July 1994: Building Law),[31] a monument is "a building" (Article 3(3)) and, as a result, is subject to all regimes concerning building structures. All this results in a difficult task of determining what kind of monument the legislator refers to in Article 261 CC (although, undoubtedly, these are not monuments of nature). The situation is even more difficult as at present the term "monument" has a broader use than its literal, linguistic meaning. It is hard to agree with the view that a monument must serve only to commemorate a person or an event (although it is usually so). As far as people are concerned, they are usually determined; their names are used in monuments' names (e.g. Frederic Chopin Monument, Maria Skłodowska-Curie Monument), although one cannot exclude cases concerning a group of people (known in person, e.g. the Monument of the

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3. Withdrawal of a status of a monument shall follow the same procedure as its recognition.
4. A minister of culture and protection of national heritage may file a motion to the World Heritage Committee to enter a monument of history onto the List of World Heritage Sites in order to provide it with protection, in accordance with the Convention concerning the Protection of the World Cultural and Natural Heritage adopted in Paris on 16 November 1972 (Journal of Laws [Dz.U.] of 1976, No. 32, items 190 and 191).

[26] Journal of Laws [Dz.U.] of 1999, No. 41, item 412; uniform text of 26 November 2015, item 2120.

[27] Article 2. The monuments of holocaust are as follows: (1) Auschwitz-Birkenau Memorial and Museum in Oświęcim; (2) Struggle and Martyrdom Memorial in Majdanek; (3) Stutthof Museum in Sztutowo; (4) Gross-Rosen Museum in Rogoźnica; (5) Museum of Struggle and Martyrdom in Treblinka; (6) Museum of the Former German Kulmhof Death Camp in Chełmno on Ner; (7) Museum of the Former Death Camp in Sobibór; (8) former Death Camp in Bełżec.

[28] Journal of Laws [Dz.U.] of 2004, No. 92, item 880; uniform text of 23 December 2016, item 2134.

[29] Article 40. 1. The monuments of nature are single natural living or lifeless formations or their groups having high biological, scientific, cultural, historical or landscape value, and characterised by individual features distinguishing them from other formations, enormous trees, domestic or foreign bushes, springs, waterfalls, karst springs, rocks, valleys, glacial erratics and caves.
2. In rural areas, provided it does not pose threat to people or property, trees-monuments of nature shall be protected until their complete natural decomposition.
3. A minister for the environment shall determine, by means of a regulation, the criteria for recognising natural living and lifeless formations as monuments of nature, taking into consideration the need to protect trees and bushes because of their size, age, shape and historical significance, and, in case of lifeless nature, their scientific, aesthetic and landscape value.

[30] As a result of Directive of the Minister of Culture and National Heritage of 1 April 2014 (Dz.Urz. MKiDN 2014.21 of 2 April 2014) the name was changed into Zamek Królewski w Warszawie – Muzeum. Rezydencja Królów i Rzeczypospolitej (Royal Castle in Warsaw – Museum, Residence of the Kings and the Republic).

[31] Journal of Laws [Dz.U.] of 1994, No. 89, item 414, as amended.

Polish Post Defenders in Gdańsk,[32] the Monument of the Defenders of Lublin[33]), or of unidentified (or only partly identified) groups of people (e.g. the Monument of Warsaw Uprising, the Tomb-Monument of the Unknown Soldier in Warsaw). However, more and more often, monuments of animals are built, sometimes commemorating animals not actually existing at all but created by authors of culture or art (e.g. the Monument of Reksio, a character of a cartoon for children, in Biesko-Biała). As far as real animals are concerned, one should mention the Monument of Dżok, the dog,[34] on Bulwar Czerwiński on the Vistula River in Kraków, not far from the Wawel Castle and Grunwaldzki Bridge, or Camilla (Border collie breed) dog monument in a town of Amatrice in central Italy, who helped the Fire Brigade in the rescue operation after the earthquake and saved many people, however, did not survive injuries incurred during the operation.[35] There are many statements made in the doctrine concerning the issue whether Article 261 is applicable only to people or extends protection onto other monuments (e.g. of animals). According to A. Michalska-Warias, "Only a monument or another place intended to commemorate a person is subject to protection. This means that desecration of a monument depicting an animal or an object or a human silhouette not representing a real historic person does not match the features of the analysed offence."[36] A. Błachnio seems to express less categorical opinions and states that a monument "(…) does not include (…) (as a rule) animals, monuments of nature, monuments of fictitious characters or monuments placed in places other than public ones."[37] Since this author states that it is so "as a rule", it can mean that exceptions are admitted. Unfortunately, she does not indicate what exceptions these might be. Therefore, a question is asked whether the protection under Article 261 CC extends onto monuments of animals (at least those real ones). It should be said that since people decided to raise monuments to commemorate those animals, this means they had essential reasons for doing that, e.g. showing appreciation and respect to

[32] The list of the defenders as well as their civilian companions is available at: https://pl.wikipedia.org/wiki/Obrona_Poczty_Polskiej_w_Gda%C5%84sku#Lista_obro.C5.84c.C3.B3w_oraz_towarzysz.C4.85cych_im_os.C3.B3b_cywilnych [accessed on 20/12/2017].

[33] There is a list of 596 names engraved on five brass plaques placed on this monument (in Zana Street, near Namysłowskiego Street in Lublin).

[34] The history of Dżok is believed to be one of Kraków's legends. It is about a dog, a black mongrel, whose master died in tragic circumstances: he suffered from a heart attack near Rondo Grunwaldzkie. The dog waited there for his master bred by the city dwellers surprising them and enjoying their sympathy. Having waited for about a year, the dog let Maria Müller become his new mistress. The woman died in 1998 and the dog ran away, wandered around railway tracks and eventually was killed by a train. Although at the beginning the city authorities were not eager to agree to the proposal to build the monument, many organisations (inter alia, the Kraków branch of the Society for the Care for Animals and the countrywide media based in Kraków), and well-known people (e.g. Z. Wodecki, J. Połomski, K. Piasecki and K. Cugowski as well as many ordinary city residents) contributed to the idea implementation. Professor Bronisław Chromy designed the sculpture and a German shepherd breed dog Kety unveiled the monument on 26 May 2001. https://pl.wikipedia.org/wiki/Pomnik_psa_D%C5%BCoka [accessed on 20/12/2017].

[35] http://www.rmf24.pl/fakty/swiat/news-w-amatrice-odslonieto-pomnik-psa-ratownika-stanowila-to-co-n,nId,2432741 [accessed on 20 /12/2017].

[36] A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 419.

[37] A. Błachnio, *Przestępstwo znieważenia...*, p. 107.

animal love and loyalty (Dżok, the dog monument), or showing gratitude for saving people (the monument of Camilla), or for helping people in the fight against enemies (Animals in War Memorial).[38] Thus, if a monument has been raised to commemorate a real animal, it is an expression of human respect for it. So, why should this material expression of respect not be given legal protection under Article 261 CC? Those who desecrate such a monument disrespect the feelings of people who decided to raise animals' monuments. Obviously, it is hard to agree that this protection should also cover monuments of animals inexistent in real life (e.g. monuments of a beetle in Szczebrzeszyn or Reksio in Bielsko-Biała). In such cases, protection laid down in other provisions of the Criminal Code and the Misdemeanour Code[39] is sufficient (e.g. Article 288 CC, Article 51 MC, Article 124 MC, Article 51 MC, Article 140 MC).

Still speaking about monuments raised to honour people, it is necessary to recall M. Flemming's opinion that "a monument of even big artistic or historic value, such as statues of antique gods or mythical characters as well as allegoric silhouettes sometimes placed in parks or other public places are not subject to protection under Article 261. In such cases, the provisions of misdemeanour law are applicable."[40] The main idea behind the quoted statement is obviously right. If a monument presents a fictitious figure, inexistent in real life, the protection envisaged in Article 261 CC does not apply to it. However, it is not right to state that in such cases only the provisions classifying misdemeanours can be applicable, because the classification of a perpetrator's act may concern crimes (e.g. Article 288 CC – destruction or damage to things; Article 108(1) Act of 23 July 2003 on the protection of antiquities and care for them – destruction or damage to an antiquity).

5. GROUNDS FOR PENALISATION – PUBLIC DISPLAY

Public display is a necessary condition for penalisation of desecration of a monument. Such interpretation seems justified because of the legislator's use of the phrase "a monument or another public place", and not "a monument or a public place". The word "another" seems to be decisive and so it can be said that the legislator meant that monuments should also be treated as public places (strictly speaking, are located in such places). The interpretation of the aims also supports this way of thinking. It would not be justified to extend the legal protection on monuments in private areas, especially as those monuments were created following the will of a private person and financed by them (often without necessary building permits). However, doubts may also arise here, namely how to treat situations in

[38] The monument, which can be found on the edge of Hyde Park in London, commemorates animals that served and died under British military command. It was designed by the English sculptor David Backhouse and unveiled in November 2004 by Princess Anne, the Princess Royal. The monument expresses special appreciation of 60 animals honoured with the Dickin Medal, including 54 serving during World War II (32 pigeons, 18 dogs, three horses and a cat); https://pl.wikipedia.org/wiki/Animals_in_War_Memorial [accessed on 20/12/2017].

[39] Act of 20 May 1971: Misdemeanour Code, Journal of Laws [Dz.U.] of 1971, No. 12, item 114, as amended; henceforth: MC.

[40] M. Flemming, [in:] M. Flemming, W. Kutzman, *Przestępstwa przeciwko porządkowi...*, p. 101.

which a monument used to be in a public place and now, as a result of changes in ownership relations, it is in a private area (e.g. the Monument of Irena Kosmowska[41] in Krasienin, placed in a manorial park, which together with a manor house constitutes a private real estate now). These are exceptional situations but they do happen. It seems that such monuments should be moved to places that give access to the members of the public (before the land is sold to a private investor). Since it was not done, we should think that the monument is not under the protection of Article 261 CC (it can be subject to protection under Article 288 CC, Article 124 MC, Article 51 MC and Article 140 MC).

6. THE ISSUE OF MONUMENTS COMMEMORATING TOTALITARIAN SYSTEM

It is necessary to come back to the issue seemingly not raising doubts, namely monuments erected to honour real (dead or still living) people. Are they always, in absolutely every case, subject to protection under Article 261 CC? One should mention the Act of 1 April 2016 on the ban of propagating communism or any other totalitarian system by means of using names of organisational units, commune (*gmina*) subsidiary units, buildings, public facilities and monuments.[42] In accordance with Article 5a of this Act, monuments cannot commemorate persons, organisations, events or dates symbolising communism or another totalitarian system or propagate this system in any other way.[43] The provision of Article 1(2) of the Act concerned is applicable, which means that the names referring to persons, organisations, events or dates symbolising repressive, authoritarian and not sovereign system of authority in Poland in the period 1944–1989 are treated as such propagating names. It should be noticed that the provision of Article 1(1) is not applicable to: (1) monuments not displayed publicly; (2) being in the area of cemeteries or other burial places; (3) exposed to the public within artistic, educational, collector's or scientific activities and the like for the purpose different than propagating a totalitarian system; (4) entered, on their own or as part of a bigger whole, into the registry of antiquities (Article 5a(3)). In accordance with Article 5a(1), a voivode, by means of a decision, must order an owner or a perpetual usufructuary of a real estate where there is a monument not matching the requirements laid down in Article 5a(1) to remove this monument.[44] The decision concerning the removal of a monument requires that

[41] Born on 20 December 1879 in Warsaw, died on 21 August 1945 in Berlin, a Polish folk activist fighting for independence and education, MP of the Legislative Sejm as well as in the 1st and 2nd term of the Sejm of the Second Republic of Poland.

[42] Journal of Laws [Dz.U.] of 2016, item 744 of 1 June 2016, as amended.

[43] In accordance with Article 5a(2), monuments also mean mounds, obelisks, sculptures, statues, busts, memorial stones and plagues, notices and signs.

[44] As it was stated in the justification to the Senate Bill amending the Act on the ban on propagating communism or any other totalitarian system by means of using names of buildings and public facilities (print no. 985), "The information provided by the voivodes indicates that there are about 469 facilities in the territory of 15 voivodeships (excluding Mazowieckie Voivodeship) that may match the criteria laid down in the Bill (the data do not include facilities

the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation issue an opinion confirming that a monument does not meet the requirements laid down in Article 5a(1) (Article 5b(2)). The owner or the perpetual usufructuary of the real estate must cover the cost of a monument removal (Article 5b(4)). Thus, there is a real problem whether it is possible to "desecrate" the monument that "commemorates persons, organisations, events or dates symbolising communism or another totalitarian system" (e.g. the monuments of Bierut or Lenin). Not all of those monuments have been removed from Polish towns, yet. How should the conduct of a perpetrator "desecrating", e.g. a still existing monument of Lenin, be assessed? We should think that in such a case we do not deal with the features of a crime laid down in Article 261 CC, but liability for destruction of or damage to things (Article 288 CC, Article 124 MC),[45] because such a monument has a considerable financial value (and sometimes may be extremely valuable from the artistic or collector's point of view, especially as quite often well-known artists designed those monuments).

7. THE ISSUE OF ANOTHER PUBLIC PLACE ARRANGED TO COMMEMORATE A HISTORIC EVENT OR TO HONOUR A PERSON

The second feature used in Article 261, i.e. "another public place arranged in order to commemorate a historic event or to honour a person", also needs analysing. According to A. Michalska-Warias, it refers to public places, which were arranged in a special way to commemorate a historical event or honour a person (e.g. a mound, a separated flowerbed with a notice, a plague built in a wall of a building, a tree planted to commemorate an event or a person).[46] According to M. Kalitowski, a place like this can be, e.g. the space arranged in a special way where an important historic event occurred (e.g. the field of battle), a fragment of a building arranged to commemorate the work of an important institution in it or a residence of an outstanding historic person.[47] As O. Górniok raises (and R. Krajewski follows[48]), "a historic event in its precise meaning is such an event that historians register in the history of the world, nation or local communities. Its broader meaning refers to all events, really registered and reported by tradition (the place where Mickiewicz

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propagating Ukrainian or Lithuanian nationalism, and Prussian, Russian and German militarism) (…). Assuming that an average cost of one facility removal (based on a quotation made for 66% of facilities), the cost of removal of the remaining 156 facilities may account for PLN 1.7 million; the total cost of removal of all 469 facilities (excluding Mazowieckie Voivodeship and monuments propagating Ukrainian and Lithuanian nationalism, and Prussian, Russian and German militarism) may be estimated at circa PLN 5 million". http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=985 [accessed on 20/12/2017].

45 According to A. Michalska-Warias, at present, such a monument is not intended to honour a person but only to provide evidence of the past epoch. A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 419.

46 *Ibid*.

47 M. Kalitowski, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 1453.

48 R. Krajewski, *Prawnokarna ochrona...*, pp. 97–98.

used to meet Maryla), which are associated with the feelings or visions of a given community and for the commemoration of which it arranged them. Assuming that they deserve legal protection, we should assign the term ‘historic event’ this broader meaning.”[49] Taking into consideration a teleological element, we should state that this course of reasoning is right, however, we must state that it is in conflict with grammatical interpretation. One cannot recognise what did not really happen as a historic event because the term “historic” (semantically) clearly indicates that this event (really) took place in the past.[50] There is also a question how the term “a person” used in the provision should be understood. In accordance with a Polish language dictionary definition, a person is “a human being” as well as “a character in a work of literature”.[51] Statute does not associate the term with its real historic being, and thus, from the linguistic point of view, there are no obstacles in the way of a given public place being arranged to commemorate a person existing only in literature or legends. But if we assume that a monument must be devoted to a person (persons) who really lived (and sometimes really living animals), and a public place arranged in order to commemorate a historic event (i.e. one that really took place in history), there are no grounds for legal protection of places arranged to commemorate a fictitious person.

In accordance with the wording of the provision, a place (arranged to commemorate a historic event or to honour a person) must be public, and thus, as a rule, accessible to indefinite circle of people without a special permission. Therefore, commemorating an event or a person in a private house or garden does not meet the requirement.[52] However, it seems that in the context of Article 261 CC, a public place may be one, which, as M. Flemming rightly notices, “is in a closed area and in places such as museums, former death camps, military barracks, regardless of the fact whether access to them is limited or entry is charged or depends on the fulfilment of other conditions such as visiting in organised groups, only with a guide, etc. It is important that after fulfilling specified requirements also in those cases, they are accessible to big unlimited groups of people in terms of numbers defined in advance.”[53]

Z. Ćwiąkalski makes a right comment that it is not important whether a place commemorates a historic event connected with Polish or foreign history or whether a hero served Poland or another country. This, on the other hand, makes the author draw a conclusion that “a monument or another arranged place must be ‘formally recognised’. Therefore, the protection is applicable only in the period when this recognition is valid.”[54] As far as a monument is concerned, it seems that the above comment is right at least because a monument is a building and because of that is subject to definite regimes resulting from building regulations. The situation is not

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[49] O. Górniok, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz*, Vol. II, Gdańsk 2005, p. 346.

[50] https://sjp.pwn.pl/sjp/historyczny;2560620.html [accessed on 20/12/2017].

[51] https://sjp.pwn.pl/sjp/osoba;2496525.html [accessed on 20/12/2017].

[52] Z. Ćwiąkalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 572.

[53] M. Flemming, [in:] M. Flemming, W. Kutzman, *Przestępstwa przeciwko porządkowi...*, p.101.

[54] Z. Ćwiąkalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 1422.

so clear, however, in the context of "other public places arranged to commemorate a historic event or a person". A. Błachnio is right to point out that "Public places arranged to commemorate a historic event or to honour a person are (…) places accessible to an indefinite circle of people, which were given such a status by authorities but also places that gained such a status as a result of the conduct of the society or local organisation (e.g. in order to commemorate a local guerrilla unit that fought a battle with the occupant in a given place)."[55] It is also indicated in jurisprudence that statute does not require that this commemoration be made by official institutions, so one cannot exclude that it took place on a private person's initiative and at the cost of that person. However, this may lead to interpretation difficulties, especially when somebody commemorates a controversial person or one that is assessed negatively in a given community.[56] According to Z. Ćwiąkalski, both a monument and an arranged place must be established in accordance with legal regulations in force, i.e. after obtaining necessary permits. Thus, a monument or a place arranged in an unlawful way is not subject to legal protection.[57] It must be stated that, in general, this author is right, claiming the case is not completely unambiguous. Undoubtedly, it is not possible to (legally) raise a monument without an adequate permit. However, the situation is not so clear in case of another arranged place. One cannot exclude a situation in which it is arranged by a private person or local community without any permit and is customarily accepted by the society. It seems that in such a case a place like that, in general, is not deprived of legal protection referred to in Article 261 CC. However, in case the place is arranged to commemorate a person or historic events that are negative from the point of view of the Polish state's interests or Polish history, it is not justified to provide it with legal protection and desecration thereof will not constitute crime under Article 261 CC (although there is a possibility of considering liability, e.g. under Article 140 MC or Article 51 MC).

8. FEATURES OF THE ACT OF DESECRATION

As far as the features of an act of desecration are concerned, it is indicated in the doctrine that desecration should be understood in the same way as in accordance with Article 216 CC, i.e. as the type of conduct which in common perception may insult the honour and memory of persons or historic events commemorated by a monument or another public place.[58] It should be assumed that the essence of desecration/insult means showing contempt, which represents a stronger negative attitude to values represented by the protected right than disrespect.[59] Disrespectful

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[55] A. Błachnio, *Przestępstwo znieważenia*..., p. 106.

[56] M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny*..., p. 797.

[57] Z. Ćwiąkalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny*..., p. 572.

[58] A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny*..., p. 419; A. Herzog, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warsaw 2015, p. 1649; O. Górniok, [in:] O. Górniok at al., *Kodeks karny*..., p. 346.

[59] It is worth drawing attention to Article 315 §1 CC of 1969, where the legislator differentiated desecration from disregarding ("A soldier who insults or shows disregard to his superior with

conduct alone in connection with a monument or another place arranged in order to commemorate a historic event or the feelings of a person is not an offence of desecration. Therefore, one cannot speak about desecration (e.g. of a monument) in case a given person standing in front of it does not take his hat off or holds his hands in his pockets.[60] The doctrine assumes that an act of desecration can only be committed in action.[61] Theoretically, one can consider extraordinary cases of omission (e.g. a person obliged to clean monuments consciously does not remove big amounts of birds' droppings from it because it displays a person he does not approve of and wants to express his negative opinion this way).

The following examples of desecration of a monument (a place) are listed in the doctrine:

- physical attacks (e.g. pouring paint or waste, placing inscriptions in vulgar language on it and throwing eggs) or verbal desecration (however, in such a way that it reaches other people; therefore, it must be done in the presence of other people or in their absence but recorded on film and publicised on the Internet) (A. Michalska-Warias),[62]
- staining, placing abusive derogatory remarks or symbols and signs, pouring liquid, throwing mud and other objects (M. Flemming),[63]
- destroying, removing or polluting; writing words or drawing pictures on a monument (O. Górniok),[64]
- pouring paint, throwing mud (J. Piórkowska-Flieger),[65]
- vulgar words, gestures, insulting inscriptions, pouring paint, throwing waste (D. Gruszecka),[66]
- statements, gestures and specific conduct, e.g. bodily functions performed in front of a monument, placing inscriptions or drawings, throwing some objects at a monument or a place, removing some fragments, pouring liquids (Z. Ćwiąkalski),[67]
- abusive gestures, statements, spitting, writing or drawing on it (K. Wiak),[68]
- performing activities that are commonly recognised as discrediting the honour or memory of a person or a historic event (E. Pływaczewski, A. Sakowicz).[69]

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a gesture, a word or in another way is subject to a penalty of deprivation of liberty for up to three years").

[60] W. Kulesza, *Zniesławienie i zniewaga*, Warsaw 1984, p. 174.

[61] Thus, inter alia, A. Herzog, [in:] R.A. Stefański (ed.), *Kodeks karny...*, p. 1649; Z. Ćwiąkalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 571; A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 419.

[62] A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 419.

[63] M. Flemming, [in:] M. Flemming, W. Kutzman, *Przestępstwa przeciwko porządkowi...*, p.101.

[64] O. Górniok, [in:] O. Górniok at al., *Kodeks karny...*, p. 346.

[65] J. Piórkowska-Flieger, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 772.

[66] D. Gruszecka, [in:] J. Giezek (ed.), *Kodeks karny...*, p. 942.

[67] Z. Ćwiąkalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 571.

[68] K. Wiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warsaw 2015, p. 1217.

[69] E. Pływaczewski, A. Sakowicz, [in:] A. Wąsek, R. Zawłocki (ed.), *Kodeks karny. Komentarz*, Vol. II, Warsaw 2010, p. 515.

It seems that the above-presented catalogue of desecration-related activities may be extended; we can add using a monument to skateboard or roller-skate,[70] placing stickers or putting underwear on it, drinking alcohol and having sex on it.

In order to assess whether desecration has been committed, objective criteria must be used.[71] Therefore, the opinions dominating in the society and moral norms, and not a subjective belief, e.g. of a witness, are decisive in determining whether given conduct constituted desecrating or not.[72] J. Wojciechowski's opinion seems to be different as he states that in order to determine whether given conduct constitutes desecration of a monument (a place), it is necessary to take into account the feelings of people for whom that monument (place) is important as a symbol or an object of remembrance.[73]

Desecration of a monument (or another public place arranged to commemorate a historic event or to honour a person) classified as a crime does not have to be committed in public (although it must be in a public place of course). Thus, it may be committed in absence of third persons, secretly; it is essential that other people get to know the consequences.[74] Therefore, a crime is committed under Article 261 CC in case somebody pours paint over a monument in the presence of many people and when he does it at night in witnesses' absence, and the fact is discovered after some time (e.g. the following day), and when the act of desecration does not leave any visible evidence on a monument (a perpetrator urinated there, which was recorded on film and publicised on the Internet).

8.1. FORMAL NATURE

The crime classified in Article 261 CC is formal in nature; its commission does not require that a perpetrator should cause changes in the outside world. And it is not necessary for the feelings of people for whom the place or a monument has a symbolic significance to be offended. The crime is committed the moment an act alone is performed.[75]

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[70] It is necessary to carefully depart from the classification of this type of conduct under Article 261 CC. It must be remembered that a perpetrator's awareness of the fact that his conduct constitutes desecration is required (he must want it or agree for it). This may be controversial in case of juvenile perpetrators who often use monuments as space to train or demonstrate their sporting skills. Compare also, comments by R. Krajewski, *Prawnokarna ochrona...*, p. 102.

[71] Thus, K. Wiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny...*, p. 1217.

[72] Compare, the Supreme Court resolution of 5 June 2012, SNO 26/12, LEX No. 1231618 (based on Article 216 CC).

[73] J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, Warsaw 2000, p. 493.

[74] Compare, the Supreme Court judgement of 28 March 1952, I K 135/52, OSN(K) 1952/4/48.

[75] The following authors believe the crime is formal in nature: Z. Ćwiąkalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 1421; A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 420; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny...*, p. 797; A. Herzog, [in:] R.A. Stefański (ed.), *Kodeks karny...*, p. 1649.

8.2. INTENTIONAL ACT

The crime under Article 261 CC is common in nature and is committed only intentionally. M. Flemming is right to comment that a perpetrator's awareness must concern the desecrating character of his act and the special features of the facility or place that is subject to unlawful action.[76] There is no unanimous opinion concerning the type of intention in case of the crime analysed. According to some authors, it can be committed only with direct intent, which is confirmed by intentionality of desecration (M. Flemming,[77] A. Marek,[78] A. Michalska-Warias,[79] E. Pływaczewski and A. Sakowicz,[80] A. Lach[81]). Some representatives of the doctrine are right to believe that it can be direct intent as well as oblique intent (Z. Ćwiąkalski,[82] M. Mozgawa,[83] O. Górniok,[84] R. Krajewski,[85] A. Błachnio,[86] R. Góral,[87] J. Piórkowska-Flieger[88]). In my opinion, both types of intent may take place. It is hard to agree with the opinion that desecration might occur only in cases when a perpetrator wants to commit it, and that cases when a perpetrator agrees for conduct, which he can predict may be recognised as desecrating, would be outside the scope of liability. R. Krajewski is right to notice that assuming only direct intent would limit the legal protection of monuments and other places arranged to commemorate a historic event or honour a person, and in his opinion, "it is also important that oblique intent, seemingly constituting a minor form of intentionality, is easier to prove."[89] These arguments are certainly also important, however, it seems that what is fundamental is the fact that the term "desecrate" is open to both forms of intent and there are no rational reasons to assume that it is intentionally tinged (especially as it is easy to imagine various forms of behaviour in which a perpetrator agrees that his conduct may constitute desecration).

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[76] M. Flemming, [in:] M. Flemming, W. Kutzman, *Przestępstwa przeciwko porządkowi...*, p. 100.

[77] As M. Flemming writes, "*Animus iniurandi* is an important feature of desecration. A perpetrator must know that his action constitutes desecration and must want it. His intention must embrace conditions for penalisation of his action. As a result, a crime under Article 261 can be committed in general only with direct intent." M. Flemming, *Ibid*., p. 100.

[78] A. Marek, *Kodeks karny. Komentarz*, Warsaw 2010, p. 559.

[79] According to this author, "The legislator's use of the verb 'desecrates', which refers to conduct characterised by the will to express a specific emotional attitude towards a desecrated object, plays a decisive role in direct intent." A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 420.

[80] E. Pływaczewski, A. Sakowicz, [in:] A. Wąsek, R. Zawłocki (ed.), *Kodeks karny...*, p. 513.

[81] A. Lach, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny...*, p. 1121.

[82] Z. Ćwiąkalski, [in:] A. Wróbel, A. Zoll (ed.), *Kodeks karny...*, p. 572.

[83] M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny...*, p. 797.

[84] O. Górniok, [in:] O. Górniok et al., *Kodeks karny...*, p. 345.

[85] R. Krajewski, *Prawnokarna ochrona...*, p. 100.

[86] E. Błachnio, *Przestępstwo znieważenia...*, p. 109.

[87] R. Góral, *Kodeks karny. Praktyczny komentarz z orzecznictwem*, Warsaw 2005, p. 424.

[88] J. Piórkowska-Flieger, [in:] T. Bojarski (ed.), *Kodeks karny...*, p. 773.

[89] R. Krajewski., *Prawnokarna ochrona...*, p. 100.

9. PENALISATION OF DESECRATION UNDER POLISH LAW

In practice, desecration under Article 261 CC often consists in destruction or damage, which results in the necessity of using cumulative classification (Article 261 in conjunction with Article 288 §1 or §2); in case the value of the destroyed property is lower than a quarter of minimum salary, we deal with an ideal concurrence of a crime and a misdemeanour (Article 261 CC in concurrence with Article 124 §1 MC). An ideal concurrence (concerning one act) of the provisions of Article 261 CC with Article 141 MC (placing an obscene inscription or drawing in a public place) or with Article 140 MC (an indecental deed) is possible.[90]

There is a special manifestation of desecration of monuments or other places arranged to commemorate a historic event or honour a person (mainly in the context of war memorials) that can sometimes consist in placing a symbol of totalitarian systems on them with the aim to identify the honoured with the fighters for the introduction of a given political system and to assign these monuments or places political meaning instead of the historic one. The provision concerning desecration of a monument (or another arranged public place referred to in Article 256 §1 CC) may concur with the provision consisting in public incitement to hatred based on national and ethnic differences.

As A. Michalska-Warias argues, it seems that there may be cumulative concurrence of the provision of Article 261 CC and other provisions of Chapter XXXII (Crimes against public order), e.g. under Article 254, when desecration takes place in the course of a public gathering, or under Article 262 §1 CC, when a desecrated monument constitutes a dead person's grave at the same time.[91]

Sometimes, monuments may have value as antiquities and their destruction (which also constitutes desecration of a monument) will imply a necessity to apply cumulative classification under Article 261 in concurrence with Article 108(1) of the Act of 23 July 2003 on the protection of antiquities and care for them ("Who destroys or damages an antiquity is subject to a penalty of deprivation of liberty for a period from six months to eight years").

It is indicated in the doctrine that real specific concurrence of the provisions of Article 261 and the provision of Article 196 CC (insult of religious feelings) is possible when a desecrated monument or a place is subject to religious worship or a place devoted to conducting religious rituals. It mainly applies to situations when a monument or another religious object is in a place of worship.[92]

It also seems that real specific concurrence of the provision of Article 261 and Article 137 §1 or §2 CC criminalising public desecration of, inter alia, a national emblem, flag, banner, ensign or another state sign of Poland (§1) or another state (§2) is possible. Monuments often have a national emblem and sometimes a flag or a banner is hung on them. In such a situation, a perpetrator's desecrating conduct

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[90] M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny...*, p. 798.
[91] A. Michalska-Warias, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 421.
[92] R. Krajewski, *Prawnokarna ochrona...*, p. 101.

should be classified under Article 261 in concurrence with Article 137 §1 (or §2) in conjunction with Article 11 §2 CC.

It also seems possible that a perpetrator performs an act, which constitutes desecration of a monument and insults natural persons (e.g. relatives putting flowers in front of a monument or the guard of honour). Then, the cumulative classification can be based on Article 261 in concurrence with Article 261 §1 CC. If the person insulted is an officer (or a person assisting him), then the cumulative classification can be based on Article 261 in concurrence with Article 226 §1 CC. In case the person insulted is the President of the Republic of Poland (e.g. a perpetrator throws eggs at the President and a monument), we deal with real specific concurrence of the provisions of Article 135 §2 CC and Article 261 CC. In case a person insulted in public is the head of another country or accredited head of diplomatic representation of another state or another person that is subject to similar protection in accordance with statute, agreements or commonly recognised international customs, then the cumulative classification under Article 136 §3 CC in concurrence with Article 261 CC is justified. In a situation when a person insulted in public is a member of diplomatic representation of a foreign state or a consular officer and the act is committed while they perform their professional duties, it is necessary to consider legal classification under Article 136 §4 CC in concurrence with Article 261 CC in conjunction with Article 11 §2 CC.

9.1. PENALTIES

A crime under Article 261 CC carries a penalty of a fine or limitation of liberty. In accordance with Article 33 §1 CC, a self-standing fine may account for 10 to 540 daily rates (and a daily rate accounts for PLN 10 to 2,000 – Article 33 §3 CC). A court may sentence a perpetrator to limitation of liberty (for a period from one month to two years). Conditional discontinuation of the criminal proceedings is possible (in accordance with Article 66 CC; of course, provided that all requirements laid down in this provision are met). Abandonment of a penalty imposition is also possible (pursuant to Article 59 CC) for a crime under Article 261, certainly, provided that social harmfulness of an act is not considerable. In such a case, a court adjudicates a penal measure (provided that this measure meets the aim of penalty). Due to the fact that a crime is committed against public order, it is possible that it will have the features of hooliganism (in accordance with Article 115 §21 CC) and then the penalty is imposed in accordance with Article 57a CC (with a possibility to adjudicate on compensation pursuant to Article 57a §2 CC). In case of a perpetrator of a crime under Article 261 CC, a court may decide to publicise a sentence if it believes that this way the aims of a penalty will be achieved with respect to its having desired social influence. It is also possible to adjudicate the seizure of objects (Article 44 CC) or obligation to redress the damage (or compensate) under Article 46 CC.

Article 261 CC – adjudications, convictions and conditional discontinuation

	Adjudications	Convictions	Conditional discontinuation
2007	8	8	0
2008	5	5	0
2009	5	5	0
2010	6	6	0
2011	5	3	2
2012	5	5	0
2013	data unavailable	4	data unavailable
2014	data unavailable	3	data unavailable
2015	3	1	2
2016	4	2	2

Source: *Krajowy Rejestr Karny, skazania prawomocne*

Article 261 CC – types of penalties

Article 261 CC Types of penalties	Self-standing fine	Limitation of liberty	Deprivation of liberty with conditional suspension of penalty execution	Deprivation of liberty without conditional suspension of penalty execution
2007	0	8	0	0
2008	4	1	0	0
2009	2	1	2	0
2010	4	1	0	1
2011	2	1	0	0
2012	1	4	0	0
2013	1	3	0	0
2014	1	2	0	0
2015	0	1	0	0
2016	2	0	0	0

Source: *Krajowy Rejestr Karny, skazania prawomocne*

If we take into consideration all adjudications under Article 261 CC over the period of the last ten years (2007–2016), we deal with 41 cases (however, we lack data for 2013–2014). Taking into account that we dealt with five convictions in those two years, we should state that the number of adjudications in the analysed period was at least 46. Within those (at least) 46 adjudications, in 42 cases perpetrators were convicted, and in four cases, conditional discontinuation of the criminal proceedings took place.[93] In 17 cases, courts passed a self-standing fine sentence (37% of adjudications) and in 22 cases sentenced the perpetrators to limitation of liberty (47.8%). In six cases, the criminal proceedings were conditionally discontinued (13%). It is hard to draw binding conclusions based on such a small number of convictions; however, it is evident that the penalty of limitation of liberty applied in almost half of all cases prevails. It is worth mentioning that according to the statistics, in three cases, the penalty of deprivation of liberty was applied (in two cases with conditional suspension of the penalty execution and in one case in an absolute form). It is interesting mainly because the sanction of Article 261 CC envisages only a penalty of a fine or limitation of liberty. Thus, a question is raised about the origin of the penalty of deprivation of liberty in the statistics. It seems that in the three above-mentioned cases, there was a real specific concurrence of provisions (and cumulative classification) and a penalty was imposed based on the provision stipulating the most severe penalty (maybe, e.g. under Article 288 §1 or §2 CC). However, the main act recognised was desecration of a monument or another public place arranged to commemorate a historic event or to honour a person (Article 261 CC).

10. CONCLUSIONS

Summing up the considerations concerning the type of crime classified in Article 261 CC, it is worth quoting R. Krajewski's comments. He analyses whether decriminalisation of this prohibited act would be justified. In his opinion, social harmfulness of such desecrating (e.g. a monument) conduct is not considerable enough to recognise it as requiring that a perpetrator must incur criminal liability. As R. Krajewski states, "(…) at least some cases of desecration of a monument or another place are connected with a perpetrator's drunkenness or have the features of hooliganism, which does not of course constitute justifying or extenuating circumstances at all, but it seems that, in social perception, it does not have much in common with insult, which is usually understood as conscious, deliberate act aimed at hurting somebody. It is also not really known to what extent the classification of this crime in the Criminal Code in force results from a well-weighed legislative decision and to what extent it is just an automatic transfer of it from the former Criminal Code copying the decision of the communist legislator of the early post-war period, especially as the pre-war legislation did not deal with such a prohibited act. It seems that the

[93] There are no data concerning the number of conditional suspensions in the period 2013–2014.

latter is quite possible. Thus, the call for relative decriminalisation, because absolutely not complete one might be justified in today's circumstances." It is hard to fully agree with the above arguments. One can assume that the decision to criminalise desecration of, inter alia, a monument was a well-weighed and not just an automatic act. It is clearly stated in the justification for the CC of 1997 (the part concerning crimes against public order) that it repeals "a number of crime types laid down in Chapter XXXVI of the CC of 1969 unambiguously associated with the totalitarian system",[94] and the crime of desecration of a monument was not recognised as such. Obviously, the origin of the provision is not estimable but it does not have to automatically negate the sense of it, especially as nowadays, in accordance with the Act on decommunisation, monuments that simply should not exist in free Poland are removed. Those that remain should be provided with appropriate legal protection. It seems that (despite a small number of crimes under Article 261 CC reported and even smaller number of convictions) the provision should remain a crime classified in the Criminal Code. However, if we decided to decriminalise it, it would not be necessary to develop a provision adequate to Article 261 in the Misdemeanour Code because Article 140 MC (indecent deeds), which is extremely capacious, and Article 51 MC (public order disturbance) would play this role.

BIBLIOGRAPHY

Bafia J., Hochberg L., Siewierski M., *Ustawy karne PRL. Komentarz*, Warsaw 1965.

Błachnio A., *Przestępstwo znieważenia pomnika na gruncie kodeksu karnego*, PS No. 3, 2017.

Bojarski T. (ed.), *Kodeks karny. Komentarz*, Warsaw 2016.

Filar M. (ed.), *Kodeks karny. Komentarz*, Warsaw 2016.

Flemming M., Kutzman W., *Przestępstwa przeciwko porządkowi publicznemu. Rozdział XXXII Kodeksu karnego. Komentarz*, Warsaw 1999.

Giezek J. (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warsaw 2014.

Góral R., *Kodeks karny. Praktyczny komentarz z orzecznictwem*, Warsaw 2005.

Górniok O., Kalitowski M., Przyjemski S.M., Sienkiewicz Z., Szumski J., Tyszkiewicz L., Wąsek A., *Kodeks karny. Komentarz*, Vol. II, Gdańsk 2005.

Grześkowiak A., Wiak K. (ed.), *Kodeks karny. Komentarz*, Warsaw 2015.

Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, Warsaw 2016.

Krajewski R., *Prawnokarna ochrona pomników i innych miejsc publicznych powstałych dla upamiętnienia zdarzenia historycznego lub uczczenia osoby*, WPP No. 3, 2010.

Królikowski M., Zawłocki R. (ed.), *Kodeks karny. Część szczególna*, Vol. II: *Komentarz*, Warsaw 2017.

Kulesza W., *Zniesławienie i zniewaga*, Warsaw 1984.

Marek A., *Kodeks karny. Komentarz*, Warsaw 2010.

Mozgawa M. (ed.), *Kodeks karny. Komentarz*, Warsaw 2017.

Nowe kodeksy karne z 1997 r. z uzasadnieniami, Warsaw 1997.

Siewierski M., *Kodeks karny. Przestępstwa przeciwko porządkowi publicznemu. Zaoczny kurs: „Prawo karne – nowe kodeksy"*, script no. 16, Warsaw 1970.

Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warsaw 2015.

[94] *Nowe kodeksy karne z 1997 r. z uzasadnieniami*, Warsaw 1997, p. 203.

Szolginia W., *Architektura*, Warsaw 1992.

Szymczak M. (ed.), *Słownik Języka Polskiego*, Vol. II, Warsaw 1984.

Wąsek A., Zawłocki R. (ed.), *Kodeks karny. Część szczególna, Komentarz do artykułów 222–316*, Vol. II, Warsaw 2010.

Wojciechowski J., *Kodeks karny. Komentarz. Orzecznictwo*, Warsaw 2000.

Wróbel A., Zoll A. (ed.), *Kodeks karny. Część szczególna*, Vol. II, *Komentarz do art. 117–211a*, Warsaw 2017.

Legal regulations

Rozporządzenie Prezydenta Rzeczypospolitej z dnia 11 lipca 1932 r. – Kodeks karny [Decree of the President of the Republic of Poland of 11 July 1932: Criminal Code], Journal of Laws [Dz.U.] of 1932 No. 60, item 571.

Dekret z dnia 13 czerwca 1946 r. o przestępstwach szczególnie niebezpiecznych w okresie odbudowy Państwa [Decree of 13 June 1946 on offences especially dangerous in the period of rebuilding the country] (Small Criminal Code), Journal of Laws [Dz.U.] of 1946, No. 30, item 192.

Projekt Kodeksu karnego z 1956 r. [Criminal Code Bill of 1956], Wydawnictwo Prawnicze, Warsaw 1956.

Projekt Kodeksu karnego z 1966 r. [Criminal Code Bill of 1966], Warsaw 1966.

Projekt Kodeksu karnego z 1968 r. [Criminal Code Bill of 1968], Warsaw 1968.

Ustawa z dnia 19 kwietnia 1969 r. Kodeks karny wykonawczy [Act of 19 April 1969. Executive Criminal Code], Journal of Laws [Dz.U.] of 1969, No. 13, item 98.

Ustawa z dnia 20 maja 1971 r. Kodeks wykroczeń [Act of 20 May 1971: Misdemeanour Code], Journal of Laws [Dz.U.] of 1971, No. 12, item 114, as amended.

Ustawa z dnia 29 maja 1989 r. o zmianie niektórych przepisów prawa karnego, prawa o wykroczeniach oraz innych ustaw [Act of 29 May 1989 amending some provisions of criminal law, misdemeanour law and some other acts], Journal of Laws [Dz.U.] of 1989, No. 34, item 180, in force on 6 June 1989.

Projekt Kodeksu karnego z 1990 r. [Criminal Code Bill of 1990] (submitted for expert discussion), edition of 5 March 1990, Warsaw 1990.

Ustawa z dnia 7 lipca 1994 r. – Prawo budowlane [Act of 7 July 1994: Building law], Journal of Laws [Dz.U.] of 1994, No. 89, item 414, as amended.

Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny [Act of of 6 June 1997: Criminal Code], Journal of Laws [Dz.U.] of 1997, No. 88, item 553.

Ustawa z dnia 7 maja 1999 r. o ochronie terenów byłych hitlerowskich obozów zagłady [Act of 7 May 1999 on the protection of the former Nazi death camps], Journal of Laws [Dz.U.] of 1999, No. 41, item 412, uniform text: 26 November 2015, item 2120.

Ustawa z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami [Act of 23 July 2003 on the protection of antiquities and care for them], Journal of Laws [Dz.U.] of 2003, No. 162, item 1568, uniform text: 24 October 2014, item 1446.

Ustawa z dnia 16 kwietnia 2004 r. o ochronie przyrody [Act of 16 April 2004 on the protection of nature], Journal of Laws [Dz.U.] of 2004, No. 92, item 880, uniform text: 23 December 2016, item 2134.

Ustawa z dnia 1 kwietnia 2016 r. o zakazie propagowania komunizmu lub innego ustroju totalitarnego przez nazwy jednostek organizacyjnych, jednostek pomocniczych gminy, budowli, obiektów i urządzeń użyteczności publicznej oraz pomniki [Act of 1 April 2016 on the ban of propagating communism or any other totalitarian system by means of using names of organisational units, commune (*gmina*) subsidiary units, buildings, public facilities and monuments], Journal of Laws [Dz.U.] of 2016, item 744, as amended.

CRIME OF DESECRATION OF A MONUMENT OR ANOTHER PUBLIC PLACE ARRANGED TO COMMEMORATE A HISTORIC EVENT OR TO HONOUR A PERSON (ARTICLE 261 CC)

Summary

The article analyses the statutory features of the crime classified in Article 261 Criminal Code (desecration of a monument or another public place arranged to commemorate a historic event or to honour a person). It also draws attention to changes in the treatment of this offence in the Small Criminal Code (of 13 June 1946) – Article 25, CC Bills (of 1956, 1963, 1966, 1968 and 1990) and CC of 1969 (Article 284 §2). The article presents an analysis of a complex issue of provisions concurrence, which shows that the provision of Article 261 CC is often in real specific concurrence with other provisions (e.g. Article 136 §3, Article 137 §1 or §2, Article 288 §1 or §2 CC, Article 256 §1 CC, Article 108(1) of the Act of 23 July 2003 on the protection of cultural heritage sites and taking care of them). Statistics indicate that the number of offences under Article 261 is not big (e.g. 53 offences registered in 2016). Despite the small number of these crimes, it seems that this type of a prohibited act should continue to be classified in the Polish Criminal Code.

Keywords: desecration of a monument, public place, concurrence of provisions, real specific concurrence of provisions

PRZESTĘPSTWO ZNIEWAŻENIA POMNIKA LUB INNEGO MIEJSCA PUBLICZNEGO URZĄDZONEGO W CELU UPAMIĘTNIENIA ZDARZENIA HISTORYCZNEGO LUB UCZCZENIA OSOBY (ART. 261 K.K.)

Streszczenie

Przedmiotem artykułu jest analiza ustawowych znamion przestępstwa stypizowanego w art. 261 k.k. (znieważenie pomnika lub innego miejsca publicznego urządzonego w celu upamiętnienia zdarzenia historycznego lub uczczenia osoby). Zwrócono uwagę również na zmiany w ujmowaniu tego występku w tzw. małym kodeksie karnym (z 13 czerwca 1946 r.) – art. 25, projektach k.k. (z 1956 r., 1963 r., 1966 r., 1968 r., 1990 r.) oraz w k.k. z 1969 r. (art. 284 §2). Przeprowadzono analizę złożonej problematyki zbiegu przepisów, która pokazała, że przepis art. 261 k.k. często pozostaje w rzeczywistym właściwym zbiegu z innymi przepisami (np. z art. 136 §3, art. 137 §1 lub §2, art. 288 §1 lub §2 k.k., art. 256 §1 k.k., art. 108 ust. 1 ustawy z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami). Statystyki wskazują, że liczba przestępstw z art. 261 nie jest znaczna (np. 53 przestępstwa stwierdzone w 2016 r.). Pomimo niewielkiej liczby przestępstw, zasadne wydaje się być utrzymanie tego typu czynu zabronionego w polskim kodeksie karnym.

Słowa kluczowe: znieważenie pomnika, miejsce publiczne, zbieg przepisów, rzeczywisty właściwy zbieg przepisów

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12. Tomasz G. Grosse (red. nauk.), *Między polityką a rynkiem. Kryzys Unii Europejskiej w analizie ekonomistów i politologów*, praca zbiorowa, Warszawa 2013.
13. Jan Grzymski, *Powrót do Europy – polski dyskurs. Wyznaczanie perspektywy krytycznej*, Warszawa 2016.
14. Marian Guzek, *Makroekonomia i polityka po neoliberalizmie. Eseje i polemiki*, Warszawa 2011.
15. Marian Guzek (red. nauk.), *Ekonomia i polityka w kryzysie. Kierunki zmian w teoriach*, praca zbiorowa, Warszawa 2012.
16. Marian Guzek, *Teorie ekonomii a instrumenty antykryzysowe*, Warszawa 2013.
17. Marian Guzek, *Kapitalizm na krawędzi*, Warszawa 2014.
18. Marian Guzek, *Doktryny ustrojowe. Od liberalizmu do libertarianizmu*, Warszawa 2015.
19. Marian Guzek, *Przyszłość kapitalizmu – cesjonalizm?*, Warszawa 2016.
20. Anna Harasiewicz-Mordasewicz, *Word 2007*, Warszawa 2009.
21. Anna Harasiewicz-Mordasewicz, *Excel 2007*, Warszawa 2010.
22. Dominika E. Harasimiuk, Marcin Olszówka, Andrzej Zinkiewicz (red. nauk.), *Prawo UE i porządek konstytucyjny państw członkowskich. Problem konkurencji i wzajemnych relacji*, Warszawa 2014.
23. Stanisław Hoc, *Prawo administracyjne gospodarcze. Wybrane zagadnienia*, Warszawa 2013.
24. „Ius Novum", Ryszard A. Stefański (red. nacz.), kwartalnik, Uczelnia Łazarskiego, numery: 1/2007, 2–3/2007, 4/2007, 1/2008, 2/2008, 3/2008, 4/2008, 1/2009, 2/2009,

3/2009, 4/2009, 1/2010, 2/2010, 3/2010, 4/2010, 1/2011, 2/2011, 3/2011, 4/2011, 1/2012, 2/2012, 3/2012, 4/2012, 1/2013, 2/2013, 3/2013, 4/2013, Numer specjalny 2014, 1/2014, 2/2014, 3/2014, 4/2014, 1/2015, 2/2015, 3/2015, 4/2015, 1/2016, 2/2016, 3/2016, 4/2016, 1/2017, 2/2017, 3/2017, 4/2017.

25. Andrzej Jagiełło, *Polityka akcyzowa w odniesieniu do wyrobów tytoniowych w Polsce w latach 2000–2010 i jej skutki ekonomiczne*, Warszawa 2012.
26. Sylwia Kaczyńska, Anna Konert, Katarzyna Łuczak, *Regulacje hiszpańskie na tle obowiązujących przepisów międzynarodowego i europejskiego prawa lotniczego*, Warszawa 2016.
27. Anna Konert (red.), *Aspekty prawne badania zdarzeń lotniczych w świetle Rozporządzenia 996/2010*, Warszawa 2013.
28. Anna Konert, *A European Vision for Air Passengers*, Warszawa 2014.
    Anna Konert (red.), *Internacjonalizacja i europeizacja prawa lotniczego. Kięga pamiątkowa ku czci Profesora Marka Żylicza*, Warszawa 2015.
29. Łukasz Konopielko, Michał Wołoszyn, Jacek Wytrębowicz, *Handel elektroniczny. Ewolucja i perspektywy*, Warszawa 2016
30. Dariusz A. Kosior, Marek Postuła, Marek Rosiak (red.), *Doustne leki przeciwkrzepliwe. Od badań klinicznych do praktyki*, Warszawa 2013.
31. Dariusz A. Kosior, Marek Rosiak, Marek Postuła (red.), *Doustne leki przeciwpłytkowe w leczeniu chorób układu sercowo-naczyniowego. Okiem kardiologa i farmakologa*, Warszawa 2014.
32. Jerzy Kowalski, *Państwo prawa. Demokratyczne państwo prawne. Antologia*, Warszawa 2008.
33. Stanisław Koziej, *Rozmowy o bezpieczeństwie. O bezpieczeństwie narodowym Polski w latach 2010–2015 w wywiadach i komentarzach Szefa Biura Bezpieczeństwa Narodowego*, Warszawa 2016.
34. Stanisław Koziej, *Rozważania o bezpieczeństwie. O bezpieczeństwie narodowym Polski w latach 2010–2015 w wystąpieniach i referatach Szefa Biura Bezpieczeństwa Narodowego*, Warszawa 2016.
35. Stanisław Koziej, *Studia o bezpieczeństwie. O bezpieczeństwie narodowym i międzynarodowym w latach 2010–2015 w publikacjach i analizach Szefa Biura Bezpieczeństwa Narodowego*, Warszawa 2017.
36. Rafał Krawczyk, *Islam jako system społeczno-gospodarczy*, Warszawa 2013.
37. Rafał Krawczyk, *Podstawy cywilizacji europejskiej*, Warszawa 2006.
38. Rafał Krawczyk, *Zachód jako system społeczno-gospodarczy*, Warszawa 2016.
39. Maria Kruk-Jarosz (red. nauk.), *System organów ochrony prawnej w Polsce. Podstawowe instytucje*, wyd. II zm. i popr., Warszawa 2008.
40. Maciej Krzak, *Kontrowersje wokół antycyklicznej polityki fiskalnej a niedawny kryzys globalny*, Warszawa 2012.
41. Michał Kuź, *Alexis de Tocqueville's Theory of Democracy and Revolutions*, Warsaw 2016.
42. Jerzy Menkes (red. nauk.), *Prawo międzynarodowe w XXI wieku. Księga pamiątkowa profesor Renaty Szafarz*, Warszawa 2007.
43. Jerzy Menkes (red. nauk.), *Prawo międzynarodowe – problemy i wyzwania. Księga pamiątkowa profesor Renaty Sonnenfeld-Tomporek*, Warszawa 2006.

44. Jerzy Menkes (red. nauk.), *Wybór kazusów z prawa międzynarodowego. Zagadnienia ogólne*, zeszyt 1, Warszawa 2008.
45. Aleksandra Mężykowska, *Interwencja humanitarna w świetle prawa międzynarodowego*, Warszawa 2008.
46. Mariusz Muszyński (red. nauk.), Dominika E. Harasimiuk, Małgorzata Kozak, *Unia Europejska. Instytucje, polityki, prawo*, Warszawa 2012.
47. „Myśl Ekonomiczna i Polityczna", Józef M. Fiszer (red. nacz.), kwartalnik, Uczelnia Łazarskiego, numery: 1(28)2010, 2(29)2010, 3(30)2010, 4(31)2010, 1–2(32–33)2011, 3(34)2011, 4(35)2011, 1(36)2012, 2(37)2012, 3(38)2012, 4(39)2012, 1(40)2013, 2(41)2013, 3(42)2013, 4(43)2013, 1(44)2014, 2(45)2014, 3(46)2014, 4(47)2014, 1(48)2015, 2(49)2015, 3(50)2015, 4(51)2015, 1(52)2016, 2(53)2016, 3(54)2016, 4(55)2016, 1(56)2017, 2(57)2017, 3(58)2017, 4(59)2017.
48. Edward Nieznański, *Logika dla prawników*, Warszawa 2006.
49. Marcin Olszówka, *Konstytucja PRL a system źródeł prawa wyznaniowego do roku 1989*, Warszawa 2016.
50. Marcin Olszówka, *Wpływ Konstytucji RP z 1997 roku na system źródeł prawa wyznaniowego*, Warszawa 2016.
51. Bartłomiej Opaliński, *Rola Prezydenta Rzeczypospolitej Polskiej w procesie stanowienia ustaw na tle praktyki ustrojowej Konstytucji III RP*, Warszawa 2014.
52. Bartłomiej Opaliński (red. nauk.), *Prawo administracyjne w ujęciu interdyscyplinarnym*, Warszawa 2014.
53. Bartłomiej Opaliński, Maciej Rogalski (red. nauk.), *Kontrola korespondencji. Zagadnienia wybrane*, Warszawa 2018.
54. Bartłomiej Opaliński, Maciej Rogalski, Przemysław Szustakiewicz, *Służby specjalne w systemie administracyjnym Rzeczypospolitej Polskiej*, Warszawa 2016.
55. Bartłomiej Opaliński, Przemysław Szustakiewicz, *Policja. Studium administracyjno-prawne*, Warszawa 2013.
56. Bartłomiej Opaliński, Przemysław Szustakiewicz (red. nauk.), *Funkcjonowanie służb mundurowych i żołnierzy zawodowych w polskim systemie prawnym. Zagadnienia wybrane*, Warszawa 2015.
57. Leokadia Oręziak, *Konkurencja podatkowa i harmonizacja podatków w ramach Unii Europejskiej*, Warszawa 2007.
58. Leokadia Oręziak (red. nauk.), *Finansowanie rozwoju regionalnego w Polsce*, Warszawa 2008.
59. Leokadia Oręziak, Dariusz K. Rosati (red. nauk.), *Kryzys finansów publicznych*, Warszawa 2013.
60. Maciej Rogalski, *Odpowiedzialność karna a odpowiedzialność administracyjna w prawie telekomunikacyjnym, pocztowym i konkurencji*, Warszawa 2015.
61. Maciej Rogalski, *Świadczenie usług telekomunikacyjnych*, Warszawa 2014.
62. Dariusz Rosati (red. nauk.), *Gospodarka oparta na wiedzy. Aspekty międzynarodowe*, Warszawa 2007.
63. Dariusz Rosati (red. nauk.), *Euro – ekonomia i polityka*, Warszawa 2009.
64. Grzegorz Rydlewski, Przemysław Szustakiewicz, Katarzyna Golat, *Udzielanie informacji przez administrację publiczną – teoria i praktyka*, Warszawa 2012.
65. Jacek Szymanderski, *Schyłek komunizmu i polskie przemiany w odbiorze społecznym*, Warszawa 2011.

66. Jacek Sierak, Kamila Lubańska, Paweł Wielądek, Marcin Sienicki, Tetiana Kononenko, Ryma Alsharabi, Malwina Kupska, Bartłomiej Rutkowski, Bogdan Olesiński, Remigiusz Górniak, *Efekty wykorzystania dotacji unijnych w ramach Regionalnych Programów Operacyjnych w latach 2007–2013. Cz. 1: Województwa Polski Północnej, Zachodniej i Południowej*, Warszawa 2016.
67. Jacek Sierak, Anna Karasek, Angelika Kucyk, Oleksandr Kornijenko, Marcin Sienicki, Anna Godlewska, Agnieszka Boczkowska, Albina Łubian, *Efekty wykorzystania dotacji unijnych w ramach Regionalnych Programów Operacyjnych w latach 2007–2013. Cz. 2: Województwa Polski Wschodniej i Centralnej*, Warszawa 2016.
68. Karol Sławik, *Zagrożenia życia i zdrowia ludzkiego w Polsce. Aspekty prawno-kryminologiczne i medyczne*, Warszawa 2015.
69. Jerzy Wojtczak-Szyszkowski, *O obowiązkach osób świeckich i ich sprawach. Część szesnasta Dekretu przypisywanego Iwonowi z Chartres* (tłum. z jęz. łac.), Warszawa 2009.
70. Janusz Żarnowski, *Współczesne systemy polityczne. Zarys problematyki*, Warszawa 2012.

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