PRINCIPLES OF BANKING LAW: COMMENTS IN THE LIGHT OF AMENDMENTS TO THE EU AND NATIONAL LAW

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1. INTRODUCTION

The need to ensure coherence of law and implementation of certain values recognised by the legislator as essential invariably inspires to enact regulations, to which in particular an ability to influence the construction of the system of law and a special role in interpretation and application of law are attributed. In jurisprudence, these are called principles of law.[1] And, although the concept of "principles of law" is not unambiguous, which motivates to undertake research into its meaning and to create various concepts of principles of law,[2] it is unquestionable that some norms are more significant in the legal system in comparison to others. Their relation to other norms of the system, "the ability to organise all norms of a given legal branch in a systemic unity"[3] and their basic meaning in the legal system or part of it[4] constitute their classification as primary ones. At the same time, quite often, the principles are not formulated clearly in one provision. They often result from "the entirety of provisions of the system of law or its part".[5]

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1 General principles of law as proposals of the system of law are also distinguished in jurisprudence, for more see, e.g. M. Kordela, *Zasady prawa. Studium teoretycznoprawne*, Poznań 2012, pp.14, 20–21 and literature referred to therein.

2 Works by R. Alexy, H. Ávil, R. Dworkin, S. Wronkowska, J. Wróblewski, M. Zieliński and Z. Ziembiński are recognised as the most important in this field.

3 M. Kordela, *Zasady prawa…*, p. 271.

4 J. Wróblewski, *Rozumienie prawa i jego wykładnia*, Wrocław–Warsaw–Kraków–Gdańsk–Łódź 1990, pp. 81–83.

5 J. Wróblewski, *Zagadnienia teorii wykładni prawa ludowego*, Warsaw 1959, p. 259.

The above-mentioned features of the principles, their role and the way in which they are laid down in the provisions, not always directly, result in the necessity of giving scientific consideration to identification and classification of the principles of law in its every branch. It is not different in case of banking law. The principles of banking law were analysed in jurisprudence several times; they were also presented and classified. Authors like J. Gliniecka, J. Harasimowicz, C. Kosikowski and T. Narożny, in particular, have discussed these issues in their works and tried to determine, describe and classify them.[6]

It is worth pointing out that analyses concerning norms which are especially significant for banking law, formulating an obligation to meet the basic values assumed by the legislator, were conducted mainly at the time when the new Act: Banking law entered into force.[7] This was connected with the necessity of formulating them and systematising in the different reality of market economy. On the other hand, Poland's accession to the European Union provoked identification of the EU banking law principles that entered the national legal system.[8]

Based on the output of the banking law doctrine, it seems possible, especially in the face of the latest amendments to regulations, to undertake further legal discourse on changes in banking law and to update the findings of the representatives of jurisprudence, which is the aim of the author of the present article.[9]

First of all, it is necessary to make a reservation that the considerations will strictly focus on banking law because it must be remembered that it is possible to discuss them from a very broad perspective of business law or a little narrower financial markets law.[10] It would be purposeful to indicate, e.g. the principle of freedom to start and do

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[6] J. Gliniecka, *Tajemnica finansowa. Aspekty aksjologiczne, normatywne i funkcjonalne*, Gdańsk 2007, pp. 50–51; by this author, *System bankowy w regulacjach polskich i unijnych*, Gdańsk 2004, p. 74; J. Gliniecka, J. Harasimowicz, *Zasady polskiego prawa bankowego*, Warsaw 1998, *passim*; by these authors, *Zasady polskiego prawa bankowego i dewizowego*, Bydgoszcz 2000, *passim*; C. Kosikowski, *Publiczne prawo bankowe*, Warsaw 1999, pp. 101–102; T. Narożny, *Prawo bankowe*, Poznań 1998, pp. 28–34.

[7] Act of 29 August 1997: Banking law, uniform text, Journal of Laws [Dz.U.] of 2016, item 1988, as amended, hereinafter referred to as BL.

[8] See, E. Fojcik-Mastalska, *Prawo bankowe Unii Europejskiej*, Wrocław 1996, p. 43; L. Góral, *Zintegrowany model publicznoprawnych instytucji ochrony rynku bankowego we Francji i w Polsce*, Warsaw 2011, pp. 38–39; A. Jurkowska-Zeidler, *Prawo bankowe Unii Europejskiej. Licencjonowanie działalności bankowej*, Bydgoszcz–Gdańsk 2003, *passim*; A. Michór, *Swoboda przedsiębiorczości na rynku finansowym Unii Europejskiej*, [in:] W. Miemiec, K. Sawicka, *Instytucje prawnofinansowe w warunkach kryzysu gospodarczego*, Warsaw 2014, p. 656; T. Nieborak, *Aspekty prawne funkcjonowania rynku finansowego Unii Europejskiej*, Warsaw 2008, pp. 98 and 99, and p. 152 ff.

[9] It must be at least signalled that the influence of failure to comply with the principles laid down in banking law on the functioning of the state, although it is a separate matter, in fact, in the context of the discussed area, is an extremely important issue. At present, not only the influence on the economic system or the financial market but also the fact of multi-plane reaction resulting from withdrawal from the adopted rules, including e.g. "the erosion of the rule of law" as a consequence of irregularities in financial policy, are becoming a sphere of growing interest to jurisprudence (for more see, e.g. a paper for an NBP scientific seminar presented on 18 January 2017, Ch.A. Hartwell, *The "Hierarchy of Institutions" Reconsidered: Monetary Policy and its Effect on the Rule of Law in Interwar Poland*, https://www.nbp.pl/badania/seminaria/18i2017.pdf [accessed on 01/06/2018]).

[10] For more see, inter alia, M. Fedorowicz, *Prawne ujęcie nadzoru makroostrożnościowego w świetle krajowych projektów ustaw o nadzorze makroostrożnościowym nad systemem finansowym*

business, which is considered to be one of the fundamental principles of the integrated financial market.[11] Following this thread, it is necessary to state that a banking system is at present more differentiated not only in terms of entities providing banking services (performing banking activities). Evolving, its perception has been extended and it covers, in the meaning *sensu largo*, not only all the banks operating in a given territory at a given time,[12] but also bodies and specialist entities working for banks and their clients.[13] Looking at the banking system and analysing the provisions in force, one can formulate a principle of separation of a legal regime for entities performing banking activities in order to satisfy the community demand for banking services and entities operating in order to ensure appropriate functioning of the banking sector or financial sector[14] (e.g. the leading role of central banking in macro-prudential supervision[15]). However, the issues are also excluded from the analysis because, as it has already been indicated, the research area is strictly limited to the principles of operations of banks as entities performing banking activities.

Thus, going onto the ground of public banking law,[16] and at the same time perceiving "principles as a result of legislator's choice of values",[17] one should start with values that are subject to protection on the banking services market. There is no doubt at present that these are security of operations on the banking market and stability of the banking system,[18] and more broadly speaking, the financial system, which both constitute the content of social interest[19] treated as a direct value in the doctrine of law and case law. The protection of these values is the basic reason for the legislator's interference into the sphere of behaviour on the banking market and enacting norms to implement them as well as other "secondary values" derived from them. Thus, these two values may be found in all norms of public banking law because the whole system must demonstrate axiological conformity. In consequence, a meta-principle may be drawn from the entirety of norms of public banking law:

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w ramach przedsejmowego etapu legislacyjnego, [in:] A. Jurkowska-Zeidler, M. Olszak (ed.), *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, Warsaw 2016, p. 117; T. Nieborak, *Unia bankowa – w stronę bezpieczeństwa i stabilności rynku finansowego Unii Europejskiej?*, [in:] A. Jurkowska-Zeidler, M. Olszak (ed.), *Prawo rynku finansowego…*, p. 95.

[11] See, S. Biernat, A. Wasilewski, *Wolność gospodarcza w Europie*, Kraków 2000, p. 197 ff; M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, Warsaw 2013, p. 191; L. Góral, *Zintegrowany model…*, pp. 37–39; T. Nieborak, *Unia bankowa…*, [in:] A. Jurkowska-Zeidler, M. Olszak (ed.), *Prawo rynku finansowego…*, p. 95; P. Zapadka, S. Niemierka, *Charakterystyka europejskiego systemu bankowego – zagadnienia instytucjonalno-prawne. System prawny oraz organizacja rynku finansowego w Unii Europejskiej*, BiK No. 10, 2003, p. 20 ff.

[12] See, A. Mikos-Sitek, P. Zapadka, *Polskie prawo bankowe: wybrane zagadnienia*, Warsaw 2011, pp. 20–21 and opinions referred to therein by: W. Baka, C. Kosikowski and Z. Ofiarski.

[13] E. Fojcik-Mastalska, *System bankowy*, [in:] E. Fojcik-Mastalska (ed.), *Prawo bankowe w zarysie*, Wrocław 2006, p. 24.

[14] A. Zalcewicz, *Bank lokalny. Studium prawne*, Warsaw 2013, pp. 191–192.

[15] M. Fedorowicz, *Prawne ujęcie nadzoru makroostrożnościowego…*, [in:] A. Jurkowska-Zeidler, M. Olszak (ed.), *Prawo rynku finansowego…*, p. 117.

[16] The author intends to discuss only the principles of public banking law and leave the issue of the content of the principles of private banking law for discussion in a separate article.

[17] M. Kordela, *Zasady prawa…*, p. 251 ff.

[18] A. Zalcewicz, *Bank lokalny…*, p. 190; T. Nieborak, *Tworzenie i stosowanie prawa rynku finansowego a proces ekonomizacji prawa*, Poznań 2016, p. 116 ff.

[19] L. Góral, *Ustawa o nadzorze nad rynkiem finansowym. Komentarz*, Warsaw 2013, p. 30.

the principle of ensuring security of operations on the banking market and stability of the banking system.[20] This influences the development of all legal instruments regulated by banking law.

In the author's opinion, a detailed analysis of the provisions of law made it possible to distinguish seven fundamental principles of public banking law concerning entities performing banking activities, namely the principles of: licensing access to banking activities, monopoly on performing banking activities, public supervision, risk minimisation, special protection of confided means, special protection for a party concluding a contract with a bank and prevention of the use of a banking system for the purpose of criminal activities.[21]

New phenomena on the financial market and the consequent need to review the former opinions on the scope of necessary legislative interference in order to ensure not only security but also trust cause that at present the citizen's economic interests are more and more strongly emphasised as the values, the protection of which leads to meeting the interests of the community. It is reflected in the latest provisions introduced at the EU level and in Member States. Analysing them, one can point out a newly formed principle of accessibility to basic banking services. And although it must be connected with the implementation of human rights, it influences the activities of entities performing banking activities and can be recognised as the latest principle of banking law incorporated in a catalogue distinguished based on the adopted criterion.

2. FUNDAMENTAL PRINCIPLES OF PUBLIC BANKING LAW CONCERNING ENTITIES PERFORMING BANKING ACTIVITIES

2.1. PRINCIPLE OF LICENSING ACCESS TO THE ACTIVITY FOR ENTITIES PERFORMING BANKING ACTIVITIES

In the European Union Member States, taking up and pursuit of the business in banking services provision (in Poland referred to as performance of banking activities) is possible after obtaining access to this business,[22] and the issue of a single licence by a competent supervisory institution is recognised throughout the EU. The

[20] A. Zalcewicz, *Bank lokalny…*, p. 190. It must be noticed that in the contemporary doctrine, trust is increasingly strongly emphasised as a fundamental value of the financial market, and stability and security in the financial sector as protected interests. As T. Nieborak points out, the legislator acts in public interest, "the content of which is filled with the major value of trust that will be achieved thanks to the protection of particular interests", T. Nieborak, *Tworzenie i stosowanie…*, pp. 111–116. It is also possible to describe the principles of banking law in a different way. There are proposals in the doctrine to distinguish, e.g. the principles of: measuring out prudence and risk or professionalism (thus, W. Góralczyk, Konferencja „Wyzwania bankowości. Prawo–Wartości–Finanse", Warsaw 15 November 2017).

[21] The presented catalogue together with the output of the doctrine and existing proposals of terminology and systemisation of the principles taken into account were developed in the monograph by A. Zalcewicz, *Bank lokalny…*, p. 190.

[22] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC

principle of "licencing" banking activity is, therefore, a principle binding in all EU Member States and is laid down in Article 8 Directive 2013/36/EU.[23]

In Poland, the requirements for carrying out business as banking activities, as defined in Article 5(1) BL, after obtaining authorisation are laid down in the provisions of BL and the Act on the freedom of business activity (hereinafter: AFBA). The legislator determines material requirements (capital, personal and organisational ones) that an entrepreneur must fulfil in order to obtain access to the banking activity. The statutory requirements meet a constitutional requirement to limit the freedom of business activities for the protection of particular interests, i.e. because of important public interest, which includes such values as stability and security of the financial market. Recognition that there are no obstacles to establishing a legal person that will carry out banking activity constitutes grounds for the issue of authorisation by a public body, i.e. the Polish Financial Supervision Authority (Komisja Nadzoru Finansowego – KNF), and this way, legitimisation of taking up and pursuit of business by a bank.

Although all banks are obliged to meet formal and material requirements, the conditions imposed on entities having a different organisational and legal form vary. It concerns both legal conditions that are subject to assessment by a supervisory body and the necessity of obtaining particular types of authorisation.[24] The rule has not been changed over the last years.

2.2. PRINCIPLE OF BANKS' MONOPOLY ON PERFORMING BANKING ACTIVITIES

Based on law, one can speak about two aspects of the principle of monopoly on performing banking activities: positive and negative ones. The former must be associated with the exclusiveness of banking activities granted by the legislator, and the latter with the ban on performing other activities than banking services by banks.

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and 2006/49/EC (OJ L 176 of 27.6.2013, p. 338); in the Polish language version the term *zezwolenie* is used for the English term *authorisation*.

[23] In the light of the topic of the present article, it is necessary to emphasise that, although the rule is not changed, at present, a new attitude of competent authorities in the EU to the division of their tasks and functions can be noticed and the Central European Bank is taking over, in fact to a still limited territorial extent, the supervisory competence in the fields of micro-prudential supervision, including the disposal of a single licence, which has been the exclusive national supervisory bodies' task so far. For more on this topic, see M. Fedorowicz, *Nowe zadania i funkcje Europejskiego Banku Centralnego w zapewnianiu stabilności finansowej w świetle regulacji Europejskiej Unii Bankowej*, Warsaw 2016, p. 67; also compare, A. Drwiłło, A. Jurkowska-Zeidler (ed.), *System prawnofinansowy Unii Europejskiej*, Warsaw 2017, pp. 225–227.

[24] See, Article 14 BL, Article 30a BL and Article 36 BL. It is also worth emphasising the functions of administrative authorisations, especially the supervisory one, beside the regulatory one, and that of organising the course of business processes. Licensing in the form of authorisation undoubtedly serves the implementation of the state's supervisory function (D. Kijowski, *Funkcje zezwoleń administracyjnych*, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (ed.), *Prawo administracyjne materialne*, Vol. 7, Warsaw 2012, pp. 397–398) resulting in the penetration of this principle together with the principle of public supervision in this area.

The positive aspect of the principle of banks' monopoly on banking activities should be drawn from Article 5(4) BL. The provision literally stipulates that business in the field of banking activities *sensu stricto* may only be conducted by banks,[25] and illegal performance of banking activities carries civil and criminal liability (Articles 170 and 171 BL).[26]

In general, the scope of activities reserved for banks is broader in Polish regulations than in the EU law. The EU provisions only lay down a ban on non-credit institutions' activities consisting in taking deposits from the members of the public or other means that are subject to repayment.[27] Thus, the monopoly applies only to deposit-related activities. In Polish literature, there are also opinions that banks' monopoly should be recognised only in relation to deposits because the deposit-related activity is the one that distinguishes banks from other business entities.[28] Agreeing with the statement that taking means with whatever repayable obligation constitutes a feature distinguishing banks (credit institutions), one cannot assume that, based on Polish law, the monopoly is limited to deposit-related activity. At present, one can even indicate banks that do not perform banking activities consisting in taking demand deposits or time deposits and do not keep such accounts, however, within the banks' monopoly, credits constitute one of their major activities belonging to the category of banking activities in the strict sense (mortgage banks[29]). Therefore, analysing the issue of exclusiveness of banking activities performed by banks, it is necessary to emphasise that the Polish legislator differentiates the scope of their performance by particular types of banks (co-operative banks or specialist banks such as mortgage banks), which does not influence the general principle of banks' monopoly on performing banking activities.

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[25] However, the Act (BL) provides also "organisational units other than banks" with an opportunity to perform them. As a result, some representatives of the doctrine define this monopoly as relative; A. Kawulski, *Prawo bankowe. Komentarz*, Warsaw 2013, p. 59.

[26] For more, see e.g. P. Ochman, *Ochrona działalności bankowej w prawie karnym gospodarczym*, Warsaw 2011, p. 218; B. Smykla, *Prawo bankowe. Komentarz*, Warsaw 2005, p. 523. One cannot fail to show that although the legislator, as it has been indicated, introduces civil sanctions for "the performance of banking activities without authorisation" and penal ones for doing business consisting in "the collection of financial means of other natural persons, legal persons or organisational units without legal personality in order to provide credits or loans, or the imposition of risk on those means in another way", in practice the banks' monopoly was often infringed. Among others, some notifications submitted by the KNF concerning the suspicion that crime was committed under Article 171(1) to (3) BL did not result in the initiation of criminal proceedings, in spite of the violation of law (compare, P. Bachmat, *Prokuratorska praktyka ścigania przestępstw z art. 171 ust. 1 i 3 prawa bankowego. Przypadki umorzeń oraz odmów wszczęcia postępowania*, Pr. w Dział. No. 18, 2014, pp. 133–182).

[27] Article 9 Directive 2013/36/EU. It must also be highlighted that the doctrine indicates the problems that arose in connection with the fact that payment agencies were authorised to take means from customers in the context of credit institutions' monopoly on deposit-related activity (see, M. Burzyńska, *Ochrona depozytów w świetle ustawy o usługach płatniczych*, [in:] W. Góralczyk (ed.), *Problemy współczesnej bankowości. Zagadnienia prawne*, Warsaw 2014, pp. 120–137).

[28] A. Janiak, *Przywileje bankowe w prawie polskim*, Kraków 2003, p. 69.

[29] Mortgage banks can only perform activities laid down in Articles 12 and 15 of the Act on mortgage banks and mortgage bonds, which, since 9 October 2016, has not contained activities consisting in taking time deposits or keeping bank accounts.

On the other hand, banks may only perform banking activities and provide strictly defined financial services. Therefore, undoubtedly, it can be pointed out that the principle discussed may be analysed with regard to its negative aspect and the scope of permitted banking services (banking activities and other financial services) is strictly determined in the provisions of law.

2.3. PRINCIPLE OF PUBLIC SUPERVISION

Banks have become subject to a regulatory body's supervision. Its activities connected with the implementation of economic administration tasks focus on ensuring the protection of significant social values on the financial market. Both BL and AFMS[30] stipulate supervision of banking activities within the supervision of financial market and determine supervisory aims and tasks. The most important supervisory requirements are, in this case, ensuring the protection of account holders' means and undisturbed functioning of the banking market[31] by an administrative body's authoritative influence on banks within the framework of awarded competences and by supervisory measures of different legal nature so that the activity of every bank complies with the provisions of law concerning the KNF's supervision.[32] The discussed principle is common in nature. All entities having the status of a bank are subject to public supervision.[33]

In order to efficiently perform tasks concerning business administration, the KNF, like other regulatory bodies, undertakes much more far-reaching activity in exercising public interest than other public administration bodies. The regulatory aims determine the KNF's activities and constitute justification for the "regulatory arbitrariness", which in the doctrine is connected with "the body's discretion to assess the factual state from the perspective of regulatory aims", and the body has "a choice between various legal grounds and arbitrariness in the use of chosen measures".[34]

Discussing the principle of public supervision, it is necessary to notice that at present one can observe a continuous tendency to extend supervision over the new areas of banking activities and redefine supervisory aims under the influence of

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[30] Act of 21 July 2006 on financial market supervision, uniform text, Journal of Laws [Dz.U.] of 2017, item 196, hereinafter: AFMS.

[31] It concerns, inter alia, ensuring the security of transfer of means on the domestic and the EU financial markets.

[32] A series of other requirements typical of supervision over the banking market are pointed out in the doctrine; in particular, see L. Góral, *Nadzór bankowy*, Warsaw 1998, p. 23; M. Fedorowicz, *Nadzór nad rynkiem finansowym…*, p. 49. It can be pointed out that "public supervision of banking, analysed as an instrument of substantive law, is connected with the supervisor's obligation to take care of banks' activity in compliance with law, imposed by the legislator", A. Zalcewicz, *Bank lokalny…*, p. 196.

[33] The principle may also be analysed in the context of the EU rules of functioning of the financial market. One of them is the principle of supervision over all credit institutions in the EU Member States.

[34] K. Jaroszyńki, M. Wierzbowski, *Organy regulacyjne*, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (ed.), *Prawo administracyjne materialne*, Vol. 7, Warsaw 2012, pp. 317–318.

the EU law. At present, it is more and more strongly emphasised that regulatory bodies perform European administration tasks.[35] In this case, the EU dimension of supervisory activities is confirmed by, e.g. the supervisory body's obligation to take into account a possible influence of its decisions not only on the domestic market but also "on the stability of financial systems in all other Member States concerned".[36] On the other hand, changes introduced at the EU level in the development of the EU supervisory bodies' competences resulting from the successive modification of the European structure of supervision over the financial market reflect new tendencies to transfer the performance of supervisory tasks, as it has been mentioned above, onto the EU level.[37]

2.4. PRINCIPLE OF RISK MINIMISATION

One of the basic principles of banking law is the requirement of undertaking steps in bank management that serve the limitation or most complete elimination of possible threats that can or might directly disturb the proper functioning of a bank and cause inappropriate fulfilment of a bank's obligations to depositors and other creditors. This results from the provisions of both the EU and national law.

Speaking about the risk occurring in banking activities, one must point out that it is more and more precisely recognised in various areas of this activity by supervisory bodies[38] as well as the representatives of the doctrine[39]. The abundant literature on this subject and supervisory practice, and the aim of this article inspire to abandon a complex presentation of the issue of risk and to signal only that the economic risk is the easiest identifiable risk associated with banking activities. As a result, the legislator introduces a series of detailed rules constituting the principle of risk minimisation such as, e.g. a bank's capital adequacy ratio, keeping

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[35] *Ibid*., p. 310.

[36] Article 7 Directive 2013/36/EU.

[37] For more, see e.g. M. Fedorowicz, *Nadzór nad rynkiem finansowym…*; by this author, *Normatywne aspekty regulacji europejskiego nadzoru finansowego ze szczególnym uwzględnieniem europejskiego nadzoru w prawie bankowym*, [in:] A. Dobaczewska, E. Juchniewicz, T. Sowiński (ed.), *System finansów publicznych. Prawo finansowe wobec wyzwań XXI wieku*, Warsaw 2010; by this author, *Rola i zadania teorii prawa rynku finansowego UE*, Bezpieczny Bank No. 1, 2016, pp. 114–134; P. Iglesias-Rodriguez, *The Accountability of Financial Regulators. A European and International Perspective*, Wolters Kluwer International BV 2014; M. Olszak, *Zmiany dotychczasowych rozwiązań prawnych w zakresie nadzoru nad rynkiem finansowym Unii Europejskiej – wybrane problemy*, [in:] C. Kosikowski (ed.), *Przyszłość Unii Europejskiej w świetle jej ustroju walutowego i finansowego*, Białystok 2013, p. 267 ff.

[38] One can point out here, e.g. numerous KNF's recommendations identifying risk: one connected with the portfolio of credit exposure with mortgage security, financial liquidity, retail credit exposure, one connected with offering insurance products, risk of offering products that are not adjusted to individual needs and possibilities of clients, etc.

[39] See, e.g.: J. Krasodomska, *Zarządzanie rykiem operacyjnym w bankach*, Warsaw 2008; W Żółtkowski, *Zarządzanie ryzykiem w małym banku – w kontekście zmieniających się regulacji nadzorczych*, Warsaw 2017; G. Birindelli, P. Ferretti, *Operational Risk Management in Banks: Regulatory, Organizational and Strategic Issues*, London 2017; J. Bessis, *Risk Management in Banking*, 4th edition, Wiley 2015.

accounting liquidity adjusted to the size and type of activity and keeping within the concentration risk limits. In fact, the content of those rules is constantly evolving, which results, inter alia, from the introduction of more and more precisely, not to say in a meticulous way, formulated requirements at the EU level concerning in particular a bank's capital.[40] However, regardless of the wording and scope of the regulation, the value that is economic risk minimisation is subject to protection.

Looking at the discussed principle in a broader way, one can speak about the necessity of limiting the occurrence of other threats (or their negative consequences) that always accompany entrepreneurs, e.g. the need to protect against operational risk. In case of big banks, there are their typical categories or irregularities endangering the functioning of the financial market in a special way, which result from the nature of banking activities, such as money laundering or those connected with progress in technological developments in banking services. Especially the last one will force legal changes in the future. The introduction of automated consulting will require decisions concerning liability in the event of defective automation (the need to find solutions limiting the risk of losing reputation connected with the allocation of liabilities, etc.[41]).

2.5. PRINCIPLE OF SPECIAL PROTECTION OF CONFIDED MEANS

The principle of special protection of confided means is discussed in the doctrine in a narrow as well as broad context. In the former, it results from the obligation of special care imposed on a bank with respect to ensuring the security of deposited means (Article 50(2) BL) connected with the economic sphere (payment of all financial means to a bank's client) as well as with a depositor's personal sphere (banking secrecy),[42] and provisions regulating the norms of protecting deposits by covering the depositor's means[43] with a deposit guarantee scheme up to a statutorily defined limit in the event of a bank's insolvency and within its mandatory restructuring[44]. However, no modification of the legislator's approach to depositors' liabilities can be observed after the introduction of the Bank Recovery and Resolution Directive (hereinafter: BRRD).[45] In accordance with Article 66(4) of the Act

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[40] See, inter alia, Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ 2013 L 176 of 27.6.2013, p. 1.

[41] See, https://www.eba.europa.eu/documents/10180/1299866/JC+2015+080+Discussion+Paper+on+automation+in+financial+advice.pdf.

[42] D. Rogoń, [in:] F. Zoll (ed.), *Prawo bankowe. Komentarz*, Kraków 2005, p. 418.

[43] It only concerns depositors in the meaning of the Act of 10 June 2016 on the Bank Guarantee Fund, a system of guaranteeing deposits and mandatory restructuring, Journal of Laws [Dz.U.] of 2016, item 996, as amended.

[44] It is worth mentioning that the protection of depositors is one of the aims of mandatory restructuring (Article 66(4) ABGF).

[45] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU and

on the Bank Guarantee Fund (hereinafter: ABGF), in the event of restructuring, the protection of depositors, as it has been indicated above, remains the aim but it does not mean a guarantee to recover the whole sum of the means confided to the bank. However, the introduction of the bail-in instrument as one of the restructuring and resolution instruments to the national legal system provides a greater opportunity to regain confided means. To tell the truth, the remission of bank's liabilities is admissible without creditors' consent, inter alia, in order to raise the capital of an entity being restructured (Article 201(1.1) ABGF) and a depositor is only certain, as far as the protected means are concerned (compare, Article 206(1) ABGF), yet the use of this instrument is in compliance with the "no creditor worse off" rule because in case of efficient performance of mandatory restructuring, they will be able to regain their means exceeding the guaranteed amount. It is also extremely important that the BFG (Bank Guarantee Fund) may exclude some or part of liabilities from remission or conversion, especially those resulting from natural persons' as well as small and medium-sized entrepreneurs' deposits. It takes place in case it might endanger financial stability, and seriously disturb the functioning of the economy and the financial market or sector (Article 206(3) ABGF).[46]

Looking at the principle of special protection of confided means from a broader perspective, one cannot fail to notice that what serves this protection is not only the obligation of special care in ensuring the security of deposited means but also the principle of licensing access to banking activities, risk minimisation and public supervision (inter alia implemented in order to ensure the security of means kept on banking accounts).[47] Care for maintaining a bank clients' trust in a bank's obligation to return a settled amount of means resulting from liabilities towards the creditor is also the reason for enacting regulations other than those concerning the possibility of suspending the activity, banks associations, their mergers and divisions. It is worth mentioning that it translates into the introduction of specified norms in other fields of law, such as insolvency law, where the principle of special care for bank depositors' interests applies.[48]

The discussed principle, introduced for the purpose of maintaining trust in the financial market, is especially important also as an element of security and stability of the financial market,[49] which should be perceived as particular ideas, valuable

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Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173 of 12.6.2014, p. 190.

[46] For more on this issue, see: M. Fedorowicz, *Bankowy Fundusz Gwarancyjny jako organ przymusowej restrukturyzacji*, [in:] J. Gliniecka (ed.), A. Drywa, E. Juchniewicz, T. Sowiński, *Praktyczne i teoretyczne problemy prawa finansowego wobec wyzwań XXI wieku*, Warsaw 2017, pp. 405–416; M. Kozińska, *Przymusowa restrukturyzacja banków w Unii Europejskiej*, Warsaw 2018, p. 104 ff.

[47] See, the discussion of the principle in the narrow and broad context in A. Zalcewicz, *Bank lokalny…*, pp. 203–207.

[48] J. Sawiłow, *Przekształcenie wierzytelności konsumentów na skutek ogłoszenia upadłości – pozycja prawna konsumenta w polskim prawie upadłościowym i naprawczym. Zagadnienia wybrane. Proceduralne aspekty ochrony konsumenta*, [in:] B. Gnela (ed.), *Ochrona konsumenta usług finansowych. Wybrane zagadnienia prawne*, Warsaw 2007.

[49] Also see, E. Fojcik-Mastalska, R. Mastalski, *Cel i zakres nadzoru bankowego*, [in:] L. Etel, M. Tyniewicki (ed.), *Finanse publiczne i prawo finansowe – realia i perspektywy zmian*, Białystok 2012, p. 567.

for the community, and a certain feature of the market, i.e. a value, on the one hand independent from one's own feelings, and on the other hand, a conditioned value being a projection of particular emotions giving grounds for trust in financial institutions, including banks.[50]

2.6. SPECIAL PROTECTION OF A PARTY TO A CONTRACT WITH A BANK FOR PROVISION OF BANKING SERVICES

The principle should be analysed, inter alia, as a specific manifestation of the constitutionally guaranteed protection of consumers (Article 76 Constitution)[51]. As it is described in the doctrine, "constitutionalisation" of the protection of weaker parties to legal transactions[52] is of critical importance for the shape of private law,[53] because it results in "the right to interfere into civil relations".[54] In case of banking services (performance of banking activities), it is, first of all, connected with the limitation of the freedom concerning the content of agreements concluded because the provisions precisely determine the requirements in this area.[55] On the other hand, as it is indicated in the doctrine and case law, constitutional protection also covers the right to obtain information about the object and conditions of a transaction[56] (the principle of protection via information) so that a consumer could "freely and in conformity with one's own interest satisfy, with the use of particular transactions, one's conscious needs based on knowledge and information provided",[57] which is especially evident in the financial market legal regulation.

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[50] Z. Duniewska indicates trust as a value connected with the transfer of some emotions (Z. Duniewska, *Pojęcie, typologia i egzemplifikacja wartości dóbr*, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (ed.), *Prawo administracyjne materialne*, Vol. 7, Warsaw 2012, p. 128.

[51] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dz.U.] No. 78, item 483.

[52] E. Łętowska, *Konstytucyjne i wspólnotowe uwarunkowania rozwoju prawa konsumenckiego*, [in:] C. Mik (ed.), *Konstytucja Rzeczypospolitej Polskiej z 1997 r. a członkostwo Polski w Unii Europejskiej*, Toruń 1999, p. 373.

[53] A. Zieliński, *Wpływ praw człowieka na kodeks cywilny*, [in:] M. Sawczuk (ed.), *Czterdzieści lat kodeksu cywilnego. Materiały z Ogólnopolskiego Zjazdu Cywilistów w Rzeszowie (8–10 października 2004 r.)*, Kraków 2006, p. 42.

[54] Judgement of the Constitutional Tribunal of 10 October 2000, P 8/99, OTK ZU No. 6, 2000, item 190. One can follow C. Banasiński and say that at present there is an extremely "strong relation of regulations guaranteeing the fulfilment of legally protected consumer's interest in the sphere of private law and regulations of public law"; C. Banasiński, *Miejsce prawa ochrony konsumentów w systemie prawa*, [in:] H. Gronkiewicz-Waltz, M. Wierzbowski (ed.), *Prawo gospodarcze. Zagadnienia administracyjnoprawne*, Warsaw 2015, p. 403.

[55] E. Rutkowska-Tomaszewska, *Nieuczciwe praktyki na rynku bankowych usług konsumenckich*, Warsaw 2011, p. 126.

[56] The Ombudsman's opinion in the case K 33/03, OTK-A, see, judgement of the Constitutional Tribunal of 21 April 2004, K 33/03, OTK-A 2004, No. 4A, item 31.

[57] Judgement of the Constitutional Tribunal of 21 April 2004, K 33/03, OTK-A 2004, No. 4A, item 31. There is, e.g. a proposal to place information about the essence of a contract to be concluded beside its detailed provisions; I. Lipowicz, *Nowe wyzwania w zakresie ochrony praw obywateli i przedsiębiorców na rynku finansowym*, [in:] A. Tarwacka (ed.), *Iura et negotia. Księga*

Looking at the matter from a different perspective, it is necessary to point out that, at the same time, such a need to build trust in the financial market translating into stability and security of that market forces the introduction of provisions not only aimed at ensuring the economic security of a bank but the protection through the development of an appropriate relation between a bank and its client, also a potential one (before an agreement conclusion) in the sphere of civil-law relations. The obligations and bans existing in the provisions, including not only those aimed at guaranteeing clients reliable, readable information in compliance with cognitive capabilities of a party to a contract with a bank but also still before its conclusion (inter alia, recognition of a bank from among other enterprises), result in considerable interference, incomparable to other market sectors. Thus, the special nature of this protection is expressed in its extraordinarily broad scope.

2.7. PRINCIPLE OF PREVENTING USE OF A BANKING SYSTEM FOR THE PURPOSE OF CRIMINAL ACTIVITIES

The protection of a financial system against its use for the purpose of criminal activities, including money laundering and financing terrorism, requires the establishment of provisions supporting activities aimed at preventing the use of a banking system for these purposes. At the same time, it is an element influencing the stability of credit institutions, the financial market and trust in the whole financial system.[58] One can identify in banking law a group of strictly connected legal norms established in order to protect the banking system against criminal activities. In particular, the legislator introduces provisions that are to limit a possibility of carrying out activities by a bank based on means obtained from crime (the principle of proof of funds earmarked for share capital) and the use of a bank for the purpose of a criminal activity (inter alia, Article 106 BL, Article 106a BL, Article 54 (4) ABGF).

What constitutes a new element preventing the use of a banking system for criminal purposes is the introduction of the instrument of refusal to keep a banking payment account because of the suspected commission of crime of financing terrorist activities and money laundering as well as in the event a bank has plausible information about a consumer's participation in crime committed with the use of a payment account or that the means retained on the account originate from crime (Article 59ic(6) of the Act on payment services).[59]

Jubileuszowa z okazji 15-lecia Wydziału Prawa i Administracji Uniwersytetu Kardynała Stefana Wyszyńskiego w Warszawie, Warsaw 2015, p. 158.

[58] Compare, motives 1 and 2 of the Preamble to the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of financial systems for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141 of 5.6.2015, p. 73.

[59] Act of 19 August 2011 on payment services, uniform text, Journal of Laws [Dz.U.] of 2016, item 1572, as amended, hereinafter: APS.

2.8. PRINCIPLE OF ENSURING ACCESS TO BASIC PAYMENT SERVICES

What constitutes a new direction of legislative activities is deeper than before inclusion of banking activities in the sphere of social activity. The social aspect of economy results from the EU law and Article 20 of the Polish Constitution, providing grounds for respect for specified social values and creating bases of the implementation of the adopted economic model in the provisions of law. The values include the creation of mechanisms of social development, the important element of which at present is access to basic banking services. At present, indeed, not only shortage of financial means but financial exclusion to a considerable extent influence an individual's potential marginalisation in social life. With that in mind, the Polish legislator followed the EU one and introduced a principle of ensuring that customers have access to basic payment services within banking activities.[60] In Poland, it mainly results from the Act on payment services (Articles 59ia-59ih APS). Their interpretation allows recognising that at present we have a group of axiologically coherent norms obliging banks to provide free banking services (performing banking activities) for the needs of some members of the public. More precisely, it is a bank's absolute readiness to conclude a basic payment account contract on a customer's request and settle some payments via a bank (with the use of a debit card or a similar payment instrument, performance of an order to pay or a remittance order) without charge within the scope of a minimum statutory transaction limit, because the legislator enumerates the reasons that may constitute grounds for refusal to conclude a contract (Article 59ic(6) and (7) APS) and its termination (Article 59ig APS).

In a broader context, the principle also results from the provisions of BL regulating family accounts (Articles 49(4), 52a, 54 BL). Although the basic reason for the introduction of the above-mentioned provisions was the need to distinguish means that are exempt from enforcement[61] from the rest of a given natural person's means in order to ensure that they will not be seized from the bank account within the judicial or administrative enforcement, in conjunction with a ban on imposing charges for keeping an account, the issue of a debit card and keeping this instrument, and withdrawals made with its use from cash machines of the bank keeping the family account, one may assume that they constitute a complementary solution that influences the exercise of the right of access to basic payment accounts.

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[60] The principle results from Article 16 Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the compatibility of fees related to payment accounts, payment account switching and access to payment accounts with basic features, OJ L 257 of 28.8.2014, p. 214.

[61] It concerns "allowances, benefits and other amounts exempt from enforcement referred to in Article 833 §§6 and 7 of the Act of 17 November 1964: Code of Civil Procedure (uniform text, Journal of Laws [Dz.U.] of 2014, item 101, as amended), with the exception of alimony" in accordance with Article 49(4) BL.

3. CONCLUSIONS

Polish banking law continually evolves and in recent years it has been influenced by the European Union law, which requires the introduction of specified solutions to the national legal systems in order to create the common market and values that are significant for it. In spite of considerable transformation and development, the axiology of the system of norms of banking law in general remains unchanged. The protection of transactions security on the banking market and the banking system stability seem to be most important for ensuring trust in the financial market, which has impact on the final shape of the principles of banking law concerning banks' activities. Nevertheless, one can see changes in their content resulting from amendments to the provisions of law.

One can also notice that the financial crisis has translated into greater activity in searching for earlier unknown solutions and a new approach to the issue of supervision as well as the perception of consumers' protection on the banking market (manifesting, inter alia, in deep interference of public law into the sphere of civil law) and a citizen's legitimate economic interests, which is reflected in the content of the principles of public banking law. The provisions adopted in the EU over the last five years under the influence of new ideas have had an impact on considerable development of supervisory regulations or the change in the scope of particular supervisory bodies' competences, and the modification of the principle of special protection of confided means. In this last case, there was a considerable change in attitudes to the repayment of confided means in connection with the introduction of the bail-in principle (i.e. the possibility of remission or conversion of liabilities, inter alia, of a bank's creditors in order to provide capital for the entity under restructuring). It is worth emphasising here that the new solutions in the protection of means also influenced the evolution of specialist banks. These banks do not perform banking activities consisting in taking deposits payable on demand or time deposits, which manifests the principle of the monopoly on banking activities.

One can also indicate the development of a new principle of ensuring access to basic payment services, which may also be perceived from the point of view of maintaining social values; and "organising mechanisms of social development"[62] undoubtedly is one of them.

Noticeable evolution of the content of principles under the influence of the EU law with parallel ever broader interference of public law into the sphere of civil law are at present two most important legislative tendencies.

[62] For more on the issue of "organising mechanisms of social development", see Z. Duniewska, *Pojęcie…*, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (ed.), *Prawo…*, p. 128.

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PRINCIPLES OF BANKING LAW: COMMENTS IN THE LIGHT OF AMENDMENTS TO THE EU AND NATIONAL LAW

Summary

The subject matter analysed in the paper is a voice in the discussion about the catalogue and content of baking law principles, which combines a theoretical analysis of the law, reference to the existing achievements of scholars in the field, and current changes in the law of the financial markets. It is an attempt at systematizing existing principles, both old and new, concerning the activity of banks. In this context, it also presents the evolution of the Polish legal system under the influence of the EU law, an increasingly strong tendency for public law to encroach upon the sphere of private law, and a visible attempt to take a new, social, aspect into account in baking activity (a citizen's legitimate economic interests). The analyses particularly take account of the impact on the content of the latest legislation concerning, for instance, orderly restructuring of banks and prevention of financial exclusion.

Keywords: financial market, banking law, law principles

ZASADY PRAWA BANKOWEGO – UWAGI W ŚWIETLE ZMIAN W PRAWIE UNIJNYM I KRAJOWYM

Streszczenie

Podjęta w opracowaniu tematyka stanowi głos w dyskusji nad katalogiem i treścią zasad prawa bankowego, łączący w sobie analizę teoretycznoprawną, odniesienie do dotychczasowego dorobku doktryny w tej kwestii oraz aktualnych zmian przepisów prawa rynku finansowego. Jest próbą usystematyzowania istniejących, uznanych i nowych, zasad dotyczących działalności banków. W tym kontekście ukazane zostały również przeobrażania polskiego porządku prawnego pod wpływem prawodawstwa unijnego, coraz silniejsze tendencje wkraczania prawa publicznego w sferę prawa prywatnego oraz widoczne dążenie uwzględniania nowego, społecznego, aspektu w działalności bankowej (słusznych interesów ekonomicznych obywatela). Dokonując analiz, w szczególności uwzględniono wpływ na treść zasad najnowszych przepisów dotyczących między innymi uporządkowanej restrukturyzacji banków czy zapobiegania wykluczeniu finansowemu.

Słowa kluczowe: rynek finansowy, prawo bankowe, zasady prawa

Cytuj jako:

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