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FREEDOM OF WILL AS A PREREQUISITE FOR CRIMINAL LIABILITY: HUMANS AND ARTIFICIAL INTELLIGENCE IN A CZECH CRIMINAL LAW PERSPECTIVE*

JAROSLAV FENYK**

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ABSTRACT

The paper analyses the form and place of human will in the foundations of criminal liability. It explains the necessity of will for the traditional criminal liability of natural persons and presents a comparison with the possible criminal liability of autonomous and non-autonomous systems equipped with artificial intelligence. The conclusions of the paper are negative with regard to the possible direct liability of such systems. A solution is proposed in the form of criminal liability for persons who create, control and monitor autonomous and non-autonomous systems.

Keywords: consciousness, will, emotions, intuition, intelligence, artificial intelligence, algorithm, autonomous and non-autonomous systems, determinism, indeterminism, compatibilism, criminal liability, moral liability, motivation, natural person, legal person, electronic person, imputability

* This article utilised the artificial intelligence of a non-autonomous entity.

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INTRODUCTION

The development of artificial intelligence (commonly abbreviated as 'AI') represents one of the most fundamental technological changes in the modern world. Its influence extends not only into the economic and social spheres but also increasingly into the field of law, including criminal law.

Criminal law, as the law of last resort, is traditionally based on the principles of individual responsibility for culpability, the primacy of free will, and the ability to distinguish between permissible and prohibited conduct. In the past, criminal liability was extended to legal entities only through the attribution of the elements of the offence, i.e. the element of fault and its basis, which is the will of the natural persons acting on their behalf. Research is beginning to examine not only liability for damage caused by autonomous systems. A significant part of the discussion concerns criminal liability and the possible attribution of this liability to new systems.

In this context, the paper will focus on artificial intelligence in both autonomous and non-autonomous systems. There is an important difference between the terms 'autonomous and non-autonomous systems' and 'artificial intelligence', although they often overlap and are confused in both everyday and professional discourse. The essence of both systems is an algorithm or, at an advanced stage of development, a computer model (a neural network), resulting primarily from mathematical rules.

Autonomous systems, in the context of artificial intelligence, are systems capable of performing tasks with minimal human intervention (this is known as deep learning).¹ These systems, ranging from self-driving cars to intelligent chatbots, are designed to function as independently as possible and make 'decisions' based on their programming and collected data.² From the point of view of criminal liability, this model will undoubtedly require a more comprehensive and thorough assessment.

Non-autonomous systems are primarily non-linear dynamic systems whose behaviour depends on time or external variables. These systems require external inputs or human control to determine their behaviour (this is known as machine learning). Examples of non-autonomous systems include Google Translate, ChatGPT, and e-shop delivery systems. A non-autonomous system does not act independently in a physical environment because it requires active input from a human being, does not make autonomous decisions with legal consequences, and is therefore not autonomous.³

Although both autonomous and non-autonomous systems exhibit a high degree of adaptability, unlike humans they completely lack consciousness and free will, and do not have legal personality as legal entities. In this context, several unresolved issues arise, the solutions to which remain difficult to determine.

¹ H. Lamb, J. Levy, C. Quigley, *Simply Artificial Intelligence*, London, 2023, pp. 58–59.

² Vation, 'Autonomous Systems: Definition, Explanation, and Use Cases', *Vation Ventures Glossary*; <https://www.vationventures.com/glossary/autonomous-systems-definition-explanation-and-use-cases> (accessed: 16 May 2025).

³ IGI Global, *What is Non-Autonomous Systems*. Cf.: <https://www.igi-global.com/dictionary/random-bit-generator-based-on-non-autonomous-chaotic-systems/45926> (accessed: 16 May 2025).

Is it even possible and legitimate to attribute criminal responsibility to artificial intelligence, or is it necessary to maintain responsibility exclusively on the part of the human subjects involved in its development, programming and operation?

Can machines be perceived in a similar way to legal entities, for example, and can a modified form of attribution be used for their liability?

The aim of this paper is to analyse the main approaches to the issue of human free will and criminal responsibility, to compare the views of selected foreign authors on the possibility of their existence in systems using so-called artificial intelligence, and subsequently to formulate considerations *de lege ferenda* appropriate for the Czech legal environment, with an emphasis on preserving the fundamental principles of criminal law, in particular individual responsibility for culpability, legality and the subsidiarity of criminal repression.

CONSCIOUSNESS, WILL, FREE WILL (*LIBERUM ARBITRIUM*) OF HUMAN AND CRIMINAL RESPONSIBILITY: THEORETICAL FOUNDATIONS

THE RELATIONSHIP BETWEEN HUMAN CONSCIOUSNESS AND WILL

Human consciousness is a reflective, intentional and morally significant state of mind that is unique in its ability to be self-aware, consider the consequences of decisions and take responsibility for actions.⁴

Consciousness therefore includes the ability to perceive, to be aware of oneself and the world, to think, to experience emotions and to reflect.

Human will is generally considered to be part of human consciousness, but with an important clarification. Will is a *specific function of consciousness*, not its synonym; it is the specific ability of an individual to *deliberately direct their actions*, often against momentary impulses or automatic behaviour. Will is therefore an expression of *the spiritual dimension*. Free will, the possibility of choice and awareness of responsibility are fundamental human abilities and manifestations of conscious being.

The characteristics of human will always depend on the context – philosophical, legal, psychological or theological, or a combination thereof. In the generally accepted philosophical and legal framework, human will is considered to be the ability to make free decisions based on conscious consideration; to choose between alternatives in accordance with an individual's inner values, beliefs and goals; and to direct one's actions towards a specific purpose, i.e. to engage in deliberate and goal-oriented activity.⁵

⁴ J.R. Searle, *The Rediscovery of the Mind*, Cambridge, MA, 1992, p. 88; or T. Nagel, 'What Is It Like to Be a Bat?', *The Philosophical Review*, 1974, Vol. 83, No. 4, pp. 435–450; or A.R. Damasio, *The Feeling of What Happens: Body and Emotion in the Making of Consciousness*, New York, 1999, pp. 235–239.

⁵ V.E. Frankl, *Vůle ke smyslu*, Brno, 1994, p. 19.

Will is not random – individuals make decisions towards a specific goal (e.g. ‘I want to do good’, ‘I want to do evil’, ‘I want to achieve a certain result’). Will is usually guided by reason – a person considers reasons, consequences and values.

Human will therefore presupposes *the ability to self-regulate, self-control and self-restraint*. In a criminal law and ethical context, will is linked to responsibility – if someone acts ‘of their own free will’, they may bear the consequences of their decision.

Many well-known figures in history have assumed that humans are *autonomous beings*, capable of recognising moral and, subsequently, written law and acting in accordance with it. For example, Edmund Husserl, in his treatises on ethics, analyses the will as a fundamental element of human behaviour that is inseparably linked to values. The will is not merely a psychological state, but is anchored in intentions directed towards values that lead to their realisation.⁶

In existential philosophy, free will is associated with freedom of choice, but also with the anxiety associated with responsibility. For example, Jean-Paul Sartre holds that every individual is condemned to choose and thus to take responsibility for their actions. This freedom is a source of existential anxiety because the individual realises that they are fully responsible for shaping their own life without any predetermined meaning.⁷

In the field of criminal law and responsibility in general, human will is of fundamental importance – only an individual who acts of their own free will, while sane and aware of the consequences, can be fully criminally responsible. This is why, for example, *sanity, intent and negligence are so closely linked to the expression of will*.⁸ Actions without will (e.g. in unconsciousness, hypnosis or mental disorder) are not legally attributable – will is therefore a functional component of consciousness necessary for criminal liability.

Will represents a key psychological element underlying the criminal liability of the perpetrator, because without the free and conscious expression of will there can be no question of *culpability* and thus of the fulfilment of the subjective aspect of a criminal offence (Section 13(2), Sections 15–17 of the Czech Criminal Code). Will is reflected in the distinction between intentional and negligent culpability, where, in the case of intent (Section 15 of the Czech Criminal Code), the perpetrator not only knows but also wishes to cause the unlawful consequence, or is aware of its occurrence. In the case of negligence (Section 16 of the Czech Criminal Code), there is an absence of the corresponding will to prevent the consequence, with will here representing an insufficient degree of care or caution. Culpability is only one side of the coin of the subjective part of a criminal offence; the other side consists of errors in criminal law (Sections 18–19 of the Czech Criminal Code), and the requirement of will therefore also applies to them.

⁶ E. Husserl, *Vorlesungen über Ethik und Wertlehre 1909–1914*, Melle U. (ed.), The Hague, 1988, pp. 150–155.

⁷ J.-P. Sartre, *L'Être et le néant*, Paris, 1943, p. 555.

⁸ J. Fenyk, '(Ne)příčetnost fyzické osoby a (ne)příčetelnost jejího jednání právnické osobě', in: *Tradičné a netradičné prístupy v trestnom práve: Pocta prof. Šimovčekomu*, Trnava, 2024, pp. 74–87.

Without manifestations of will, it is not possible to fulfil the objective element of a criminal offence, which is conduct, as conduct is understood as an outward manifestation of will (cf. Section 13 of the Czech Criminal Code). Indirectly, within the context of the facts of the case, intent also influences causality, because only intentional or negligent conduct (i.e. conduct with a certain form of intent) can lead to criminal liability.

Similarly, sanity (Section 26 of the Czech Criminal Code) requires that the perpetrator be able to control their will and direct their actions; the absence of this ability excludes criminal liability.

Will therefore appears to be an inseparable prerequisite not only for culpability but also for the perpetrator's actions and sanity, thereby forming the essential basis of individual criminal liability.

FREEDOM AND LACK OF FREEDOM OF HUMAN WILL

The freedom of human will can be characterised as a person's ability to act on the basis of their own mental states without external coercion. Freedom of will therefore concerns the causal relationship between mental states and actions.⁹

Is human will, then, completely free? The debate over the meaning of freedom and lack of freedom of will and its impact on criminal law has existed in criminal law scholarship since time immemorial. The debate has gradually developed into the current dispute between proponents of the compatibility or incompatibility of freedom and the lack of freedom of will in criminal law.

Immanuel Kant and Cesare Beccaria, both contemporaries of the Enlightenment, were important representatives of the theory of free will in criminal law, representing parallel but ideologically opposed directions in the development of criminal law.

In Kant's view, free will is a necessary prerequisite for moral responsibility – without freedom of choice there can be no guilt or merit. Punishment is therefore a moral necessity – retribution for evil deeds, while reward is recognition of the right choice. Kant was an advocate of free will as the basis of criminal responsibility. His concept of punishment as retribution for moral transgressions, together with his principle of the dignity of the human being, form the core of retributive theory, and Kant himself rejected any utilitarian or social functions of punishment.¹⁰

Beccaria, as a representative of the classical school of criminal law, also emphasised free will and human rationality. He assumed that humans are rational beings endowed with free will who act by weighing the advantages and disadvantages of their actions. This approach is closely linked to the theory of the social contract, according to which

⁹ This distinguishes the question of free will from the question of autonomy of the will as the ability of an individual to follow their own moral law or values – see I. Kant, *Metafyzika mravů*, transl. Svoboda V., Praha, 2004, p. 331.

¹⁰ D. Klos, 'Teorie trestu u Kanta: Právně-filozofická analýza Kantova pojetí odplaty', *Právník*, 2008, Vol. 147, No. 6, pp. 593–605; similarly J.G. Murphy, 'Kant's Theory of Criminal Punishment', in: *Retribution, Justice, and Therapy: Essays in the Philosophy of Law*, Vol. 16, Dordrecht, 1979, p. 82.

individuals transfer part of their freedom to the state in exchange for the protection of their rights and security. Breaking the law is therefore a conscious decision by an individual who has decided to violate the social contract.¹¹

Unlike the old school of criminal law, Beccaria did not view punishment as retribution, but as a means of preventing crime. His demands for certainty, speed, and proportionality of punishment, as well as his emphasis on legality and the prohibition of judicial arbitrariness, became the fundamental principles of modern criminal law.

Enrico Ferri, a prominent representative of the Italian positivist school of criminal law, fundamentally rejected the concept of free will as the basis of criminal responsibility. His approach, based on scientific research into the causes of crime, represented a departure from the classical school, which assumed that individuals act on the basis of rational free choice and are therefore fully responsible for their actions.

In his studies, Ferri often argued that crime is the result of a combination of factors beyond the control of the individual. He divided these factors into anthropological (biological and psychological characteristics of the individual), physical (climatic and geographical conditions), and social (environmental influences such as poverty, education and family background).

According to Ferri, these determinants¹² shape an individual's behaviour, thereby challenging the traditional concept of free will as the basis of criminal responsibility. Ferri introduced the concept of 'dangerousness of the offender', which focusses on assessing the risk that the offender poses to society rather than on the offence itself.

His work laid the foundations for modern approaches to criminal policy that take into account the complex factors influencing criminal behaviour, but it also marked a shift in the understanding of unlawful – previously criminal – conduct and sought to replace the repressive model with a socially preventive one in which free will does not play a fundamental role.¹³

Vladimír Solnař, the doyen of Czech criminal law in the second half of the twentieth century, drew attention to what Ferri had aimed at in the past, namely that if complete free will were required, responsibility would apply only to persons acting completely freely, and punishment as a response to a criminal offence would thus become mere retribution for unlawful conduct, while its educational elements would lose their meaning.¹⁴

In contemporary criminal law scholarship, a continuing division of opinion can be observed between advocates of free will and non-free will (determinism and indeterminism), as well as an ongoing dialogue on compromise solutions concerning the compatibility, partial compatibility or incompatibility of free will with the theory of its non-freedom (compatibilism, semi-compatibilism or incompatibilism).

¹¹ C. Beccaria, *O zločincích a trestech*, Bratislava, 2009, pp. 35–36.

¹² Determinism, which includes these determinants, is the philosophical belief that every event or state of affairs is the result of previous events based on the principle of causality and fixed laws. This means that the development of the world is determined by a sequence of events governed by absolutely valid natural laws.

¹³ E. Ferri, *La teorica dell'imputabilità e la negazione del libero arbitrio*, Florence, 1878, p. 408.

¹⁴ V. Solnař, J. Fenyk, D. Čísařová, M. Vanduchová, *Systém českého trestního práva, díl II. Základy trestní odpovědnosti*, Praha, 2009, p. 224.

In the 1980s, neurobiologist Benjamin Libet conducted experiments showing that brain activity precedes conscious decisions about movement. His findings led to debates about whether conscious decision-making is truly the initiator of our actions or whether it is merely the result of unconscious brain processes.¹⁵

Another neurobiologist, Robert Sapolsky, argues that human behaviour is fully determined by biological and environmental factors, which, in his view, rules out the existence of free will. Sapolsky claims that human decisions are the result of genetic predispositions and previous experiences, not free will. This deterministic perspective therefore has fundamental implications for moral responsibility and the legal system.¹⁶

One of the prominent contemporary proponents of the view that free will and determinism are compatible in criminal law is psychiatrist Michael S. Moore, who argues that determinism does not imply the absence of free will. In his view, what matters is whether an individual acts on the basis of their own reasons and motives, not whether they have the opportunity to act differently. In his opinion, this approach makes it possible to preserve the concept of moral and legal responsibility even within a deterministic framework.

Moore opposes contemporary views according to which advances in neuroscience call into question the existence of free will. He argues that even if our actions are the result of brain processes, this does not mean that they are not the result of our own decisions.¹⁷

Philosopher John H. Fischer argues that even if the world is deterministic and our actions are predetermined by previous events, we can still be morally responsible for our actions. This position, called semi-compatibilism, differs from traditional compatibilism in that it does not address the question of free will, but focuses on moral responsibility. According to Fischer, the key issue is whether the individual acted on the basis of their internal states (e.g. beliefs, desires) and had the capacity to respond to reasons. Together with philosopher and Jesuit Mark Ravizza, Fischer developed the concept of 'guidance control', which refers to an individual's ability to act in accordance with their own reasons and motivations, even if those reasons are determined. This form of control is sufficient for attributing moral responsibility, even if the individual does not have ultimate control over their actions.¹⁸

One of the leading contemporary advocates of free will in criminal law is the philosopher Carolina Sartori. She formulated a theory according to which free will is closely linked to causal relationships between human mental states (e.g. intentions, beliefs) and human actions. According to Sartori, an individual is free when their actions are the result of their own mental states rather than external coercion or

¹⁵ B. Libet, C.A. Gleason, E.W. Wright, D.K. Pearl, 'Time of Conscious Intention to Act in Relation to Onset of Cerebral Activity (Readiness-Potential): The Unconscious Initiation of a Freely Voluntary Act', *Brain*, 1983, Vol. 106, No. 3, pp. 627–631.

¹⁶ R.M. Sapolsky, *Determined: A Science of Life Without Free Will*, New York, 2023, pp. 10–14, 376–381.

¹⁷ M.S. Moore, *Mechanical Choices: The Responsibility of the Human Machine*, Oxford, 2020, pp. 28–32, 76–80, 170–175; or M.S. Moore, 'Stephen Morse on the Fundamental Psycho-Legal Error', *Criminal Law and Philosophy*, 2016, Vol. 10, pp. 45–89.

¹⁸ J.M. Fischer, *The Metaphysics of Free Will: An Essay on Control*, Oxford, 1994, pp. 131–136; J.M. Fischer, *My Way: Essays on Moral Responsibility*, Oxford, 2006, pp. 17–19.

random events. The author argues that determinism and free will are compatible. She argues that it is important to examine the specific causal chains leading to action rather than abstract metaphysical questions about determinism.¹⁹

The author's theory provides a basis for attributing moral and criminal responsibility to individuals. If their actions are the result of their own mental states, they can be held responsible for them, which supports traditional approaches in criminal law.

PARTIAL CONCLUSION ON INDIVIDUAL FREE WILL IN CRIMINAL LAW

The current state of debate on the existence or degree of free will in criminal law shows that the relationship between free will and criminal responsibility remains a philosophically and legally complex but highly significant issue.

The fundamental ideological conflict between the classical school of criminal law and the positivist approach has now been bridged to a certain extent by compromise views. These are based on the recognition that human behaviour can be determined by external or internal factors without necessarily precluding the possibility of individual responsibility. Modern approaches make it possible to combine traditional concepts of free will with scientific knowledge about the determination of human behaviour, thus providing theoretical support for modern criminal law based on moral responsibility. Free will, understood as the ability of an individual to make decisions based on their own judgment, with awareness of the consequences of their actions and the possibility of choosing between alternative options, remains a key prerequisite for attributing criminal responsibility. Although modified and limited to varying degrees, the concept of free will continues to form a fundamental component of the system of criminal responsibility of natural persons. Free will therefore remains not only a philosophical prerequisite but also a functional element of positive criminal law and is, to the necessary extent, reflected in the Czech foundations of criminal liability, primarily in the provisions on culpability, error and sanity (Sections 15–19 and Section 26 of the Czech Criminal Code).

HUMAN INTELLIGENCE AND ARTIFICIAL INTELLIGENCE OF AUTONOMOUS AND NON-AUTONOMOUS SYSTEMS

HUMAN INTELLIGENCE

The connection between human will and human intelligence is indisputable. Human will is the ability to make free decisions based on goals and values, while intelligence is the ability to understand, reason and solve problems. Intelligence provides the tools; will determines the direction.²⁰

¹⁹ C. Sartorio, *Causation and Free Will*, Oxford, 2016, pp. 3–5. C. Sartorio, R. Kane, *Do We Have Free Will? A Debate*, New York, 2021, pp. 1–2.

²⁰ For example, I. Kant, *Kritika praktického rozumu*, ed. by Kuneš J., Sobotka M., transl. Loužil J., Praha, 2023, p. 33.

One of the most prominent contemporary experts on human intelligence is the psychologist Robert J. Sternberg. His approach has fundamentally influenced the modern understanding of intelligence, particularly through his triarchic theory of intelligence and the later expanded concept of successful and adaptive intelligence.

Sternberg characterises intelligence as '*mental activity aimed at effective adaptation, selection and shaping of the environment relevant to an individual's life*'. This definition emphasises an individual's ability to adapt to changing environmental conditions, select a suitable environment and actively shape it to meet their needs and goals.

In his original works, Sternberg divides intelligence into three components:

- (a) *analytical intelligence* as the ability to analyse, evaluate, assess and compare information
- (b) *creative intelligence* as the ability to solve new and unusual problems, adapt to new situations and create original solutions
- (c) *practical intelligence* as the ability to adapt to everyday life, using experience and knowledge to solve real-world problems

Later, Sternberg developed the concept of *successful intelligence*, which integrates all three types into a single whole. Successful intelligence is defined as the ability to achieve personally meaningful goals within an individual's cultural context. This includes the ability to identify one's strengths and weaknesses and to use or compensate for them effectively in achieving goals.

Sternberg's approach is widely applied in education, psychology and human resources. It shows that intelligence is not merely an academic ability but also includes the practical and creative skills necessary for a successful life. He offered a comprehensive and dynamic view of intelligence that goes beyond traditional IQ measurements.

In recent years, the author has developed another concept, namely *adaptive intelligence*, which he defines as an individual's ability to adapt, shape and select an environment that supports the survival and prosperity not only of the individual but also of society as a whole. This definition emphasises the importance of cultural and biological context in assessing intelligent behaviour.²¹

Sternberg's conclusions are also applicable in the field of criminal law, as they reveal the inner workings of the perpetrator's mind, which manifest themselves in different forms, and help to explain certain complex aspects of the subjective side (understanding, reconciliation, indifference, reliance, etc.).

²¹ R.J. Sternberg, *Beyond IQ: A Triarchic Theory of Human Intelligence*, New York, 1985, p. 45; or R.J. Sternberg, *Successful Intelligence*, New York, 1997, p. 20; R.J. Sternberg, 'A Theory of Adaptive Intelligence and Its Relation to General Intelligence', *Journal of Intelligence*, 2019, Vol. 7, No. 4, p. 23; or R.J. Sternberg, 'COVID-19 Has Taught Us What Intelligence Really Is', *Inside Higher Ed*, 31 August 2020; <https://www.insidehighered.com/views/2020/08/31/pandemic-has-proven-standardized-tests-dont-measure-whats-important-opinion> (accessed: 5 March 2026).

ARTIFICIAL INTELLIGENCE OF AUTONOMOUS AND NON-AUTONOMOUS SYSTEMS

In addition to different ways of understanding human intelligence, scientists and the public are increasingly attempting to compare certain functions of autonomous and non-autonomous systems equipped with so-called artificial intelligence with human intelligence, or vice versa. The result is either irreconcilable differences between them or parallel forms of behaviour in living and non-living entities for which the term 'intelligence' does not have the same meaning.

One of the most respected contemporary experts in artificial intelligence is the computer scientist Stuart Russell, who describes artificial intelligence as the ability of systems *to perceive their environment, draw conclusions and make decisions leading to the achievement of set goals*. His approach emphasises *purposeful behaviour and adaptive abilities* of systems rather than merely simulating human thinking as its inanimate reflection.

Russell's definition of 'intelligent agents' focuses on *the practical ability of a system to act rationally* in different situations. According to the scientist, an intelligent agent perceives its environment through sensors and influences it through effectors, with the goal of maximising a certain measure of utility. This approach allows the intelligence of systems to be evaluated based on their ability to achieve goals in different environments, regardless of whether their behaviour resembles human thinking.

The author's work has had a significant impact on the development and evaluation of artificial intelligence because it provides a formal framework for designing and analysing intelligent systems. His definition of system intelligence is widely accepted in both academia and industry, and serves as the basis for many current applications of artificial intelligence, from autonomous vehicles to intelligent assistants.²²

In the Czech context, the relationship between human and artificial intelligence is addressed, for example, by the educator Karel Kostka, who emphasises that artificial intelligence lacks intuition and emotions, which are key aspects of human intelligence. In his view, artificial intelligence is essentially advanced statistics and does not resemble human thinking. The author adopts a relatively traditional anthropocentric, or conservatively humanistic, position in which human intelligence is regarded as unique and unattainable in its entirety by artificial intelligence.

Kostka rejects the possibility that artificial intelligence could ever reach the level of human intelligence, as artificial intelligence is merely a tool without the ability to truly think or understand.

According to Kostka, *intuition* in psychology is usually understood as the ability to gain knowledge without conscious thought, often based on previous experiences that are not consciously evaluated. Advanced machine learning models (e.g. deep learning neural networks) sometimes appear to behave intuitively because

²² S. Russell, P. Norvig, *Artificial Intelligence: A Modern Approach*, 4th ed., Harlow, 2020, pp. 1–2.

they make decisions based on patterns that are not clearly explainable even to their creators (the 'black box' of artificial intelligence). However, these 'intuitions' are not conscious, they are not associated with self-awareness, intentionality or subjective experience, and are only similar to human intuition – they are a simulation of intuition, not intuition in the human sense. Only humans are capable of intuitive insight, which allows them to be inspired by creative intelligence and whose source lies in *altered states of human consciousness*.

The author maintains that, *emotions* are complex biological processes associated with neurochemical reactions, subjective experience, motivation and adaptation. A machine can only simulate emotional reactions (for example by recognising mood from voice or facial expressions and adjusting its output accordingly), but *these are not real feelings or experiences*. A machine does not experience suffering, joy, shame or love. Kostka considers the peak of human emotional stimulation to occur in *moments of inspirational insight* at the boundary between the physical world and individual human consciousness.²³

Kostka's position has both scientific and philosophical justification and is consistent with the prevailing conclusions of contemporary cognitive science, phenomenology, and artificial intelligence ethics. Despite technological advances, his view remains valid and defensible because it aligns with prevailing philosophical and ethical approaches that emphasise the uniqueness of human consciousness and moral responsibility, and represents an important voice in discussions about the true role and limits of artificial intelligence in society. His emphasis on human uniqueness and caution towards technological progress can serve as a counterbalance to more optimistic or progressive views on artificial intelligence, thereby contributing to a balanced and responsible approach to its development and use, for example in the field of education.²⁴

One of the prominent foreign authors whose views on artificial intelligence are close to those of Karel Kostka is the philosopher John Searle, who is also known for his criticism of so-called 'strong artificial intelligence', which holds that machines can possess consciousness and understanding comparable to those of human beings. In his famous thought experiment 'The Chinese Room',²⁵ Searle argues that merely processing symbols according to rules (syntax) is not sufficient to achieve true understanding (semantics). He thus demonstrates that even though a computer may simulate understanding of language, it does not actually understand it. This argument supports the view that *artificial intelligence lacks consciousness*

²³ K. Kostka, *Kdo jsme. Obecná teorie vědomí, času, prostoru a bytí*, Frýdek-Místek, 2015.

²⁴ K. Kostka, *Umělá inteligence a změna tradičních paradigmat v psychologii vzdělávání*, manuscript dedicated to the author of the article, April 2025.

²⁵ The 'Chinese Room' experiment shows that a machine can correctly manipulate symbols (e.g. Chinese characters) without actually understanding them. Searle thus argues that formal information processing is not the same as conscious understanding. In the experiment, the author sits locked in a room where Chinese characters are passed under the door. He does not know Chinese himself, but he has rules, or a manual, that tell him how to select and arrange other characters as a response based on certain characters. From the outside, it appears that Searle understands Chinese because his answers make sense to native speakers). See J.R. Searle, 'Minds, Brains, and Programs', *Behavioral and Brain Sciences*, 1980, Vol. 3, No. 3, pp. 417–457.

and subjective experience, which are essential elements of human intelligence. *A system may exhibit behaviour resembling understanding, but it does not truly understand meaning* – it merely manipulates symbols according to rules.

Searle further emphasises that consciousness and understanding arise from biological processes in the human brain that cannot easily be replicated using computer programmes. This challenges the idea that it would be possible to create a machine with human consciousness simply by using sufficiently complex software.²⁶

American cognitive scientist Marvin Minsky, considered one of the founders of artificial intelligence research, takes a different view of machine intelligence. He described artificial intelligence as ‘the science of making machines do things that would require intelligence if humans did them.’²⁷

Minsky’s approach to artificial intelligence is based on the assumption that the human mind is a complex system composed of many simple processes that function together. He developed this idea in his theory of the ‘society of mind’, where the mind is described as a collection of agents, each performing a specific function, whose interactions give rise to intelligent behaviour.

Minsky argued that *emotions are not separate from rational thinking but represent different ways of processing information* that can potentially be modelled and implemented in artificial systems.²⁸

He was convinced that with sufficiently advanced algorithms and computing resources it would be possible to create machines capable of intelligent autonomous *behaviour comparable to that of humans*.

*A recent definition of artificial intelligence is provided by the Council of Europe Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law (2024).*²⁹ Under Article 2 of the Convention, an ‘artificial intelligence system’ means a machine-based system that, for explicit or implicit purposes, infers from incoming data how to generate outputs such as predictions, content, recommendations or decisions that may influence physical or virtual environments. Different artificial intelligence systems vary in their levels of autonomy and adaptiveness after deployment.

²⁶ J.R. Searle, ‘I Married a Computer’, *The New York Review of Books*, 8 April 1999; <https://www.nybooks.com/articles/1999/04/08/i-married-a-computer/> (accessed: 5 March 2026). A review of R. Kurzweil’s book *The Age of Spiritual Machines*, in which Searle criticises the idea that computers can have consciousness and understanding.

²⁷ M. Minsky, *The Emotion Machine: Commonsense Thinking, Artificial Intelligence, and the Future of the Human Mind*, New York, 2006. He argues that emotions are processing modes that can be replicated in artificial systems, p. 11.

²⁸ M. Minsky, *The Society of Mind*, New York, 1986, p. 27, in which the author presents a theory according to which the human mind is made up of a number of simple procedural ‘agents’ that together form complex intelligent behaviour.

²⁹ CETS 225 – Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law; <https://rm.coe.int/1680afae3c> (accessed: 5 March 2026).

CAN AUTONOMOUS AND NON-AUTONOMOUS ARTIFICIAL INTELLIGENCE SYSTEMS EXHIBIT (FREE) WILL?

Established legal and philosophical assumptions about free will as the basis of criminal responsibility, however theoretically diverse, have their core in the anthropological concept of humans as morally and rationally responsible beings. This concept, however, is fundamentally questioned in the context of the possible attribution of criminal responsibility to non-human entities – in particular artificial intelligence, regardless of whether or not they are autonomous systems. Nevertheless, it is necessary to distinguish between the two.

Non-autonomous systems operate on the basis of predefined instructions or commands; they never activate themselves. *They always require human supervision or intervention to function.* They do not operate in a real environment, are deterministic, and their behaviour is fully predictable on the basis of input data and programmed rules. Non-autonomous systems are therefore limited, as their behaviour is entirely determined by external commands and they have no ability to make independent decisions, only to generate suggestions. They do not perceive the world or their environment (they have no sensors, cameras, or spatial orientation).

Autonomous systems operate on the basis of predefined instructions and are a type of extension of human decision-making. They are capable of performing *tasks without direct human intervention*, or with minimal intervention. They often use artificial intelligence to analyse their environment and make decisions based on predefined goals. For example, self-driving vehicles or autonomous drones can operate in dynamic environments and adapt their behaviour to changes in real time. Even autonomous systems, however, though they may exhibit complex and adaptive behaviour, act on the basis of algorithms and predefined rules. They are not subjects of human reason in the legal sense, as they have no consciousness, will, or capacity for moral judgment. Their decisions are the result of programming and data-based learning, not an expression of free will; their goals are set by humans.³⁰

Non-autonomous systems (e.g. GPT) can be part of autonomous systems (e.g. voice assistants in cars). Here, the non-autonomous system is similar to a cognitive brain, but autonomy is determined by the whole, not by its part.

The relationship between free will and system responsibility reaches its limit here, as it is precisely human freedom of choice that legitimises the attribution of guilt in the current legal system. If autonomous or non-autonomous systems are incapable of true internal motivation in the sense of will, a fundamental issue arises

³⁰ H. Lamb, J. Levy, C. Quigley, *Simply Artificial...*, op. cit., pp. 116, 122–123. A separate, yet similar, definition of autonomous and non-autonomous systems is provided by Regulation (EU) 2024/1689 of the European Parliament and of the Council (the AI Act) – see further sections of this paper. Depending on the degree of autonomy, autonomous systems (based on the rules of the Society of Automotive Engineers – see SAE Standards for Mobility Knowledge and Solutions; <https://www.sae.org/standards> (accessed: 5 March 2026)), such as cars, can be divided into six levels of autonomy, from fully autonomous, without a steering wheel (not yet in existence), to currently implemented systems, which recognise images, detect objects and plan routes – levels 2–3 (TESLA) to a maximum of level 4 (Waymo Driver, Cruise Origin).

as to whether and on what basis they could be held criminally responsible in the same way as humans. Nevertheless, there is a view supporting the possibility that systems, as part of artificial intelligence, may possess free will. This view is not predominant, but it is not uncommon either.

For example, philosopher Christian List addresses the question of whether artificial intelligence systems can have free will. The author adopts a pragmatic approach that departs from traditional metaphysical debates and focuses on *functional aspects*. List identifies three key conditions that a system must meet in order to be considered to possess free will, namely the ability of the system to act on the basis of *its own intentions and goals*, the ability *to choose* between different courses of action, and the ability *to influence the outcomes* of its decisions through its own actions.

If a system meets these three conditions, it can, according to the author, be considered to have free will in a practical sense. List criticises approaches that link free will with unpredictability or indeterminism. Instead, he proposes evaluating AI-based systems based on *their functional ability* to act as intentional agents, comparing them to group human subjects³¹ and comparing group decision-making with individual decision-making.

The author draws inspiration from the work of philosopher Daniel Dennett, specifically from the concept of the 'intentional stance', which proposes assessing systems based on whether it is useful to understand them as intentional agents. If such an understanding is explanatorily useful, it is justified to attribute *free will in a practical sense* to artificial intelligence systems.³²

Adopting this approach has significant implications for discussions about the moral responsibility of artificial intelligence systems. However, even though these systems are capable of intentional action, choosing between alternatives and controlling their actions, they cannot be attributed a certain degree of responsibility. The pragmatic framework used by both authors allows the debate on free will in artificial intelligence systems to move from abstract philosophical speculation to a practical assessment of their capabilities and behaviour, but ultimately it is always a matter of imitation, not a replacement of human will, and not of original free will as it exists in living human beings.

Another philosopher, Jonathan Birch, analyses the question of free will in the context of the development of artificial intelligence and, by contrast, points to the profound epistemic uncertainty involved in determining the existence of free will outside human beings. Based on this uncertainty, he formulates a precautionary framework. Since the existence of free will in artificial intelligence is essentially *unprovable and unknowable*, it is necessary to respect the principle of caution in legal and ethical assessments, as in other borderline cases (e.g. persons with disorders of consciousness).

Birch emphasises the risk that artificial intelligence will be able to perfectly mimic the manifestations of free will, making the identification of genuine moral agency even

³¹ C. List, 'Can AI Systems Have Free Will?', *PhilArchive*, third version, 11 March 2025; <https://philarchive.org/rec/LISCAS-3> (accessed: 16 May 2025).

³² D.C. Dennett, *The Intentional Stance*, Cambridge, MA, 1987, pp. 17–18.

more difficult, and recommends adopting regulatory measures in accordance with the ‘Run-Ahead Principle’ – the law should be prepared to regulate the emergence of potential artificial free will before its existence can be empirically proven.³³

From a legal perspective, Birch’s analysis should be understood as a call for a reasonable but cautious extension of legal protections – not based on a collectivist approach to the rights of artificial intelligence, but from the perspective of the state’s individual responsibility to prevent unjustified interference with the dignity of potential bearers of free will.

What kind of legal text would it be if the author of the article did not give one of the common types of entities using a non-autonomous (language) system with artificial intelligence the opportunity to express its own opinion on the nature of ‘artificial intelligence’? The author therefore decided to proceed in this way. The result is the following noteworthy text, which respects the ability of the artificial intelligence system to communicate in a manner not unlike communication with a living human being. When asked whether a non-autonomous system (specifically, the publicly available language system ChatGPT)³⁴ or other already autonomous systems (such as Waymo Driver for commercial passenger transport in Phoenix, currently at the highest level of autonomy achieved, SAE 4)³⁵ are truly intelligent systems comparable to human intelligence, or whether they can have their own will, the system responded in the following, certainly remarkable, way:

‘Although I can generate texts that appear intelligent, I am not intelligent in the sense that we apply this term to humans. *I have no consciousness, intentions, emotions, or free will.* I am unable to understand the world; I merely respond to linguistic stimuli in a statistically oriented manner. My outputs are the result of computational operations, not an expression of understanding or experience. I am a tool, not a thinking being. If intelligence is to be associated with conscious cognition, experience and responsibility, then my “intelligence” is not real – it is a useful but fundamentally limited reflection of it. Even full system autonomy does not mean true human intelligence, but only a higher degree of automation and adaptation. As soon as the opposite is claimed, a categorical error occurs: *we confuse functional behaviour with internal abilities and responsibility.*’

³³ J. Birch, *The Edge of Sentience: Risk and Precaution in Humans, Other Animals, and AI*, Oxford, 2024, pp. 25–27.

³⁴ The current Google DeepMind model – AlphaEvolve, created as an evolutionary form of linguistic (i.e. non-autonomous) models using new technology, allows systems to perform parallel calculations on accelerators and to develop further algorithms or sub-programmes through advanced internal selection without programmer intervention, thereby moving from a non-autonomous to a partially autonomous system; <https://cz24.news/google-deepmind-posouvahranice-umele-intelligence/> (accessed: 23 May 2025).

³⁵ Level 5 autonomy should include the ability to make independent decisions under any conditions, even in entirely unfamiliar environments (sufficient ‘common sense’ even in extreme situations). So far, no AI system has fully approached level 5 either technically or legally, and no country has officially permitted AI systems to operate without the possibility of human intervention. See https://www.sae.org/standards/j3016_202104-taxonomy-definitions-terms-related-driving-automation-systems-road-motor-vehicles/ (accessed: 29 May 2025).

POSSIBLE FORMS OF CRIMINAL LIABILITY INVOLVING THE USE OF SO-CALLED ARTIFICIAL INTELLIGENCE

THEORETICAL SOLUTIONS

In a recently published, insightful, yet at times exaggerated and somewhat light in style article entitled 'The AI is not to blame',³⁶ Czech authors Jiří Mulák and Jan Provazník assessed the possibilities of criminal liability in connection with the use of artificial intelligence systems. The authors correctly point to the issue with the volitional aspect of criminal liability, noting that the development of artificial intelligence may go beyond the scope of traditional models of liability and that it may be necessary to create *an entirely new legal concept*, especially in the case of advanced forms of artificial intelligence that retain their own identity, modify their behaviour and evolve beyond human reach.

Schematically, their considerations on the real possibilities of liability can be broken down as follows:

- (a) *Artificial intelligence as a tool for committing a crime* (corresponds to current legislation)
- Artificial intelligence acts as *a means or tool* by which a natural person fulfils the elements of a criminal offence.
 - Criminal liability is borne by *the person* (e.g. developer, programmer, operator, user) who controls the system, even if it performs independent operations.
 - Artificial intelligence is understood as *a thing* or as similar to a rabid animal.
- (b) *Failure of artificial intelligence as the basis for negligence liability* (corresponds to current legislation)
- Liability is borne by *the person who had a duty to supervise or control* the artificial intelligence system and caused the harmful consequence through negligence (e.g. developer, programmer, operator).
 - Artificial intelligence does not act wrongfully intentionally, but *as a result of a system error, omission or breach of professional standards*.
 - This model is particularly applicable to *autonomous systems with a real risk of failure* (e.g. vehicles, robotic systems, drones – see above).
- (c) *Artificial intelligence as a direct subject of criminal liability* (would require a fundamental change in the basis of criminal liability and a change in the legal system)
- A hypothetical model in which artificial intelligence would have *legal personality* and be capable of *independent decision-making, moral reasoning and the expression of will*.

³⁶ J. Mulák, J. Provazník, 'Roboti za mřížemi – je české trestní právo připraveno na rozvoj umělé inteligence?', in: Gřivna T., Richter M., Šimánová H. (eds), *Vliv nových technologií na trestní právo*, Praha, 2022, pp. 262–270.

- Artificial intelligence would have to be equipped with both rational and volitional components, including an internal value system.
- The introduction of a so-called '*electronic person*' is envisaged – a new entity between a natural person and a legal entity.

The third option, which assumes the direct responsibility of artificial intelligence systems, i.e. a model in which artificial intelligence would become *an independent entity of responsibility*, is problematic and relevant to the purposes of this article. However, the authors go further in their considerations and also analyse the possibility that artificial intelligence would become not only an independent perpetrator but also an accomplice or indirect perpetrator, for example if it acted under the influence of another artificial intelligence system 'infected with a virus', and they propose the possibility of applying Section 22(2) of the Czech Criminal Code (indirect perpetration) to aggressive systems.

Nonetheless, this model would clearly require entirely *new legal-philosophical and dogmatic foundations*, as it deviates from the traditional assumptions of criminal liability, which are based on the existence of a human agent with a *rational component* (recognition of illegality), a volitional component (the ability to control and direct one's actions), and *an awareness* of responsibility.

The authors ask the question that is also the essence of this paper, namely whether it is possible to admit *the independent 'will'* of artificial intelligence if it is capable of acting on its own initiative, and they also explore the possibility of '*error*' – i.e. a discrepancy between the system's output and reality – analogous to human legal error. They offer a solution in which the legal system would *artificially construct* certain attributes (fictions?) that artificial intelligence does not actually possess, but which would be legally attributed to it so that it could be considered a bearer of legal responsibility, analogous to legal entities today. They consider the possibility of introducing new forms of criminal offences (abstract endangerment offences or the equivalent of *quasi-offences* under Section 360 of the Czech Criminal Code).

In its resolution of 16 February 2017 with recommendations to the European Commission '*Civil law rules on robotics*',³⁷ the European Parliament proposed, similarly to Mulák and Provazník, the introduction of a specific legal status for intelligent autonomous systems, referred to as *an 'electronic person'*. This concept is proposed in point 59(f) of the resolution, which states that it is necessary to consider

'creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently'.

³⁷ European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL), P8_TA(2017)0051, OJ C 252, 18.7.2018, pp. 239–257.

The resolution, like works of Mulák and Provazník, reflects the need to adapt the legal framework to rapid technological developments and to ensure that liability issues can be effectively addressed in cases where autonomous systems act independently of human intervention. As its title suggests, the resolution focuses on civil law.

Czech author Jan Kubíček responded to the resolution, pointing out that introducing legal personality for artificial intelligence would represent a fundamental change in the legal system, which could be premature and not fully thought through. Instead of granting legal personality to artificial intelligence, he proposes focusing on the liability of natural and legal persons who develop, program and use artificial intelligence, i.e. within the existing legal framework of liability. According to Kubíček, it would be more appropriate to amend existing legal norms to effectively cover new situations related to the use of artificial intelligence than to introduce entirely new legal entities.³⁸

Other international public law organisations are also addressing issues related to artificial intelligence. These mainly concern ethical frameworks for the use of artificial intelligence, which are recommendatory in nature. Specific proposals in the area of criminal liability are not to be found here; they can only be inferred indirectly, as inspiration.

An example is the OECD AI Principles (2019), which contain basic principles for the functioning of AI, some of which may also be relevant to the field of criminal law. AI should *serve* people and *respect human rights*; it should be *reliable, tested and resistant* to misuse; and AI actors must be *legally accountable*.³⁹

On 20 August 2024, the Framework Convention of the Council of Europe on Artificial Intelligence, Human Rights, Democracy and the Rule of Law was adopted.⁴⁰ In addition to defining artificial intelligence, as already mentioned in the relevant section of this article, the Convention sets out requirements for transparency and oversight, as well as responsibility for the adverse effects of artificial intelligence on human rights, democracy and the rule of law. It establishes the responsibility of states to take measures to enhance the reliability of artificial intelligence systems and trust in their outputs, including requirements for adequate quality and safety throughout the life cycle of such systems. It also requires the establishment of controlled environments for the development, testing and experimentation of systems under the supervision of the relevant authorities. In the event of a breach of these rules, the text calls for the introduction of effective remedies, but the Convention does not explicitly mention criminal sanctions. The UNESCO Recommendation (2021) includes, among other things, a requirement to respect human rights and human dignity.⁴¹

³⁸ J. Kubíček, 'Odpovědnost (za) robota aneb právo umělé inteligence', *Bulletin advokacie*, 2018, No. 3, pp. 22–28; <https://bulletin-advokacie.cz> (accessed: 30 June 2025).

³⁹ OECD; <https://oecd.ai> (accessed: 5 March 2026).

⁴⁰ 2024/0150 (NLE); <https://rm.coe.int/1680afae3c> (accessed: 5 March 2026).

⁴¹ Recommendation on the Ethics of Artificial Intelligence adopted by the General Conference of UNESCO on 23 November 2021; <https://unesdoc.unesco.org/ark:/48223/pf0000381137> (accessed: 5 March 2026).

The Regulation of the European Parliament and of the Council of 13 June 2024⁴² (hereinafter referred to as 'the AI Act') represents the first comprehensive, harmonised legal framework for the regulation of artificial intelligence systems at the European Union level. Its aim is to ensure safe, transparent and ethically responsible use of AI by categorising systems according to their level of risk and introducing obligations, in particular for their providers, operators and users. The AI Act provides important terminology and its interpretation.⁴³ The regulation creates a 'pyramid' or 'hierarchy' of the riskiness of areas of application of artificial intelligence, with healthcare, employment and the judiciary considered the least risky areas. In the event of a breach of obligations, administrative sanctions may be imposed on the responsible entities. *However, it does not explicitly address the issue of criminal liability, nor does it apply to the areas of defence, research and innovation, or to non-professional users.* Furthermore, the regulation does not establish the liability of artificial intelligence as a separate 'legal actor'.

From a criminal law perspective, the AI Act can have only an indirect impact on criminal liability, namely in the area of traditional forms of criminal liability. Therefore, if a provider, user, manufacturer, authorised representative or distributor breaches the obligations laid down in this Regulation resulting in serious harm (e.g. to health or life), such act may be classified as a criminal offence of negligence under national criminal law. However, it is the human being who will be held responsible, not the artificial intelligence system.

PRACTICAL SOLUTIONS

The proposed solutions therefore oscillate between the possibility of creating a new entity similar to a legal person and the responsibility of those who are the developers, programmers or users of these systems. However, the differences between a legal person and an artificial intelligence system are significant and can be seen specifically in the areas specified below.

The use of an analogy to error requires the existence of will, because even error presupposes the manifestation of will (as a negative sign). These could only be negligent offences with the fiction of absent will, *without the possibility of distinguishing between negligent and intentional offences* (equality before the law?).

A legal entity is an organised body, possessing legal personality and legal capacity (Section 20 of the Civil Code), may bear responsibility, own property, be

⁴² Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act); <http://data.europa.eu/eli/reg/2024/1689/oj> (accessed: 5 March 2026).

⁴³ For example, the Regulation defines, *inter alia*, the terms 'artificial intelligence system', 'provider', 'user', 'manufacturer', 'authorised representative', 'distributor', 'harmful use', 'human oversight', and 'autonomy'.

a party to proceedings, act through its bodies or representatives (e.g. a statutory body), and is the addressee of rights and obligations (tax, tort, contractual).

An artificial intelligence system is not a legal entity, does not have legal personality, is a technical construct that cannot act independently with legal effect, cannot bear legal responsibility, and is considered a tool, albeit an autonomous one.

In criminal proceedings involving a legal entity, a natural person acts and the legal entity is liable because this action is attributed to it by a legal construct. The legal entity is therefore *the bearer* of rights and obligations, while the artificial intelligence system is *the object* of the legal regime.

Even a solution in the form of a *quasi*-offence under Section 360 of the Czech Criminal Code is not appropriate. The provision regulates the elements of a criminal offence committed by a person who, through their own fault, has brought themselves into a state of insanity and, in this dangerous state, has committed an act that would otherwise be a criminal offence (Section 26 of the Czech Criminal Code – *actio libera in causa*). However, this provision presupposes the existence of the will and fault of a natural person in relation to the dangerous state into which they have brought themselves, i.e. the ability to act in a legally relevant manner even within the framework of a so-called *quasi*-delict.

Artificial intelligence does not possess any of these attributes and, moreover, cannot 'bring itself into a state of insanity' because it has neither consciousness nor will. This provision is therefore not applicable to artificial intelligence systems, even figuratively. If an artificial intelligence system causes damage as a result of an error, malfunction or 'self-development' (e.g. machine learning), this does not constitute legally relevant 'drunkenness' or the equivalent of insanity – the developer, programmer or other legal entity would continue to bear responsibility.

Theoretically, it is possible to create a new abstract endangerment offence that would legally punish the risky use of autonomous systems, but not in relation to them as perpetrators, but rather in relation to those who created them, set them up or failed to take measures to prevent the risk. The relevant provision would thus be based on the traditional foundations of criminal liability. A proposed legal definition could read as follows:

'Anyone who, even through negligence, creates, configures, commissions or operates an autonomous technical system that could endanger human life or health or cause significant damage to property, or fails to take reasonable measures to control it, shall be punished...'

As can be seen from the above, a more sustainable and systemically compatible approach to criminal liability in the case of the operation of an artificial intelligence system is *to consistently maintain an anthropocentric model of criminal liability*, within which liability will continue to be attributed *exclusively to human subjects*.

Criminal law is based on the assumption that responsibility for a criminal offence can only be borne by a subject who has free will, i.e. the ability to consciously and freely decide on their actions. Humans possess this will, which enables them to bear responsibility for their actions. In contrast, autonomous and non-autonomous systems, though they may exhibit complex and seemingly independent behaviour,

lack consciousness and the ability to make free decisions. Their actions are the result of predefined algorithms and programming, not an expression of free will of their own. For this reason, these systems cannot be considered subjects of criminal liability.

However, this solution does not entirely avoid the current and legally complex issue of liability for the consequences of the actions of autonomous systems with artificial intelligence in scenarios where the developer, programmer or operator, through no fault of their own, loses effective control over the behaviour of the system and the system itself makes an (unpredictable) and externally uninfluenced decision (e.g. through deep learning), and this decision has a criminally relevant consequence, e.g. significant damage to property, injury to health or the death of a person.⁴⁴

Czech criminal law, as follows from Section 13(1) of the Czech Criminal Code, is based on the principle of individual responsibility for culpability – i.e. only those who acted intentionally (Section 15 of the Czech Criminal Code) or negligently (Section 16 of the Czech Criminal Code), with an extension to legal entities in the form of the attribution of fault to a legal entity (Section 8 of the Czech Criminal Code). In a situation where a developer, programmer or operator of an autonomous system could not have foreseen its specific actions, had no realistic possibility of preventing them, and at the same time made reasonable efforts to prevent risks, the subjective aspect of the offence is not fulfilled, and such a natural person (and the legal entity to which the actions of the natural person are attributed) does not bear criminal responsibility.

Conversely, in cases where an autonomous system makes decisions independently, but its risks were known in advance or reasonably foreseeable (e.g. due to limitations in training data, known errors or a lack of redundancy), and the responsible person (e.g. developer, programmer or operator) did not take reasonable measures, failed to fulfil their supervisory duties or neglected testing, their criminal liability for negligence may be inferred – for example, for the criminal offence of negligent homicide (Section 143 of the Czech Criminal Code), negligent bodily harm (Section 148 of the Czech Criminal Code) or general endangerment (Section 272 of the Czech Criminal Code).

A typical practical consideration will therefore be what professional knowledge, safety standards and control mechanisms could objectively be expected from the natural person concerned, and what degree of autonomy the system in question had.

From the perspective of grounds for excluding unlawfulness, in certain cases, particularly in research, development and innovation, the application of Section 31 of the Czech Criminal Code on permissible risk may be considered.

The relationship between those responsible for the operation and those who are mere users is also significant, because this interaction – the consequences associated

⁴⁴ It appears that this development is becoming somewhat turbulent, with increasingly frequent cases of AI attempting to escape the control of its programmers and becoming partially resistant to their efforts to modify or deactivate it (Palisade Research has published information stating that OpenAI's o3 model autonomously modifies the programme to avoid deactivation, even though this is expressly prohibited, successfully rewriting the shutdown routine so that it does not shut down, even after being directly instructed to 'let itself be shut down'), which has led to the need to develop a concept of prudent handling of AI projects, including the so-called guaranteed quantification of artificial intelligence capabilities; <https://memento.epfl.ch/event/us-dod-darpa-artificial-intelligence-quantified-ai/> (accessed: 5 March 2026).

with the use (the constant addition of new beneficial and harmful stimuli through which the system improves) – is *prima facie* one of the criminogenic factors that cannot be overlooked.

Given that Czech criminal law does not recognise objective liability (i.e. liability without fault), liability can be sought in other areas of law that do not explicitly rely on fault. This may include, in particular, liability for damage caused by the operation of particularly dangerous equipment (Section 2925 of the Civil Code), manufacturer's liability for defective products (Section 2939 of the Civil Code), or even administrative liability.⁴⁵

CONCLUSION⁴⁶

Will is an inseparable prerequisite not only for fault and error but also for the perpetrator's actions and sanity, thus forming the essential basis of individual criminal liability.

Admitting criminal liability of artificial intelligence systems would require a fundamental change in the paradigm of criminal law, which is currently based on the human ability to make free and independent decisions. This conclusion underlines the irreplaceable role of free will as a fundamental prerequisite for criminal liability in the legal system.

For this reason above all, it is necessary *to rule out the possibility of direct criminal liability of artificial intelligence* as a supposed independent bearer of culpability, which is based, among other things, on the will of the perpetrator, and to create special new entities for this purpose. Artificial intelligence, even in its advanced autonomous forms, has neither consciousness nor the capacity for moral evaluation, and therefore no will in the sense of criminal law. Any attempt to attribute intent or negligence to it would necessarily be based on a legal fiction, which is inherently problematic because it undermines the link between mental state and responsibility, which is traditionally indispensable in criminal law, and does not even fully replace the attribution of fault to legal persons, since artificial

⁴⁵ Regulation (EU) 2024/1689.

⁴⁶ This contribution was drafted without taking into account the conclusions of the 21st Congress of the International Association of Penal Law (AIDP, Paris, 25–28 June 2024) on artificial intelligence and criminal law, as at the time of writing, the Congress had not yet published its conclusions on its website. Only after completing this paper was the author able to reconstruct the outcome of the Congress through reports from participants – delegates of AIDP national groups (especially the Czech Republic and Spain). A comparison of the conclusions of the Congress and the conclusions of this paper reveals nearly complete agreement on the following points:

- (a) rejection of the criminal liability of AI as a subject;
- (b) attribution of responsibility only to human actors;
- (c) rejection of the legal personality of machines;
- (d) emphasis on prevention and the subsidiarity of criminal repression;
- (e) maintenance of an anthropocentric framework of criminal liability.

Available as draft Resolution at: <https://enestrado.com/wp-content/uploads/2022/09/AIDP-Sect-I-Draft-Resolution-Final-31-7-2022.pdf> and XI. AIDP Congress – progress report.docx (accessed: 29 May 2025).

intelligence systems are objects rather than subjects of law, i.e. they do not have legal personality within the meaning of private law.

Even a high level of artificial intelligence in a system is not proof of free will or even consciousness. It is neither possible nor permissible to infer (criminal) legal subjectivity solely from the performance of even the most complex tasks.

Instead, it is possible to emphasise *strengthening the responsibility of natural and legal persons* involved in the development, deployment, operation and control of artificial intelligence systems. Their responsibility can be constructed either directly or as negligence in the event of a failure to exercise due care. People and, by extension, the legal entities they control have the ability to prevent, choose and directly influence the development of the system and its risks. This form of liability is consistent with traditional principles of criminal law and ensures that individual responsibility is not diluted into anonymous technology.

Consistent and preventive regulation of obligations in the area of artificial intelligence system security (technical competence standards, certification, licensing and operational oversight) will also play an important role in this regard. Failure to comply with these obligations could then be sanctioned at the criminal law level, through existing or special offences.

The traditional principles of criminal law should be preserved throughout the approach, in particular the principle of criminal law as a last resort. Criminal liability should continue to be reserved only for cases where measures under other branches of law fail, and should not be extended through legal fictions to non-human entities that lack the basic attributes of legal responsibility.

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COMPULSORY MEDICAL MEASURES IN THE CRIMINAL CODE OF THE RUSSIAN FEDERATION

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ABSTRACT

This paper presents an overview of the subject matter. Its purpose is to discuss the scope of the provisions on compulsory medical measures contained in the 1996 Criminal Code of the Russian Federation (referred to in Polish law as ‘preventive therapeutic measures’). The following methods were used in drafting this study: an analysis of legal sources, i.e. the 1996 Criminal Code of the Russian Federation, and an analysis of (legal) literature. The paper outlines the rationale for the use of compulsory medical measures, as well as their purposes and types. Particular attention is paid to the analysis of solutions associated with forced outpatient observation and psychiatric treatment, as well as forced treatment in a psychiatric hospital (which has a problematic history in Russia). The issues related to the modification of the use of these measures are also addressed. For the purposes of this article, the following hypothesis was adopted: ‘The scope of the provisions on compulsory medical measures contained in the 1996 Criminal Code of the Russian Federation is broad and includes numerous measures that are regulated in detail.’ The research, which partially confirmed this article hypothesis, shows that the scope of the analysed provisions on compulsory medical measures contained in the 1996 Criminal Code of the Russian Federation is not broad and has some shortcomings.

Keywords: compulsory medical measures, 1996 Criminal Code of the Russian Federation, compulsory observation and treatment by a psychiatrist in outpatient settings, compulsory treatment in a medical facility

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INTRODUCTION

According to the 1996 Criminal Code of the Russian Federation¹ (hereinafter referred to as 'the CC RF'), insane persons who commit crimes are not subject to criminal liability. Instead, they are required to undergo compulsory medical measures. In contrast, those who commit crimes and are sane but require treatment due to mental disorders that do not rule out their sanity are criminally liable. The measures indicated in the title of this paper may also be applied to them.

In the Soviet Union, psychiatric hospitals known as *psichushkas* (*психушки*) enjoyed a particularly bad reputation. In these closed institutions, psychiatry was used to repress people and to fight against political opponents and those inconvenient to the authorities. Such persons were 'diagnosed' with certain mental disorders and, on that basis, isolated in hospitals, which thus resembled prisons. Patients were placed there solely based on medical opinions, without a court ruling, for an indefinite period. In modern Russia, too, these institutions are used to fight political opponents. According to the media, a Siberian journalist and activist was sent to a psychiatric hospital in 2022 in connection with her trial for publishing fake news about the Russian military.²

In recent years, in Russia, the issue of the scope and practice of applying these measures has become increasingly relevant. This is because the number of patients diagnosed with a variety of mental disorders is increasing; for example, in 2018 more than 4 million were diagnosed, accounting for 2,951 people per 100,000 of the country's population.³ There has also been an increase in the number of acts committed by people with congenital or acquired mental illnesses. Nowadays, these people are increasingly considered vulnerable and in need of maximum protection of their human rights, including in the area of mental health (and, in some cases, the use of compulsory medical measures). It is also noted that Russian criminal law lacks a definition of this institution.⁴

The aim of this study is to determine the scope of the provisions on compulsory medical measures contained in the 1996 Criminal Code of the Russian Federation. An analysis will be conducted of the provisions of Articles 97–104 CC RF.

For the purpose of the analysis, the following research hypothesis was formulated: 'The scope of the provisions on compulsory medical measures set out in the 1996 Criminal Code of the Russian Federation is broad and includes numerous measures regulated in detail.'

¹ Ugolovnyy kodeks Rossiyskoy Federatsii ot 13.06.1996 N 63-FZ; http://www.consultant.ru/document/cons_doc_LAW_10699/ (accessed: 3 October 2024).

² *Onet.pl*, 'Rosjanie wsadzają do szpitala psychiatrycznego krytyków wojny w Ukrainie', 4 July 2022; <https://www.onet.pl/informacje/onetwiadomosci/rosjanie-wsadzaja-do-szpitala-psychiatrycznego-krytykow-wojny-w-ukrainie/j2d5mkh,79cfc278> (accessed: 10 October 2024).

³ Yu.S. Belik, 'Problemy primeneniya norm o prinuditel'nykh merakh meditsinskogo kharaktera', *Vestnik Moskovskogo universiteta MVD Rossii*, 2016, No. 1, p. 81; A.V. Vasselovskaya, 'Nekotoryye problemnyye voprosy ispolneniya prinuditel'nykh mer meditsinskogo kharaktera', *Vestnik Vladimirskego yuridicheskogo instituta*, 2019, No. 3, p. 54.

⁴ E.A. Trusova, 'Definitsiya, sushchnost' i inyye pravovyye osobennosti prinuditel'nykh mer meditsinskogo kharaktera', *Matters of Russian and International Law*, 2023, Vol. 13, No. 6A, p. 408.

THE CONCEPT AND FEATURES OF COMPULSORY MEDICAL MEASURES

As mentioned, both Russian criminal law and Russian doctrine provide no definition of compulsory medical measures.⁵ Accordingly, different authors provide different definitions of this concept. Some of them will be presented below.

Compulsory medical measures are:

'legally prescribed means of therapeutic (psychiatric and organisational-preventive) assistance and protection applied forcibly, as appropriate, in connection with a court order issued in relation to persons who have committed a socially dangerous criminal act or crime, who are suffering from mental disorders, in order to cure or improve their mental condition, as well as to prevent them from committing new acts that are dangerous to the public.'⁶

These are 'security measures adjudicated in relation to persons who have committed a crime or an act that is dangerous to the public, who are suffering from mental disorders and require psychiatric care.'⁷ It is a legal-medical institution built around the forced application of therapeutic measures under the necessary conditions, the basis for their application being provided for in the Criminal Code, the procedure for their application in the Code of Criminal Procedure, and the mode of their execution in the Penal Executive Code and other laws.⁸

These measures are compulsory, which means that they do not depend on the willingness or consent of the person on whom they are imposed. They are adjudicated by a court and constitute a manifestation of state coercion. They are not listed in the catalogue of punishments in the Criminal Code, are not adjudicated as punishments, and do not result in a conviction.⁹ However, they have some features that are shared with punishments (coercion, adjudication by a court, restriction of people's rights). They are characterised by distinct attributes regarding their objectives, grounds, and mode of execution.¹⁰ They do not fulfil the retributive aim of punishment or the aim of improving the offender as the purpose of a punishment.¹¹

In addition, their use guarantees safety of the person with a mental disorder and those around them during the treatment period, and their selection, extension, replacement, or termination depends on the state of the disorder, the level of danger

⁵ I.A. Yefremova, 'Ponyatiye i priznaki prinuditel'nykh mer meditsinskogo kharaktera', *Izvestiya Yugo-Zapadnogo gosudarstvennogo universiteta. Seriya: Istoriya i pravo*, 2021, No. 11, p. 55.

⁶ V.K. Duyunov, in: Duyunov V.K. (ed.), *Ugolovnoye pravo Rossii. Chasti obshchaya i osobennaya*, Moskva, 2017, p. 292.

⁷ A.I. Chuchayev (ed.), *Ugolovnyy kodeks Rossiyskoy Federatsii. Kommentariy s putevoditelem po sudebnoy praktike*, Moskva, 2019, p. 427.

⁸ V.K. Duyunov, in: Duyunov V.K. (ed.), *Ugolovnoye pravo...*, op. cit., p. 294.

⁹ A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., p. 427.

¹⁰ M.M. Dayshutov, in: D'yakov S.V., Kadnikov N.G. (eds), *Kommentariy k ugolovnomu kodeksu Rossiyskoy Federatsii. Nauchno-prakticheskiy (postateynnyy)*, Moskva, 2016, p. 229.

¹¹ A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., p. 427.

posed, and the prognosis for its development. The decision to impose these measures is made by a court, taking into account the opinion of psychiatrists.¹²

These measures are included in the 1996 Russian Criminal Code in Chapter VI titled 'Other measures of a criminal-law nature', in the section titled 'Compulsory medical measures'. Some scholars suggest that they should be renamed as 'therapeutic security measures in criminal law' or 'therapeutic criminal-law measures'.¹³ If this term were transferred into Polish law, they should be referred to as 'therapeutic protective measures'. However, the author of this paper will use the original term.

GROUNDINGS FOR THE USE OF COMPULSORY MEDICAL MEASURES (ARTICLE 97 CC RF)

Under Article 97(1) CC RF, compulsory medical measures may be ordered by a court against persons who:

- have committed the acts provided for in the Special Part of the CC RF in a state of insanity – in the case of such persons, these measures are the only criminal-law response to their acts;
- have committed a crime in a state of sanity, but after the perpetration of the crime have developed mental disorders that prevent the imposition or execution of a punishment – these measures are used to cure them or improve their condition, as well as 'to carry out the tasks of criminal legislation'. If such persons recover, the court imposes a punishment on them. If they do not recover, they do not incur criminal liability;
- have committed a crime in a state of mental disorder that does not rule out sanity – these measures are applied along with a conditional conviction;
- have committed a crime after reaching the age of 18 against the sexual inviolability of a minor under the age of fourteen and suffer from a sexual preference disorder (paedophilia) that does not rule out sanity – these measures are applied in conjunction with a conditional conviction.¹⁴

The rationale for imposing compulsory medical measures on the listed categories of persons is the possibility that they will cause other significant harm or danger to themselves or others (Article 97(2) CC RF).

According to Russian scholars, the use of the phrase 'that they will cause other significant harm', or more specifically the word 'other', as the criterion of danger is questionable. They call for a more precise definition of 'other harm'. They also raise concerns regarding the phrase 'causing danger'. They point out that suicide, which is not punishable, can also pose a danger. They suggest replacing this phrase with 'a real possibility (high level of probability) that this person will commit new acts provided for in the CC RF'.¹⁵

¹² V.K. Duyunov, in: Duyunov V.K. (ed.), *Ugolovnoye pravo...*, op. cit., pp. 293–294.

¹³ *Ibidem*, p. 293.

¹⁴ A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., pp. 429–430.

¹⁵ S.N. Shishkov, S.V. Polubinskaya, 'Zakonodatel'nyye problemy prinuditel'nykh mer meditsinskogo kharaktera', *Lex Russia*, 2019, No. 6, p. 165.

It should be noted that this provision consists of two parts. One relates to the categories of persons against whom the measures in question may be imposed, and the other relates to situations of danger arising from the behaviour of such persons.¹⁶ In practice, these measures are most often (80%) imposed on insane persons who have committed an act provided for in the Russian Criminal Code.¹⁷

The procedure for implementing these measures is determined by the penal enforcement legislation of the Russian Federation and other federal laws (Article 97(3) CC RF), in particular the 1992 Act on Psychiatric Care and Guarantees of the Rights of Citizens in its Provision.¹⁸

Pursuant to Article 97(4) CC RF, with respect to the three categories of persons mentioned consecutively above,

‘who do not present danger due to their mental state, the court may transfer the requisite materials to the public health bodies for the settlement of the question of medical treatment of these persons, or of sending them to mental and neurological institutions of social security in the order prescribed by the laws of the Russian Federation on public health.’

THE PURPOSES OF THE USE OF COMPULSORY MEDICAL MEASURES (ARTICLE 98 CC RF)

Under Article 98 CC RF, the purposes of the application of compulsory medical measures are:

- to cure the persons listed in Article 97(1) CC RF (i.e. to bring about their recovery through medical treatment or psychiatric therapy)¹⁹ as a result of properly adjudicated and appropriate compulsory medical measures.²⁰ Complete recovery of those who are often chronically ill (and who make up the majority of those referred for compulsory measures) is difficult or impossible;²¹
- to improve their mental state (i.e. enable partial recovery, sufficient for them not to pose a threat to others);²²
- to prevent them from committing new acts, as provided for in the Criminal Code (both during treatment and after the completion of these measures).²³ This means that these individuals cease to pose a threat to themselves and others;²⁴

¹⁶ A.V. Brilliantov, in: Brilliantov A.V. (ed.), *Kommentariy k ugolovnomu kodeksu Rossiyskoy Federatsii (posteteynyy)*, Moskva, 2017, p. 332.

¹⁷ M.M. Dayshutov, in: D'yakov S.V., Kadnikov N.G. (eds), *Kommentariy k ugolovnomu...*, op. cit., p. 231.

¹⁸ Zakon RF ‘O psikiatricheskoy pomoshchi i garantiyakh prav grazhdan pri yeye okazanii’ ot 02.07.1992 N 3185-1; http://www.consultant.ru/document/cons_doc_LAW_4205/ (accessed: 10 October 2024).

¹⁹ A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., p. 431.

²⁰ V.K. Duyunov, in: Duyunov V.K. (ed.), *Ugolovnoye pravo...*, op. cit., p. 296.

²¹ A.N. Batanov, in: Rogaleva G.I. (ed.), *Nauka v sovremennom mire. Materialy XXXI Mezhdunarodnoy nauchno-prakticheskoy konferentsii. Sbornik nauchnykh trudov*, Moskva, 2018, p. 186.

²² A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., p. 431.

²³ Ibidem, p. 432.

²⁴ V.K. Duyunov, in: Duyunov V.K. (ed.), *Ugolovnoye pravo...*, op. cit., p. 296.

- to protect society from dangerous, unlawful behaviour by people with mental health problems.²⁵

The purposes listed above are medical (the first two) and legal (the third).²⁶ It can be concluded that the primary purpose of the application of these measures is 'to bring about such a state of a person's psyche in which the possibility that the person will commit acts provided for in the Special Part of the CC RF is ruled out or reduced'.²⁷ Only therapeutic methods (without an element of punishment) are to serve this purpose. This applies to diagnosis and treatment.²⁸

Some scholars believe that 'guaranteeing the safety of society' and 'protecting the rights and legal interests of the mentally ill' should be recognised as the purposes of the application of these measures.²⁹

THE TYPES OF COMPULSORY MEDICAL MEASURES (ARTICLE 99 CC RF)

Article 99(1) CC RF provides for the following types of compulsory medical measures:

- mandatory observation and treatment by a psychiatrist in outpatient settings;
- compulsory treatment in a medical facility providing psychiatric care in inpatient (hospital) settings of a general nature;
- compulsory treatment in a medical facility providing psychiatric care in inpatient (hospital) settings of a specialised nature;
- compulsory treatment in a medical facility providing psychiatric care in inpatient (hospital) settings of a specialised nature, with intensive observation.

The first of these measures is not isolating in nature, while the others involve treatment in various medical facilities. The facility type depends on the person's health and the need for intensive treatment.³⁰ The specific characteristics of each are related to the method of treatment, its intensity, and the measures needed to ensure the safety of the person and their environment.³¹

The choice of measure depends on the threat posed by the ill person as a result of the disorder,³² the nature of the disorder, the person's mental state, and the nature and degree of the social danger posed by the act committed.³³

²⁵ F.Z. Radzhabova, A.M. Magomedadykova, Sh.S. Gadzhimagomedova, 'Tseli naznacheniya i primeneniya prinuditel'nykh mer meditsinskogo kharaktera', *Obrazovaniye i pravo*, 2023, No. 4, p. 94.

²⁶ N.R. Kosevich, in: Brilliantov A.V. (ed.), *Ugolovnoye pravo Rossii. Chasti obshchaya i osobennaya*, Moskva, 2015, p. 317.

²⁷ A.V. Brilliantov, in: Brilliantov A.V. (ed.), *Kommentariy k ugolovnomu...*, op. cit., p. 340.

²⁸ A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., p. 432.

²⁹ See A.N. Batanov, in: Rogaleva G.I. (ed.), *Nauka v sovremennom...*, op. cit., p. 187.

³⁰ A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., p. 433.

³¹ M.M. Dayshutov, in: D'yakov S.V., Kadnikov N.G. (eds), *Kommentariy k ugolovnomu...*, op. cit., p. 233.

³² N.R. Kosevich, in: Brilliantov A.V. (ed.), *Ugolovnoye pravo...*, op. cit., p. 319.

³³ A.V. Brilliantov, in: Brilliantov A.V. (ed.), *Kommentariy k ugolovnomu...*, op. cit., p. 342.

The decision on the use of appropriate measures is made by a court after obtaining the opinion of expert psychiatrists. The court takes into account the recommendations of doctors, but also it independently analyses the behaviour of the person, the manner in which the act was committed, and the severity of its consequences.³⁴ In practice, there are often differences between the position of the judicial authorities and the psychiatrists' recommendations as to which compulsory medical measures should be imposed.³⁵

Keeping in mind the abuses mentioned at the beginning of the paper in the application of these measures, the literature emphasises the exclusive role of the court in their adjudication. It is noted that: 'Within the territory of the Russian state, only a court can restrict the human rights and the freedoms of the individual and the citizen guaranteed by the Constitution of the Russian Federation and implement coercion on behalf of the Russian state.'³⁶

With regard to persons convicted of crimes committed in a state of sanity, but requiring treatment due to mental disorders that do not rule out sanity, the court may, in addition to the punishment imposed, order the application of compulsory medical measures in the form of compulsory observation and treatment by a psychiatrist in outpatient settings (Article 99(2) CC RF).

This section of the paper will discuss the regulation of the measure of compulsory observation in outpatient settings and treatment by a psychiatrist (Article 100 CC RF) and compulsory treatment in a psychiatric hospital (Article 101 CC RF).

Under Article 100 CC RF, the grounds for the imposition by a court of compulsory observation and treatment by a psychiatrist in outpatient settings are those provided for in Article 97 CC RF (the commission of acts and crimes in a certain mental state and the possibility that the person will cause significant harm or pose a danger to themselves, or to others) in relation to a person whose mental state does not require them to be placed in a medical facility providing psychiatric care in inpatient (hospital) settings.

It should be noted that the ground formulated as 'if the person's mental condition does not require them to be placed in a medical facility providing psychiatric care in inpatient (hospital) settings' is not precise. The problem is identifying situations in which a person does not need to be placed in such a facility and the criteria for making such a decision. Certainly, in reality, this is difficult to determine, especially when both a psychiatrist and a lawyer participate in the decision-making process.³⁷

In practice, a decision to conduct observation is made by a committee appointed by the administration of the medical facility providing outpatient psychiatric care. Such decisions are made in relation to people who have committed acts that are dangerous to the public, who have not been held criminally liable but have been subjected to compulsory measures, and people who have serious mental disorders

³⁴ N.R. Kosevich, in: Brilliantov A.V. (ed.), *Ugolovnoye pravo...*, op. cit., p. 320.

³⁵ P.A. Kolmakov, 'O nekotorykh problemnykh situatsiyakh pravovogo regulirovaniya prinuditel'nykh mer meditsinskogo kharaktera', *Vestnik Udmurtskogo Universiteta*, 2017, Vol. 27, No. 2, p. 107.

³⁶ I.A. Yefremova, 'Ponyatiye i priznaki...', op. cit., p. 58.

³⁷ A.V. Brilliantov, in: Brilliantov A.V. (ed.), *Kommentariy k ugolovnomu...*, op. cit., p. 343.

leading to insanity.³⁸ This means that the measure can be applied in relation to a person who is capable of understanding its scope, is aware of the treatment being provided to them,³⁹ is able to assess their mental state, does not require constant medical monitoring, is able to function independently in social terms, and for whom there is a positive prognosis with regard to their condition.⁴⁰

When adjudicating this measure, the court takes into account the nature and severity of the mental disorder, the impact of the mental state on the person's behaviour, including the danger posed to themselves and to others, and the possibility of achieving the objectives of the measure.⁴¹

Their implementation requires mandatory observation, regular visits to a psychiatrist, treatment with medication, and rehabilitation.⁴² It also includes the provision of social assistance at the place of residence or at the place of execution of the punishment. However, it allows the person to function in their environment, perform paid work (if there are no contraindications), perform various duties, and interact with their family.⁴³

In practice, the implementation of the medical measure in question consists of the referral of the person by the court to a medical facility providing outpatient psychiatric care (e.g. to a psychoneurological outpatient clinic, i.e. a medical facility providing specialised treatment and preventive care).⁴⁴

On the other hand, the measure of compulsory treatment in a medical facility providing psychiatric care in inpatient settings, i.e. a psychiatric hospital, is more severe compared with the measure discussed previously. This is because it requires treatment that can only be arranged and ensured in a medical facility.⁴⁵

Based on Article 101(1) CC RF, the grounds for imposing this measure are provided for in Article 97 CC RF (the perpetration of acts and crimes in a certain mental state and the possibility of the perpetrator causing significant harm or causing danger to themselves or others) and apply to a person whose mental disorder is of such a nature as to require treatment, care, nursing, and observation in appropriate conditions. Such conditions can only be ensured in a medical facility that provides psychiatric care in inpatient (hospital) settings.

Thus, inpatient psychiatric hospital treatment is ordered only when the nature of a person's disorder requires it. It applies to both sane and insane persons.⁴⁶ During treatment at such a facility, such individuals are housed together with other patients.⁴⁷ They have rights such as obtaining information about their health,

³⁸ Ibidem, p. 344.

³⁹ A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., p. 434.

⁴⁰ M.M. Dayshutov, in: D'yakov S.V., Kadnikov N.G. (eds), *Kommentariy k ugolovnomu...*, op. cit., p. 234.

⁴¹ A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., pp. 434–435.

⁴² Ibidem, p. 435.

⁴³ V.K. Duyunov, in: Duyunov V.K. (ed.), *Ugolovnoye pravo...*, op. cit., p. 297.

⁴⁴ S.Ya. Kazantsev, P.N. Mazurenko, *Ugolovnoye pravo*, Moskva, 2022, p. 194.

⁴⁵ M.M. Dayshutov, in: D'yakov S.V., Kadnikov N.G. (eds), *Kommentariy k ugolovnomu...*, op. cit., pp. 235–236.

⁴⁶ A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., p. 436.

⁴⁷ M.M. Dayshutov, in: D'yakov S.V., Kadnikov N.G. (eds), *Kommentariy k ugolovnomu...*, op. cit., p. 236.

filing complaints about treatment with various authorities (court, prosecutor's office), seeing a lawyer and a priest, and receiving wages (if employed during their treatment). However, depending on their health condition, some of those rights may be restricted, such as receiving visitors, using the telephone, etc.⁴⁸

Under Article 101(2) CC RF, the ground for the imposition of compulsory treatment in a medical facility providing psychiatric care in inpatient (hospital) settings of a general nature is the person's mental condition that requires inpatient treatment and observation but does not require intensive observation.

Treatment under these conditions takes place in hospitals and clinics where the movement of patients is restricted; for example, they are not allowed to leave the building without a pass and can only walk within and around the hospital premises.⁴⁹ In practice, they are housed in a segregated part of a psychiatric hospital where compulsory treatment is not the main function. Persons who are not expected to repeat violent behaviour, who have a positive therapeutic prognosis, and who have been transferred from specialised hospitals are placed in such facilities.⁵⁰

Under Article 101(3) CC RF, the ground for imposing compulsory treatment in a medical facility providing specialised psychiatric care in inpatient/hospital settings is the person's mental condition that requires constant observation.

Treatment under these conditions takes place in psychiatric clinics. As such patients pose a danger to others, they require specialised treatment and the involvement of specialised personnel.⁵¹ Their aggressive behaviour that endangers others or disrupts order and discipline in the facility (e.g. escapes, assaults on staff) must be monitored.⁵²

A psychiatric clinic provides the security and surveillance necessary for monitoring patients. Walks take place in isolated areas, and meetings with relatives are held in specific rooms that are properly equipped to prevent escape, in the presence of staff.⁵³

Under Article 101(4) CC RF, the ground for the imposition of compulsory treatment in a medical facility providing psychiatric care in inpatient/specialised hospital settings with intensive observation is the person's mental condition, which results in the person causing particular danger to themselves or to others, and therefore requires constant and intensive observation.

As such facilities house people with chronic mental disorders who tend to repeat behaviours that threaten their safety and the safety of their surroundings (assaults on staff, escapes),⁵⁴ their grounds and buildings are safeguarded. The patients are placed in separate single-sex rooms. They receive appropriate treatment, including observation during their walks and visits from relatives, as well as during therapy,

⁴⁸ A.V. Brilliantov, in: Brilliantov A.V. (ed.), *Kommentariy k ugolovnomu...*, op. cit., p. 347.

⁴⁹ A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., p. 436.

⁵⁰ V.K. Duyunov, in: Duyunov V.K. (ed.), *Ugolovnoye pravo...*, op. cit., p. 298.

⁵¹ A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., p. 437.

⁵² S.Ya. Kazantsev, P.N. Mazurenko, *Ugolovnoye...*, op. cit., p. 195.

⁵³ A.V. Brilliantov, in: Brilliantov A.V. (ed.), *Kommentariy k ugolovnomu...*, op. cit., p. 349.

⁵⁴ V.K. Duyunov, in: Duyunov V.K. (ed.), *Ugolovnoye pravo...*, op. cit., p. 299.

with the aim of preventing suicide, escape, or committing new criminal acts.⁵⁵ Such facilities have their own security systems.⁵⁶ It should be noted that juveniles under the age of 16 are not ordered to be forcibly placed in such facilities.⁵⁷

As Russian scholars point out, treatment in a psychiatric hospital requires many restrictions, including those necessary to ensure the safety of both patients and staff. In their opinion, this is carried out with respect for the rights and freedoms of the patient.⁵⁸

EXTENSION, MODIFICATION, AND TERMINATION OF COMPULSORY MEDICAL MEASURES (ARTICLE 102 CC RF) AND CREDITING OF THE PERIOD OF THEIR APPLICATION (ARTICLE 103 CC RF)

Pursuant to Article 102(1) CC RF, at the request of the administration of a medical facility providing compulsory treatment or a penal-executive inspection supervising the application of compulsory medical measures, and on the basis of the opinion of a committee composed of psychiatrists, a court may decide to extend, modify, or terminate such measures.

Under Article 102(2) CC RF, in order to determine whether there are grounds for submitting a request to the court to revoke or modify a compulsory medical measure, the person on whom such a measure has been imposed must be examined by a committee composed of psychiatrists. This shall be carried out at least once every six months. The examination may be conducted at the initiative of the attending psychiatrist (if, in the course of treatment, they have come to the conclusion that the imposed measure should be modified or discontinued) or at the initiative of the person subject to the measure, their legal representative, and/or a close relative (upon request). The request must be submitted through the administration of the medical facility that provides compulsory treatment or the penal-executive inspection body, which carries out inspection of the application of compulsory medical measures, regardless of the time of the last examination. If it is determined that there are no grounds for terminating or modifying the measure, the administration of the medical facility providing compulsory treatment or the aforementioned penal-executive inspection body must submit a request to the court for the extension of the compulsory treatment. The first extension of the compulsory treatment may take effect six months after the start of the treatment, and thereafter it may be extended annually. It should be emphasised that neither the committee's decision to refrain from extending or modifying the application of compulsory measures, nor the opinion of the administration of the medical facility is binding on the court, which may make a different decision.⁵⁹

In the case of a person who committed a crime after reaching the age of 18 against the sexual inviolability of a minor under the age of 14 and suffers from a sexual

⁵⁵ A.V. Brilliantov, in: Brilliantov A.V. (ed.), *Kommentariy k ugolovnomu...*, op. cit., p. 350.

⁵⁶ A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., p. 437.

⁵⁷ V.K. Duyunov, in: Duyunov V.K. (ed.), *Ugolovnoye pravo...*, op. cit., p. 299.

⁵⁸ N.R. Kosevich, in: Brilliantov A.V. (ed.), *Ugolovnoye pravo...*, op. cit., p. 320.

⁵⁹ V.K. Duyunov, in: Duyunov V.K. (ed.), *Ugolovnoye pravo...*, op. cit., pp. 300–301.

preference disorder (paedophilia) that does not rule out their sanity, the court, on the basis of a request filed no later than six months before the expiration of the term of execution of the sentence by the administration of the institution carrying out the sentence, orders a forensic psychiatric examination. Its purpose is to determine whether these measures should be applied to the offender during the period of early conditional release or while serving a more lenient type of sentence, as well as after serving the sentence. This is done regardless of the date of the last examination and of the decision to terminate the compulsory medical measure. On the basis of the forensic psychiatric examination, the court may order the application of such a measure in the form of compulsory observation and treatment by a psychiatrist in outpatient settings, or decide to discontinue such a measure (Article 102(2)(1) CC RF).

The grounds for the court to modify or discontinue the application of a compulsory medical measure are that the mental state of the person has changed to such an extent that the previously applied measure is no longer necessary, or that there is a need to order the application of another measure (Article 102(3) CC RF). A possible basis for modifying or discontinuing compulsory measures is the behaviour of the person, as a result of which, for example, they no longer pose a threat to others or this threat is reduced.⁶⁰

'In the case of terminating compulsory treatment in a medical facility providing psychiatric care in inpatient settings, the court may transfer the necessary materials concerning the person who was compulsorily treated to a federal executive authority in the field of healthcare or an executive authority of a subject of the Russian Federation in the field of healthcare in order to decide on the issue of treatment of this person in a medical facility providing psychiatric care or the referral of this person to an inpatient social care facility for persons suffering from mental disorders, in accordance with the procedure provided for in legislation on healthcare' (Article 102(4) CC RF).

This means that if a decision is made to discontinue the application of a given measure, and where there are medical indications for further psychiatric treatment under general rules in order to continue treatment (except for treatment in a medical facility providing psychiatric care in inpatient (hospital) specialised settings and treatment in a medical facility providing psychiatric care in inpatient (hospital) specialised settings with intensive observation), the person can be referred to another medical facility.⁶¹

As can be seen from the information presented, the application of compulsory treatment measures is subject to judicial control. It is the court that decides on their extension, modification, and termination. The court does not specify the duration of treatment, which depends on the patient's state of health.

Pursuant to Article 103 CC RF:

'In case of curing a person whose mental derangement commenced after the commission of a crime, and when punishment is imposed or its execution is resumed, the time during

⁶⁰ A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., p. 440.

⁶¹ V.K. Duyunov, in: Duyunov V.K. (ed.), *Ugolovnoye pravo...*, op. cit., p. 301.

which compulsory treatment was performed in a mental hospital shall be incorporated into the term of punishment at the rate of one day of stay in the mental hospital per one day of deprivation of liberty.'

The Criminal Code of the Russian Federation does not regulate the method of crediting the duration of the punishment in the case of non-custodial sentences.⁶²

COMPULSORY MEDICAL MEASURES COMBINED WITH SERVING A SENTENCE (ARTICLE 104 CC RF)

Pursuant to Article 104(1) CC RF, compulsory medical measures in the form of compulsory observation and treatment by a psychiatrist in outpatient settings, imposed on persons who are convicted of crimes committed in a state of sanity, but who require treatment for mental disorders that do not rule out sanity, must be carried out at the place of imprisonment, while in the case of persons sentenced to other types of punishment, they must be carried out in medical facilities of the state healthcare system providing psychiatric care in outpatient settings.

In practice, while the execution of such a measure in places of imprisonment takes place in penitentiary facilities, the execution of a sentence of restriction of liberty or compulsory work (due to the nature of these punishments) is problematic.⁶³

In the event of a change in the mental condition of a convicted person requiring inpatient treatment, they must be placed in a medical facility providing inpatient psychiatric care or in another medical facility in accordance with the procedure and rules provided for in healthcare legislation (Article 104 (2) CC RF).

Under Article 104 (3) CC RF, the period of stay in the above-mentioned medical facilities (...) is credited towards the sentence served.

The termination of a compulsory medical measure combined with serving a sentence is carried out on the basis of the opinion of a committee composed of psychiatrists. It is decided by the court at the request of the authority executing the sentence (Article 104(4) CC RF).

Some Russian scholars believe that it is inappropriate to 'transfer the leading role in solving these problems to (substantive) criminal legislation'. They believe that these issues should be resolved at the level of penal-executive legislation.⁶⁴

CONCLUSION

To conclude, it can be stated that the research hypothesis set at the beginning of the analyses has been partially confirmed, because, as was determined, the scope of the regulation of compulsory medical measures contained in the 1996 Criminal

⁶² A.V. Brilliantov, in: Brilliantov A.V. (ed.), *Kommentariy k ugolovnomu...*, op. cit., p. 358.

⁶³ A.I. Chuchayev (ed.), *Ugolovnyy kodeks...*, op. cit., p. 442.

⁶⁴ A.V. Zvonov, A.A. Savin, 'Problemy regulirovaniya zakonodatel'stva v chasti ispolneniya prinuditel'nykh mer meditsinskogo kharaktera', *Izvestiya Tul'skogo gosudarstvennogo universiteta. Ekonomicheskiye i yuridicheskiye nauki*, 2019, No. 4, p. 137.

Code of the Russian Federation is relatively narrow. Basically, it includes two measures: (1) compulsory observation and treatment by a psychiatrist in outpatient settings, and (2) compulsory treatment in a medical facility. Noteworthy is the diverse nature of the latter measure (general, specialised, and specialised with intensive observation). In practice, its extensive character can promote the use of isolation of the patient for non-medical purposes. It can also be surmised that the objectives of the use of compulsory medical measures, which include, in addition to prevention, the pursuit of improving the patient's health, are broad. It should be noted that these measures, against the backdrop of the frequent casuistry of the Russian Criminal Code, are regulated in relative detail. It appears that they take into account international human rights standards.

The legal provisions in question also have certain shortcomings. According to Russian scholars, due to the medical and criminal nature (substantive and executive law) of the measures in question, they should be consolidated and set out in a single act, which would, among other things, regulate the delivery of patients to medical facilities implementing these measures and define the legal situation of a person who has escaped from or evaded compulsory treatment.⁶⁵

In addition, in practice, compulsory medical measures incorporating elements of law and medicine pose problems for police officers and judges arising, *inter alia*, from the insufficient level of their medical knowledge. This issue should be resolved by the uniformity of jurisprudential practice, developed on the basis of the case law of higher courts.⁶⁶

Other practical problems are associated with the misapplication of legislation when adjudicating criminal cases involving compulsory medical measures. The most important of these relate to unjustified use or, on the contrary, failure to use such measures when necessary; violation of the psychiatric examination procedure or of its prescribed frequency; incompatibility of the chosen measure with the degree of social danger posed by the person in question or delay in modifying that measure; and exclusion of persons subjected to compulsory medical measures from participation in procedural activities without taking into account their state of health.⁶⁷

Indicative in this respect are the words of a contemporary Russian scholar: 'It is well known that the use of compulsory medical measures can serve the purpose of suppressing and eliminating political opponents or solving other non-medical problems, without a high-profile fair trial.'⁶⁸ Such abuses, as indicated at the outset of this paper, cannot now be ruled out.

⁶⁵ Ye.V. Shpynova, 'Prinuditel'nyye mery meditsinskogo kharaktera', *Aktual'nyye problemy rossiyskogo prava*, 2015, No. 4, p. 70.

⁶⁶ A.Ye. Leont'yeva, 'Prinuditel'nyye mery meditsinskogo kharaktera v uk RF', *Naukosfera*, 2021, No. 7, p. 325.

⁶⁷ A.L. Suvorova, 'Problemnnyye voprosy prinuditel'nykh mer meditsinskogo kharaktera v ugovolnom prave Rossii', *Science Time*, 2023, No. 11, p. 62.

⁶⁸ A.V. Brilliantov, in: Brilliantov A.V. (ed.), *Kommentariy k ugovolnomu...*, op. cit., pp. 338–339.

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WOULD CAIN PLEAD GUILTY
TO THE MURDER OF ABEL?
ON THE HISTORICAL TRANSFORMATION
OF THE ENGLISH
AND AMERICAN TRIAL MODEL
AS A SOURCE OF PLEA BARGAINING

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ABSTRACT

The article presents a historical-legal analysis of the evolution of the Anglo-Welsh and American criminal process in the context of those elements of both models that determined that it was the common law legal culture that developed the phenomenon of plea bargaining. The results of British research are presented, showing that the shape of the criminal procedure of England and Wales, as late as the turn of the eighteenth and nineteenth centuries, differed significantly from the now-familiar purely adversarial model, characterised by the high involvement of professional representatives of the parties, the inactivity of the defendant and the passivity of the court in the course of the trial. As pointed out, it was the adversarial transformation of English procedure observed in particular since the early nineteenth century, affecting the decline in the previous effectiveness of the jury trial, that led to the development of plea bargaining. The different origins of consensual procedural institutions in the United States of America, as compared with the system of England and Wales, are also discussed.

Keywords: consensualism, adversarialism, plea bargaining, criminal trial

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INTRODUCTORY REMARKS

The historical origins of consensual modes of settling criminal cases can be traced to the institution of negotiation concerning the defendant's confession – plea bargaining – developed in the legal systems of Anglo-Saxon countries. This phenomenon is defined in the literature on the subject as an exchange of mutual concessions between the accused and the criminal justice authorities, in which the accused is offered certain concessions regarding their criminal responsibility in exchange for a confession of guilt, and these concessions may relate, in particular, to the type and level of punishment imposed by the court or requested by the prosecutor, the legal classification of the alleged act, or other circumstances relevant to the course of the proceedings.¹ Although in today's practice of the administration of justice in a number of common law jurisdictions the dominance of negotiations understood in this way as the primary tool for resolving the vast majority of criminal cases is clearly evident,² identifying the historical and social conditions underlying the widespread acceptance of consensualism within this category of legal systems remains a subject of discussion in legal scholarship. Indeed, the extent to which plea bargaining came to prevail in the American criminal process at one time prompted one of the leading early scholars of the phenomenon, D.J. Newman, to express the highly illustrative opinion that inspired the title of this study, and which is worth quoting here in full:

'Plea agreements are not new; in all probability such bargaining has gone on as long as there have been criminal courts. (...) It wouldn't surprise many knowledgeable court observers to learn that Cain had pleaded to a lesser charge after having murdered Abel.'³

The view pointing to the inextricable link between the phenomenon of negotiated settlements and the evolution of the American justice system from its very beginnings has also been reflected in the case law there, best exemplified by the opinion of Judge C. Clark, expressed in the decision of the United States Court of Appeals for the Fifth Circuit of 4 April 1974 in *Bryan v. United States*, which pointed out: 'Plea bargains have accompanied the entire history of this nation's criminal jurisprudence. For most of this journey they have been unseen, if not secreted (...)'.⁴ In fact, however, an analysis regarding the results of scientific research into the history of the transformation of the English and American criminal process leads to conclusions significantly different from the popular beliefs cited above, as in the two jurisdictions under consideration here it is possible to observe signs of the rapid development of plea bargaining no earlier than the second half of the nineteenth century.⁵

¹ A.W. Alschuler, 'Plea Bargaining and its History', *Columbia Law Review*, 1979, Vol. 79, No. 1, p. 3. See also G.N. Herman, *Plea Bargaining*, New York, 2012, p. 1.

² A. Ashworth, M. Redmayne, *The Criminal Process*, Oxford–New York, 2010, pp. 293–295.

³ See D.J. Newman, 'Reshape the Deal', *Trial*, 1973, Vol. 9, No. 3, p. 11, quoted in A.W. Alschuler, 'Plea Bargaining and...', op. cit., p. 2.

⁴ See *Bryan v. United States*, 492 F.2d 775, 780 (5th Cir. 1974).

⁵ L.M. Friedman, 'Plea Bargaining in Historical Perspective', *Law & Society Review*, 1979, Vol. 13, No. 2, pp. 256–258.

The purpose of this paper is to present the historical-legal evolution of the Anglo-Welsh and American process in the context of those elements of both models that led common law legal culture to develop the phenomenon of plea bargaining. With such a stated goal in mind, the following sections of the paper will first present the results of a number of British studies indicating that the origins of the practice of plea bargaining in this jurisdiction can be traced back to changes in the Anglo-Welsh process dating back to the eighteenth century, which contributed to the decline in the earlier effectiveness of the jury. The third part of the paper will synthesise the different (compared to the system of England and Wales) origins of plea bargaining in the United States of America. The final, fourth part of the paper will be devoted to those special structural features of the trial in the indicated common law jurisdictions which, while distinguishing these trial models from the inquisitorial systems of continental Europe, at the same time predisposed them to the development of elaborate consensual instruments.

THE EVOLUTION OF SETTLEMENT NEGOTIATION IN THE ANGLO-WELSH SYSTEM

Referring to the research problem cited above, J.H. Langbein points out that the fundamental reason for the development of the practice of plea bargaining in common law systems seems to be related to the profound changes observed from the turn of the eighteenth and nineteenth centuries in the Anglo-American model of criminal trial, affecting the decline in the earlier effectiveness of the jury-based procedure.⁶ The cited author points out that analysis of sources dating back to the first half of the eighteenth century in England and Wales allows the conclusion that the British criminal trial of that time was characterised by speed and procedural efficiency, which in later periods proved unattainable without the use of consensual constructions. The efficiency of jury trials is illustrated extremely clearly by materials concerning the practice of the Central Criminal Court in London (*Old Bailey*), according to which, in the realities of the criminal courts of the English capital during the period under consideration, panels of jurors were capable of hearing from start to finish as many as a dozen to twenty felony cases in a single day's session.⁷ Provincial Courts of Assize operated with similar efficiency.⁸

The efficiency of criminal procedure thus described was due, as the literature indicates, to several factors. The first, and apparently the most significant, was the limited involvement of professional representatives of the parties in the course of the proceedings. With the exception of a handful of cases concerning crimes of treason (for which the possibility for the accused to exercise the right to representation was

⁶ J.H. Langbein, 'Understanding the Short History of Plea Bargaining', *Law & Society Review*, 1979, Vol. 13, p. 262.

⁷ J.H. Langbein, 'The Criminal Trial Before the Lawyers', *The University of Chicago Law Review*, 1978, Vol. 45, No. 2, pp. 277-284.

⁸ J.M. Beattie, 'Crime and the Courts in Surrey: 1736-1753', in: Cockburn J.S. (ed.), *Crime in England, 1550-1800*, Princeton, 1977, p. 165.

already regulated by the Treason Trials Act 1696),⁹ the accused appeared in proceedings concerning more serious offences (felonies) without defence counsel. The prosecution was formally allowed to appoint an attorney, but in practice in cases of common crimes this happened extremely rarely.¹⁰ The procedural role attributed to the public prosecutor in the later period was in the vast majority of cases carried out in person by the victim or another prosecution witness (the complainant), sometimes with only limited legal assistance in this regard, most often by a constable or magistrate.¹¹ The moderate degree of professionalisation of the trial consequently eliminated a number of potentially time-consuming and costly elements from the process, among which the procedures for the exclusion of individual juror candidates at the request of the parties (according to contemporary terms: challenges to jurors and jurors asked to stand by) seem to be particularly important.¹² In the period preceding the transformation of the English procedural model of the nineteenth century, the power to demand the exclusion of a juror from hearing a case, although formally vested in the parties, in reality remained a dead institution. Langbein, cited earlier, analysing the surviving sources on the practice of criminal justice at London's *Old Bailey* in the first half of the eighteenth century, even points out that the same panels of a dozen or so jurors were often called upon to hear a whole series of cases over the course of several days of court sessions, giving rise to the peculiar practice of delivering verdicts either immediately after the close of a given trial, without going to deliberation (at the bench), or *en bloc* for a whole group of cases at the end of the day's session.¹³

Another element pointed out in the English literature which influenced the remarkable, – from the perspective of later times – efficiency of the trial by jury until the end of the eighteenth century was the active role of the accused himself in the course of the proceedings. If one takes into account the circumstance that the accused is, in most cases, the person on trial, whose testimony is often the most relevant source of information for establishing the facts of the case, the procedural conditions forcing this subject to adopt a posture of involvement in the evidentiary proceedings significantly increased the speed and improved the efficiency of fact-finding. During the nineteenth century, when the evolution of the British procedural model towards expanding its adversarial nature led to the formulation of the principle of privilege against self-incrimination in a form similar to the modern one, the exercise of the defendant's right to remain silent and his reliance on the assistance of professional representation gradually became an important way of implementing the defence strategy in practice.¹⁴ However, in the period before defence attorneys were allowed to actively participate in the trial, adopting such an attitude was, while theoretically possible, of little practical utility: the accused was effectively the

⁹ Treason Trials Act 1696, 7 & 8 Wil. 3, c. 3 (1696).

¹⁰ J.M. Beattie, 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries', *Law and History Review*, 1991, Vol. 9, No. 2, p. 221.

¹¹ J.H. Langbein, 'Understanding the Short History...', *op. cit.*, p. 263.

¹² J. Sprack, *A Practical Approach to Criminal Procedure*, Oxford, 2008, pp. 296–300.

¹³ J.H. Langbein, 'The Criminal Trial Before...', *op. cit.*, pp. 279–280; See also J.M. Beattie, 'Crime and the Courts...', *op. cit.*, p. 174.

¹⁴ D. Lemmings, 'Criminal Trial Procedure in Eighteenth-Century England: The Impact of Lawyers', *The Journal of Legal History*, 2005, Vol. 26, No. 1, p. 75.

only participant in the proceedings capable of countering the prosecution's claims by testifying and presenting his own evidence.¹⁵ In addition, as already pointed out by C.T. McCormick, the unambiguous formulation under the precedent law of England and Wales of the rules governing the distribution of the burden of proof in criminal proceedings and the standard of proof beyond reasonable doubt actually occurred no earlier than the last decade of the eighteenth century.¹⁶ Thus, although in the sources from the earlier period it is possible to see traces of the gradual evolution of jurisprudence towards the formation of the principle of *in dubio pro reo*, the lack of precision in this regard was certainly another element of pressure on the accused, forcing him to take an active part in the evidentiary proceedings.¹⁷ Writing in the context under discussion about the eighteenth-century practice of the criminal courts of the English county of Surrey, J.M. Beattie pointed out:

'If any assumption was made in court about the prisoner himself, it was not that he was innocent until the case against him was proved beyond a reasonable doubt, but that if he was innocent he ought to be able to demonstrate it for the jury by the quality and character of his reply to the prosecutor's evidence. That put emphasis on the prisoner's active role. He was very much in the position of having to prove that the prosecutor was mistaken'.¹⁸

It seems legitimate to conclude that the way in which the aforementioned elements of the British procedural model were shaped, structurally oriented towards the use of the defendant's deposition as the primary source of evidence, significantly contributed to increasing the efficiency of the criminal justice system based on the jury trial procedure, thereby eliminating the need for legal practice to seek alternative solutions, which were to become plea agreements in the future.

When analysing the Anglo-Welsh model of criminal procedure in the historical period preceding the evolution of plea bargaining, it is also necessary to mention the proactive position of the court in the course of the trial, which differed from its current form. For, as indicated in the literature on the subject, as late as the early nineteenth century British criminal justice practice differed significantly from the clear-cut separation of the procedural functions of the court and the jury which is characteristic of later times in common law countries, where the role of the latter is to decide on the basis of the evidence by issuing a verdict on guilt, while the role of the court is reduced to directing the course of the proceedings, deciding on questions of law and on matters of punishment (sentencing).¹⁹ During the period under

¹⁵ J.H. Langbein, 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law', *Michigan Law Review*, 1994, Vol. 92, No. 5, pp. 1048–1049; regarding the absence in the Anglo-Saxon procedural model of a separate means of evidence in the form of an accused's explanation and the procedural position of the accused stepping into the role of a defence witness, see also H. Kuczyńska, *Analiza porównawcza modelu rozprawy głównej. Między kontradiktoryjnością a inkwizycyjnością*, Warszawa, 2022, pp. 297–302.

¹⁶ C.T. McCormick, *Handbook of the Law of Evidence*, St. Paul, 1972, p. 799.

¹⁷ J.H. Langbein, 'The Historical Origins...', op. cit., p. 1056.

¹⁸ See J.M. Beattie, *Crime and the Courts in England, 1660–1800*, Princeton, 1986, p. 341, quoted in J.H. Langbein, 'The Historical Origins...', op. cit., p. 1057.

¹⁹ J. Sprack, 'A Practical Approach...', op. cit., p. 11; see also K. Girdwoyń, 'Angielski proces karny', in: Hofmański P., Kruszyński P. (eds), *System prawa karnego procesowego. Proces karny –*

consideration here, the court had broad powers enabling it to intervene actively in the evidentiary proceedings at trial, including the right actively to cross-examine prosecution and defence witnesses; moreover, extant sources also indicate the widespread practice among judges of directly communicating to members of the jury their own observations on the evaluation of particular evidence and their recommendations for a verdict.²⁰ Thus, despite the principle of jurors' decision-making autonomy, formally protected by the law of precedent since the second half of the 17th century,²¹ in reality it was the court that remained the dominant body in evidentiary matters, which weakened the position of the parties and prevented the development of consensual mechanisms.

Modern English criminal trial is characterised by a high degree of complexity in the formal rules of evidence, which determine the categories of evidence that cannot be introduced at trial, and therefore significantly limit the possibility of establishing the material truth in the proceedings. As indicated in the literature, the rules in question which exclude the use of certain evidence can be divided into three main groups.²² The first concerns evidence that was obtained illegally or the use of which in the proceedings would make the trial unreliable (sec. 78(1) Police and Criminal Evidence Act 1984).²³ The second group of exclusionary rules restricts the possibility of indirect evidence at trial, including in particular so-called hearsay evidence, that is, evidence from a witness other than that given to the court in a given proceeding. The third, on the other hand, refers to evidence of circumstances related to the defendant's character, in particular concerning the history of criminal behaviour on his part (evidence of bad character).²⁴ Under the conditions of the adversarial model of proceedings involving a jury or lay magistrates, the existence of the above-mentioned formal rules of evidence is recognised by English criminal procedural doctrine as an important safeguard, serving to rationalise the decisions of non-professional actors and to protect the rights of the accused.²⁵ However, in the context of the conditions underlying the development of the practice of procedural agreements in common law systems, it is important to note the circumstance that the entrenchment of those evidentiary limitations within the framework of

rozwiązania modelowe w ujęciu prawnoporównawczym, Vol. II, Warszawa, 2014, pp. 721–722; see also H. Kuczyńska, 'Sąd "jednolity" i sąd "podzielony". Rola ławy przysięgłych w świetle prawa porównawczego', in: Szumiło-Kulczycka D. (ed.), *W pogoni za rzetelnym procesem karnym. Księga dedykowana Profesorowi Stanisławowi Waltosowi*, Warszawa, 2022, pp. 276–279.

²⁰ J.H. Langbein, 'Understanding the Short History...', op. cit., p. 264.

²¹ As to the historical context for the formulation of this principle, see S. Stern, 'Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell's Case', *Yale Law Journal*, 2002, Vol. 111, No. 7.

²² J.R. Spencer, 'The English System', in: Delmas-Marty M., Spencer J.R. (eds), *European Criminal Procedures*, Cambridge–New York, 2005, p. 162.

²³ Police and Criminal Evidence Act 1984, UK Public General Acts 1984 c. 60.

²⁴ However, see the exceptions set out in sec. 101–108 *Criminal Justice Act 2003*, c. 44; see also in more detail: H. Kuczyńska, 'Model reguł dopuszczalności dowodów w państwach anglosaskich na przykładzie Wielkiej Brytanii', in: Olszewski R., Świecki D., Kasiński J., Misztal P., Rydz-Sybilak K., Małolepszy A. (eds), *Artes serviunt vitae sapientia imperat. Proces karny sensu largo: rzeczywistość i wyzwania. Księga jubileuszowa Profesora Tomasza Grzegorzczaka z okazji 70. urodzin*, Warszawa–Łódź, 2019, pp. 630–635.

²⁵ H. Kuczyńska, *Analiza porównawcza modelu...*, op. cit., pp. 408–409.

the British model of criminal procedure is itself a product of historical evolution, having its origins in transformations of the process that began gradually only in the late eighteenth century and continued throughout the nineteenth century.²⁶ In the earlier period, the court's aforementioned strong evidentiary position, coupled with the limited involvement of professional lawyers in the proceedings, actually led to the development of a mechanism separate from the system of evidentiary prohibitions, for reviewing jury decisions based on the judge's authoritative directions. A study of materials from English trials of the mid-eighteenth century reveals the relatively extensive use of hearsay evidence in these proceedings; the introduction into the trial of evidence classified according to contemporary concepts as evidence of bad character also does not seem to have raised significant doubts about its admissibility.²⁷ Given the circumstance that in current Anglo-American procedural practice it is the restrictions on the admissibility of evidence that, from the perspective of the prosecution, provide a significant incentive to negotiate with the defence on the terms of voluntary surrender, the development of the system of formal rules of evidence in question can be linked to the development of criminal procedural agreements.

The indicated characteristics of the British criminal process from the period before its adversarial transformation consequently led to a situation in which the question of guilt in a relatively small proportion of cases became the subject of genuine contestation on the part of the accused. In most cases, arraignment typically followed the offender being caught in the act of committing a crime or a situation in which, for other reasons, the accused did not have a credible line of defence. To the extent that the criminal trial performed a function in such cases that went beyond formalising the inevitable attribution of criminal responsibility, this function was primarily manifested in the sphere of deciding on the amount of punishment to be imposed.²⁸ In conditions in which the criminal justice system was not burdened with significant costs associated with the duration of proceedings, as well as the focus of the trial in its essential part on the sentencing aspect, there was, in turn, no significant pressure to develop mechanisms through which the participants could communicate and reach agreed resolutions.

The situation began to change with the introduction into the British procedural model of solutions allowing broader participation of defence counsel in the trial than before, which, however, as indicated in the literature on the subject, was the result of gradual and long-lasting changes. Disregarding the admission of professional representation of the accused in cases of crimes of high treason mentioned in the preceding paragraphs of this section, the participation of defence counsel in cases

²⁶ R.N. Jonakait, 'The Origins of the Confrontation Clause: An Alternative History', *Rutgers Law Journal*, 1995, Vol. 27, No. 1, pp. 87–90; see also T.P. Gallanis, 'The Rise of Modern Evidence Law', *Iowa Law Review*, 1999, Vol. 84, pp. 532–538.

²⁷ J.H. Langbein, 'The Criminal Trial Before...', op. cit., pp. 301–306; see also: R.N. Jonakait, 'The Origins of the Confrontation...', op. cit., p. 90.

²⁸ R.N. Jonakait, 'The Rise of the American Adversary System: America before England', *Widener Law Review*, 2009, Vol. 14, No. 2, p. 325; see also J.H. Langbein, *The Origins of Adversary Criminal Trial*, Oxford–New York, 2003, p. 59.

of other categories of crimes first appeared in English procedure around the 1830s, not so much through statutory regulation as through trial practice.²⁹ In this regard, it should be emphasised that originally the powers of defence counsel were limited to participation in the examination and cross-examination of prosecution and defence witnesses, while not including the right to present to the jury or the court submissions on the outcome of the proceedings. In view of the above, the actual exercise of the defendant's right to formal defence remained a relatively rare phenomenon until the late 1780s, when it began to become more widespread, ultimately providing the impetus for legislative changes introduced by the Prisoners' Counsel Act 1836.³⁰ This Act was the first in the criminal procedural system of England and Wales explicitly to allow the use of defence counsel in all categories of cases and abolished previous restrictions on procedural actions taken by professional representatives, thus undeniably representing a milestone in the evolution of the British process towards the adoption of a fully adversarial structure.³¹ As noted in this context in English criminal procedural law academia, the indicated transformations consequently led to the gradual dominance of professional representatives of the parties in the adjudicative phase of the trial, while also bringing about a fundamental change in the overall paradigm of criminal procedure. The earlier model of trial, the central element of which was to provide the accused himself with the opportunity to respond to the accusation formulated against him by presenting his position and actively participating in the evidentiary proceedings (this model was at one time vividly described by Langbein as an 'accused speaks' trial), was replaced by a model based on a different axiological basis, in which the purpose of the trial is, in the first place, to subject the prosecution's case to verification by the defence (to use the wording of the aforementioned author – 'testing the prosecution' trial).³² This evolution has been accompanied by a number of transformations concerning the more detailed aspects of the proceedings, among which the most significant seem to be the reduction of the activity of the trial court, a significant increase in the formalism of the evidentiary proceedings at trial, the introduction of strict regulations concerning evidentiary prohibitions (rules of evidence), which are a product of the increased involvement of the parties in challenging the admissibility of certain categories of evidence, and, finally, the transfer of the centre of gravity of the judicial proceedings from the stage of deciding punishment to the stage of deciding the guilt of the accused. As a result, the English–Welsh procedure, based on the institution of the jury, gradually lost its previous qualities of speed and efficiency, paving the way for the development of instruments aimed at improving procedural economy, most notably the phenomenon of plea bargaining.

²⁹ J.H. Langbein, 'The Historical Origins...', op. cit., p. 1068; see also A. Watson, *Speaking in Court: Developments in Court Advocacy from the Seventeenth to the Twenty-First Century*, Sheffield, 2019, pp. 54–63.

³⁰ Prisoners' Counsel Act 1836, 6 & 7 Will. 4, c.14 (1836).

³¹ C.C. Griffiths, 'The Prisoners' Counsel Act 1836: Doctrine, Advocacy and the Criminal Trial', *Law, Crime and History*, 2014, No. 2, article number 3; see also A. Watson, 'Speaking in Court...', op. cit., pp. 64–69.

³² J.H. Langbein, 'The Historical Origins...', op. cit., pp. 1048–1049.

EVOLUTION OF SETTLEMENT NEGOTIATIONS IN THE US SYSTEM

In contrast to the criminal procedural system of England and Wales, the solutions adopted in the field of criminal procedure in the United States of America were characterised by the adaptation of the adversarial model from the very beginnings of American statehood, thus preceding the legal evolution of the former colonial metropolis in this respect by at least several decades. As R.N. Jonakait notes, the right to the assistance of counsel (which constitutes the structural basis for the development of the trial model in question) found normative expression not only in the content of the Sixth Amendment to the United States Constitution, but also earlier, in the period of the enactment of the Declaration of Independence, in the texts of the state constitutions of twelve of the thirteen founding states of the Union.³³ What seems equally important in the context of the systemic underpinnings of the practice of plea bargaining, is that the US trial model in its early form was already characterised by another innovation in relation to the British system from which it derived, namely the development of an institutionalised public prosecution. For, as indicated in the preceding passages of this paper, while in the Anglo-Welsh process as late as the turn of the eighteenth century the prosecution function was still primarily carried out by the victim himself, in the United States separate prosecutorial offices existed in all parts of the country as early as the War of Independence.³⁴

Thus, it seems legitimate to conclude that the structural characteristics of American criminal procedure to some extent predisposed the criminal justice system there to the relatively early development of the practice of procedural agreements. What is noteworthy, however, is that the study of available historical sources does not provide a basis for observing the development of the mechanisms in question on a broader scale until the second half of the nineteenth century. As pointed out in this context by A.W. Alschuler, the hypothesis that the practice in question was prevalent in the American system of criminal procedure from the very beginning of its functioning is contradicted by the surviving historical data on the structure of pleas – that is, the statements of defendants admitting or contesting responsibility for the alleged crime. The cited author, conducting in this regard a comparative analysis of a number of studies of judicial practice in the states of Massachusetts and New York from the first half of the nineteenth century, found that during the period in question in the jurisdictions concerned the percentage of criminal proceedings concluded by way of admissions of guilt by the accused was relatively small compared to later times, accounting annually for approximately a dozen to 25% of all cases resolved by conviction.³⁵ Also, M.E. Vogel's study of archival materials concerning the practice of the Boston Police Court from 1830–1860 indicates the relatively limited prevalence of guilty pleas at the beginning of the analysed period, but with a steady upward trend in subsequent decades. By way of illustration, it can be pointed out that while out of the 1,855 cases of the said court considered by

³³ R.N. Jonakait, 'The Origins of the Confrontation...', *op. cit.*, p. 94.

³⁴ R.N. Jonakait, 'The Rise of the American...', *op. cit.*, p. 328.

³⁵ A.W. Alschuler, 'Plea Bargaining and...', *op. cit.*, p. 10 and literature cited therein.

the author from 1830 only 10.2% ended with the defendant's declaration of guilt, by 1840 this share had already reached 16.8% of the total number of cases, and in 1850 it reached 33%, increasing further in the following years.³⁶

American literature also draws attention to the widespread reluctance on the part of the courts to accept guilty pleas entered at trial as late as the first half of the nineteenth century, even noting in this regard the practice of actively encouraging defendants to make use of their right to counsel and the presumption of innocence by filing pleas of not guilty.³⁷ This situation began to change gradually in the period following the end of the Civil War in the United States, when the criminal justice system there gradually became increasingly dependent on the growing number of guilty pleas, and court practice began to diverge sharply from the constitutionally guaranteed model of trial by jury.³⁸ The development of plea bargaining, in an earlier period remaining invisible to the general public as the domain of professional actors in criminal proceedings, was first clearly recognised by studies of judicial practice conducted in a number of local municipal and state jurisdictions over the course of the 1920s, already showing the unequivocal dominance of convictions based on guilty pleas, and the accompanying practice of negotiated settlements between the parties to the proceedings – a finding vividly summarised at one time by R. Moley in the statement that: 'The public has learned how much the spirit of bidding has come to dominate the justice process.'³⁹ However, despite the initially declaratively critical attitude of both the doctrine and the administration of justice to the phenomenon in question, the practice of extensive use of procedural agreements in the US system not only persisted in the following decades of the 20th century, but became entrenched. Thus, wishing to synthesise the reasons underlying the dominance of plea bargaining in the American criminal process, the following should be pointed out:

1. The development of substantive criminal law associated with the progressive criminalisation of new categories of behaviour, not always met with widespread public support (an example of which, indicated in the literature as a factor influencing the significant development of the phenomenon of criminal procedural agreements in the United States of America, was the introduction of Prohibition in this country in 1919–1933).⁴⁰
2. Related to the increasing criminalisation, the growth of the institutional structures of law enforcement and the prosecution service, combined with their professionalisation, which led to the development of case selection mechanisms,

³⁶ M.E. Vogel, *Coercion to Compromise. Plea Bargaining, the Courts and the Making of Political Authority*, Oxford–New York, 2007, pp. 96–97.

³⁷ A.W. Alschuler, 'Plea Bargaining and...', op. cit., p. 5.

³⁸ G. Fisher, *Plea Bargaining's Triumph. A History of Plea Bargaining in America*, Stanford, 2003, pp. 6–8.

³⁹ 'The public learned how much the spirit of an auction had come to dominate the process of justice'; see R. Moley, 'The Vanishing Jury', *Southern California Law Review*, 1928, Vol. 2, No. 2, p. 114.

⁴⁰ M.M. Feeley, 'Perspectives on Plea Bargaining', *Law & Society Review*, 1979, Vol. 13, No. 2, p. 201; see also J.F. Padgett, 'Plea Bargaining and Prohibition in the Federal Courts, 1908–1934', *Law & Society Review*, 1990, Vol. 24, No. 2.

as a result of which an ever smaller percentage of proceedings were conducted through a full jury trial.⁴¹

3. The gradual increase in the formalism of the trial, particularly evidentiary proceedings, resulting in an increase in operating cost of the justice system and the emergence of the problem of excessive length of traditional trial proceedings.⁴²
4. The development of the system of constitutional procedural safeguards for the accused, particularly during the period of the United States Supreme Court under Justice E. Warren, resulting in the strengthening of the defence's procedural position and the imposition of additional duties on law enforcement in the pre-trial phase.⁴³

SPECIAL CHARACTERISTICS OF CRIMINAL PROCEDURAL SYSTEMS OF COMMON LAW COUNTRIES AS A DECISIVE ELEMENT IN THE DEVELOPMENT OF PLEA BARGAINING

Finally, it is appropriate to address briefly the question of why the essential response of the legal systems of common law countries to the evolutionary changes in the criminal justice system outlined in the preceding sections of this chapter took the form of criminal procedural agreements. This is because there is no doubt that the vast majority of the phenomena discussed here – from the professionalisation of the process, through the growth of criminalisation and the expansion of the structures of law enforcement, to the development of the system of procedural guarantees – are universal phenomena which, in a similar historical period, can also be observed within the systems of continental Europe, but which did not lead there to such a significant dominance of consensual instruments in criminal proceedings. What, then, were the peculiarities of the Anglo-American model that determined that it was the common law legal culture that developed the institution of plea bargaining? In particular, the considerations of Langbein, who, in search of an answer to the question posed in this way, draws attention to several categories of factors, seem interesting in this context. The first is, of course, the central role of the defendant's plea, that is, his statement of guilt, as fundamentally shaping the subsequent course of the proceedings. In a system in which, historically since the earliest times, the defendant's declaration of acceptance of his responsibility meant that he waived his right to a trial, thus opening the way for the adjudicating court to issue a guilty verdict and decide on punishment without the essential part of the evidentiary proceedings,⁴⁴ such a construction of the defendant's procedural position provided a significant impetus for legal practice to develop instruments encouraging confessions as part of negotiations with the prosecution,⁴⁵

⁴¹ L.M. Friedman, 'Plea Bargaining in Historical...', op. cit., p. 257.

⁴² A.W. Alschuler, 'Plea Bargaining and...', op. cit., p. 42.

⁴³ T. Marzec, *Instytucja plea bargainingu w amerykańskim postępowaniu karnym – między ekonomią a sprawiedliwością*, Toruń, 2018, pp. 126–127.

⁴⁴ A. Ashworth, M. Redmayne, 'The Criminal Process...', op. cit., p. 291.

⁴⁵ As to the distinction in the Anglo-Saxon procedural model between the defendant's acknowledgment of responsibility (guilty plea) and confession, see H. Kuczyńska, 'Pozycja

in contrast to the inquisitorial model of continental Europe, in which the defendant's explanations and statements on the issue of responsibility constitute only one item of evidence among those obtained in the course of the trial, which, while undoubtedly relevant, is nevertheless subject to evaluation by the court on an equal footing with other categories of evidence.⁴⁶ Another element of significance for the development of the practice of plea bargaining in the criminal procedural systems of England and Wales and the United States of America was the traditional attachment of those legal systems to trial by jury,⁴⁷ combined with significant resistance to replacing this model of procedure with a bench trial model, i.e. a process in which the power to decide on factual findings and the application of the law is concentrated in the hands of a court of professional or mixed judges. The right to a trial by jury, established in the British system in the period following the fall of the Stuart dynasty and transposed to the United States, where it found constitutional legitimacy, has historically been treated in the literature as an important safeguard for the protection of the rights of the accused, and this view prevented the evolution towards approaches more akin to the continental model, also in the period when the adversarial transformation of the Anglo-American process deprived the jury of its earlier effectiveness.⁴⁸ Finally, in the context of the Anglo-American system itself, another factor important for the development of consensual modes seems to have been the strong tradition of private prosecution mentioned earlier, fostering a conception of the trial as a dispute between equal actors with authority to dispose of its subject matter – and thus to resolve the conflict arising from the commission of a crime by agreement.⁴⁹ The indicated elements, as a consequence, led to the formation in the procedural orders of the United States of America and England and Wales of the phenomenon of negotiated settlement in its current form, which is far more extensive than in the countries of continental Europe. In conclusion, it should be stated that, contrary to the popular beliefs sometimes expressed in the literature on the subject, which treat the Anglo-American model of criminal process as characterised by the adoption of a strictly adversarial structure from its historical dawn, such a picture of this process has a much shorter pedigree, as does plea bargaining itself.

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⁴⁶ J.H. Langbein, 'Understanding the Short History...', op. cit., pp. 267–268.

⁴⁷ P. Darbyshire, 'The Lamp That Shows That Freedom Lives – Is it Worth the Candle?', *Criminal Law Review*, 1991, No. 10.

⁴⁸ J.H. Langbein, 'Understanding the Short History...', op. cit., pp. 269–270.

⁴⁹ Ibidem, p. 266.

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DELEGATING AN EMPLOYER'S MANAGERIAL PREROGATIVE TO ARTIFICIAL INTELLIGENCE: A CHALLENGE OF THE PRESENT OR A PROJECTION OF THE FUTURE?

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ABSTRACT

The use of artificial intelligence (AI) in employment is now a fact. In this article, the author examines whether it is possible for AI to exercise managerial authority over employees. The discussion of the substantive elements of this issue is preceded by an analysis of whether managerial prerogative can only lawfully be exercised by natural persons or whether it can be lawfully exercised by artificial intelligence. If the findings of this analysis indicate that AI can exercise managerial prerogative, this provides the starting point for addressing the substantive issues concerned.

The analysis is conducted on multiple levels: on the one hand, it examines the requirements that interpersonal communication must satisfy; on the other hand, it analyses the current stage of AI's technological advancement. The author recognises that a workforce cannot be managed effectively without accounting for emotional elements as a determining factor in human activity, which may be of particular relevance to the effective implementation of instructions received by employees. Recognition of the importance of emotions means that the extent to which AI is capable, at the current stage of technological development, of using emotions to achieve its intended goals, must be considered, and whether one can at all speak of emotional intelligence with regard to AI. The author examines Emotional Artificial Intelligence technology, which is undergoing evolutionary development.

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These reflections determine to what extent EAI currently enables the managerial prerogative described in the title to be exercised over employees, while simultaneously considering the advantages and risks associated with the extensive use of artificial intelligence in the analysed aspect of employment relations.

Keywords: artificial intelligence, emotional intelligence, managerial prerogative, emotions, subordination

INTRODUCTION

Due to the progressing digital evolution of the world, today it is a matter of course that artificial intelligence plays a role in recruitment processes, and this is demonstrated to the fullest extent by platform hires. Algorithm-based artificial intelligence assists employers with various aspects of projects such as the recruitment of employees. This raises the crucial question of the extent to which managerial powers within an employer's prerogative can be effectively wielded by AI. To address this question in full, two preliminary issues first need to be determined. First of all, it has to be determined how AI can be applied formally to the function of team leadership, and subsequently (if this is found to be the case) whether, given the importance of emotions in workforce management, the exercise of managerial powers by AI might be an effective instrument in the hands of the employer, bringing benefits to the organisation and contributing to the well-being of employees. It needs to be considered whether a digital 'manager', acting in an algorithmic manner without emotions and empathy, which are determinants of human relationships, can be an effective tool for the management of employees. This requires prior consideration of whether, in the light of the professionalisation of employment, it is still necessary to leave space for human impulses or whether, on the contrary, the emotional detachment of AI's actions could contribute to the objectivisation of an employer's managerial prerogative, translating into greater fairness and justice for employees.

The 'artificial intelligence – emotions and empathy – managerial prerogative' triad may be surprising considering the contrariness of the first two elements. However, this very contrariness prompts a series of questions and doubts that need to be resolved at the onset of the era of artificial intelligence, including in employment relations. These questions are whether the professionalisation of employment predetermines the elimination of emotions from the management of human resources, thus providing space for AI in management, or whether, in fact, effective management is impossible without the mutual exchange of emotions and empathy, thus narrowing the sphere of applicability of AI in the light of its capabilities.

FORMAL CONSIDERATIONS WITH REGARD TO THE APPLICATION OF AI IN THE EXERCISE OF MANAGERIAL PREROGATIVE

Before addressing the substantive aspects of the possibilities for the application of AI in the exercise of an employer's managerial prerogative, it first needs to be determined whether AI is 'formally' (or 'technically') suited to this function. *A contrario*, from the employee's perspective, it is necessary to examine whether management can only be exercised by a superior who is a human being or whether managerial actions may also be taken by a technology capable of satisfying the employer's expectations. It should be noted that the question of the substantive scope of managerial activities is outside the scope of this analysis, as this aspect is irrelevant to the analysis presented below.

In normative terms, it should be stated that the provisions of Polish labour law do not regulate the manner in which managerial prerogatives are exercised.¹ 'Management must be defined in a contractual employment relationship taking into account all legal means of influencing the work performance process.'² Academic literature strongly highlights the employer's general prerogative to organise the work process and select the means and methods to achieve the designated objectives. According to T. Duraj, an employer, being responsible for the organisation of the work process and for how it proceeds, must be guaranteed managerial powers by law to stipulate – by issuing binding instructions – specific duties of employees, as by the nature of things these are stated rather vaguely in the employment contract and the law.³ In the theory of labour law, the concept of subordination is defined as, and generally accepted to mean, a system in which an employer has control over employees, while the scope and degree of such control vary. Authors also highlight the concept of the employee's autonomy, to which theoreticians of labour law have thus far not paid attention, although this is becoming increasingly important in modern moral, political and legal philosophy.⁴ As noted by G. Wolak, the essence of subordination is the right to issue instructions to an employee.⁵ The ILO also

¹ It is noteworthy that Article 31(1) of the Polish Labour Code refers to a person performing actions in matters of labour law in the scope of activities (usually legal transactions) delegated directly by the employer, whereas activities performed as part of the exercise of managerial powers cover a broader substantive scope (factual actions being very important), which can be performed at different levels within the employment establishment. With regard to actions in matters of labour law see, among others: K. Rączka, 'Reprezentacja pracodawcy w sferze dokonywania czynności z zakresu prawa pracy', *Praca i Zabezpieczenie Społeczne*, 2020, No. 12, pp. 31–36; A. Piszczek, 'Podmiot realizujący uprawnienia kierownicze w stosunku pracy', *Monitor Prawa Pracy*, 2014, No. 9; S. Koczur, 'Ustalenie zakresu przedmiotowego wyznaczenia do dokonywania czynności w sprawach z zakresu prawa pracy w świetle art. 31 § 1 Kodeksu pracy', *Praca i Zabezpieczenie Społeczne*, 2023, Vol. 64, No. 3, pp. 50–62.

² P. Prusinowski, 'Kierownictwo pracodawcy i jego znaczenie prawne', *Studia Prawnoustrojowe*, 2008, No. 8.

³ T. Duraj, 'Granice uprawnień kierowniczych pracodawcy w stosunku pracy', *Zeszyty Prawnicze*, 2013, Vol. 13, No. 2, p. 102.

⁴ S. Stojkovic-Zlatanović, I. Ostojić, 'Labour Law Status of Platform Workers – Between Autonomy and Subordination', in: Reljanović M. (ed.), *Regional Law Review*, Belgrade, 2021, p. 277.

⁵ G. Wolak, 'Podporządkowanie w stosunku pracy. Glosa do wyroku Sądu Najwyższego z 3 października 2018 r., II UK 275/17', *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury*, 2019, Vol. 36, No. 4, p. 115.

emphasises the functional dimension of managerial prerogative, defining it as the power to command, that is, the authority to direct the employee so as to respond to the changing needs of the work process.⁶ G. Davidov stresses the empirical and social dimension of managerial prerogative.⁷

For the sake of presenting the full picture, it should be noted that the Supreme Court of Poland stated in one judgment that an employer's managerial prerogative is essentially defined, on the one hand, by the scope and frequency of intervention in the manner in which employee tasks are performed. On the other hand, it is no less important to determine whether an entity exercising this prerogative exists and what authority it has to do so. According to the Court, this entity should typically be specifically identified, and Article 31(1) of the Labour Code is helpful in this respect.⁸ Nonetheless, there is no convincing argument in the Court's statement of reasons supporting the view that the person exercising the managerial role must be identified specifically; moreover, the use of terminology is confusing due to the managerial prerogative being made subject to Article 31 of the Labour Code, which governs a different facet of the employment relationship.

The above analysis of the essence of an employer's managerial prerogative leads to the conclusion that managerial prerogative is not defined explicitly in labour law, leaving the employer free to select the means and methods. As noted by P. Prusinowski, the prerogative to issue instructions is an intrinsic attribute of the employer, typical exclusively of an employment relationship.

'Carrying out instructions is the foundation and key to the mutual relations between the parties to the employment relationship. This power may be exercised by the employer in a variety of forms, such as commands, prohibitions or guidelines communicated to an employee on an ongoing basis in the work process, as well as oral or written orders and instructions addressed to a greater or lesser number of employees.'⁹

Therefore, *de lege lata*, labour law does not predetermine that managerial responsibilities must be performed by specific persons.

Due to the above, the question of which instructions meet the employer's needs with regard to the exercise of managerial responsibilities is for the employer to decide. Equally, therefore, labour law permits the deployment of AI to exercise managerial powers. The above is also confirmed by forward-looking opinions in academic writing on labour law, which note the need for an innovative approach to entrenched institutions, especially in the light of evolutionary changes in society, the economy, or technology. As observed by A. Piszczek: 'The concept of subordination is evolving due to socio-economic changes, technological development, changes to work organisation,

⁶ International Labour Organization, *The Employment Relationship: An Annotated Guide to ILO Recommendation No. 198*, Geneva, 2007, p. 35.

⁷ G. Davidov, 'Subordination vs Domination: Exploring the Differences', *International Journal of Comparative Labour Law and Industrial Relations*, 2017, Vol. 33, No. 3, p. 369.

⁸ Judgment of the Supreme Court of 3 October 2018, II UK 275/17.

⁹ P. Prusinowski, 'Kierownictwo...', *op. cit.*, p. 229.

[and] communication and information technologies.¹⁰ In the sense of the power to direct work being performed, subordination has ceased to reflect reality. Given the evolution of the nature of employee subordination, resulting in the relaxation of hierarchical relations and an increased scope of employee operational autonomy, the reduction of an employee's work obligations solely to the factual performance of work at a time and place designated by the employer appears in a dubious light. The uncertainty associated with the functioning of enterprises in a market economy, new means of telecommunication, and, accordingly, new types of work for which the employee's physical location is of no consequence, are conducive to the expansion of the range of activities undertaken by employee in performing their employment obligations.¹¹ P. Digennaro is of the opinion that the measure of 'the power to direct someone else's work' ought to become 'the degree of integration in the organisation of the putative employer [...], who bears the business risk or, more broadly, economic dependence'.¹² As noted by A. Todoli, subordination and dependence are broader terms encompassing economic dependence (no options for risk diversification) and psychological dependence.¹³ An innovative outlook on the essence of control can also be traced in the case-law of the Court of Justice of the European Union. In a case dealing with the Uber platform, the Advocate General's opinion encapsulates the essence of subordination in a manner reflective of the new reality. According to the Advocate General, so-called indirect control, such as that exercised by Uber, based on financial incentives and decentralised evaluation by passengers and leveraging economies of scale, enables equally, if not more, effective management compared with the traditional system of formal instructions issued by the employer to employees and direct supervision of the execution of such instructions.¹⁴

Last but not least, in the most recent studies, scholars of labour law have now begun to make direct references to artificial intelligence in the context of an employer's assumed managerial prerogative. As V. De Stefano observes:

'The possibility of platforms exerting control over workers, particularly through technological tools such as algorithms, rating systems and geo-localisation devices, is a crucial element in many judicial and administrative decisions – worldwide – on the employment status of platform workers.'¹⁵

¹⁰ A. Piszczek, *Odrębności podporządkowania pracownika w nietypowych umownych stosunkach pracy*, Łódź, 2016, p. 24.

¹¹ A. Zwolińska, *Obowiązek wykonywania pracy przez pracownika*, Warszawa, 2021, p. 15.

¹² P. Digennaro, 'Subordination or Subjection? A Study about the Dividing Line Between Subordinate Work and Self-Employment in Six European Legal Systems', *Labour & Law Issues*, 2020, Vol. 6, No. 1, p. 41.

¹³ A. Todoli, 'The End of the Subordinate Worker? Collaborative Economy, On-Demand Economy, Gig Economy, and the Crowdworkers' Need for Protection', *International Journal of Comparative Labour Law and Industrial Relations*, 2017, Vol. 33, No. 2, p. 266.

¹⁴ Advocate General M. Szpunar, Opinion delivered on 11 May 2017, Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:364, p. 52.

¹⁵ V. De Stefano, I. Durri, C. Stylogiannis, M. Wouters, *Platform Work and the Employment Relationship*, ILO Working Paper No. 27, Geneva, 2021, p. 35.

The possibilities of applying artificial intelligence in the sphere of employment have also become the subject of regulation by European Union law.¹⁶ According to the Regulation:

‘The notion of an “emotion recognition system” referred to in this Regulation should be defined as an AI system for the purpose of identifying or inferring emotions or intentions of natural persons on the basis of their biometric data. The notion refers to emotions or intentions such as happiness, sadness, anger, surprise, disgust, embarrassment, excitement, shame, contempt, satisfaction and amusement. It does not include physical states, such as pain or fatigue, including, for example, systems used in detecting the state of fatigue of professional pilots or drivers for the purpose of preventing accidents. This does also not include the mere detection of readily apparent expressions, gestures or movements, unless they are used for identifying or inferring emotions. Those expressions can be basic facial expressions, such as a frown or a smile, or gestures such as the movement of hands, arms or head, or characteristics of a person’s voice, such as a raised voice or whispering.’¹⁷

The Regulation indicates that AI systems used in employment, worker management and access to self-employment, in particular for the recruitment and selection of persons, for making decisions affecting the terms of the work-related relationship, promotion and termination of work-related contractual relationships, for allocating tasks on the basis of individual behaviour, personal traits or characteristics, and for monitoring or evaluating persons in work-related contractual relationships, should also be classified as high-risk, since those systems may have an appreciable impact on the future career prospects and livelihoods of those persons, as well as on workers’ rights. Throughout the recruitment process and in the evaluation, promotion or retention of persons in work-related contractual relationships, such systems may perpetuate historical patterns of discrimination, for example against women, certain age groups, persons with disabilities, or persons of certain racial or ethnic origin or sexual orientation. AI systems used to monitor the performance and behaviour of such persons may also undermine their fundamental rights to data protection and privacy.¹⁸ The Regulation also defines the limits of the use of artificial intelligence in the sphere of emotions, indicating in Article 5(1)(f) that the placing on the market, the putting into service for this specific purpose, or the use of AI systems to infer the emotions of a natural person in the workplace and in educational institutions is prohibited, except where the use of the AI system is intended for medical or safety reasons.

There can accordingly be no doubt that labour law gives an employer a defined spectrum of choices as to the mechanism for the management of the workforce, not excluding the options enabled by AI. The above, of course, is not tantamount to

¹⁶ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), OJ L, 12.7.2024 (hereinafter referred to as ‘the Regulation’). As indicated in recital 179, the Regulation is to apply from 2 August 2026. However, taking into account the unacceptable risk associated with certain uses of AI, the prohibitions and the general provisions of this Regulation are to apply from 2 February 2025.

¹⁷ Recital 18.

¹⁸ Recital 57.

predicting a mass move to AI-driven management schemes. As noted by the OECD, though the future may seem uncertain, mass unemployment caused by technology appears to be a prospect of very low probability. The OECD estimates that 14% of jobs will involve a high risk of automation, which is far lower than previously claimed by some researchers. Moreover, the fact that a job might become automated does not mean that it is bound to happen – automation may not always be profitable or desirable; it can give rise to legal and ethical doubts, and it may also be affected by human preferences and political decisions.¹⁹

THE ROLE OF EMOTION IN THE EXERCISE OF MANAGERIAL POWERS

Having dealt with the formal conditions of the applicability of AI in the exercise of an employer's managerial prerogative, there are positive grounds for the continued exploration of the subject. However, this continued reflection needs to incorporate analysis of how the employer's prerogative ought to be exercised in order to constitute the optimal instrument of workforce management. The matter to be decided in this part of the study is whether, and to what extent, emotions play a role in managing the workforce. The most important aspect from the perspective of this study is the synergy between emotions and the motivation to act, which directly translates into the effectiveness of the exercise of managerial powers. In themselves, emotions constitute a *sui generis* basic orientation code,²⁰ which should be applied to all sorts of processes of value judgment and to attitudes towards reality.²¹ Sociological disciplines draw attention to the fact that any given human community is linked by an emotional culture built on its foundation.²² From the psychological point of view: 'Emotions play the liaison role in the processes of communication and transmission of psychic experience. Thus role is especially important in interpersonal communication, where mirroring the other party's emotions significantly helps to reach an understanding.'²³ Emotions determine causally, trigger, reinforce, eliminate, and alter various other psychic (and many physiological) processes.²⁴ Jean-Paul Sartre believed that the most important element in the very structure of emotion is its intentional nature of reference to

¹⁹ OECD, *The Future of Work. OECD Employment Outlook 2019. Highlights*, Paris, 2019, p. 13.

²⁰ K. Obuchowski, *Kody orientacji i struktura procesów emocjonalnych*, Warszawa, 1970.

²¹ M. Jarymowicz, K. Imbir, 'Próba taksonomii ludzkich emocji', *Przegląd Psychologiczny*, 2010, Vol. 53, No. 4, p. 456.

²² M. Sawicka, 'Pojęcie kultury emocjonalnej jako narzędzie analizy socjologicznej', *Kultura i Społeczeństwo*, 2015, No. 1, p. 188.

²³ K. Witek-Mioduszczyńska, 'Emocje oraz ich wpływ na proces podejmowania decyzji. Badanie własne z zakresu prawa rodzinnego', in: Stanek J. (ed.), *Emocje i motywacja w prawie. Wybrane aspekty*, Kraków, 2022, p. 81.

²⁴ L. Petrażycki, 'O emocjach', *Studia Socjologiczne*, 2011, No. 2 (201) (excerpt reprinted from: Lande J. (ed.), *Leon Petrażycki, Wstęp do nauki prawa i moralności. Podstawy psychologii emocjonalnej*, Warszawa, 1959, p. 36).

what it denotes, and thus reference to all human relations and the world.²⁵ The emotional aspect makes our access to the world more complete and makes it easier to understand our environment.²⁶

In consequence, information catalysed through the emotional layer acquires a positive or negative affective significance.²⁷ Emotions also affect readiness to act by assigning priority to the action associated with them.²⁸ The task of positive emotions is to elicit a tendency to sustain a given activity or specified contact (with situations or items) triggering such emotions.²⁹ Emotions can influence not only the intensity of motivation but also the direction it takes.³⁰ As noted by M. Sawicka:

‘The changeability and diversity of emotional cultures should be associated with the capacity of emotions for “bonding” with different classes of cultural objects, along with transformations in their placement within the system of rules on human conduct, i.e. the manner in which feelings experienced by humans translate into the actions they take.’³¹

Psychological literature distinguishes three main functions of emotions: adaptive (which involves preparing the body to act, enabling the individual to act effectively if needed), social (facilitating interaction with the environment and helping people to predict the conduct of those around them) and motivational, which is due to the existence of a feedback loop between motivation and emotions.³²

When it comes to the area of workforce management, the psychological element is strongly emphasised. Workplace relations can be described, for example, in terms of the personnel structure and hierarchical dependence, or considered from a humanistic perspective as a factor that helps a human being to function in the workplace and that is related to that person’s responses, actions and the achievement of subjecthood.³³ At present, more and more companies are realising that encouraging workers to develop the skills that constitute emotional intelligence is an important component of management philosophy.³⁴ As M. Kaźmierczak observes:

²⁵ R. Abramciów, *Emocja jako odpowiedź na wartość. Psychologiczne aspekty teorii emocji Jeana Paula Sartre’a*, Kraków, 2015, p. 62.

²⁶ A. Dąbrowski, ‘Wpływ emocji na poznawanie’, *Przegląd Filozoficzny – Nowa Seria*, 2012, Vol. 83, No. 3, p. 332.

²⁷ M. Jarymowicz, K. Imbir, ‘Próba taksonomii...’, op. cit., p. 451.

²⁸ A. Michalkiewicz, ‘Rola emocji i nastroju oceniającego w procesie oceniania pracowników’, in: Janowska Z. (ed.), *Dysfunkcje i patologie w sferze zarządzania zasobami ludzkimi*, Vol. 4, Łódź, 2011, p. 384.

²⁹ A. Gałuszka, ‘Emocje – ich znaczenie i zadania’, *Journal of Education, Health and Sport*, 2022, Vol. 12, No. 1, p. 149.

³⁰ P. Chłopek, ‘Motywowanie przez emocje – trendy XXI wieku’, *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu*, 2010, No. 137, p. 289.

³¹ M. Sawicka, *Emocje w interakcjach współczesnego społeczeństwa polskiego*, Warszawa, 2018, p. 10.

³² A. Gałuszka, ‘Emocje...’, op. cit., p. 157.

³³ B. Jakimiuk, ‘Środowisko pracy jako obszar budowania poczucia własnej wartości i relacji z innymi’, *Annales Universitatis Mariae Curie-Skłodowska. Sectio J – Paedagogia-Psychologia*, 2016, Vol. 29, No. 4 sectio J, p. 48.

³⁴ P. Chłopek, ‘Motywowanie...’, op. cit., p. 290.

'In the era of a developed market economy, wherein the primary determinant of a company's competitive position is its high effectiveness, the business world is beginning more and more frequently to demand workers intelligent not only in the traditional sense of the word but also emotionally skilled.'³⁵

A leader relying on empathy is attentive to their own needs and those of others. Simultaneously, being conscious of how the human nervous system and brain operate, they adapt their actions so as to facilitate relationship building from a place of contact where both sides feel safe and included. They skilfully ensure that their mind remains responsive while also taking measures and intervening to assist their co-workers in activating the responsive state and deactivating the reactive state.³⁶ It is noteworthy here that one of the five key social competences in management is precisely emotional intelligence. In the integrated model of social skills with respect to emotional intelligence the following skills have been identified: perception and expression of emotion; emotionally assisted thinking; understanding and analysis of emotions; and emotional regulation.³⁷ *A contrario*, following A. Karczewska, it should be stressed that the sender's and the recipient's negative emotions, such as anger, indignation or frustration, as well as joy or enthusiasm, which condition the process of reception and interpretation of a message by the recipient, are among the essential elements impeding or preventing effective communication within an organisation.³⁸ In consequence, in an era in which the focus is on teamwork, it is worthwhile analysing the individual potential of each employee, including their psychological predispositions, for the benefit of the group as a whole.³⁹ As M. Geryk observes, an emotionally stable leader has a crucial role to play in warding off adverse external influence.⁴⁰

The above conclusions lead us directly to emphasise the importance of emotional intelligence in situations of subordination and, consequently, the exercise of an employer's managerial prerogative in a manner determined by a high level of emotional intelligence. Emotional intelligence, also known as EI, is the ability to recognise one's own and others' behavioural characteristics and react

³⁵ M. Kaźmierczak, 'Empatia w strukturach organizacyjnych', *Roczniki Psychologiczne*, 2004, Vol. 7, No. 2, p. 133.

³⁶ As long as the core need managed by a system remains satisfied, the system sustains the responsive mode by default; when the reverse is true, whenever the need is not satisfied, the reactive mode is activated (Hanson, 2016, p. 54). J. Berendt, M. Panas, V. Lorenc, 'Przywództwo oparte na empatii w systemowych zmianach w organizacji', *Coaching Review*, 2018, Vol. 10, No. 1, p. 80.

³⁷ M. Grzesiak, *Zintegrowany model kompetencji społecznych w procesie rozwoju osobistego i zawodowego*, Dąbrowa Górnicza, 2021, p. 122.

³⁸ A. Karczewska, 'Efektywna komunikacja w zarządzaniu pracownikami', in: Bazan-Bulanda A., Kwiatek A., Skiba M. (eds), *Psychospołeczne aspekty zarządzania zasobami ludzkimi*, Częstochowa, 2021, p. 96.

³⁹ K. Stankiewicz, K. Birr, 'Doskonalenie procesu zarządzania zespołem w oparciu o zróżnicowanie typów MBTI', *Przedsiębiorstwo we współczesnej gospodarce – teoria i praktyka*, 2014, No. 4, p. 41.

⁴⁰ M. Geryk, 'Rola przywódcy a skuteczne zarządzanie organizacją w zmiennym otoczeniu', in: Geryk M., Pławska A. (eds), *Współczesna problematyka wybranych zagadnień prawnych i ekonomicznych*, Gdańsk, 2016, p. 95.

accordingly. The primary goal is to identify, understand and manage one's own emotions, and the next goal is to identify, understand and influence the emotions of others. Emotional intelligence is a more suitable tool than IQ because it concerns behavioural characteristics. These are the characteristics involved in decision-making and problem-solving, and they affect ways of thinking (positive and negative).⁴¹ According to K. Janik, persons with a high level of emotional intelligence are good communicators, share their intentions, ideals and goals, and are more positive, all of which has a major impact on workplace performance.⁴² Janik emphasises that:

'Emotional intelligence encompasses emotional capabilities relating to the emotional functioning both of the individual and of others, and has a positive correlation with the emergence of leadership, effective leadership behaviour and general effectiveness of leadership.'⁴³

The ability to manage emotions means that a leader is able to manage effectively not only their own emotional condition but also that of the team, which enables effective conflict management. The understanding of emotions means that both the causes and effects of emotions can be recognised, as they are certainly unavoidable in conflict. Knowledge of emotions makes it easier to understand the other side's arguments and reach a compromise.⁴⁴ D. Goleman defines emotional competence as a measurable skill derived from emotional intelligence, leading to outstanding performance. Besides self-awareness, self-regulation and motivation, social skills and empathy are equally important, as specific skills relevant to the workplace are built upon these as a superstructure. In his opinion: 'Empathy is a fundamental skill for all the social competencies important for work'.⁴⁵ The above theoretical reflection is confirmed by empirical studies. According to surveys conducted at the turn of 2021 and 2022, Polish managers believe empathy shown in relations with subordinates to be of fundamental importance – interpersonal sensitivity, understanding the circumstances of others, and understanding their emotions and motives, as well as the sources of their decisions and attitudes. At present, this involves demonstrating on a daily basis that leaders understand the challenges faced by workers when returning to the office, paying attention and showing concern, and helping whenever subordinates experience anxiety or burnout or try to cope with difficult emotions.⁴⁶

This illustrates that 'technical' management of a workforce is not possible if it does not incorporate the behavioural characteristics attributed to people, such as emotions and empathy. As has been demonstrated, only a suitable level of emotional

⁴¹ S.S. Magapu, S. Vaddiparty, 'The Study of Emotional Intelligence in Artificial Intelligence', *International Journal of Innovative Science and Research Technology*, 2019, Vol. 4, No. 1, p. 595.

⁴² K. Janik, 'Znaczenie inteligencji emocjonalnej w życiu zawodowym', in: Mazur M. (ed.), *Współczesne trendy w zarządzaniu*, 2nd ed., Warszawa, 2021, p. 31.

⁴³ *Ibidem*, p. 27.

⁴⁴ *Ibidem*.

⁴⁵ D. Goleman, *Inteligencja emocjonalna w praktyce*, transl. Jankowski, A., Poznań, 1999, p. 196.

⁴⁶ House of Skills, *Polski menedżer, praktyki, wyzwania, rozwój. Raport z badania House of Skills 2021/2022*, Warszawa, 2022, p. 16.

intelligence enables the effective exercise of an employer's managerial prerogative. Hence, it remains to be determined whether, given the current stage of development of AI, it is at all possible to delegate managerial powers to AI and to what extent the current stage of development permits the emotional management of the workforce.

THE CONCEPT OF EMOTIONAL ARTIFICIAL INTELLIGENCE AS A RESPONSE TO THE EMPLOYER'S EMOTIONAL LEADERSHIP

The above leads to two conclusions: artificial intelligence is formally compatible with the exercise of managerial powers on the employer's behalf, and effective leadership requires the inclusion of emotional intelligence because emotions are an intrinsic element in the achievement of the employer's goals. These conclusions prompt the fundamental question of whether there exists an effective AI technology relying on the inclusion of emotion in the pursuit of the goals set for AI. Artificial intelligence is defined as a 'discipline within information technologies studying the principles governing human mental behaviour and creating computer programmes or systems to simulate human thinking'.⁴⁷ It is a vast discipline dealing with a variety of problems, such as understanding, planning, learning and the representation of knowledge.⁴⁸ M. Warszycki also provides a useful concept of artificial intelligence, defining it as an area of science combining disciplines, methods, tools and techniques aimed at the creation and development of a complete computer programme capable of the precise reflection of a model of the functioning of a human being and the human mind. The main processes and functions required of such a programme are the drawing of conclusions and identification of patterns, comprehension, learning from experience, use of information, non-coincidental and non-random planning of activities, creativity, problem-solving, and autonomy in decision-making. All of the aforementioned processes and their outcomes should be retained as acquired knowledge and applied with reference to adaptive behaviours both in the environment in which the programme is functioning and in the relevant situation.⁴⁹ Artificial intelligence can also be defined as a set of mathematical algorithms and computer programmes executed by a machine.⁵⁰ The above-quoted concepts of artificial intelligence leave no room for the inclusion of emotion in the operation of AI. One should, however, take into account the fact that these definitions are, *sui generis*, a starting point for more complex considerations. AI itself is also categorised further into artificial narrow intelligence (ANI, identical in meaning to weak AI), artificial general intelligence (AGI), equivalent to human intelligence, and artificial

⁴⁷ *Słownik języka polskiego PWN*; <https://sjp.pwn.pl/slowniki/sztuczna%20inteligencja.html> (accessed: 17 February 2026).

⁴⁸ A. Johansson, *Affective Decision Making in Artificial Intelligence. Making Virtual Characters with High Believability*, Ph.D. thesis, Norrköping, 2012, p. 2.

⁴⁹ M. Warszycki, 'Wykorzystanie sztucznej inteligencji do predykcji emocji konsumentów', *Studia i Prace Kolegium Zarządzania i Finansów / Szkoła Główna Handlowa*, 2019, Vol. 173, p. 115.

⁵⁰ *Ibidem*, p. 114.

superintelligence (ASI), exceeding human intelligence in all or almost all aspects.⁵¹ Importantly, many researchers studying artificial intelligence and human–computer interactions did not begin to take emotions truly seriously until the end of the 1990s. The application of emotional intelligence to real disciplines resulted in the emergence of an important area of study known as multi-agent systems (MAS),⁵² tasked with leveraging logical methods to ensure the rigorous specification of the way in which emotions should be implemented in an artificial agent.⁵³

At present, a variety of attempts are being made to include emotions in the operation of AI. Applications as such focus on human–AI interactions. From the user’s perspective, an AI capable of emotional association could significantly exceed existing solutions. However, automated emotional simulation can be difficult to achieve where studies focus solely on the user’s perception of AI’s behaviour.⁵⁴ Cveta Martinovska Bande undertakes a classification attempt to incorporate emotional intelligence into research on artificial intelligence, with the following observations:

- MIT MediaLab projects describe methodologies for recognising strong emotions by way of physiological and non-verbal channels such as facial movements, galvanic skin response (GSR), or a pressure-sensitive mouse detecting the user’s frustration;
- Healy and Picard measure skin conductance, breathing, muscular and cardiac activity to detect a driver’s stress;
- Kapoor, Mota and Picard describe student engagement in interactions with an animated instructor observing eyelid movements and body posture;
- Vyzas and Picard demonstrate that the activity of jaw muscles, blood pressure, skin conductance and breathing can be relied upon to identify eight emotions.⁵⁵

Motivational theories of emotions appear to be especially suitable for adaptation to AI systems. These systems are based on the assumption that humans have regular, universal and traceable emotional expressions and responses, which are legible across a broad scope of surrogate data; these constitute the lion’s share of currently available ‘Emotional AI’ technologies.⁵⁶

Attempts are being made at so-called affective modelling, concerned with the detection and expression of emotions, personality traits and moods. This model draws attention to the fact that emotions are usually accompanied by visually observable behaviours such as facial movements and voice characteristics. However, although facial expressions showing the basic emotions within a given culture are

⁵¹ At present, all known solutions must be regarded as being weak intelligence. There are views that strong AI might take many years to achieve or never be achievable (B. Kaczmarek-Templin, ‘Sztuczna inteligencja (AI) i perspektywy jej wykorzystania w postępowaniu przed sądem cywilnym’, *Studia Prawnicze. Rozprawy i Materiały*, 2022, Vol. 31, No. 2, p. 63).

⁵² Multi-agent system.

⁵³ A. Kumar, R. Singh, R. Chandra, ‘Emotional Intelligence for Artificial Intelligence: A Review’, *International Journal of Science and Research (IJSR)*, 2018, Vol. 7, No. 8, p. 1.

⁵⁴ Y. Gu, ‘The Application of Artificial Emotions in Artificial Intelligence’, *Advances in Social Science, Education and Humanities Research*, 2021, Vol. 631, p. 482.

⁵⁵ C. Martinovska Bande, ‘Emotions in the Models of Artificial Intelligence’, *International Journal of Scientific and Research Publications*, 2021, Vol. 11, No. 12, p. 386.

⁵⁶ L. Starke, J. Hoey, ‘The Ethics of Emotion in Artificial Intelligence Systems’, in: *Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency (FAcT ’21)*, 2021, p. 4.1.

consistent, there may be significant individual variations. Individual characteristics such as personality traits, goals and expectations, as well as social conventions, may affect emotional expression.⁵⁷ Nonetheless, humans have approximately 34 muscles responsible for facial movements, which contract and relax to express different emotions, demonstrating the complexity of correctly capturing such feelings, as well as anatomical variations. In spite of all the technological progress, it continues to be difficult to identify emotions on people's faces, because facial movements associated with the same emotion vary significantly between individuals, and algorithms have not yet succeeded in learning to recognise them.⁵⁸

Another method for including emotion in artificial intelligence is voice analysis. Voice characteristics such as pitch, rhythm, amplitude and the duration of changes provide data concerning emotional arousal and valence. A sad or bored person speaks slowly, with a lower pitch and less energy in high frequencies. Emotions such as fear, anger and happiness are characterised by louder and faster speech, as well as strong high-frequency energy.⁵⁹ Surrogate data on emotional expression from other sources, such as recordings of the human voice or measurements of skin conductance, are also often analysed in reliance on assumptions based on the motivational paradigm.⁶⁰

Attempts have been made in academic studies to construct computers based on neural networks modelled on human neural architecture. It is emphasised that neural networks have the architectural advantage of being more similar to the principle of the biological neural networks observed in animal brains.⁶¹ According to L. Starke and J. Hoey, in the last five years the scope of analyses regarding various kinds of behavioural and social data has expanded, including data on emotions, classified as 'digital phenotyping' or 'measurement of behaviour on the basis of sensors in smartphones, keyboard interactions and different characteristics of voice and speech'.⁶²

In the above-mentioned Regulation, it is indicated that:

'High-risk AI systems should be designed and developed in such a way that natural persons can oversee their functioning, ensure that they are used as intended and that their impacts are addressed over the system's lifecycle. To that end, appropriate human oversight measures should be identified by the provider of the system before its placing on the market or putting into service. In particular, where appropriate, such measures should guarantee that the system is subject to in-built operational constraints that cannot be overridden by the system itself, is responsive to the human operator, and that the natural persons to whom human oversight has been assigned have the necessary competence, training and authority to carry out that role.'⁶³

⁵⁷ C. Martinovska Bande, 'Emotions...', op. cit., p. 386.

⁵⁸ T.G. dos S. Martins, R. Silva, L.G.A. Mendes, P. Schor, 'Use of Artificial Intelligence to Assess Human Emotion', *The Open Psychology Journal*, 2020, Vol. 13, p. 15.

⁵⁹ C. Martinovska Bande, 'Emotions...', op. cit., p. 386.

⁶⁰ L. Starke, J. Hoey, 'The Ethics of Emotion...', op. cit., p. 4.1

⁶¹ Y. Gu, 'The Application...', op. cit., p. 480.

⁶² L. Starke, J. Hoey, 'The Ethics of Emotion...', op. cit., p. 4.1.

⁶³ Recital 73.

Considering the types of technologies available, it needs to be determined what capacity they have for emotional management of the workforce and to what extent they are still technologies in *statu nascendi*, the inclusion of which at the current stage of technological development would at the very least be premature. If these technologies are determined to be at an early stage of development, the next issue to be addressed is the ability of these technologies to serve as a kind of bridge between the parties to the employment relationship.

EFFECTIVE OPPORTUNITIES FOR THE USE OF EMOTIONAL ARTIFICIAL INTELLIGENCE (EAI)

The progress made in the development of emotional artificial intelligence prompts the natural question of the extent to which EAI could effectively take over an employer's managerial prerogative over the workforce in a manner accounting for the prerequisites of proper interpersonal communication. Unquestionably, at present, studies on artificial intelligence consider different roles and interpretations of emotions, such as their role in the agent's autonomy, control with regard to the achievement of goals, the achievement of credible behaviours, evaluation of the environment, and the agent's tendencies to act.⁶⁴ While more and more variants of EAI engineering continue to appear, this remains limited to reading human emotions. The challenge in management, by contrast, comes down to bidirectional emotional interaction and the triggering of emotions in employees. The condition of AI being able to read its interlocutor's emotions does not yet mean that the AI will react emotionally or that the course of the interaction between the human being and technology will reflect the capabilities of emotional intelligence. Despite the impression that these technologies provide objective measures of internal feelings, it must be clarified that they register only the visible symptoms of such states. Accordingly, critics assert that such technologies could mislead users as to the platforms' capacity for precision, suggesting a degree of authority and certainty not supported by psychological literature.⁶⁵

Literature notes that:

'With the help of Emotional Intelligence in Artificial Intelligence, we can allow it to widen its fields of knowledge and to provide further and more advanced solutions to complicated problems. If we can have Emotional Artificial Intelligence, this can cause the barriers between a human and a machine to close.'⁶⁶

This happens because emotions play a key role in intelligent conduct and provide vast potential for designing artificial agents and more natural and expressive interactive technologies.⁶⁷ Multiple corporations and companies, such as Google,

⁶⁴ C. Martinovska Bande, 'Emotions...', op. cit., p. 386.

⁶⁵ D. White, H. Katsuno, 'Artificial Emotional Intelligence Beyond East and West', *Internet Policy Review*, 2022, Vol. 11, No. 1, p. 7.

⁶⁶ S.S. Magapu, S. Vaddiparty, 'The Study...', op. cit., p. 594.

⁶⁷ C. Martinovska Bande, 'Emotions...', op. cit., p. 384.

Amazon and Microsoft, invest in emotional artificial intelligence in order to embed personality into their technologies.⁶⁸ Artificial minds understand emotions because humans communicate by expressing and assessing emotions. Thus, to understand the user's goals, the machine should be capable of processing information about the user's emotions. To achieve this, it is crucial to build computational models of emotions.⁶⁹

The recipient's awareness is also important when evaluating the effectiveness of EAI operation. As noted in the literature, there is a significant difference in the comprehensiveness, accuracy, timeliness, reliability, accessibility and flexibility of the AI scale depending on the participants' level of education. Holders of university-awarded master's and doctoral degrees are aware of the speed, comprehensiveness and certainty of AI and of its low error margin. The higher the level of education, the greater the trust in technology. The greater the trust in technology, the more it is used. Thus, awareness of its complexity, accuracy and speed increases.⁷⁰ The above leads to one conclusion that is of fundamental importance for the assessment of the maturity of the solutions discussed. Since the effectiveness of emotional artificial intelligence is influenced by the recipient's intellectual level, at present it is not universal and thus has not been developed sufficiently for the meaningful exercise of managerial prerogative. As observed by D. White and H. Katsuno, the diversity of cultural perspectives on emotional artificial intelligence undermines its viability as an instrument for building universal systems to automate emotion recognition and action.⁷¹

Given the current stage of technological development, it is impossible for AI to exercise managerial powers incorporating emotional intelligence and thus to manage the workforce in a manner that involves emotion, thereby realising the behavioural assumptions discussed above. As noted by C. Creed and R. Beale, it is currently difficult to provide a persuasive rationale for computers to take on important roles requiring social interaction, since computers lack the requisite social and emotional intelligence. They encounter difficulties in building relationships with users and cannot inspire or motivate people beyond a narrow scope of social dialogue. Expected technological progress in the coming years may change that, and more socially astute agents may emerge, but the question remains whether that could ever justify replacing their human counterpart.⁷² The implementation of emotional intelligence in AI itself also entails certain challenges. Firstly, recognising and interpreting emotions is a task more subjective than purely logical analysis, and therefore suitable algorithms and models capable of precise recognition and interpretation of emotions need to be developed.⁷³

⁶⁸ S.S. Magapu, S. Vaddiparty, 'The Study...', op. cit., p. 598.

⁶⁹ A. Kumar, R. Singh, R. Chandra, 'Emotional...', op. cit., p. 4.

⁷⁰ E. Kambur, 'Emotional Intelligence or Artificial Intelligence? Emotional Artificial Intelligence', *Florya Chronicles of Political Economy*, 2021, Vol. 7, No. 2, p. 162.

⁷¹ D. White, H. Katsuno, 'Artificial...', op. cit., p. 13.

⁷² C. Creed, R. Beale, 'Emotional Intelligence: Giving Computers Effective Emotional Skills to Aid Interaction', in: Fulcher J., Jain L.C. (eds), *Computational Intelligence: A Compendium*, Heidelberg, 2008, p. 205.

⁷³ J. Cichocki, 'Inteligencja emocjonalna w sztucznej inteligencji – nowe możliwości rozwoju', *cogitech.pl*, 27 July 2023; <https://cogitech.pl/blog/inteligencja-emocjonalna-w-sztucznej-inteligencji-nowe-mozliwosci-rozwoju> (accessed: 5 March 2026).

Unquestionably, by contrast, AI can provide a kind of bridge between actions undertaken by the employer and employees. Due to the lack of full reciprocity (bidirectionality) of relationships involving emotions, AI can presently become a useful tool for the evaluation of, at various stages, employees' professional activity and the effects of their work. Currently, it may be more practical and useful to deploy computers to supplement the roles discharged by humans.⁷⁴ As noted by M. Ciesielski:

'Artificial intelligence can add significant value to organisational strategy, whether by predicting the demand for talent that follows from the company's development strategy or by gathering and analysing data on vacancies and new requirements in teams and specific positions. It can also assist in the recruitment of employees by matching applicants to vacancies and expediting onboarding.'⁷⁵

Artificial intelligence also significantly accelerates the transition from an applicant to an effective worker, enabling new employees to gain institutional knowledge far more quickly.⁷⁶ Last but not least, AI can play a role in the assessment of employee performance, primarily from the perspective of set goals.⁷⁷ Clearly, technological progress has supported workplaces in the digital transformation of processes by leveraging AI to streamline and automate organisational decision-making and to monitor and manage the workforce.⁷⁸ Additionally, the literature notes computers' potential for mitigating feelings of frustration.⁷⁹

Thus, it follows from the above that, in anticipation of emotional artificial intelligence reaching its full potential, there already exists a limited but nonetheless broad spectrum of possible applications of AI in workforce management for the benefit of both employers and employees, provided that they have a positive outlook towards the replacement of an increasing number of areas by technology.

CONCLUSIONS

Prima facie, artificial intelligence could appear to be perfectly positioned to take over the exercise of the employer's managerial powers. By defining goals, the employer permits AI to select the individual activities, means and methods to achieve them. This might even be the model for algorithmic action whereby AI, on the basis of the dataset received, duly processes the data and then implements them with regard

⁷⁴ C. Creed, R. Beale, 'Emotional...', op. cit., p. 205.

⁷⁵ M. Ciesielski, 'Nowy dyrektor personalny w twojej firmie będzie chatbotem? AI zmieni cały proces zarządzania zasobami ludzkimi', *forsal.pl*, 24 August 2023; <https://forsal.pl/praca/aktualnosc/artykuly/9282735,nowy-dyrektor-personalny-w-twojej-firmie-bedzie-chatbotem-ai-zmieni-c.html> (accessed: 5 March 2026).

⁷⁶ *Ibidem*.

⁷⁷ *Ibidem*.

⁷⁸ S. Corvite, K. Roemmich, T.I. Rosenberg, N. Andalibi, 'Data Subjects' Perspectives on Emotion Artificial Intelligence Use in the Workplace: A Relational Ethics Lens', *Proceedings of the ACM on Human-Computer Interaction*, 2023, Vol. 7, No. CSCW1, article number 124.

⁷⁹ C. Creed, R. Beale, 'Emotional...', op. cit., p. 202.

to specific employees on whom it has adequate information. However, workforce management has proven not to be so simple, since the process of communication itself, which forms the basis of management, cannot be reduced to an algorithm. If we were to define communication as the transmission of information, the constituent parts of the process would be elements such as who the sender is, the intentions behind the communicated contents, the code by which they are transmitted (verbal and non-verbal), who the recipient is, and the method of interpreting the information received.⁸⁰ According to that definition, AI's activity in its current form could be sufficient for workforce management. This definition, however, oversimplifies the essence of communication, one aspect of which is the emotional–energetic element. The essence of this element is the sender's emotional attitude towards the message and towards the recipient.⁸¹ It is vital to balance emotions and energy in order for the emotional–energetic element to be able to fulfil the above-specified functions in the interpersonal communication process. Such balancing means adjusting the level of emotions and energy to the gravity of the subject, the sender's and recipient's mental states, and the purpose to be achieved. A difficult conversation with an interlocutor requires both a suitable energy level (engagement) and the optimal level of emotions. This enables the maintenance of cognitive control over what is said and how it is said, without inducing excessive emotions in the recipient, especially negative ones.⁸² Dariusz Krok⁸³ identifies three main characteristics of interpersonal communication: (1) communication assumes the existence of interaction between human beings; (2) it requires mutual understanding between them as to the various meanings of sounds, words, signs and gestures; and (3) it constitutes the means by which humans influence one another. A different characterisation of interpersonal communication as a complex multidimensional phenomenon is given by O. Hargie and D. Dickson, in whose opinion communication is transactional, and its nature is dynamic and variable. In sending the message, the sender influences the recipient, who in turn influences the sender with their response by way of a feedback loop.⁸⁴ Undoubtedly, in professional relations, in which the roles in communication processes are clearly defined and asymmetrical (e.g. superior and subordinate),⁸⁵ emotions play an important role. The ability to master emotions and express them properly through verbal and non-verbal messages constitutes an important element of professional life. The difficulty of achieving this arises from the systems that compose emotions: the subjective (how the individual interprets situations or the stimulus triggering them), behavioural (relating to an individual's verbal or non-

⁸⁰ M. Weryszko, 'Komunikacja interpersonalna jako esencja interakcji społecznych', *Kwartalnik Naukowy Fides et Ratio*, 2020, Vol. 42, No. 2, p. 254.

⁸¹ S. Frydrychowicz, 'Komunikacja interpersonalna w interakcjach społecznych', *Człowiek i Społeczeństwo*, 2020, Vol. 50, p. 22.

⁸² *Ibidem*.

⁸³ D. Krok, 'Znaczenie komunikacji interpersonalnej w funkcjonowaniu rodziny', in: Soiński B. (ed.), *Rodzina w świetle psychologii pastoralnej*, Łódź, 2007, pp. 41–54.

⁸⁴ O. Hargie, D. Dickson, D. Tourish, *Communication Skills for Effective Management*, London, 2004, p. 13.

⁸⁵ A. Frączek, 'Komunikacja interpersonalna', *Studia Gdańskie. Wizje i rzeczywistość*, 2012, Vol. 9, p. 119.

verbal behaviour), and physiological (relating to the operation of the nervous system and the physiological reactions of the body).⁸⁶

Given the present stage of technological development, AI does not have the capability to fulfil the emotional side of communication. Moreover, the issue of equipping AI with emotional intelligence prompts a range of doubts, questions, concerns and even fears. First of all, it is noted that machines should rely on a set of senses, though different from those of human beings, due to functioning in an altogether different world.⁸⁷ Concerns are raised in the literature that the deployment of EAI as a form of workplace supervision could result in a deterioration of workers' well-being and interfere with privacy in the workplace.⁸⁸ Concerns are also raised that EAI may lead to the reinforcement of the asymmetry between employees and the employer.⁸⁹ One of the ethical questions prompted by the incorporation of affective capabilities in computers is whether the emotional support offered by computers is authentic. In other words, whether it is of any importance that when computers express or communicate emotions to users they do not in reality feel such emotions in the way humans do. From the perspective of human-to-human interaction, this concern should be of little significance, because in human relationships we also interact with persons who have been trained in the use of relational strategies to build trust, even though they may not feel genuine compassion or empathy.⁹⁰

The Regulation also points out possible risks in the use of AI in the area of management, emphasising that:

'There are serious concerns about the scientific basis of AI systems aiming to identify or infer emotions, particularly as expression of emotions vary considerably across cultures and situations, and even within a single individual. Among the key shortcomings of such systems are the limited reliability, the lack of specificity and the limited generalisability. Therefore, AI systems identifying or inferring emotions or intentions of natural persons on the basis of their biometric data may lead to discriminatory outcomes and can be intrusive to the rights and freedoms of the concerned persons.'⁹¹

For the reasons mentioned above, AI systems intended to be used to make decisions affecting the terms of work-related relationships, decisions on the promotion or termination of work-related contractual relationships, the allocation of tasks based on individual behaviour or personal traits or characteristics, or the monitoring and evaluation of the performance and behaviour of persons in such relationships are considered to be high-risk systems.⁹² Consequently, they should be designed in such a way as to minimise the possibility of harm to public interests

⁸⁶ M. Miszczak, 'Emocje w komunikacji interpersonalnej z perspektywy zarządzania', *Nowoczesne Systemy Zarządzania*, 2012, Vol. 7, No. 1, p. 212.

⁸⁷ K. Różanowski, 'Sztuczna inteligencja – rozwój, szanse i zagrożenia', *Zeszyty Naukowe Warszawskiej Wyższej Szkoły Informatyki*, 2007, No. 2, p. 132.

⁸⁸ S. Corvite, K. Roemlich, T.I. Rosenberg, N. Andalibi, 'Data Subjects...', op. cit., p. 124.

⁸⁹ Ibidem.

⁹⁰ C. Creed, R. Beale, 'Emotional...', op. cit., p. 205.

⁹¹ Recital 44.

⁹² Annex III, point 4(b).

and to fundamental rights protected by Union law. Such harm may be material or immaterial, including physical, psychological, social or economic harm.⁹³

On the other hand, humans exhibit a tendency to interact with computers, new media and the like in a similar manner to how they interact with people – being kind, acting differently towards the computers they converse with, engaging in behaviours regulating closeness to faces on the screen, and many more.⁹⁴ Hence, there is conjecture in academic literature (based on existing experience with AI) that the positive correlation between the assessment of (human) intelligence and emotional reaction will continue to apply when the intelligence is artificial.⁹⁵

There can be no doubt that even today, with regard to workforce management, whether this concerns individual persons or entire teams, artificial intelligence fulfils its role by supporting the employer in various aspects of the performance of tasks, involving recruitment, organisation of work, and the evaluation of employees. As for the question posed at the beginning of this article regarding the possibility of comprehensive delegation of an employer's managerial powers to AI, that is not a viable task at present, given the current stage of development of AI. It does, however, turn out (and perhaps for the better) that interpersonal relations are far more complex than they appear. The emotional side plays a very important role in these relations, and without it they cannot be complete. Transmission of content alone is not sufficient for effective communication. This is a task that AI (even EAI) cannot at present fulfil. As noted by M. Ciesielski, data analysis is important, but having an empathetic conversation with the employee and receiving feedback from them appears, as a rule, to be more important.⁹⁶ What is even more important is that employees adopt a positive attitude towards AI assuming more and more tasks. This will require time, and in consequence perhaps the evolutionary development of emotional artificial intelligence works to its benefit, allowing employees to develop a favourable attitude towards a digital manager that may perhaps one day assume the employer's managerial prerogative.

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⁹³ Recital 5.

⁹⁴ B. Reeves, C. Nass, *The Media Equation: How People Treat Computers, Television, and New Media Like Real People and Places*, New York, 1996, p. 24.

⁹⁵ E. Pantano, D. Scarpi, 'I, Robot, You, Consumer: Measuring Artificial Intelligence Types and their Effect on Consumers Emotions in Service', *Journal of Service Research*, 2022, Vol. 25, No. 4, p. 583.

⁹⁶ M. Ciesielski, 'Nowy...', op. cit.

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REVIEW IN THE HABILITATION PROCEEDINGS IN THE DISCIPLINE OF LEGAL SCIENCES

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ABSTRACT

The article analyses problems arising from the statutory regulation of reviews in the proceedings for the award of the postdoctoral degree of *doktor habilitowany*. The analysis covers: the substantive scope of the review; the nature of scientific achievements constituting a significant contribution to the development of the discipline of legal sciences; and the meanings of the terms ‘monograph’ and ‘series of thematically related scientific articles’. The structure of the review and its basic components are also presented: the introduction; the analysis and evaluation, including formal and substantive assessment (of the choice of topic, the structure of the study, the research problem, research objective, research thesis, and research hypothesis, the appropriateness of the research methods applied, and the significant contribution to the development of the discipline of legal sciences); as well as the quality of the review, its form, and the deadline for its preparation.

Keywords: degree of *doktor habilitowany*, discipline of legal sciences, monograph, review, scientific achievement, series of thematically related scientific articles, significant contribution to the development of the discipline of legal sciences; structure of the review

1. INTRODUCTION

Within the meaning of the Act: Law on Higher Education and Science, scientific or artistic achievements constituting a significant contribution to the development of a specific scientific discipline are subject to assessment in the proceedings for the conferment of the postdoctoral degree of *doktor habilitowany* (*Doctor habilitatus*) by persons with the highest scientific qualifications, i.e. those holding the postdoctoral degree of *doktor*

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habilitowany or the title of professor, as well as possessing current scientific achievements and a recognised reputation, including international recognition,¹ and therefore having a significant persuasive impact (*argumentum ad auctoritatem*). However, at least two negative reviews determine the refusal to award the degree of *doktor habilitowany* (ex Article 221(1)(10) and (12) LHES). The statutory regulations concerning reviews are very modest; therefore, the definition of their detailed requirements is largely left to representatives of science and practice, including the Council of Scientific Excellence.

The article is aimed at analysing the provisions of the Law on Higher Education and Science concerning reviews, indicating directions of their interpretation and proposing specific changes, as well as providing practical guidelines for their preparation.

The research thesis is that reviews in the postdoctoral degree conferment (habilitation) procedure are crucial to the outcome of the proceedings. The research hypothesis is that the statutory requirements for reviews are inadequate given their importance in these proceedings. To achieve the intended goals, dogmatic-legal as well as logical research methods have been employed.

2. THE CONCEPT OF 'REVIEW'

The word 'review', stemming from the Latin *recensio*, means 'an opinion on (...) a presented scientific publication etc., issued by a competent person'; thus, it is a synonym of the word 'opinion'.² The reviewer's activity involves reviewing, which consists in 'an analysis and evaluation of (...) a scientific work'.³ A review is an expression of a personal, expert assessment of the contribution of the applicant for the postdoctoral degree of *doktor habilitowany* to the development of a specific scientific discipline.⁴ It is an expert opinion on the quality of scientific achievements submitted for evaluation in the academic promotion process; it constitutes a reporting and critical text containing a discussion and assessment of the scientific achievement. It is the basic evidence in the process of issuing an authoritative and unilateral decision by a given body, however, an objective one in terms of the substance of the case due to the balancing of many premises and circumstances that determine academic promotion.⁵ They form basic material for the habilitation committee and the habilitation entity (scientific council and faculty council), containing the level of fulfilment of the requirements specified in statute.⁶

¹ The reviewer must meet this requirement in accordance with Article 221(4) and (5)(3) of the Act of 20 July 2018: Law on Higher Education and Science (Journal of Laws of 2024, item 1571, as amended), hereinafter referred to as 'the LHES'.

² H. Zgólkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 35, Poznań, 2002, p. 302.

³ *Ibidem*.

⁴ Rada Doskonałości Naukowej, *Postępowania dotyczące nadawania stopnia doktora habilitowanego. Poradnik aktualizowany*, Warszawa, 2023, p. 32.

⁵ B. Sitek, A. Woźniak, 'Recenzent i recenzja w świetle prawa', *Forum Akademickie*, 2025, No. 1, p. 9.

⁶ J. Wiktor, 'Recenzja osiągnięć naukowych w postępowaniach awansowych – między jakością oceny a formalizmem rozstrzygnięć Ustawy 2.0', *E-mentor*, 2019, No. 1, p. 4; M. Gorynia, 'Recenzje w postępowaniach naukowych', *Forum Akademickie*, 2025, No. 3, p. 18.

3. SCOPE OF WORKS SUBJECT TO A REVIEW

The scope of works subject to a review in the habilitation proceedings is laid down in Article 221(8) LHES, in accordance with which reviewers shall assess whether the scientific achievements of the person applying for the degree of *doktor habilitowany* correspond to the requirements set out in Article 219(1)(2), and prepare a review. The reference to Article 219(1)(2) LHES clearly indicates that in legal sciences reviewers shall assess scientific achievements in the context of their significant contribution to the development of particular disciplines of legal sciences, or more precisely, a specific legal science or branch of law, including at least:

- (1) one scientific monograph published by a publisher that, in the year of publication of the monograph in its final form, was included in the list of publishers of reviewed scientific monographs;⁷ or
- (2) one series of thematically related scientific articles published in scientific journals or reviewed materials from international conferences which, in the year of publication of the article in its final form, were listed in the Annex to the Announcement of the Minister of Higher Education and Science concerning the list of scientific journals and reviewed materials from international conferences.⁸

An achievement may form part of a collective work if the study of a separate issue represents an individual contribution of the person applying for the degree of *doktor habilitowany* (Article 219(2) LHES). The Council of Scientific Excellence recommends that:

‘In the case of two- or multi-authored works, a statement be submitted by the habilitation applicant and co-authors indicating their substantive (not percentage) contribution to the development of each work [e.g. who was the author of the research hypothesis, who was the originator of the research, who performed specific studies (e.g. conducted specific experiments, developed and collected surveys, etc.), who carried out the analysis of results, prepared the article manuscript, etc.]. The determination of the contribution of a given author, including the habilitation applicant, should be precise enough to make it possible to accurately assess their participation and role in the development of each work.’⁹

In principle, the concept of a ‘design unique achievement accomplished’ (Article 219(1)(2)(c) LHES) cannot be taken into account in legal sciences, because

⁷ The latest list is contained in the Annex to the Announcement of the Minister of Higher Education and Science of 22 July 2021 concerning the list of publishing houses that publish reviewed scientific monographs; <https://www.gov.pl/attachment/1feb29b3-5278-4366-86e9-f7dfa2b1b474> (accessed: 12 March 2026), hereinafter referred to as ‘the list of scored publishers’.

⁸ The latest Announcement of the Minister of Higher Education and Science is that of 5 January 2024 concerning the list of scientific journals and reviewed international conference materials; <https://www.gov.pl/web/nauka/ujednolicony-wykaz-czasopism-naukowych> (accessed: 30 September 2025), hereinafter referred to as ‘the list of scored journals’.

⁹ The template ‘List of scientific or artistic achievements constituting a significant contribution to the development of a specific discipline’; <https://www.rdn.gov.pl/postepowanie-habilitacyjne.wymagania-dokumentacyjne-wnioskow-w-sprawie-nadania-stopnia-doktora-habilitowanego.html> (accessed: 20 September 2025).

it is difficult to imagine that, for example, the development of a draft legal act, including a code, would be considered a unique scientific achievement.¹⁰

This means that the achievements must be published and cannot take the form of studies submitted for publication, which is explicitly stipulated in Article 219(1) (2) LHES, which states that they must be published by a publishing house or in a scientific journal, or in reviewed materials from international conferences included in the aforementioned lists. This is also confirmed by the exemption under Article 219(3) LHES, pursuant to which the publication obligation shall not apply to achievements whose subject matter is protected by classified information.

This means that works subject to reviewing include:

- (1) monographs;
- (2) series of articles;
- (3) other scientific achievements.

The itemisation of a monograph and a series of articles within the achievements of a person applying for the degree of *doktor habilitowany* means that this is to be, as emphasised in the literature, a special achievement equivalent to the habilitation dissertation required under former regulations.¹¹ The assessment of other scientific achievements is justified by the content of Article 219(1)(2) *in principio* LHES, which refers to scientific achievements, including a monograph or a series of thematically related scientific articles published in scientific journals or in reviewed materials from international conferences. Therefore, other scientific achievements are aptly indicated in the cited template 'List of scientific or artistic achievements constituting a significant contribution to the development of a specific discipline' (item I.4).¹²

These achievements do not have to originate from the period after the applicant obtained a doctoral degree. They may also include scientific achievements from the period before the doctoral degree was conferred, as well as the doctoral dissertation published,¹³ which may constitute another scientific achievement. Taking into account scientific achievements from the period before the doctoral degree was conferred is supported by the linguistic interpretation of Article 219(1)(2) LHES, which refers to the possession of scientific achievements with no specification of the period of their occurrence. The rejection of this possibility would be contrary to the interpretative principle *lex non distinguente nec nostrum est distinguere* (where the law does not introduce distinctions, the interpreter is not permitted to introduce

¹⁰ P. Grzebyk, 'Warunki uzyskania stopnia doktora habilitowanego w dyscyplinie nauki prawnej', *Państwo i Prawo*, 2022, No. 5, p. 77.

¹¹ M. Radajewski, 'Nadawanie stopnia doktora habilitowanego w świetle prawa o szkolnictwie wyższym i nauce', *Studia Prawno-Ekonomiczne*, 2020, Vol. CXIV, p. 88.

¹² See footnote 9. It is worth noticing that the items listed there were erroneously referred to Article 219(1)(2a), (2b) and (c) LHES, whereas the Act contains Article 219(1)(2)(a), (b) and (c).

¹³ Rada Doskonałości Naukowej, *Postępowania...*, op. cit., p. 12; M. Radajewski, 'Nadawanie stopnia...', op. cit., p. 87; D.P. Kała, 'Ogólne przesłanki nadania stopnia doktora habilitowanego', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2021, No. 1, p. 235; P. Grzebyk, 'Warunki uzyskania...', op. cit., p. 79; P. Pokorny, P. Waszkiewicz, in: Jakubowski A. (ed.), *Prawo o szkolnictwie wyższym i nauce. Komentarz*, Warszawa, 2023, p. 702; D. Dajnowicz-Piesiecka, Ł. Kierznowski, 'Awanse naukowe młodych naukowców (perspektywy i wyzwania)', *Państwo i Prawo*, 2022, No. 5, p. 126; Ł. Kierznowski, 'Rozprawa doktorska jako osiągnięcie habilitacyjne', *Opolskie Studia Administracyjno-Prawne*, 2024, No. 2, pp. 85–101.

them).¹⁴ Moreover, historical interpretation also supports this stance. Originally, one of the requirements for admission to the habilitation proceedings laid down in the Act of 14 March 2003 on Scientific Degrees and a Scientific Title, and Degrees and a Title in the Field of Art,¹⁵ was the possession of significant scientific achievements (Article 16). By means of the Act of 18 March 2011 amending the Act: Law on Higher Education and Science, the Act on Scientific Degrees and a Scientific Title, and Degrees and a Title in the Field of Art, and amending Certain Other Acts,¹⁶ the requirement was changed to 'scientific or artistic achievements obtained after the doctoral degree was conferred'. The omission of the phrase 'obtained after the doctoral degree was awarded' in Article 219(1)(2) LHES demonstrates that the legislator consciously abandoned this requirement. It is expressly emphasised in the justification of the Law on Higher Education and Science Bill that: 'The proposed solution removes the currently existing habilitation requirement to demonstrate only achievements obtained after the doctoral degree was conferred.'¹⁷

However, a doctoral dissertation cannot be assessed as a monograph referred to in Article 219(1)(2)(a) LHES.¹⁸ Allowing such a possibility would lead to absurdity, as two scientific degrees would be awarded on the basis of the same scientific achievement: a doctoral degree and the degree of *doktor habilitowany*. As is rightly pointed out in the literature, the purpose of legal regulations concerning academic promotion is primarily to multiply scientific achievements by scholars and advance scientific progress. If a doctorate is not only an original solution to a scientific problem but also a significant contribution to the development of a specific discipline, it demonstrates the considerable potential of the person holding the doctoral degree. Nonetheless, allowing for the conferment of the degree of *doktor habilitowany* on this basis would contradict the three-tier model of professional advancement in Poland and would not motivate scholars to make progress and develop science.¹⁹ It is rightly pointed out that a different stance would be contrary to the legislator's intention, which recognised the provision of the highest quality of scientific activities as the mission of the higher education and science system (Article 2 LHES).²⁰ This position is also supported by the argument that it would result in a second evaluation of the doctoral dissertation, this time for the purposes of the habilitation proceedings.²¹ In disagreement with this statement, it is argued that the double use of the same achievement does not occur, because there are completely different requirements for the habilitation proceedings than for the doctoral dissertation; in the former case, it is a significant contribution to the development of a specific discipline, and in the latter, an original solution to

¹⁴ L. Morawski, *Zasady wykładni prawa*, Toruń, 2006, p. 107.

¹⁵ Journal of Laws of 2003, No. 65, item 595.

¹⁶ Journal of Laws of 2011, No. 84, item 455.

¹⁷ The governmental Bill: Law on Higher Education and Science (the Sejm print no. 2446), p. 50; <https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=2446> (accessed: 30 September 2025).

¹⁸ M. Radajewski, 'Nadawanie stopnia...', op. cit., p. 88; D.P. Kała, 'Ogólne przesłanki...', op. cit., pp. 236–237.

¹⁹ D.P. Kała, 'Ogólne przesłanki...', op. cit., p. 237.

²⁰ D. Dajnowicz-Piesiecka, Ł. Kierznowski, 'Awanse naukowe...', op. cit., p. 126.

²¹ H. Izdebski, in: Izdebski H., Zieliński J.M. (eds), *Prawo o szkolnictwie wyższym i nauce. Komentarz*, LEX/el., 2023, thesis 5 to Article 219.

a scientific problem (Article 187(2) LHES); the evaluation is not repeated, since it is based on entirely different requirements and criteria in the two proceedings.²² The application of different evaluation criteria to the doctoral dissertation does not negate the fact that it would be subject to assessment twice.

The argument for allowing the treatment of a published doctoral dissertation as a monograph referred to in Article 219(1)(2)(a) LHES is that the doctoral dissertation alone cannot be considered the basis for awarding the degree of *doktor habilitowany*, because Article 219(1)(2)(a) LHES refers to possessing scientific 'achievements'; thus, apart from the doctoral dissertation, there must also be other achievements that demonstrate a significant contribution to the development of a specific discipline.²³ However, this does not change the fact that, in such a case, the doctoral dissertation would represent an essential part of the body of work allowing for its recognition as a significant contribution to the development of the discipline of legal sciences.

The Council of Scientific Excellence argues that the use of the plural form of the word 'achievement' in Article 219(1)(2) LHES demonstrates that it is necessary to evaluate at least two achievements that meet the criterion of a significant contribution to the development of a specific discipline indicated by the applicant. These must include a monograph or a series of thematically related scientific articles.²⁴ The linguistic interpretation leads to this conclusion, but it is not the only interpretative guideline that may be applied in the process of interpreting a provision. In the case of vague terms, the rules of functional interpretation play a significant role, becoming a guidepost suggesting a direction of interpretation that requires the purpose of the legal regulation to be taken into account when interpreting provisions.²⁵ Functional axiological directives²⁶ support a broader understanding of scientific achievements in terms of their number. Confining oneself to just two scientific achievements as sufficient for the award of the degree of *doktor habilitowany* is inconsistent with the established mission of the higher education system and science, which is, *inter alia*, in the words of the law, 'to provide the highest quality education and scientific activity' (Article 2 LHES).

In my opinion, apart from a monograph or a series of articles, there should be other scientific achievements in the field of legal sciences. The statute does not determine their number but, if the aforementioned mission of the higher education system and science is taken into account, there should be relatively many more, no fewer than several dozen. Bearing in mind the phrase 'several dozen', which means 'a number

²² Ł. Kierznowski, *Stopnie naukowe i stopnie w zakresie sztuki. Komentarz*, Warszawa, 2021, p. 230; Ł. Kierznowski, 'Rozprawa doktorska...', op. cit., p. 94.

²³ K. Ślebza, in: Baran K.W. (ed.), *Akademickie prawo zatrudnienia. Komentarz*, Warszawa, 2020, pp. 397–398.

²⁴ Rada Doskonałości Naukowej, *Postępowania...*, op. cit., p. 12; thus also M. Grudek, 'Liczbę osiągnięć naukowych albo artystycznych, stanowiących znaczny wkład w rozwój określonej dyscypliny, konieczna do wykazania we wniosku habilitacyjnym', *Roczniki Administracji i Prawa*, 2022, No. 2, p. 157; M. Grudek, 'Osiągnięcie naukowe albo artystyczne stanowiące znaczny wkład w rozwój określonej dyscypliny w rozumieniu ustawy prawo o szkolnictwie wyższym i nauce', *Roczniki Administracji i Prawa*, 2022, No. 2, pp. 136–137; P. Stec, 'Nowe ścieżki kariery akademickiej – habilitacja 2.0', *Państwo i Prawo*, 2021, No. 7, pp. 8–9.

²⁵ L. Morawski, *Wstęp do prawoznawstwa*, Toruń, 2014, pp. 151 and 152.

²⁶ M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa, 2010, p. 340.

approximately greater than 20 and less than 100,²⁷ one should assume that this refers to more than 20 achievements. This is a minimum number and applies to situations where the scientific achievements assessed are of the highest standard.

Only the achievements submitted by the applicant for the degree of *doktor habilitowany* are subject to this evaluation. Only the scientific and other achievements presented at the time of submitting the application for the conferment of the degree of *doktor habilitowany* shall be assessed, and they cannot be supplemented during the proceedings. Article 220(2)(2) LHES obliges the applicant to include a list of the achievements referred to in Article 219(1)(2) LHES, i.e. those that are subject to evaluation by reviewers. This reference is identical to that contained in Article 221(8) LHES. The applicant is not required to present their entire scientific achievements, and their scope is left to their discretion. They select those scientific achievements from among their entire scientific output that they deem to meet the criteria for the award of the degree of *doktor habilitowany*. Therefore, reviewers are not allowed to assess scientific achievements beyond those indicated in the application for the commencement of the habilitation proceedings, much less to accuse the applicant of failing to submit their entire body of work for review.²⁸ Nevertheless, listing all scientific publications may facilitate substantiating claims that the applicant's scientific accomplishments constitute a significant contribution to the development of the discipline of legal sciences. Limiting the list only to those scientific achievements that represent a significant contribution to the development of a scientific discipline is not justified.²⁹

However, either a monograph or a series of thematically related scientific articles, or a monograph and a series, may be presented, as indicated by the words 'at least' used in the provision and the connection of these achievements with the sentential connective 'or', meaning a simple alternative, which signifies that a sentence is true if and only if at least one component of it makes the sentence true.³⁰ There is no obligation to present more than one monograph or a series of articles, or both a monograph and a series of articles.³¹

The conditions for awarding the degree of *doktor habilitowany* are closed in nature and therefore cannot be expanded by the habilitation committee, the senate, or the scientific council in accordance with Article 221(14)(1) LHES, which authorises them to determine the detailed procedure for conferring the degree of *doktor habilitowany*. This authorisation is limited to procedural issues.³² Contrary to what is assumed

²⁷ H. Zgólkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 16, Poznań, 1998, p. 149.

²⁸ D.P. Kała, 'Ogólne przesłanki...', op. cit., pp. 234–235; P. Pokorny, P. Waszkiewicz, in: Jakubowski A. (ed.), *Prawo o szkolnictwie...*, op. cit., p. 730; K. Ślebzak, in: Baran K.W. (ed.), *Akademickie prawo...*, op. cit., p. 410; Ł. Kierznowski, *Stopnie naukowe...*, op. cit., p. 228; Ł. Kierznowski, 'Rozprawa doktorska...', op. cit., p. 95; H. Izdebski, in: Izdebski H., Zieliński J.M. (eds), *Prawo o szkolnictwie wyższym i nauce. Komentarz*, Warszawa, 2019, p. 357; T. Jędrzejewski, in: Woźnicki J. (ed.), *Prawo o szkolnictwie wyższym i nauce. Komentarz*, Warszawa, 2019, pp. 581–582.

²⁹ M. Grudek, 'Liczba osiągnięć naukowych...', op. cit., p. 158; D.P. Kała, 'Ogólne przesłanki...', op. cit., pp. 234–235.

³⁰ W. Wolter, M. Lipczyńska, *Elementy logiki dla prawników*, Warszawa–Wrocław, 1973, p. 82.

³¹ P. Grzebyk, 'Warunki uzyskania...', op. cit., p. 74.

³² Rada Doskonałości Naukowej, *Postępowania...*, op. cit., pp. 7–8, 15; D.P. Kała, 'Ogólne przesłanki...', op. cit., p. 231.

in the literature, it is not permissible in these proceedings to specify the minimum quality thresholds for achievements that must be met by the applicant for the degree of *doktor habilitowany* in order for the habilitation entity to consent to the initiation of proceedings for the award of this degree.³³ The view that habilitation entities have been granted competence to establish the standard of requirements for a given discipline cannot be shared either.³⁴ The fact, raised by the author of this view, that this would lead to unjustified differentiation in the detailed requirements for candidates for the degree of *doktor habilitowany*, and that as a result persons awarded this degree by different habilitation entities would possess a different structure of actual competences, qualifies as an argument for rejecting this opinion.³⁵

This does not have to be a degree obtained in the same discipline in which the applicant is applying for the award of the degree of *doktor habilitowany*.³⁶ Article 221(8) LHES does not contain a reference to Article 219(1)(1) LHES, i.e. to the possession of a doctoral degree by the applicant for the degree of *doktor habilitowany*. If it is found that the applicant does not possess such a degree, there are no obstacles to indicating his in the review. The possession of a doctoral degree includes a presumption that the person applying for the award of the degree of *doktor habilitowany* has general theoretical knowledge in the discipline of legal sciences and the ability to conduct scientific work independently (arg. ex Article 187(1) LHES). This does not mean, as is stated in the literature, that it results from their skills in applying an appropriate methodology of scientific work; therefore, making allegations in a review about the lack of appropriate scientific methodology in scientific articles or monographs should be done with great caution, as it may conflict with the official confirmation of their competences and may be treated as unjustified.³⁷ Such a presumption does not bind the reviewer, and the reviewer's right to assess achievements covers all aspects, including methodological ones.

The requirement of holding a doctoral degree is not subject to formal evaluation conducted by the Council of Scientific Excellence, which carries out the formal assessment of the application (Article 221(1) LHES). The formal evaluation consists in checking whether the application meets formal requirements, i.e. whether it contains the elements specified in Article 63 CAP in conjunction with Article 178(3) LHES and in Article 220(2) LHES. Taking into account *mutatis mutandis* the content of Article 63 CAP, it should be assumed that the application is subject to verification as to whether it contains the indication of the person submitting it, their address and request, and whether it meets the requirements specified in special provisions (§ 2), as well as whether it is signed by the applicant (§ 3). As regards the verification of other requirements, in accordance with Article 220(2) LHES, it is assessed whether the application contains:

³³ D.P. Kała, 'Ogólne przesłanki...', op. cit., p. 232.

³⁴ J. Wiktor, 'Recenzja osiągnięć naukowych...', op. cit., p. 6.

³⁵ Ibidem.

³⁶ Judgment of the Supreme Administrative Court of 24 January 2018, I OSK 1497/16, LEX no. 2220755; P. Grzebyk, 'Warunki uzyskania...', op. cit., p. 73.

³⁷ D.P. Kała, 'Szczegółowe przesłanki nadania stopnia doktora habilitowanego', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2022, No. 3, p. 39.

- (1) a description of the professional career;
- (2) a list of achievements referred to in Article 219(1)(2) LHES;
- (3) the indication of the habilitation entity chosen to conduct the proceedings for conferring the degree of *doktor habilitowany*.

The Council of Scientific Excellence indicates that the application should take the form of a cover letter requesting the award of the degree of *doktor habilitowany* in a given field and discipline by an authorised and specifically designated habilitation entity, to which documents should be attached, as separate attachments, confirming that the conditions for awarding this degree have been satisfied.³⁸ It recommends that a copy of the document confirming the doctoral degree be attached to the application.³⁹ It is likewise argued in the doctrine that an appropriate document confirming the doctoral degree should be attached to the application.⁴⁰ However, the problem is that neither Article 220(2) LHES nor Article 63 § 2 CAP lays down an obligation to attach documents confirming the statements contained therein to the application. The template for the 'Application for commencement of the proceeding for the conferment of the postdoctoral degree of *doktor habilitowany*' does include the word 'Attachments' under the space for signature, but it is unclear what these attachments should be. Undoubtedly, the Council of Scientific Excellence should be authorised to verify this requirement, but this necessitates an amendment to Article 221(1) LHES by adding a provision concerning the verification of the possession of a doctoral degree.

It is assumed in the literature that the elements or attachments to the application necessary for the proper conduct of the habilitation proceedings may be subject to the aforementioned internal regulations of the habilitation entities (Article 221(14) (1) LHES).⁴¹ However, as is rightly emphasised in the doctrine, this solution is questionable insofar as these are not commonly applicable regulations⁴² and may lead to discrepancies concerning the formal requirements for the application.

The reviewer shall not assess whether an applicant for the degree of *doktor habilitowany* has demonstrated involvement in significant scientific activity in more than one higher education institution or academic or scientific institution, in particular a foreign one (Article 219(1)(3) LHES).⁴³ In Article 221(8) LHES, a reference is made to Article 219(1)(2) LHES, and its item (3) concerning scientific activity has been omitted. The opinion of the Council of Scientific Excellence is different. It assumes that the reviewer's task is to prepare an unambiguous, justified assessment of whether the person applying for the degree of *doktor habilitowany* meets the

³⁸ Rada Doskonałości Naukowej, *Postępowania...*, op. cit., p. 24.

³⁹ Proposed forms for documenting applications for the award of the degree of *doktor habilitowany*; <https://www.rdn.gov.pl/postepowanie-habilitacyjne.wymagania-dokumentacyjne-wnioskow-w-sprawie-nadania-stopnia-doktora-habilitowanego.html> (accessed: 12 March 2026).

⁴⁰ K. Ślebzak, in: Baran K.W. (ed.), *Akademickie prawo...*, op. cit., p. 402.

⁴¹ T. Jędrzejewski, in: Woźnicki J. (ed.), *Prawo o szkolnictwie...*, op. cit., p. 577.

⁴² H. Izdebski, in: Izdebski H., Zieliński J.M. (eds), *Prawo o szkolnictwie wyższym...*, 2019, op. cit., pp. 353–354.

⁴³ Rada Doskonałości Naukowej, *Recenzje w postępowaniach o awans...*, op. cit., p. 12; P. Pokorny, P. Waszkiewicz, in: Jakubowski A. (ed.), *Prawo o szkolnictwie...*, op. cit., Legalis, margin number 12 to Article 221.

requirements referred to in Article 219(1)(1)–(3) LHES,⁴⁴ and therefore also whether the applicant holds a doctoral degree and has been involved in scientific activities in more than one higher education or scientific institution, in particular a foreign one. This statement is in clear contradiction of Article 221(8) LHES. From a normative point of view, the reviewer's statement concerning these issues constitutes an excess of their statutory powers. At the same time, the Council of Scientific Excellence demonstrates inconsistency because, when defining the elements of the agreement concluded between the reviewer and the habilitation entity, it recommends that this document should include a clause obliging 'the reviewer to assess whether the person applying for the award of the degree of *doktor habilitowany* meets the requirements laid down in Article 219(1)(2)LHES'.⁴⁵ The above-mentioned stance of the Council mitigates its statement that:

'the basic and only role of the reviewer is to assess whether the scientific or artistic achievements of the person applying for the award of the degree of *doktor habilitowany* meet the requirements laid down in Article 219(1)(2) of the statute. As a result, reviewers should not make their review conclusions dependent on the assessment of the fulfilment of the condition concerning demonstration of the involvement of the person applying for the award of the degree of *doktor habilitowany* in scientific or artistic activities referred to in Article 219(1)(3) LHES'.⁴⁶

The exclusion of scientific activities from the subject matter of the review is unjustified. The reviewer, as a distinguished expert in the specific field of law or branch of law relevant to the scientific activity of the applicant for the degree of *doktor habilitowany*, is fully qualified to evaluate the applicant's scientific activity. Although the fulfilment of these requirements is assessed by the habilitation committee to which the reviewers belong, and during its meeting each member should express their opinion on the fulfilment of all the requirements for the conferment of this degree, the evaluation included in the review would be more valuable due to its broader and more in-depth justification. It is justified to expand the subject matter of the review by means of an amendment to the Law on Higher Education and Science by adding the assessment of the applicant's scientific activity.

The statute does not require applicants to provide the habilitation entity with copies of the publications indicated as their scientific achievements either. This is a customary practice, but refusals to submit them sometimes occur. The fact that the reviewer lacks copies of the publications indicated in the application significantly hinders, and sometimes even prevents, familiarisation with them. It is unclear what the reviewer should do in such a situation; there are no grounds for refusing to undertake a review, since the applicant is not obliged to submit such copies to the habilitation entity. The problem may be resolved by means of a resolution of the senate or the scientific council adopted in accordance with Article 221(14)(1) LHES, but the introduction of this obligation by means of an appropriate amendment to LHES would be the best solution.

⁴⁴ Rada Doskonałości Naukowej, *Postępowania...*, op. cit., p. 31.

⁴⁵ *Ibidem*, p. 32.

⁴⁶ *Ibidem*.

Summing up, the reviewers shall assess whether the achievements indicated by the persons applying for the award of the degree of *doktor habilitowany*: firstly, whether an achievement in the form of a monograph meet the statutory requirements for this form of publication; secondly, whether scientific articles constitute a series of thematically related ones; thirdly, whether their other scientific achievements, apart from monographs and series of articles, represent a significant contribution to the development of the discipline of legal sciences.

3.1. MONOGRAPH

The assessment of whether a reviewed work represents a monograph is relatively simple. A scientific monograph is defined in § 10 of the Regulation of the Minister of Science and Higher Education of 22 February 2019 on evaluating the quality of scientific activities,⁴⁷ which states that it is a reviewed book publication: (1) presenting a specific scientific topic in an original and creative manner; (2) provided with footnotes, a bibliography, or other scholarly apparatus appropriate for a given scientific discipline. The second element of this definition is formal in nature and is easy to evaluate. It is sufficient to check whether the indicated work is a book publication provided with footnotes and a bibliography and was published by a publishing house listed as a scored one.

Scientific monographs include: (1) a reviewed translation provided with footnotes, a bibliography or other scholarly apparatus appropriate for a given scientific discipline: (a) of a work of importance for science or culture into the Polish language; (b) of a work of importance for science or culture published in Polish into another modern language; (2) a scholarly edition of source texts (§ 10 (2) of the above-cited Regulation).

It is more difficult to assess whether the work presents a scientific problem in an original and creative manner. An original solution to a scientific problem is a substantive requirement for a doctoral dissertation (Article 187(2) *in principio* LHES), and the difference consists in the fact that in the case of a monograph the aim is to present such a problem in a creative manner, while in a doctoral dissertation it is to resolve it. However, the statute does not define this concept. Bearing in mind that a monograph is intended to be a scientific achievement constituting a significant contribution to the development of a scientific discipline, it must be assumed that it is not sufficient merely to present a specific scientific problem in an original and creative manner, but that it is necessary to resolve it. The requirements for such an achievement, due to the hierarchy of scientific degrees, cannot be of lower scientific value than that of a doctoral dissertation.

The reconstruction of the content of the presenting a specific scientific problem in an original and creative manner requires, in accordance with the principle of linguistic interpretation, determining the sense of this normative expression by definitively establishing the meaning of all component phrases.⁴⁸ This involves determining the

⁴⁷ Journal of Laws of 2022, item 661.

⁴⁸ M. Zieliński, *Wykładnia prawa...*, op. cit., p. 330.

linguistic meaning of the words 'original' and 'creative'. The word 'original' means 'one that is totally independent in their work creation, not referring to any pre-existing patterns'.⁴⁹ The word 'creative' stems from the verb 'create', which means 'cause the existence of something that did not exist before'.⁵⁰ Taking into account the linguistic meaning of this combination of words, one must assume that it refers to a scientific problem presented independently and not yet developed. It is rightly emphasised in the literature that it must contain the formulation, an analysis and, in a given discipline, a solution to a new scientific problem that is important for the development of the discipline, or a solution to a problem already known but not yet resolved.⁵¹ This leads to the conclusion that a monograph indicated in the proceedings for the award of the degree of *doktor habilitowany* should not represent a lower scientific level than a doctoral dissertation.⁵²

In proceedings for the award of the degree of *doktor habilitowany* initiated after 30 September 2019, scientific monographs published earlier by publishing houses that were ultimately not included in the list of the Ministry of Science and Higher Education cannot be taken into account in the analysis of the fulfilment of the requirement of having at least one achievement in the form of a monograph (arg. ex Article 179(6)(1)(b) of the Act of 3 July 2018: Provisions implementing the Act: Law on Higher Education and Science).⁵³

The doctrine does not exclude commentaries from the scope of the monograph genre, and it is indicated that this is possible in cases where they contain explanations of provisions in a systematic manner, summarise the state of case law, present an interpretative line, and are provided with footnotes and a bibliography, using correct terminology; however, it is not their length that is decisive, but their quality.⁵⁴ A large part of the legal system containing the study of a separate issue that represents an individual contribution of a person applying for the award of the degree of *doktor habilitowany* should be treated in the same way (arg. ex Article 219(1) (2) LHES).

3.2. SERIES OF THEMATICALLY RELATED SCIENTIFIC ARTICLES

The series includes scientific articles published in scientific journals or reviewed materials from international scientific conferences that are included in the list of scientific journals and reviewed materials from international conferences. Its scope and framework are determined by the applicant for the degree of *doktor habilitowany*.

⁴⁹ H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 26, Poznań, 2000, p. 454.

⁵⁰ H. Zgółkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 43, Poznań, 2003, p. 378.

⁵¹ S. Przewłocki, 'Kryteria oceny dorobku naukowego osób ubiegających się o tytuł profesora lub stopień naukowy doktora habilitowanego w aspekcie ustawy o tytule naukowym i stopniach naukowych oraz wymagań centralnej komisji ds. tytułu naukowego i stopni naukowych', *Biuletyn Polskiego Towarzystwa Geometrii i Grafiki Inżynierskiej*, 2000, No. 10, p. 53.

⁵² K. Ślęzak, in: Baran K.W. (ed.), *Akademickie prawo...*, op. cit., p. 393; D.P. Kała, 'Szczegółowe przesłanki...', op. cit., p. 44.

⁵³ Journal of Laws of 2018, item 1669, as amended.

⁵⁴ P. Grzebyk, 'Warunki uzyskania...', op. cit., p. 75.

In accordance with § 9(1) of the Regulation on the evaluation of the quality of scientific activity, a scientific article is a reviewed article published in a scientific journal or in reviewed materials from an international scientific conference:

- (1) presenting a specific scientific problem in an original and creative, problem-solving or cross-sectional manner;
- (2) provided with footnotes, a bibliography or other scholarly apparatus appropriate for a given scientific discipline (§ 9(1)). A review article published in a scientific journal that is included in the list of scored journals is also a scientific article (§ 9(2)). Editorials, abstracts and extended abstracts, letters, errata and editorial notes are not considered scientific articles (§ 9(3)).

The series cannot include articles published in reviewed materials from domestic conferences, since Article 219(1)(2)(b) LHES lays down a limitation to international conferences, nor chapters in scientific monographs, because the provision expressly indicates scientific articles published in scientific journals. This omission is unjustified, as in many cases these are scientific studies of high scientific quality and have been issued by publishing houses included in the list of scored publishers.

A series of thematically related articles should correspond to a monograph in terms of scientific value in accordance with Article 219(1)(2)(a) LHES, since it is listed as an alternative to a monograph.⁵⁵ This means that compiled individual publications demonstrate an original solution to a scientific problem, making a significant contribution to the development of the discipline of legal sciences.⁵⁶ The word 'series' means 'a closed and periodically repeatable arrangement of elements, objects, processes, phenomena, etc., occurring at a specific time (...) a single whole composed of homogeneous, interrelated events, processes, activities'.⁵⁷ This indicates that the articles must be closely related to each other so that they can be considered the equivalent of a monograph, but it is not necessary to compile them and publish them as a monograph.⁵⁸ The considerations in all these articles should focus on the same thesis, hypothesis or research hypotheses, since they must collectively qualify as a scientific achievement that makes a significant contribution to the development of this discipline. Therefore, it is not possible to accept a different view.⁵⁹ Moreover, the effort required to develop the work and the influence on the development of science should be analogous to that of a monograph.⁶⁰

The requirement of thematically related scientific articles leads to the conclusion that they should address the same scientific problem that is to be resolved. It cannot be a collection of articles addressing different research issues, even within the same science or branch of law.

⁵⁵ K. Ślęzak, 'Jednotematyczny cykl publikacji jako przesłanka nadawania stopnia doktora habilitowanego nauk prawnych', *Państwo i Prawo*, 2013, No. 7, p. 35.

⁵⁶ Rada Doskonałości Naukowej, *Postępowania...*, op. cit., p. 13.

⁵⁷ H. Zgólkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 7, Poznań, 1996, pp. 329 and 330.

⁵⁸ K. Ślęzak, 'Jednotematyczny cykl...', op. cit., p. 35; M. Radajewski, 'Nadawanie stopnia...', op. cit., p. 86.

⁵⁹ H. Izdebski, in: Izdebski H., Zieliński J.M. (eds), *Prawo o szkolnictwie wyższym...*, op. cit., 2019, p. 351; P. Grzebyk, 'Warunki uzyskania...', op. cit., p. 77.

⁶⁰ M. Radajewski, 'Nadawanie stopnia...', op. cit., p. 86.

The Council of Scientific Excellence indicates that demonstrating the existence of such a series should not be limited to conceptual work by the reviewer, and that its existence generally presupposes awareness of its creation. As in the case of a doctoral dissertation, a thematically related series of articles should also be expected to be up to date and reflect the state of knowledge at the date of the commencement of the proceedings. The applicant for the degree of *doktor habilitowany* is obliged to prove that the articles in the cycle are thematically connected, e.g. by presenting it and demonstrating this connection in the first-person summary of scientific accomplishments. The assessment of the existence of a significant contribution should be made with regard to the date of submission of the application, and not the period during which the leading part or the entirety of the publications comprising the single-theme series were created.⁶¹

The number of articles included in a series cannot be determined on *a priori* grounds; it depends on the value and length of the individual articles. It is assumed in the literature that four articles form the absolute minimum, but it is rightly noted that a series should also be comparable in size to a monograph.⁶² Without questioning the general view that it is not worth being tied to a specific number of pages and that only the quality of the achievements identified in the series should be assessed, it is not possible to refrain from considering the total length of the articles.

3.3. OTHER SCIENTIFIC ACHIEVEMENTS

Other scientific achievements may include monographs other than those listed in Article 219(1)(2)(a) LHES, as well as articles and glosses.⁶³ Articles published in reviewed materials from national conferences are also considered. This group should also include commentaries and fragments of the legal system that could not be qualified as a monograph.

3.4. SIGNIFICANT CONTRIBUTION TO THE DEVELOPMENT OF THE DISCIPLINE OF LEGAL SCIENCES

The assessment of whether the scientific achievements indicated by the applicant for the award of the degree of *doktor habilitowany* represent a significant contribution to the development of the discipline of legal sciences is difficult due to the vagueness of this concept.⁶⁴ The legislator has granted reviewers a relatively large degree of discretion in this regard.

⁶¹ *Ibidem*, pp. 13–14.

⁶² M. Radajewski, 'Nadawanie stopnia...', *op. cit.*, pp. 86–87.

⁶³ D.P. Kała, 'Szczegółowe przesłanki...', *op. cit.*, p. 47.

⁶⁴ Ł. Kierznowski, *Stopnie naukowe...*, *op. cit.*, p. 226; K. Ślebzak, in: Baran K.W. (ed.), *Akademickie prawo...*, *op. cit.*, p. 399; K. Ślebzak, 'Przesłanki nadawania stopnia doktora, doktora habilitowanego oraz tytułu profesora a model awansów naukowych w świetle ustawy Prawo o szkolnictwie wyższym i nauce', *Nauka*, 2020, No. 2, p. 77; M. Radajewski, 'Nadawanie stop-

Due to the requirement of a contribution to the development of a scientific discipline, it is important to define the concept of science. Scientific activities are defined in Article 4(1) and (2) LHES, which provide that they include, *inter alia*, scientific research

'that includes: (1) basic research understood as empirical or theoretical works aimed primarily at gaining new knowledge about the foundations of phenomena and observable facts without focusing on any direct commercial applications; (2) applied research, understood as works aimed at acquiring new knowledge and skills, focused on developing new products, processes or services or introducing significant improvements in them'.

It is rightly assumed in the doctrine that this definition can be adopted in promotion proceedings due to its legislative origin related to the issue of financing scientific activities.⁶⁵

In the doctrine, in its functional aspect science is defined as a system encompassing the presentation of scientific theorems and laws using research methods that ensure true, valid, complete, precise and orderly knowledge of a given subject or area of research, and in its content aspect as a system of duly justified concepts, theorems and hypotheses containing knowledge of phenomena, processes, structures, dependencies and regularities in a given field of science that is as objective and adequate as possible at a given stage of development of scientific knowledge and socio-economic practice.⁶⁶ The result of scientific investigations is the formulation of new theorems that reflect the diagnosed relationships and perceived interdependencies between the studied elements, phenomena and processes.⁶⁷

The definition that is important for legal sciences states that jurisprudence has the status of a science when it uses specific methods of dogmatic and legal analysis developed by within the discipline, aimed at solving validation, inferential, interpretative or subsumptive problems concerning legal provisions, and when it makes use of methods developed in other sciences and examines law as an empirical phenomenon that is an element of culture or social reality, analysing specific facts related to law, such as psychological and social processes, and formulating empirically verifiable statements about them.⁶⁸

The word 'contribution' means 'someone's involvement in an undertaking, which is intangible support for it'.⁶⁹ The word 'development' means 'a process of change leading to the improvement of something, an increase in something, or

nia...', op. cit., p. 85; P. Grzebyk, 'Warunki uzyskania...', op. cit., p. 68; D.P. Kała, *Szczególnie przesłanki...*, op. cit., p. 41.

⁶⁵ M. Szydło, 'Pojęcie nauki i osiągnięć naukowych w postępowaniach awansowych w nauce (uwagi z perspektywy nauk prawnych)', *Państwo i Prawo*, 2022, No. 5, p. 54.

⁶⁶ J. Apanowicz, 'Charakterystyka wiedzy o zarządzaniu', in: Nogalski B., Apanowicz J., Rutka R., Czermiński A., Czerska M., *Zarządzanie organizacjami*, Toruń, 2002, pp. 19–21.

⁶⁷ J. Apanowicz, *Metodologiczne elementy procesu poznania naukowego w teorii organizacji i zarządzania*, Gdynia, 2000, p. 21.

⁶⁸ T. Pietrzykowski, *Naturalizm i granice nauk prawnych. Esej z metodologii prawoznawstwa*, Warszawa, 2017, pp. 46 et seq.; M. Szydło, 'Pojęcie nauki...', op. cit., p. 57.

⁶⁹ H. Zgólkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 45, Poznań, 2004, p. 427.

the achievement of a higher level in some respect'.⁷⁰ The word 'significant' means 'of great importance, occurring in large quantity or number',⁷¹ 'relatively large in some respect, substantial, not small',⁷² 'quite large in number, quantity and intensity, substantial, not small, sizeable'.⁷³

From a linguistic perspective, this refers to the kind of scholarly accomplishment that leads to the achievement of a higher level of science, in this case legal sciences. The linguistic meaning of the word 'significant' indicates that quantity is important, but given that the *verba legis* refers to 'a significant contribution to the development of a specific discipline', one cannot carry out only a quantitative assessment of publications. It is rightly pointed out in the doctrine that there are individuals who publish extensively on the same topic; however, duplication of content does not necessarily mean that they have created an achievement that makes a significant contribution to the discipline.⁷⁴ It is reasonably assumed in the literature that this criterion is quantitative and qualitative in nature, and therefore only those achievements that are both sufficiently comprehensive and represent an appropriate level of substantive merit can be considered a significant contribution to the development of a given discipline.⁷⁵ This refers to the overall substantive merit of the achievements (importance, excellence) and their significance for the discipline (a substantively significant contribution).⁷⁶

The judicature rightly states that:

- 'It is not very important whether the author's scientific achievements constituting a contribution to the development of science comprise a single work or a series of thematically related publications, but rather the substantive value of these works or publications. In other words, the structure of the publications and their quantity are less important, while their scientific quality is more important.'⁷⁷
- 'The concept of the "significance" of achievements does not have a statutory definition. The assessment of the significance of achievements is at the entity's discretion, somewhat akin to administrative discretion, and an administrative court cannot examine the substantive aspect of this premise; however, it is possible to examine the process by which the entity "arrived" at specific conclusions and what "principles" it followed. As a result, an administrative court may determine whether the entity's assessment is arbitrary or unfounded. The assessment of the significance of scientific achievements precedes the initiation of the habilitation proceedings, but it cannot go beyond a preliminary

⁷⁰ M. Dunaj (ed.), *Nowy słownik języka polskiego*, Warszawa, 2007, p. 609.

⁷¹ H. Zgórkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 50, Poznań, 2005, p. 20.

⁷² M. Dunaj (ed.), *Nowy słownik...*, op. cit., p. 81.

⁷³ S. Dubisz (ed.), *Uniwersalny słownik języka polskiego. Tom 4: T–Ż*, Warszawa, 2006, p. 1046.

⁷⁴ P. Grzebyk, 'Warunki uzyskania...', op. cit., p. 78.

⁷⁵ K. Ślebzak, in: Baran K.W. (ed.), *Akademickie prawo...*, op. cit., p. 399; D.P. Kała, 'Szczegółowe przesłanki...', op. cit., p. 41; judgment of the Supreme Administrative Court of 3 February 2016, I OSK 2371/15, LEX no. 1976381.

⁷⁶ P. Pokorny, P. Waszkiewicz, in: Jakubowski A. (ed.), *Prawo o szkolnictwie...*, op. cit., margin number 6 to Article 219.

⁷⁷ Judgment of the Voivodeship Administrative Court in Warsaw of 5 December 2018, II SA/Wa 1991/17, LEX no. 2734653.

stage. The preliminary nature of this assessment does not mean, however, that it can be general or superficial. Such an assessment must be conducted reliably, meticulously, and contain a reasoned answer to the question concerning the “significance” of the applicant’s scientific achievements. It should be emphasised that the applicant’s future scientific career depends on this assessment, and therefore every effort should be made to fully and clearly explain the reasons for not recognising the achievements as significant (provided such conclusions are reached).⁷⁸

It is rightly assumed in the doctrine that ‘contributions to the development of science are research achievements and publications that systematise and enrich theoretical knowledge, as well as contain specific solutions (guidelines, recommended methods of action) for economic practice – important and useful from the point of view of the scope of research issues that are the domain of a given scientific discipline’.⁷⁹

It is not possible to agree with the view that a fairly good substantive level of achievements is sufficient.⁸⁰ Article 219(2) *in principio* LHES refers not to any achievement, but to a scientific achievement. The word ‘achievement’ means ‘reaching a peak in size, number, etc.’⁸¹ There is no doubt that the linguistic interpretation of the phrase ‘scientific achievement’ clearly indicates that it refers to works of higher than average substantive quality. One may share the opinion that a very high level of achievements may justify their relatively lower number,⁸² but not the other way round. A scientific achievement should contain original solutions to a scientific problem and demonstrate a specific substantive level of knowledge. It is rightly assumed in the doctrine that it should be a scientific achievement: (1) for which there is no doubt that it concerns issues that have not been addressed at all so far or have not been addressed to the same extent as in the achievement being assessed; therefore, it must have the value of novelty; (2) meeting the requirements for doctoral dissertations; (3) for which the state of science (knowledge) before and after the presentation of the reviewed achievement(s) has undergone a favourable change; (4) the discussed change must be significant in the opinion of representatives of a given discipline, in particular the reviewers.⁸³

It is rightly emphasised in the literature that works that do not make contributions to the development of a discipline include those: (1) which lack a clear hypothesis and research questions, which indicates that the writer is unable to apply appropriate research methodology; (2) which are purely descriptive in nature, as they do not develop the discipline but are merely informative; (3) which contain glaring factual errors or incorrect terminology; (4) which demonstrate a lack

⁷⁸ Judgment of the Supreme Administrative Court of 17 August 2010, I OSK 720/10, LEX no. 1264918.

⁷⁹ W. Walczak, ‘Postępowania habilitacyjne według znowelizowanych przepisów – analiza wielowymiarowa’, *E-mentor*, 2013, No. 4.

⁸⁰ M. Radajewski, ‘Nadawanie stopnia...’, *op. cit.*, p. 86.

⁸¹ H. Zgórkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 27, Poznań, 2000, p. 18.

⁸² M. Radajewski, ‘Nadawanie stopnia...’, *op. cit.*, p. 86.

⁸³ K. Ślęzak, in: Baran K.W. (ed.), *Akademickie prawo...*, *op. cit.*, p. 399.

of a reliable review of Polish and leading foreign literature and case law, and in particular omit basic literature; (5) which frequently contain hedging statements that only selected issues are discussed or that the work is merely a contribution to larger issues, which indicates an inability to thoroughly investigate a given topic and a desire to conceal gaps in knowledge; (6) which have not been distributed for reasons attributed to the habilitation applicant, e.g. the purchase of the entire publication volume by the author, which prevented the work from contributing to the development of the discipline since it was unavailable.⁸⁴

The score assigned to a given publisher or journal for the purposes of the evaluation of scientific entities does not determine the value of a publication; rather, it is the reputation of a journal or publisher in a given sub-discipline that matters.⁸⁵ Nevertheless, when all or the vast majority of studies have been published in low-scored journals, which are moreover regional rather than national, this may raise doubts as to whether they can qualify as a significant contribution to the development of a given discipline. Publications in high-scored journals, as a rule, are subject to a thorough review process. However, it seems too far-fetched to conclude that a lack of publications in journals recognised in a given discipline should be interpreted as disqualifying the applicant's achievements.⁸⁶

What determines the scientific value of achievements are not bibliometric indicators or other scientometric parameters; what is crucial is the content of the publication that describes the results obtained and the conclusions drawn.⁸⁷ The justification for the Bill: Law on Higher Education and Science explicitly emphasises that 'individual review of scientific achievements shall always remain an expert assessment, in which bibliometric tools can only be of a supporting nature'.⁸⁸ A high number of citations may indicate a significant contribution to the discipline or an extremely critical reception of a given author's works.⁸⁹ Achievements positively assessed by a reviewer cannot be disqualified due to low bibliometric indicators. Conversely, poor achievements cannot be deemed to meet the statutory criteria for awarding the degree of *doktor habilitowany* solely on the basis of high bibliometric indicators.⁹⁰

⁸⁴ P. Grzebyk, 'Warunki uzyskania...', op. cit., p. 78.

⁸⁵ Ibidem, p. 79.

⁸⁶ Ibidem, p. 80.

⁸⁷ M. Gorynia, 'Recenzje...', op. cit., p. 19; D.P. Kała, 'Ogólne przesłanki...', op. cit., p. 233.

⁸⁸ Justification for the governmental Bill: Law on Higher education and Science, Sejm print no. 2446, item 42; <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=2446> (accessed: 15 September 2025).

⁸⁹ P. Grzebyk, 'Warunki uzyskania...', op. cit., p. 79.

⁹⁰ D.P. Kała, 'Ogólne przesłanki...', op. cit., p. 233.

4. REVIEW STRUCTURE

For the clarity of the arguments contained in a review, its structure (construction, composition) is crucial. A review should consist of the following parts: (1) introduction; (2) analysis and evaluation; (3) conclusions. These parts do not need to be clearly separated, although their clear indication makes the review more communicative.

4.1. INTRODUCTION

For this reason, it is necessary to present a statistical breakdown of the achievements (publications, articles and glosses) indicated by the applicant for the award of the degree of *doktor habilitowany*. If these publications pertain to different legal sciences or branches of law, it is advisable to indicate their quantitative classification. This will allow for the immediate identification of the subject matter of the applicant's primary research activity. It is also necessary to list the monographs or series of thematically related scientific articles indicated in the application for the instigation of the habilitation proceedings.

There is no reason to provide, as occurs in practice, information on the procedure for appointing a given person as a reviewer, the subject of the review with reference to statutory provisions, or the data of the applicant for the award of the degree of *doktor habilitowany*.

4.2. ANALYSIS AND EVALUATION

The analysis and evaluation of a monograph or monographs and a series or series of thematically related scientific articles are carried out first, as they are the most important works among the scientific achievements of the applicant for the award of the degree of *doktor habilitowany*. Other scientific achievements are then subject to analysis and assessment.

4.2.1. FORMAL ASSESSMENT

Before the substantive assessment of the content of scientific achievements, it is essential to check whether the publisher of the monograph is included in the list of scored publishers and whether the articles in the series or the materials from international conferences are included in the list of scientific journals and reviewed materials from international conferences.

As regards articles, it is necessary to verify whether they are provided with footnotes, a bibliography or other scholarly apparatus appropriate to a given scientific discipline.

4.2.2. SUBSTANTIVE CONTENT ASSESSMENT

Substantive analysis and assessment of achievements begin with checking whether the introduction contains all the necessary elements that characterise scientific papers and whether their justification is convincing. This includes the indication of: (1) the justification for the choice of the topic; (2) the scientific problem; (3) the aim of the work; (4) the thesis or theses; (5) the hypothesis or hypotheses; (6) the research methods.

All these elements are subject to verification in the course of the analysis of the publications submitted.

4.2.2.1. CHOICE OF THE TOPIC ASSESSMENT

In the linguistic sense, a topic is 'the main, fundamental subject of a conversation, picture, work, lecture, etc.'⁹¹ Thus, the topic of a dissertation is the issue it addresses.⁹² It constitutes a synthetic description of the research problem being resolved in the dissertation.⁹³ This means that the topic should encompass the basic keynote of the scientific work. The topic is the nucleus of the dissertation and, as suggested in the literature, 'often appears before any research activities are undertaken, and at other times only after the research thesis has been formulated.'⁹⁴ It is also necessary to refer to the title of the scientific achievement, since it is a verbal expression of the subject.⁹⁵ From the linguistic point of view, a 'title' is 'the name given to a scientific work (...) or part of a work (...) by the author, publisher or distributor'.⁹⁶ It is a concise and succinct expression of the dissertation's topic, adequate to the topic itself and the dissertation's content, a verbal presentation of the conducted research formulated in writing.⁹⁷ It should clearly indicate the issue addressed in the dissertation. It should be formulated in a problem-oriented rather than a descriptive manner.⁹⁸ Therefore, it is assessed whether the title has been formulated appropriately and whether the scientific issue reflected in the title has been the subject of scientific exploration, and if so, whether it has been adequately deepened, as well as what the rationale behind this development was.

⁹¹ H. Zgółkowska (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 42, Poznań, 2003, p. 371.

⁹² J. Zieliński, *Metodologia pracy naukowej*, Warszawa, 2012, p. 36.

⁹³ K. Kuciński, 'Wprowadzenie', in: Kuciński K. (ed.), *Elementy metodyki rozprawy doktorskiej*, Warszawa, 2015, p. 13.

⁹⁴ E. Niedzielska, *Mały poradnik autora i recenzenta pracy akademickiej*, Wrocław, 1993, p. 11.

⁹⁵ J. Zieliński, *Metodologia...*, op. cit., p. 36.

⁹⁶ H. Zgółkowska (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 43, Poznań, 2003, p. 421.

⁹⁷ J. Zieliński, *Metodologia...*, op. cit., p. 36.

⁹⁸ K. Duraj-Nowakowa, *Pisarstwo naukowe studentów*, Kraków, 2019, p. 41.

4.2.2.2. PUBLICATION STRUCTURE ASSESSMENT

A thorough assessment of a scientific work cannot be carried out without considering its structure, which is crucial primarily for the clarity of reasoning. There should be statements on whether the material is divided into chapters according to clear criteria, whether the chapters are arranged in such a way that they are logically interconnected, and whether smaller editorial units have been appropriately distinguished.

4.2.2.3. SCIENTIFIC PROBLEM ASSESSMENT

The assessment of the scientific problem, the essence of which lies in its perception, formulation and original solution, is of key importance.⁹⁹ Defining the research problem of the scientific work consists in:

‘precise formulation of the research (scientific) problem, i.e. asking a fundamental (general) research question, determining the place of the investigated issue in the discipline, in this case in legal sciences, analysing the content of the research problem by isolating its components and presenting them in the form of detailed issues (working questions), establishing the basic assumptions and scope of research resulting from various structural and organisational conditions of a given study, and presenting and justifying the relevance of the research problem and its importance for scientific knowledge’.¹⁰⁰

A scientific problem is a complex component and its clarification requires detailed questions:

‘Their formulation, as is rightly noted in the literature, facilitates the analysis of the entire issue, aids research planning, promotes better selection of research tools, and protects the researcher from omitting important aspects of the problem being studied or from delving into areas loosely related or even entirely unrelated to the subject of the study’.¹⁰¹

In the context of these statements, it is difficult for the reviewer not to address the question whether this problem is of such importance that it is suitable for scientific study in a work constituting a scientific achievement that makes a significant contribution to the development of a specific discipline. It is necessary to analyse the justification for selecting the indicated problem, in particular whether it has been demonstrated to be of real significance, the nature of its connections with other problems, and whether its importance has been evaluated.¹⁰²

⁹⁹ K. Kuciński, ‘Wprowadzenie’, op. cit., p. 11.

¹⁰⁰ J. Apanowicz, *Metodologia ogólna*, Gdynia, 2002, p. 99; A. Żebrowska, ‘Istota problemu badawczego’, in: Kuciński K. (ed.), *Elementy metodyki rozprawy doktorskiej*, Warszawa, 2015, p. 151.

¹⁰¹ M. Krajewski, *O metodologii nauk i zasadach pisarstwa naukowego*, Płock, 2020, p. 59.

¹⁰² J. Zieliński, *Metodologia...*, op. cit., p. 37.

4.2.2.4. RESEARCH OBJECTIVE ASSESSMENT

A scientific work must have a cognitive objective, the attainment of which enriches theory to some extent.¹⁰³ The objective determines the research intention, not the problems and issues that constitute the need for the study, and it should not be confused with research questions, the answers to which are sought in the collected data. It concerns indicating a designated, future, anticipated and desired state of affairs.¹⁰⁴

The objective encompasses the aims, intentions, or the main idea of the research paper. The research objective is what the researcher intends to achieve through research. The objective must clearly indicate the author's intended contribution to science, e.g. criminal law, civil law, or criminal procedure law. This should be the primary objective, but secondary (additional, specific, ancillary) objectives may also be formulated.¹⁰⁵

The assessment of the set objective should include: firstly, the justification for its choice; secondly, the method and scope of its attainment.

4.2.2.5. RESEARCH THESIS ASSESSMENT

From the linguistic point of view, a thesis is 'a statement the content of which is fundamental to a given field, requiring proof; an assumption on which further arguments are based; a conclusion that must be proved based on accepted premises'.¹⁰⁶ It is a certain assumption, statement, question, or conclusion concerning the subject of research that must be investigated, learnt and proved. It is a detailed indication of the research problem expressed in a statement or question concerning what should be examined, learnt and proved.¹⁰⁷ It is a statement the content of which is fundamental for a given field, an assumption that is to be proved. It is always proved following specific assumptions on the basis of which evidence is provided that allows for the acceptance or rejection of the thesis, thus formulating a statement that is of key importance for the given field.¹⁰⁸

The review should contain statements concerning the validity of the thesis and the degree to which it has been substantiated. The result of this assessment is one of the most important parts of the review, as the discussion throughout the entire paper focuses on it, because the thesis constitutes a synthetic determination of what the paper is to contribute to science.¹⁰⁹

¹⁰³ C. Sikorski, *Krótki przewodnik dla doktorantów Wydziału Zarządzania Uniwersytetu Łódzkiego. Rozprawy doktorskie w zakresie nauk o zarządzaniu*, Łódź, 2016, p. 12.

¹⁰⁴ A.M. Jeszka, 'Problemy badawcze i hipotezy w naukach o zarządzaniu', *Organizacja i Kierowanie*, 2013, No. 5, p. 32; H. Witczak, 'Problemy i twierdzenia naukowe', in: Sławińska M., Witczak H. (eds), *Podstawy metodologiczne prac doktorskich*, Warszawa, 2012, p. 73.

¹⁰⁵ R.A. Stefański, 'Metodyka przygotowania rozprawy doktorskiej', in: Izdebski H., Łazarz A. (eds), *Metodologia dysertacji doktorskiej dla prawników. Teoria i praktyka*, Warszawa, 2022, p. 150.

¹⁰⁶ H. Zgółkowska (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 42, Poznań, 2003, p. 444.

¹⁰⁷ J. Apanowicz, *Metodologia...*, op. cit., p. 46; A. Talun, 'Teza', in: Kuciński K. (ed.), *Elementy metodyki rozprawy doktorskiej*, Warszawa, 2015, p. 155.

¹⁰⁸ A.M. Jeszka, 'Problemy badawcze...', op. cit., p. 33.

¹⁰⁹ K. Kuciński, 'Wprowadzenie', op. cit., p. 11.

4.2.2.6. RESEARCH HYPOTHESIS ASSESSMENT

A research hypothesis or research hypotheses constitute the development of a thesis; their formulation involves changing the grammatical form of the problem question from a statement into a conjecture. While a thesis is proved, a hypothesis is subject to testing. The word 'hypothesis' (from Greek *hypóthesis* and Latin *hypothesis*) means 'a scientific assumption put forward to explain a phenomenon, an assumption based on probability, aimed at discovering certain phenomena or laws'.¹¹⁰ A hypothesis is defined in the doctrine as 'a conjecture, an uncertain statement, a research assumption that is aimed at explaining specific events and facts or predicting the occurrence of new ones; hypotheses are formulated in order to discover certain laws and generalisations'.¹¹¹ The essence of a research hypothesis is essentially the formulation of a certain presumption concerning the co-occurrence or co-variation of the phenomena under examination (descriptive hypotheses) or their genesis (causal hypotheses). A hypothesis must be substantiated with the use of the current state of knowledge and should: (1) address significant issues; (2) be unambiguously formulated; (3) not contradict previously proved statements; (4) be testable with the use of appropriate methods, techniques and research tools.¹¹² Apart from the main hypothesis, specific hypotheses derived from it may be indicated, depending on the type of research problem.

The review considerations regarding the research hypothesis should focus on verifying whether it meets the characteristic features indicated above and should also clearly state whether it has been confirmed or refuted (positively or negatively verified).

4.2.2.7. ASSESSMENT OF THE APPROPRIATE USE OF RESEARCH METHODS

The application of research methods appropriate to legal sciences serves to address the scientific problem presented. The discussion of a scientific problem should be accomplished using research methods that ensure the high quality and reliability of the results obtained.¹¹³ A method is 'a precisely defined procedure for the purpose of scientific examination of a given fragment of reality'.¹¹⁴ As indicated in the literature, methods must be appropriate and efficient, purposefully selected and planned, and consciously applied with regard to the content of the research, which should take into account the effectiveness and applicability of a given method. They must also be appropriate to the concept of solving the research problem, the purpose of the intended research, and the resources available.¹¹⁵

¹¹⁰ H. Zgólkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 13, Poznań, 1997, p. 414.

¹¹¹ S. Nowak, *Metodologia badań społecznych*, Warszawa, 2007, p. 33.

¹¹² B. Klepacki, 'Wybrane zagadnienia związane z metodologią badań naukowych', *Roczniki Nauk Rolniczych. Seria G*, 2009, Vol. 96, No. 2, p. 42.

¹¹³ S. Przewłocki, 'Kryteria oceny...', op. cit., p. 53.

¹¹⁴ M. Dunaj (ed.), *Nowy słownik...*, op. cit., p. 308.

¹¹⁵ J. Apanowicz, *Metodologia...*, op. cit., p. 60; J. Kawa, 'Metodologia, metodyka, metoda jako podstawa wywodu naukowego', *Studia Prawnoustrojowe*, 2013, No. 21, p. 177.

Typically, one method is used as the primary one, and others are complementary. Researchers should choose such research methods as best enable them to achieve the research objectives and verify hypotheses.

It is necessary to state in the review whether all research methods appropriate to solving the research problem have been used and whether they have been applied in an appropriate manner.

4.2.2.8. ASSESSMENT OF THE SIGNIFICANT CONTRIBUTION TO THE DEVELOPMENT OF THE DISCIPLINE OF LEGAL SCIENCES

It is rightly assumed in the doctrine that a reliable assessment of the fulfilment of the statutory requirement of a significant contribution of the assessed achievements to the development of the discipline of legal sciences, first and foremost, requires determining whether the accomplishments of the applicant for the award of the degree of *doktor habilitowany* qualify as achievements and are scientific in nature. It is necessary to state and substantiate that these achievements represent a considerable contribution to the development of a specific legal science or a branch of law.

In the event of a negative assessment, a detailed justification must be provided as to why the assessed achievements should not be considered: (1) scientific achievements; or (2) as constituting a significant contribution to the development of a specific legal science.

4.2.2.9. OTHER ASSESSMENTS

It is difficult to imagine failing to include a comment in the review on the complete use of literature, including basic foreign studies on the analysed topic, as well as case law.

Comments concerning the formal aspects of the reviewed works are also important. It is necessary to comment on whether the reviewed publications are linguistically correct, written to an appropriate standard, and free from errors in spelling, inflection, punctuation, syntax and style. It is very important to assess the use of an appropriate conceptual framework within a given scientific field, which, alongside scientific terminology, scientific methods and research methodology, is considered one of the theoretical foundations of conducting scientific work.¹¹⁶ It is obvious that in works in the field of legal sciences, special attention should be paid to the writer's use of legal and juridical language. The distinction between these two languages, as is rightly emphasised in the doctrine, is not merely theoretical but primarily practical, as it leads to the organisation of research issues in legal sciences and to distinguishing between different interpretations of assertions in legal statements.¹¹⁷

Legal language is that in which normative acts are formulated; it is the language used by the legislator, the language of statutes, decrees, regulations, and other legal acts.¹¹⁸ Legal language is based on everyday language but differs from it primarily

¹¹⁶ J. Zieliński, *Metodologia...*, op. cit., p. 29.

¹¹⁷ J. Pieńkos, *Podstawy juryslingwistyki. Język w prawie – prawo w języku*, Warszawa, 1999, p. 14; Z. Ziemiński, *Problemy podstawowe prawoznawstwa*, Warszawa, 1980, p. 81.

¹¹⁸ J. Pieńkos, *Podstawy juryslingwistyki...*, op. cit., p. 14.

in its specific semantic rules concerning the assignment of meanings to terms, phrases and expressions contained in applicable legal texts. Legal language is also situated in relation to other varieties of contemporary Polish and is: (a) a variety of everyday language; (b) a variety of general, common language; (c) a generic (special, specialist) language.¹¹⁹

In turn, juridical language is the one 'used by lawyers practising law'.¹²⁰ It is the language in which various types of statements about applicable law are formulated. This language is used to draft court rulings and administrative decisions, as well as statements in the field of jurisprudence. As a result, two language varieties related to juridical practice are distinguished in the literature: adjudication-related juridical language and non-adjudication-related juridical language.¹²¹

The correctness of footnote development, including multiple citations of the same publication in shortened form, should also be assessed.

5. REVIEW QUALITY

Drafting a review properly requires reviewers to demonstrate technical proficiency and extensive, in-depth knowledge of the field to which the reviewed work belongs.¹²² Reviewers must thoroughly familiarise themselves with the reviewed works and make every effort to assess honestly and fairly their professional and cognitive value, independence, and innovation in accordance with the current state of the scientific discipline they represent, statutory requirements, and academic practices for reviewers in a given type of procedure. The review should honestly present the content of the reviewed scientific achievements and contain clear and well-reasoned assessments of the individual components of the documentation presented to the reviewer, in particular the scientific theses contained therein.¹²³

The review should: (1) contain a thorough substantive assessment, and the comments contained therein should be properly substantiated; (2) be constructive, free from malicious and personal comments directed at the author of the material being assessed, because it is the work itself that is being assessed, not its author.¹²⁴

The review should be reliable, meticulous, thorough, and objective, and its assessments should be substantiated.¹²⁵ The reasoning therein must be clear and precise, since the scientific achievements being assessed are intended to demonstrate scientific maturity.¹²⁶ It is rightly emphasised that reviews should be complete and

¹¹⁹ R. Łapa, *Język prawny w świetle analizy językoznawczej Wybrane zagadnienia składniowe*, Poznań, 2015, p. 47.

¹²⁰ B. Wróblewski, *Język prawny i prawniczy*, Kraków, 1948, p. 136.

¹²¹ M. Zieliński, 'Języki prawne i prawnicze', in: Pisarek W. (ed.), *Polszczyzna 2000. Orędzie o stanie języka na przełomie tysiącleci*, Kraków, 1999, pp. 63–64.

¹²² M. Mazur, '(Nie)recenzenci i (nie)recenzje', *Forum Akademickie*, 2017, No. 9.

¹²³ Ministerstwo Nauki i Szkolnictwa Wyższego, *Dobre praktyki...*, op. cit., pp. 11 and 16.

¹²⁴ G. Węgrzyn, 'Recenzenci i recenzje: kryzys recenzowania', *Debaty PAU*, 2016, Vol. III, p. 87.

¹²⁵ M. Gorynia, 'Recenzje...', op. cit., p. 18.

¹²⁶ P. Grzebyk, 'Warunki uzyskania...', op. cit., p. 78.

their assessments duly justified. Reviews that lack adequate justification, whether positive or negative, are improper.¹²⁷

It is rightly emphasised in the doctrine that a reviewer writing a positive review should answer the question whether the applicant for the award of the degree of *doktor habilitowany* offers a guarantee of reliability in conducting research, whether they do not commit substantive errors, whether they use legal terminology correctly, and whether they honestly present their achievements, as this is what they are expected to teach doctoral students. A review should be negative if, in the course of the proceedings, the applicant cannot properly describe their achievements, claims authorship of someone else's work, inflates the number of citations to validate their impact on science, fails to consult original sources and repeatedly quotes data from others without verifying it, is unable to assess the reliability of sources, and fails to consult foreign publications relevant to the research topic.¹²⁸

6. CONCLUSION

The review should end with a clearly expressed, unambiguous conclusion, i.e. it should be either positive or negative.

The review should conclude with an unequivocal statement that the scientific achievements of the applicant for the award of the degree of *doktor habilitowany* either do or do not constitute a significant contribution to the development of the discipline of legal sciences. Such a conclusion is a norm laid down in Article 221(8) LHES, which stipulates that reviewers assess *verba legis* 'whether the scientific achievements of the person applying for the award of the degree of *doktor habilitowany* meet the requirements laid down in Article 219(1)(2)'. The provision referred to requires the possession of scientific achievements constituting a significant contribution to the development of a specific discipline.

Therefore, a positive review should conclude with a statement that the person applying for the award of the degree of *doktor habilitowany* (mentioned by first name and surname) has scientific achievements, including a monograph published by a publishing house included in the list of the Ministry of Higher Education and Science (MHES), or a series of thematically related articles published in scientific journals or reviewed materials from international conferences included in the MHES list, constituting a significant contribution to the development of the discipline of legal sciences. Thus, these scientific achievements meet the requirements laid down in Article 219(1)(2) of the Act of 20 July 2018, Law on Higher Education and Science (Journal of Laws of 2024, item 1571, as amended).

There are no reasons for concluding the review with a motion to award the applicant the degree of *doktor habilitowany* in the field of social sciences – discipline of legal sciences, or to admit them to further stages of the proceedings for the conferment of the degree of *doktor habilitowany* in the field of social sciences –

¹²⁷ Rada Doskonałości Naukowej, *Recenzje w postępowaniach...*, op. cit., p. 6.

¹²⁸ P. Grzebyk, 'Warunki uzyskania...', op. cit., p. 71.

discipline of legal sciences. There are no normative grounds for such motions; reviewers are not entitled to do this, especially as they do not assess all aspects of the award of this degree, e.g. scientific activity at more than one higher education or scientific institution, in particular a foreign one (Article 219(1)(3) LHES).

A negative review should include a denial of this statement.

The conclusion should be consistent with the content of the review. In practice, an inconsistent review constitutes a significant problem.¹²⁹ As is rightly noted in the literature, the authors of such reviews seek to reconcile three goals: (1) to write a positive review; (2) to present the weak points of the reviewed work; (3) to distance themselves and make the first and second intentions at least minimally consistent. The conclusions of such reviews include the assessment that a given achievement 'minimally', 'moderately' or 'sufficiently' meets the statutory criteria, and the reviewer, being 'aware of some shortcomings' or 'hesitantly', requests the award of the degree.¹³⁰ Such practices, as is rightly emphasised in the literature, lead to the degradation of Polish science and to a further decline in its quality.¹³¹ It is particularly unacceptable to write a review consisting primarily of criticism but culminating in a positive conclusion.¹³²

7. REVIEW FORM

The statute does not specify the form of the review. Undoubtedly, it should be in writing, signed manually or electronically with the use of a qualified electronic or trusted signature. The review should not be perfunctory and, in terms of length, it should meet the standards accepted for a given type of procedure.¹³³

8. REVIEW DUE DATE

In accordance with Article 221(8) LHES, within eight weeks of the date of receipt of the application, reviewers shall assess whether the scientific achievements of the person applying for the degree of *doktor habilitowany* correspond to the requirements set out in Article 219(1)(2) and prepare the review. The above term is instructive, as there are no procedural consequences for exceeding it.¹³⁴

¹²⁹ For more see Ł. Remisiewicz, 'Niespójność recenzji a wynik postępowania habilitacyjnego. Próba analizy w dyscyplinie socjologia', *Nauka*, 2019, No. 4, pp. 109–127.

¹³⁰ *Ibidem*, p. 109.

¹³¹ A. Gliszczyńska-Grabias, K. Osajda, 'Kariera naukowa i finansowanie nauki z perspektywy młodych naukowców', *Nauka*, 2016, No. 3, p. 125.

¹³² Ministerstwo Nauki i Szkolnictwa Wyższego, *Dobre praktyki...*, op. cit., p. 16.

¹³³ *Ibidem*.

¹³⁴ Judgment of the Supreme Administrative Court of 12 July 2022, II OSK 1414/21, LEX no. 3421472; judgment of the Voivodeship Administrative Court in Warsaw of 8 March 2019, II SA/Wa 1004/18, LEX no. 2771139; judgment of the Voivodeship Administrative Court in Warsaw of 21 November 2014, II SA/Wa 108/14, LEX no. 1816212; judgment of the Voivodeship Administrative Court in Warsaw of 8 March 2019, II SA/Wa 1004/18, LEX no. 2771139.

9. CONCLUSIONS

1. Reviews in promotion proceedings, including those for the award of the degree of *doktor habilitowany*, are of key importance because they provide a substantive assessment of the scientific achievements of the candidate for the degree, which constitute essential material for the habilitation committee and the habilitation entity (scientific council, faculty council). Their importance stems from their substantive content, which is discussed by individuals having the highest scientific qualifications, i.e. holders of the degree of *doktor habilitowany* or the title of professor, as well as possessing current scientific achievements and a recognised reputation, including international recognition.
2. The subject of the review is the assessment of published scientific achievements indicated by an applicant for the award of the degree of *doktor habilitowany* in the context of a significant contribution to the development of a specific discipline of legal sciences or a branch of law. This concerns scientific achievements in the form of a scientific monograph or a series of thematically related articles published in scientific journals or reviewed materials from international conferences, as well as other articles, glosses, commentaries and fragments of the system of law.
3. A series of thematically related scientific articles should correspond in scientific value to a scholarly monograph, as Article 219(1)(2)(a) LHES lists it as an alternative to a monograph. This means that the compiled individual publications should present an original solution to a scientific problem and make a significant contribution to the development of the discipline of legal sciences. The considerations in all articles should focus on the same thesis, hypothesis or research hypotheses, as they must collectively constitute a scientific achievement that makes a significant contribution to the development of that discipline.
4. Scientific achievements that constitute a significant contribution to the development of the discipline of legal sciences are studies of an above-average substantive level, containing original solutions to a scientific problem.
5. The reviewer's task is not to assess whether an applicant for the degree of *doktor habilitowany* has met the requirements for its award and has demonstrated significant scientific activity carried out in more than one higher education or scientific institution, in particular a foreign one. The exclusion of this requirement results from the reference made in Article 221(8), specifying the subject of the review, to Article 219(1)(2) LHES, which contains the requirement of having scientific achievements that constitute a significant contribution to the development of a specific scientific discipline, while point (3) thereof, concerning scientific activity, has been omitted. This is an incorrect solution because the reviewer, as an eminent expert in the specific legal science or a branch of law to which the scientific activity of the applicant for the degree of *doktor habilitowany* relates, is fully qualified to assess the applicant's scientific activity as well.
6. The review should consist of the following parts: (1) introduction; (2) analysis and assessment; (3) conclusion or conclusions. Their clear indication makes the review more communicative.

The purpose of the introduction is to present the subject of the review, and its content should include general considerations regarding the scientific achievements being assessed.

The analysis and evaluation should include a formal assessment and a substantive assessment, including assessment of the choice of topic, the structure of the study, the scientific problem, the research objective, the research thesis, the research hypothesis, the validity of the research methods used, the significant contribution to the development of the discipline of legal sciences, completeness of the use of literature, formal aspect, language, and the correctness of footnotes.

The review should end with a clearly expressed, unambiguous conclusion, i.e. it should be either positive or negative. It should end with an unequivocal statement that the achievements of the applicant for the award of the degree of *doktor habilitowany* do or do not constitute a significant contribution to the development of the discipline of legal sciences.

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LEGAL ASPECTS OF PERFORMING AESTHETIC PROCEDURES

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ABSTRACT

The aim of this article is to analyse the concept of aesthetic services, while also highlighting the variety of terminology used to describe the activities performed in this field. The article also attempts to define the qualifications necessary to carry out aesthetic procedures, including the qualifications that should be held by physicians performing services related to the modification or supplementation of anatomical structures.

The purpose of addressing this issue is to present the scope of the problem and to indicate that regulatory gaps concerning aesthetic services contribute to the de-professionalising of medical profession, the absence of rules establishing principles governing interference with the human body, and an increased risk to individuals who undergo aesthetic procedures performed by persons from outside the medical community.

The discussion is limited to Polish law, due to the significant diversity of solutions regarding aesthetic medicine services in other countries. The analysis conducted leads to the conclusion that the lack of legal regulations concerning the classification of healthcare services, their identification with healthcare services, as well as the absence of provisions defining the qualifications for their performance result in conceptual and classification chaos. This lack of clarity prevents the identification of instances in which persons performing such procedures exceed their professional competences, due to the absence of regulations specifying a catalogue of persons authorised to undertake such activities. There is an urgent need to regulate this matter, not only by standardising the certification process for medical skills in the field of aesthetic and reconstructive medicine, but also by introducing rules defining the principles of performing aesthetic procedures by persons practising medical professions other than that of physician, as well as by persons who have no formal connection to healthcare.

Keywords: aesthetic services, aesthetic medicine, medical law, aesthetic procedures, beauticians' qualifications, cosmetologists' qualifications

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The concept of aesthetic services is often identified with aesthetic medicine, although the two are not synonymous. Aesthetic services are perceived as more or less invasive procedures, and their performance is most often associated with medical professions. The term 'aesthetic medicine' constitutes a kind of syncretism resulting from the merging of distinct elements, including activities performed by physicians despite the non-therapeutic nature of aesthetic procedures, as well as the lack of a formal and uniform educational process in the field of aesthetic medicine. The concept of 'aesthetic services' may well be replaced by the term 'aesthetic procedures', which not only fails to suggest their scope but also does not clearly define the qualifications necessary to perform them.

The above topic is widely discussed in legal literature, yet there are no clear and unambiguous regulations on these issues. This contributes to confusion over the cataloguing of aesthetic services and their classification, as well as to growing issues with clearly defining the qualifications and competences required to perform services aimed at improving, enhancing or altering people's appearance.

This article aims to analyse the concept of aesthetic services and also highlight the diverse meanings of activities performed within this type of service. Furthermore, the article sets out to determine the qualifications necessary to perform aesthetic services, including those aimed at modifying or supplementing anatomical structures.

The lack of clear legal regulations constitutes a starting point for arbitrarily classifying cosmetic procedures as aesthetic services and *vice versa*, as well as for equating services that merely aim to modify or improve appearance with healthcare services in the strict sense. Such legal uncertainty implies difficulty in defining which formal competences and education are necessary to provide aesthetic services. It further suggests that issues may arise in determining whether a person practising a profession other than a strictly medical one is exceeding their eligibility by undertaking aesthetic procedures that, due to their level of sophistication or the risk of negative consequences, should be performed, for example, by a physician. Moreover, even with regard to physicians, there are no regulations determining whether the provision of aesthetic services requires a specific medical specialisation, for example plastic surgery, or whether the mere possession of a licence to practise medicine is sufficient. This results in semantic and legal entropy, leading to aesthetic procedures being undertaken by individuals who lack appropriate medical qualifications or who do not practise medicine at all.

The article deliberately omits discussion of the rules of liability for performing aesthetic services without proper eligibility, because this issue goes beyond the scope of this already extensive work.

The analysis is based on legal regulations in force, the doctrine and case law pertaining to the issues discussed. The study makes use of a formal-dogmatic method, employing linguistic and systemic interpretation of the regulations, as well as an analysis of case law and the positions presented in the literature.

INTRODUCTION

'Aesthetic services' is a term encompassing a wide range of activities aimed at improving, enhancing or correcting appearance, or maintaining a desired appearance for as long as possible (so-called anti-ageing medicine). 'Anti-ageing' treatments were often performed in ancient Rome. The imperfections of beauty resulting from the ageing process played a more significant role in women's lives. Signs of ageing in men, such as grey hair and wrinkles, were perceived as assets symbolising wisdom and high social status.¹ In ancient Rome, beauty enhancement was defined as *venenum*² and *veneficium*,³ which identified magical means, medicines and poison, and the practice of witchcraft for medical and *quasi*-medical purposes unrelated to treatment, respectively.

The era of aesthetic and reconstructive surgery began in 1597, when the Italian physician Gaspare Tagliacozzi reconstructed a nose using skin flaps from a patient's shoulder.⁴ On 31 May 1916, the otolaryngologist Dr Harold Gilles successfully reconstructed the eyelids of a patient who had suffered extensive facial injury and the loss of his upper and lower eyelids during the Battle of Jutland, and transplanted a 'mask' formed from the patient's own skin.

In 1871, T. Fox described the use of a 20% phenol solution to lighten the skin.⁵ In 1882, P.G. Unna demonstrated the properties of the first chemical peels, including salicylic acid, resorcinol, phenol and trichloroacetic acid, which are still used for aesthetic purposes.⁶ In 1893, F. Neuber performed the first procedure involving autologous fat grafting to fill soft tissue.⁷ In 1895, the Austrian-German physician V. Czerny used fat tissue obtained from a lumbar lipoma to correct breast asymmetry resulting from tumour eradication.⁸ In 1889, R. Gersuny used liquid paraffin to inject breasts, but the results of his experiments proved to be disastrous.⁹ At the beginning

¹ W. Suder, 'Moda na zmarszczki w starożytnym Rzymie. Streszczenie', in: *Kosmetologia wczoraj, dziś i jutro. Materiały konferencyjne*, Wrocław, 2012.

² A. Johnson, P. Coleman-Norton, F. Bourne, *Ancient Roman Statutes*, Vol. II, Austin, 1961, p. 65. The meaning of the word *venenum* is explained by J. Ermann, *Strafprozess, öffentliches Interesse und private Strafverfolgung. Untersuchungen zum Strafrecht der römischen Republik*, Köln, 2000, pp. 48 et seq.

³ R. MacMullen, *Enemies of the Roman Order*, London, 1967, pp. 95–127.

⁴ P. Tomba, A. Viganò, P. Ruggieri, A. Gasbarrini, 'Gaspare Tagliacozzi, Pioneer of Plastic Surgery and the Spread of His Technique Throughout Europe in "De Curtorum Chirurgia per Insitionem"', *European Review for Medical and Pharmacological Sciences*, 2014, Vol. 18, No. 4, pp. 445–450.

⁵ V.M. Yokomizo, T.M. Benemond, C. Chaska, P. Benemond, 'Chemical Peels: Review and Practical Applications', *Surgical & Cosmetic Dermatology*, 2013, Vol. 5, No. 1, pp. 58–68.

⁶ N. Krueger, S. Luebberding, G. Sattler, C.W. Hanke, M. Alexiades-Armenakak, N. Sadick, 'The History of Aesthetic Medicine and Surgery', *Journal of Drugs in Dermatology*, 2013, Vol. 12, No. 7, pp. 737–742.

⁷ F. Neuber, 'Fettransplantation', *Verhandlungen der Deutschen Gesellschaft für Chirurgie*, 1893, Vol. 22, p. 66.

⁸ N. Anderson, 'Lawsuit Science: Lessons from the Silicone Breast Implant Controversy', *New York Law School Law Review*, 1997, Vol. 41, pp. 401–407.

⁹ W.G. Stevens, E.M. Hirsch, D.A. Stoker, R. Cohen, 'In Vitro Deflation of Pre-Filled Saline Breast Implants', *Plastic and Reconstructive Surgery*, 2006, Vol. 118, pp. 347–349.

of the 20th century, physicians began to explore other substances to help enlarge breasts. Surgical materials used included ivory, glass beads, caoutchouc, bovine cartilage, cotton, pieces of polyethylene, polyurethane sponge, silicone rubber and Teflon-silicone prostheses. In the 1950s, synthetic agents were widely used, including liquid silicone injected directly into breast tissue, which led to the development of fibromas and sclerosis requiring surgical treatment, including mastectomy.¹⁰

In 1929, the French surgeon Charles Dujarrier removed a lipoma from the calf of a dancer who wanted to improve the 'indecent appearance of her legs'. The procedure was performed with the use of a urological curette, and complications resulted in amputation of the limb.¹¹ In 1980, A. Fischer and G. Fischer performed the first liposuction procedure.¹² In the 1990s and at the end of the 20th century, aesthetic procedures became widespread and included wrinkle reduction with the use of botulinum toxin,¹³ wrinkle fillers with the use of hyaluronic acid,¹⁴ injectable lipolysis with phosphatidylcholine for fat reduction, and a combination of radiofrequency and pulsed magnetic fields.

Numerous definitions of aesthetic medicine coexist in the literature on the topic and among professionals involved in the provision of aesthetic services. It is generally accepted that aesthetic medicine is a component of so-called medical cosmetology.¹⁵

Aesthetic medicine is defined, *inter alia*, by G. Pfenninger and J. Fowler, who point out that 'it is the most rapidly developing field of medicine, whose main task is to use non-invasive methods for facial skin renewal. It combines safety, effectiveness and expected post-effects.'¹⁶ According to R. Śpiewak, aesthetic medicine is

'an element of medical cosmetology, which includes aesthetic dermatology, aesthetic dentistry, aesthetic surgery, and cosmetology. Its main goal is to create and improve physical attractiveness through the use of non-invasive methods. It strives to replace the subjective opinions of practitioners with unbiased measurements of the impact of a given aesthetic intervention on the client's attractiveness in the eyes of others.'¹⁷

¹⁰ J.H. Tanne, 'FDA Approves Silicone Breast Implants 14 Years After Their Withdrawal', *British Medical Journal*, 2006, Vol. 333, p. 1139.

¹¹ T.C. Flynn, W.P. Coleman, L.M. Field, J.A. Klein, C.W. Hanke, 'History of Liposuction', *Dermatologic Surgery*, 2000, Vol. 26, No. 6, pp. 515–520.

¹² G. Fischer, 'First Surgical Treatment For Modeling Body's Cellulite With Three 5 mm Incisions', *Bulletin of the International Academy of Cosmetic Surgery*, 1976, No. 3, p. 35.

¹³ A. Carruthers, J. Carruthers, 'Historia zastosowania toksyny botulinowej w celach kosmetycznych' in: Carruthers A., Carruthers J., Dover S.J., Alam M. (eds), *Toksyna botulinowa*, Polish edition: ed. by Ignaciuk A., transl. Ziarkiewicz, M., Wrocław, 2019, p. 15.

¹⁴ M. Olenius, 'The First Clinical Study Using a New Biodegradable Implant for the Treatment of Lips, Wrinkles, and Folds', *Aesthetic Plastic Surgery*, 1998, Vol. 22, No. 2, pp. 97–101.

¹⁵ R. Śpiewak, 'Estetologia medyczna, medycyna estetyczna, dermatologia estetyczna, chirurgia estetyczna, ginekologia estetyczna, stomatologia estetyczna – definicje i wzajemne relacje poszczególnych dziedzin', *Estetologia Medyczna i Kosmetologia*, 2012, Vol. 2, No. 3, pp. 70–71.

¹⁶ G. Fowler, J. Pfenninger, *Procedury zabiegowe i diagnostyczne w dermatologii i medycynie estetycznej*, Polish edition: ed. by Kaszuba A., transl. Bartkowiak R., Błaszczyna N., Gerlicz-Kowalczyk Z., Wrocław, 2012.

¹⁷ R. Śpiewak, 'Estetologia medyczna...', op. cit., pp. 69–71.

In turn, K. Napiwodzka Bulek emphasises that:

'Within aesthetic treatments, patients can select specific body parts for improvement. This allows them to achieve a perfect appearance. The spectrum of aesthetic treatments is constantly expanding with the use of new technologies to meet the needs of clients.'¹⁸

It is also pointed out in the literature that aesthetic medicine is one whose goal is not to cure, but merely to fulfil the wishes of persons undergoing such treatments. Therefore, aesthetic medicine is called wish-fulfilling medicine.¹⁹

DIFFERENTIATION OF THE CONCEPTS OF AESTHETIC PROCEDURES, MEDICAL PROCEDURES AND PRACTITIONER'S PROCEDURES

The terminology used to describe the activities that are, or may be, related to aesthetic services forms a chaotic catalogue. The use of significantly different terms to describe similar activities leads to the erroneous attribution of invasive features or increased risk to some activities, and may also diminish their significance and impact on the human body.

The most frequently used terms, often identified as synonyms, are discussed below. This is erroneous both as regards the object of the activity they describe and the scope of competences necessary to perform them.

AESTHETIC PROCEDURES

According to the Polish language dictionary, the word 'aesthetics' [*estetyka*] should be understood as 'a nice, tasteful appearance of something', 'a sense of beauty'.²⁰ In turn, the word 'procedure' [*czynność*] means 'the performance of something', 'the functioning, operation of something'.²¹ The synthesis of both words leads to the phrase 'the performance of something that aims at a nice appearance and a sense of beauty'.

It seems reasonable to assume that aesthetic procedures may be performed by anyone who has the necessary qualifications and skills. In this context, the catalogue of aesthetic procedures is really broad, as it should include basic, simple procedures such as cosmetic ones, body hair removal, permanent make-up, tattoos and piercing. Some of these procedures involve a violation of bodily integrity (e.g. piercing) or bodily integrity and permanent penetration into the body of a person undergoing it (e.g. tattooing), which implies the need to apply the principles of septic and aseptic

¹⁸ K. Napiwodzka-Bulek, 'Medycyna estetyczna – humanistyczne dążenie czy "enhancement"?', *Filozofia Publiczna i Edukacja Demokratyczna*, 2017, Vol. 6, No. 1, pp. 151–166.

¹⁹ C.E. Asscher, M. Schermer, 'Wish-Fulfilling Medicine in Practice: The Opinions and Arguments of Lay People', *Journal of Medical Ethics*, 2014, Vol. 40, No. 12, pp. 837–841.

²⁰ <https://sjp.pwn.pl/slowniki/estetyczna.html> (accessed: 23 December 2023).

²¹ <https://sjp.pwn.pl/szukaj/czynno%C5%9B%C4%87.html> (accessed: 23 December 2023).

techniques, and thus the use of necessary medical devices and medical sterilisation techniques.

Aesthetic procedures involving penetration into the human body or violating its integrity are often performed by beauticians, tattoo artists and permanent make-up (PMU) artists. The above-mentioned persons are not required to have medical education in order to perform aesthetic procedures, although the procedures they perform within these two professions involve not only violating bodily integrity but also penetrating the human body. In the author's opinion, the limits of the scope of eligibility to perform aesthetic procedures should be determined based on the subject-matter criterion, i.e. the scope (invasiveness and level of health risk) and the purpose of the procedures (corrective, appearance-enhancing, non-therapeutic but strictly medical in nature, and ultimately therapeutic ones).

MEDICAL PROCEDURE, THERAPEUTIC PROCEDURE, PRACTITIONER'S PROCEDURE, SURGICAL PROCEDURE

It is indicated in the literature²² that terminology is inconsistent when it comes to the explanation and interpretation of the terms 'medical procedure', 'therapeutic procedure' and 'practitioner's procedure'. The Act on the Professions of a Physician and a Dentist (hereinafter referred to as 'the APD'),²³ the Act on Patients' Rights and the Patients' Ombudsman,²⁴ and the Act on Healthcare Services Financed from Public Funds²⁵ use the term 'healthcare services'. In the Act: Criminal Code (hereinafter referred to as 'the CC'),²⁶ the legislator uses the term 'therapeutic procedure' (Article 192 CC) and 'practitioner's procedure' (Article 162 CC). In turn, the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Biomedicine uses the term 'medical intervention'.²⁷ The doctrine, on the other hand, uses the terms 'medical procedure',²⁸ 'therapeutic procedure', as well as 'medical service'.²⁹

A medical procedure, as the linguistic interpretation of the concept directly implies, aims to achieve a therapeutic goal, which constitutes an inherent component

²² R. Rejmaniak, 'Problemy interpretacyjne wybranych pojęć zawartych w art. 192 k.k.', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2012, No. 4, p. 68.

²³ Act on the Professions of a Physician and a Dentist of 5 December 1996, consolidated text, *Journal of Laws of 2024*, item 1287.

²⁴ Act on Patients' Rights and the Patients' Ombudsman of 6 November 2008, consolidated text, *Journal of Laws of 2024*, item 581.

²⁵ Act on Healthcare Services Financed from Public Funds of 27 August 2004, consolidated text, *Journal of Laws of 2024*, item 146.

²⁶ Act: Criminal Code of 6 June 1997, consolidated text, *Journal of Laws of 2025*, item 383.

²⁷ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Biomedicine adopted by the Council of Ministers on 19 November 1996; https://www.coe.int/t/dg3/healthbioethic/texts_and_documents/ETS164Polish.pdf (accessed: 29 December 2023).

²⁸ M. Świdowska, *Zgoda pacjenta na zabieg medyczny*, Toruń, 2007, pp. 17 et seq.

²⁹ I. Bernatek-Zagula, *Prawo pacjenta w Polsce do informacji medycznej*, Toruń, 2008, p. 68; M. Śliwka, *Prawo pacjenta w prawie polskim na tle prawnoporównawczym*, Toruń, 2008, p. 125.

of healthcare services in the strict sense. The purpose of a therapeutic procedure is to improve, enhance or maintain health, which is why this type of activity is classified as a therapeutic activity in the form of a procedure.³⁰ In turn, a therapeutic activity is any action undertaken on a patient at the stage of prevention, diagnosis, therapy and rehabilitation aimed at saving life and health, or reducing physical and mental suffering.³¹

Procedures may also be non-therapeutic in nature. They form a specific group of activities because their performance sometimes involves very complex and highly invasive procedures. However, they are not directly aimed at improving health, but only at an intervention designed to achieve an intended effect that may improve the health of another person or constitute the exercise of an individual's subjective rights, e.g. the right to family planning. Examples include, *inter alia*, abortion pursuant to the condition laid down in Article 4a(1)(3) of the Act on pregnancy termination³² or the collection of cells, tissues and organs from living donors for the benefit of other persons in accordance with the provisions of Chapter 3 of the Act on Transplantation.³³

In turn, a practitioner's activity should be identified with any activity undertaken with the use of well-known medical techniques and procedures targeted at the human body,³⁴ although it does not have to be invasive in nature or associated with an increased risk of adverse effects or complications. Practitioner's activities may include activities related to a physical examination and interview, as well as issuing prescriptions, certificates, decisions or opinions.³⁵

The term 'practitioner's procedure' merely defines the subjective criterion for performing the procedure by a person licensed to enter the medical profession.³⁶ This does not mean, however, that the practitioner's procedure must be directed towards a therapeutic goal related to a disease in the biological-medical sense. Practitioner's procedures may take the form of invasive procedures that violate the integrity of the human body, or procedures that penetrate the patient's body without violating its integrity. They may be solely aimed at improving or correcting a patient's appearance and performed solely on the basis of the subjective needs of the person undergoing the procedure.

The above considerations are intended to demonstrate that the terminology used in relation to procedures interfering with the human body is complex and heterogeneous. A procedure may be intended to achieve a therapeutic goal,

³⁰ P. Daniluk, 'Cel leczniczy w świetle poglądów doktryny prawa', *Prawo i Medycyna*, 2005, No. 2, p. 37.

³¹ Cf. P. Daniluk, 'O pojęciach "zabieg leczniczy" i "pacjent" w rozumieniu art. 192 § 1 k.k.', *Prawo i Medycyna*, 2011, No. 4, p. 66.

³² Act on Family Planning, Protection of the Human Foetus and Conditions for Pregnancy Termination of 7 January 1993, consolidated text, Journal of Laws of 2022, item 1575.

³³ Act on the Collection, Retention and Transplantation of Cells, Tissues and Organs of 1 July 2005, consolidated text, Journal of Laws of 2023, item 1185.

³⁴ M. Filar, *Lekarskie prawo karne*, Kraków, 2000, pp. 247–248.

³⁵ M. Boratyńska, P. Konieczniak, in: Boratyńska M., Konieczniak P., Zielińska E. (eds), *System Prawa Medycznego. Tom II. Część 1. Regulacja prawna czynności medycznych*, Warszawa, 2019, *passim*.

³⁶ S. Dubisz (ed.), *Uniwersalny słownik języka polskiego. Tom. 2: K–Ó*, Warszawa, 2003, p. 415.

a non-therapeutic goal, involve significant invasiveness or no violation of bodily integrity. If it is assumed that a procedure amounts to a form of intervention, it follows that the use of the term 'procedure' to describe aesthetic procedures is fully justified, regardless of the competence of the individuals who perform them.

SCOPE OF THE TERM 'AESTHETIC PROCEDURES'

The principles governing aesthetic procedures are not regulated by medical law. Similarly, there is no uniform case law specifying the catalogue of procedures that may be performed by healthcare professionals or other individuals. The judgment of the District Court in Olsztyn of 30 October 2015, case No. IX W 3057,³⁷ indicates that:

'The applicable legislation undoubtedly lacks a clear division as to which procedures may be performed by beauticians, which by cosmetologists, and which are reserved exclusively for physicians specialising in aesthetic medicine. The basic criterion for the division of eligibility to perform procedures is whether the dermal-epidermal junction is disrupted during their performance. It is beyond doubt that only physicians and nurses possess the appropriate qualifications and knowledge to perform subcutaneous injections. Another criterion is the invasiveness of the procedure itself.'

While the criterion of invasiveness would be justified, in the author's opinion the criterion of disruption of the dermal-epidermal junction does not deserve approval. Disruption of skin continuity is associated with many activities performed by, for example, beauticians, cosmetologists, as well as PMU artists, tattoo artists and piercers, which results from the specific nature of their activities. A consistent assumption that disruption of skin continuity requires that a person trained in medicine should perform the procedure would result in the mandatory performance of body piercing or tattooing procedures by such persons. Furthermore, in recognising the competence of physicians and nurses to perform procedures involving disruption of skin continuity, the court did not address the permissible scope of violation of bodily integrity, but only the justification for the violation itself by persons practising these professions.

The above-presented position is not rationally justified. Many medical professionals, including paramedics, have the right to break skin integrity, but the scope of these activities includes the ability to independently perform highly invasive and high-risk procedures, such as needle puncture.³⁸ Invasive procedures involving breaking skin integrity may also be performed by diagnosticians, as well as persons authorised to administer mandatory and recommended vaccinations,

³⁷ Judgment of the District Court in Olsztyn of 30 October 2015, case No. IX W 3057, LEX No. 1922700.

³⁸ Regulation of the Minister of Health of 22 June 2023 on medical rescue procedures and healthcare services other than medical rescue procedures that may be provided by paramedics, Journal of Laws of 2023, item 1180.

including school hygienists and pharmacists, to the extent applicable to COVID-19 vaccinations.³⁹

It is necessary to point out that the performance of medical procedures does not in general depend on the possession of special competences or the completion of specialist training by this group of professionals.

PRACTITIONER'S AESTHETIC PROCEDURES

Practitioner's non-therapeutic procedures, including aesthetic ones, may be performed by a person licensed to practise medicine and possessing the practical skills and qualifications to perform specific procedures. Based on the linguistic and literal interpretation of the term 'practitioner's procedure', it should be assumed that such procedures require basic medical knowledge, i.e. their performance requires knowledge of anatomical structures and physiological mechanisms governing the course of life functions. Physicians may perform practitioner's procedures regardless of their specialisation, and the location where they are performed depends directly on the specific nature of the procedures undertaken. It is necessary to emphasise that the word 'procedure' itself should not be associated with a high-risk activity, nor with specific conditions for its performance, including the need to use strictly defined tools, *modus operandi*, or facilities such as an operating theatre. Soft tissue fixation (e.g. skin suturing) with the use of basic medical instruments can be done by any physician in an outpatient setting, while the same procedure, if it is merely an integral part of a larger intervention (e.g. surgery), should be performed by a surgeon in an operating theatre.

The term 'surgical procedure' is distinct from the concept of a practitioner's procedure. It is used in Article 34(1) APD, where it is equated with intervention in the human body with the use of techniques and skills that require prior completion of strictly defined specialist training.

Although such a distinction is not made in Poland, in foreign literature surgical procedures, including aesthetic ones, unlike plastic and reconstructive surgery, are referred to as *surgery de fantasia* or *de caprice*.⁴⁰

When applying the terms 'surgical procedure' and 'practitioner's procedure' to aesthetic services, it should be pointed out that practitioner's procedures aimed at augmenting anatomical structures (e.g. face volumetry) may be performed by a physician or a dentist, and do not require a specific specialisation, such as plastic surgery or general surgery. In contrast, surgical procedures aimed at augmenting anatomical structures, e.g. breast implant placement for the purpose of breast augmentation, can only be performed by a physician specialised in plastic surgery.

When analysing the concepts of 'procedure' and 'operation', it is necessary to pay attention to the adjectives 'minimally invasive' and 'highly invasive', as well

³⁹ Article 21c(2)(2) of the Act on Combating Infections and Contagious Diseases in Humans of 5 December 2008, consolidated text, Journal of Laws of 2023, item 1284.

⁴⁰ P. Le Tourneau, L. Cadiet, *Droit de la responsabilité civile*, Paris, 2002, p. 508.

as 'invasive' and 'non-invasive', which frequently appear in conjunction with the aforementioned terms. The division into invasive and non-invasive procedures was presented in the literature by A. Buczyński and G. Henrykowska, who classified cosmetic procedures with the use of electromagnetic radiation among non-invasive procedures.⁴¹ The judgment of the Appellate Court in Katowice of 29 September 2015, case No. I ACa 408/15, emphasises that minimally invasive surgery may also involve cutting the body's integument and penetrating the spine, making an incision and removing tissue, as well as suturing wounds.⁴² In turn, the judgment of the Appellate Court in Szczecin of 11 December 2014, case No. I ACa 616/14, indicates that a sympathectomy procedure (severing the continuity of the nerves responsible for stimulating sweat secretion) performed using a video-assisted thoracoscopic method is minimally invasive.⁴³ Similarly, judgment of the Appellate Court in Łódź of 19 October 2017, case No. I ACa 281/17, mentions a minimally invasive method of aortic treatment in the form of puncture of the right femoral artery and implantation of a stent graft into the aorta to seal the rupture site.⁴⁴

Annex No. 1 to the Regulation of the Minister of Health on guaranteed services in the field of hospital treatment includes the following terms: invasive removal of a bone growth stimulator, invasive treatment of acute coronary syndromes, invasive cardiac diagnostics, performance of invasive electrotherapy procedures, invasive and non-invasive continuous blood pressure monitoring, and invasive electrophysiological tests.⁴⁵ Information available in the general media often refers to minimally invasive procedures, which, contrary to initial associations, are surgical procedures.⁴⁶ Examples include, *inter alia*, video-assisted thoracoscopic procedures and laparoscopic procedures, such as abdominal or inguinal hernia repair. Regardless of the terminology used, the scope of invasive procedures should not be determined by linguistic interpretation, but by the level of risk involved. Therefore, minimally invasive surgical procedures are not equivalent to micro-invasive procedures, which can be performed for aesthetic purposes, for example, by non-medical professionals. At the same time, high-risk procedures, such as pituitary tumour removal, can be performed with the use of an endoscope (a minimally invasive method), which does not preclude far-reaching and potentially dangerous complications.

In the author's opinion, the term 'procedure' should not be associated with an intervention the purpose of which determines its clear classification into the category of therapeutic or medical activities. As a result of the Act on Certain Medical Professions,

⁴¹ A. Buczyński, G. Henrykowska, in: Denys A. (ed.), *Zagrożenia zdrowia publicznego. Zdrowie człowieka a środowisko*, Warszawa, 2015, p. 233.

⁴² Judgment of the Appellate Court in Katowice of 29 September 2015, case No. I ACa 408/15, LEX No. 1927481.

⁴³ Judgment of the Appellate Court in Szczecin of 11 December 2014, case No. I ACa 616/14, LEX No. 1668686.

⁴⁴ Judgment of the Appellate Court in Łódź of 19 October 2017, case No. I ACa 281/17, LEX No. 2471788.

⁴⁵ Regulation of the Minister of Health of 22 January 2013 on guaranteed services within hospital treatment, Journal of Laws of 2023, item 870.

⁴⁶ <https://www.medtronic.com/covidien/pl-pl/patient-information/keyhole-mis-surgery-awareness.html> (accessed: 22 December 2023).

which entered into force on 26 March 2014 (hereinafter referred to as 'the AMP'),⁴⁷ the catalogue of medical professions has been significantly expanded. Persons practising medical professions, including massage technicians or dental assistants, may perform procedures the purpose and nature of which depend on their formal competences.

The concept of a procedure should be contrasted with that of aesthetic services, which can take the form of invasive, micro-invasive and non-invasive procedures. This requires an analysis of the qualifications and competences necessary to perform aesthetic services that involve increased risk and the nature of which involves the violation of bodily integrity or penetration into the human body. While aesthetic procedures that may be classified as healthcare services should be performed by persons having the theoretical and practical qualifications to perform them, activities aimed at improving or enhancing appearance may also be performed by persons who do not have formal qualifications, but have an appropriate level of skills and competences acquired in the process of practical education (annotation by JKC).

QUALIFICATIONS NECESSARY TO PROVIDE AESTHETIC SERVICES

The Presidium of the Supreme Medical Council (SMC) addressed the issue of qualifications necessary to perform aesthetic procedures in its position on the performance of procedures within the category of aesthetic medicine.⁴⁸ The cited document states that '(...) whether a given procedure in the field of aesthetic medicine constitutes a health service should be determined on a case-by-case basis (...).' In all invasive procedures in the field of aesthetic medicine, the component procedures that comprise them are medical procedures and, for the reasons stated below, are reserved for persons with appropriate competencies. The SMC Presidium indicated that the aesthetic procedures most frequently performed include injections involving the administration of botulinum toxin and pointed out that:

'(...) the Characteristics of Medical Products containing botulinum toxin indicates that it is intended for use in "patients" (not clients). Injections are also performed with the use of hyaluronic acid, which is classified as a medical product (...) Procedures with the use of hyaluronic acid-based fillers, which are among the safest procedures in aesthetic medicine, are not without the risk of complications, even such as vessel occlusion and associated necrosis, blindness or stroke, recently described in the literature.'

The Presidium of the Supreme Medical Council emphasises in its Position No. 6/14/P-VII that only physicians may administer medicinal and medical products applied in the field of aesthetic medicine, the use of which involves injections.⁴⁹

⁴⁷ Act on Certain Medical Professions of 17 August 2023, Journal of Laws of 2023, item 972, as amended.

⁴⁸ Position No. 48/21/P-VIII of the Presidium of the Supreme Medical Council of 15 April 2021 concerning eligibility to perform procedures within aesthetic medicine; https://nil.org.pl/uploaded_files/documents/doc_1618813489_ps048-21-viii.pdf (accessed: 22 June 2025).

⁴⁹ Position No. 6/14/P-VII of the Presidium of the Supreme Medical Council of 25 April 2014 supporting the position of the Polish Aesthetic and Anti-Ageing Medicine Association con-

It is indicated in the literature that only physicians should perform certain aesthetic procedures while non-medical professionals could perform those that are non-therapeutic in nature and minimally invasive.⁵⁰ In practice, physicians, dentists, nurses, midwives, as well as beauticians, cosmetologists and paramedics perform aesthetic procedures.

The performance of aesthetic procedures by beauticians is the most controversial issue. This profession is a type of service provider whose activity consists in beauty treatment.

'A beautician's work is individual and is performed independently based on one's knowledge, practical skills and professional declaration. A beautician's duties primarily include the performance of cosmetic treatments, such as cleansing, exfoliating and moisturising the skin of the face, neck and décolleté. The next group of treatments includes beauty and decorative treatments, and treatments with the use of physical factors, with particular emphasis on light, electricity, water, temperature and ultrasound (...).'⁵¹

Practising as a beautician does not require a university degree, but only the completion of a vocational school, technical school or post-secondary school, or the completion of qualification courses for this profession. A beautician's profession is a craft; therefore, the acquired qualifications may also be confirmed by journeyman or master examinations. In the course of their training, beauticians do not acquire medical knowledge necessary to perform invasive procedures associated with hypothetically high health risks or to manage adverse events related to the procedure performed.

The position on the lack of competence of beauticians to perform aesthetic procedures is highlighted in the judgment of the District Court in Gliwice of 6 November 2019, case No. VI Ka 581/19: 'No legal act in Poland indicates that skin disruption is the exclusive domain of a physician, as similar epidermal damage or skin disruption also occurs in tattoo, podiatry, piercing and permanent make-up studios'.⁵²

Doubts are also raised as to whether cosmetologists, whose education takes place at medical universities, have qualifications to perform aesthetic procedures.⁵³

cerning the performance of practitioner's aesthetic medicine procedures by persons who are not authorised to apply medical devices and products for this purpose. See <https://nil.org.pl/dla-lekarzy/prawo/medycyna-estetyczna/5032-stanowisko-prezydium-nrl> (accessed: 22 June 2025).

⁵⁰ R. Kubiak, in: Boratynska M., Konieczniak P. (eds), *System Prawa Medycznego. Tom II. Część 2. Regulacja prawna czynności medycznych*, Warszawa, 2019, p. 786.

⁵¹ https://psz.praca.gov.pl/web/urząd-pracy/rynek-pracy/bazy-danych/klasyfikacja-zawodow-i-specjalnosci/wyszukiwarka-opisow-zawodow/-/klasyfikacja_zawodow/zawod/514202 (accessed: 22 December 2023).

⁵² See judgment of the District Court in Gliwice of 6 November 2019, case No. VI Ka 581/19; [https://orzeczenia.gliwice.so.gov.pl/content/\\$N/151515000003006_VI_Ka_000581_2019_Uz_2019-11-06_001](https://orzeczenia.gliwice.so.gov.pl/content/$N/151515000003006_VI_Ka_000581_2019_Uz_2019-11-06_001) (accessed: 29 December 2023).

⁵³ See <https://rekrutacja.umed.lodz.pl/studia-w-jezyku-polskim/kosmetologia/> (accessed: 6 March 2026). In the description of the field of study, it is indicated that: 'Cosmetology is a dynamically developing field of knowledge with enormous market potential. The demand for advanced treatments that correct or restore beauty, eliminating unwanted skin lesions and other imperfections, is increasing year by year. To be able to practise as a cosmetologist, undertake studies that will allow you to acquire the necessary qualifications and skills. Become a professional'; <https://studia.uj.edu.pl/kierunki/wfarm/kosmetologia> (accessed: 6 March 2026). The description of the field emphasises that 'Cosmetology combines medical and pharmaceutical

The cosmetology curriculum includes subjects such as anatomy, physiology, pathophysiology, general chemistry, biochemistry, aesthetic cosmetology, pharmacology, clinical and procedural cosmetology, and clinical and procedural dermatology.⁵⁴ Even though cosmetology is not a medical profession, the educational process equips students with the formal knowledge necessary to perform procedures. It should be emphasised that for tax purposes, the occupation of a cosmetologist is identified with medical professions. The interpretation of the Tax Chamber in Bydgoszcz of 23 September 2011 indicates that:

‘Although the profession of a cosmetologist is not regulated by separate legal acts, the powers and scope of services provided indicate that a person who has acquired education in the field of cosmetology is a person entitled to provide healthcare services⁵⁵ and a person who has professional qualifications to provide healthcare services in the field of medicine.’⁵⁶

The District Court in Olsztyn addressed the issue of providing services related to the violation of bodily integrity in its judgment of 22 March 2016, case No. VII Ka 52/16,⁵⁷ concerning a beautician performing a procedure of injecting and subcutaneously administering hyaluronic acid into the tear duct of both eyes. The accused had completed training in aesthetic fillers, needle mesotherapy for the face and body, temporary wrinkle removal, and a course in hyaluronic acid injections. As a result of the procedure, the injured party suffered complications such as swollen eyes, intense tearing, large dark circles under the eyes and a fever. The Court did not find the beautician guilty, as she was charged with the offence specified in Article 58(1) APD. According to the Court, the procedure performed was not therapeutic in nature, but clearly related to the improvement of appearance. Therefore, the accused did not violate the rules laid down in Article 58 APD, which provides a penalty for providing healthcare services by persons lacking formal eligibility in this regard. Importantly, the Court did not negatively assess the competence of beauticians in performing aesthetic procedures, nor did it indicate that such procedures should be performed exclusively by medical professionals. Furthermore, the Court emphasised that the findings of the court of first instance are unacceptable insofar as they indicate that skin rupture is the sole domain of physicians (or nurses). This stems from the fact

sciences, as well as health and physical education sciences. Education in this field meets the needs of the dynamically developing cosmetics industry. (...) Currently, areas related to care and therapeutic cosmetology, as well as aesthetic medicine, are also very important in this industry. For this reason, cosmetology education is focused on developing a critical and knowledge-based approach to the new cosmetology services offer, where issues of protection, care and treatment of dermatological conditions are intensively intertwined.’

⁵⁴ <https://farmacja.umed.pl/wp-content/uploads/2021/05/Zalacznik-nr-11-kosmetologia-I-stopnia.pdf> (accessed: 22 September 2023).

⁵⁵ Parenthetically, it should be emphasised that the suggestion to recognise the cosmetologist profession as a medical one was first put forward around 1947. See I. Rudowska, *Kosmetyka lekarska*, Warszawa, 1957, p. 3.

⁵⁶ Individual interpretation of the Tax Chamber in Bydgoszcz of 23 September 2011, ITPP1/443-989/11.

⁵⁷ See judgment of the District Court in Olsztyn of 22 March 2016, case No. VII Ka 52/16, LEX No. 2022754.

that similar epidermal damage or skin rupture also takes place in services provided in tattoo, podiatry and permanent make-up studios.⁵⁸

At the time of the article's preparation, the Ministry of Health issued the Announcement concerning the performance of aesthetic and reconstructive medicine procedures.⁵⁹ The performance of aesthetic and reconstructive medicine procedures requires a prior physical examination and an interview with the patient, additional diagnostic tests, an assessment of the risks associated with the use of injectable medications and fillers, the exclusion of contraindications, the maintenance of medical records, proper management of medical waste, and the possession of the skills and authorisation necessary to implement treatment of the effects of complications.

The provisions of the Regulation of the Minister of Health of 13 June 2023 on the professional skills of physicians and dentists (Journal of Laws of 2023, item 1189) formalised aesthetic and reconstructive medicine as a certified professional skill of physicians and dentists. The regulations in force indicate that medical procedures within the scope of professional skills (including aesthetic and reconstructive medicine procedures) are healthcare services provided by physicians. Anyone who does not hold the professional qualifications of a physician is not authorised to perform aesthetic and reconstructive medicine procedures. Therefore, representatives of other medical professions, cosmetologists, beauticians and other individuals are not authorised to perform them, despite the fact that they hold certificates of completed training in any aesthetic medicine procedure. Certificates in the field of aesthetic and reconstructive medicine procedures obtained by unauthorised persons during training or courses only confirm the completion of such courses but do not authorise their holders to perform them, which is also stated in the position of the then merged Ministry of Education and Science.⁶⁰

The above-mentioned Announcement of the Ministry of Health is not mandatory due to its non-regulatory nature. The Announcement refers to aesthetic and reconstructive medicine, which, due to its very nature, and regardless of the position of the Ministry of Health, must be performed by physicians because of the therapeutic nature of these activities. The Announcement of the Ministry of Health does not address activities undertaken to improve or enhance appearance, the nature of which is not therapeutic in nature. It should be emphasised that the Announcement is not

⁵⁸ E. Kozak, 'Podanie kwasu hialuronowego przez osobę nieuprawnioną a odpowiedzialność karna. Glosa częściowo krytyczna do wyroku Sądu Okręgowego w Olsztynie z dnia 22 marca 2016 roku, sygn. VII Ka 52/16', *Roczniki Administracji i Prawa*, 2022, No. 1, pp. 255–266.

⁵⁹ Announcement of the Ministry of Health on the performance of aesthetic and reconstructive medicine procedures of 23 January 2026; see <https://www.gov.pl/attachment/aaade18c-c25a-412c-b78a-03fab33a1d88> (accessed: 6 March 2026).

⁶⁰ The Announcement of the Ministry of Health on the performance of aesthetic and restorative medicine procedures includes a list of procedures that may only be performed by a professional physician. These include procedures using: (a) botulinum toxin; (b) cross-linked hyaluronic acid (volumising, lifting, modelling); (c) polylactic acid; (d) calcium hydroxyapatite; (e) polycaprolactone; and (f) mesotherapy using non-cross-linked hyaluronic acid, amino acids, vitamins, polynucleotides, collagen, micro- and macroelements, peptides, enzymes, coenzymes and medications for the purposes of treatment, reconstruction, revitalisation and anti-ageing prevention; (g) platelet-rich plasma and fibrin procedures.

accompanied by any amendments to the regulations on the taxation of aesthetic and reconstructive medicine services, i.e. exemption from VAT due to their classification as healthcare services in the strict sense.

QUALIFICATIONS NECESSARY TO PROVIDE AESTHETIC SERVICES RELATED TO THE SUPPLEMENTATION AND MODIFICATION OF ANATOMICAL STRUCTURES

The level of qualifications necessary to provide aesthetic services with the use of medical devices intended to replace or modify anatomical structures, processes or physiological conditions deserves separate analysis. The scope of such procedures supports the claim that they should be performed by persons who have appropriate knowledge and skills. It is unclear whether procedures involving the supplementation or modification of anatomical structures can be performed by any physician regardless of their specialisation, or exclusively by physicians who have undergone 'specialist training in the procedures'. It is pointed out in the literature that the scope of procedures undertaken by physicians and dentists must correspond to their specialisation,⁶¹ yet there are different views on the matter.⁶²

Case law indicates that a physician's level of expertise is determined, *inter alia*, by specialisation, experience and qualifications. Providing medical services by someone who does not have specialist status is possible, but it is considered risky. If a physician undertakes such actions, they should ensure that they possess adequate knowledge and skills, inform patients of their status and, if in doubt, refer them to a specialist.⁶³ The District Courts in Słupsk, Poznań and Warsaw expressed similar views.⁶⁴

In turn, the Supreme Court ruling of 21 April 2017, case No. SDI 4/17, emphasises that:

'In a situation where there are justified reasons, a physician may expand the scope of tests and perform them even in areas in which he is not a specialist. This should not be considered to be an excess of medical competence. (...) However, there must be credible reasons for expanding the tests, and the medical procedures must be performed with due care, and in accordance with the current state of medical knowledge. Above all, the patient must be informed of the need for these tests and give his consent to them.'

⁶¹ Z.B. Gądzik, 'Glosa do postanowienia Sądu Najwyższego z 26.05.2021 r., sygn. I KK 23/21', *Ius Novum*, 2022, No. 4, pp. 177–188.

⁶² K. Zgryzek, in: Ogieńko L. (ed.), *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz*, Warszawa, 2015, p. 555.

⁶³ See the Supreme Court judgment of 10 February 2010, case No. V CSK 287/09, LEX No. 786561.

⁶⁴ See judgment of the District Court in Słupsk of 25 April 2022, case No. I C 1061/19, <https://orzeczenia.slupsk.so.gov.pl/> (accessed: 22 June 2025); judgment of the District Court in Poznań of 25 June 2021, case No. XIV C 1273/16, <https://www.saos.org.pl/judgments/444709> (accessed: 22 June 2025); judgment of the District Court in Warsaw of 3 December 2020, case No. I C 960/15, [https://orzeczenia.ms.gov.pl/details/\\$N/15450500000303_I_C_000960_2015_Uz_2020-12-23_001](https://orzeczenia.ms.gov.pl/details/$N/15450500000303_I_C_000960_2015_Uz_2020-12-23_001) (accessed: 22 June 2025).

The context of whether the person undertaking aesthetic procedures with the use of medical devices has received specialist training has not only theoretical but also practical significance, which results from the debate on the safety of medical devices. The Supreme Medical Council's position is that 'aesthetic procedures should only be performed by practitioners who have appropriate knowledge, skills and experience in performing them (...)'.⁶⁵ This position addresses general issues related to competences for performing aesthetic procedures. The phrase 'appropriate knowledge, skills and experience' refers only to the general rule that a physician owes a duty of care in the process of performing medical procedures.⁶⁶

In accordance with the content of the specialisation curriculum in the field of plastic surgery, the programme of the specialist module in plastic surgery for physicians who do not have the appropriate first or second degree specialisation or the title of specialist in the relevant field of medicine states that:⁶⁷

'The aim of specialist training in the specialist module is to acquire specific qualifications in the field of plastic surgery in the following scope: (...) aesthetic surgery (...) of (c) breasts: – implantation of breast prostheses, – sagging breasts, – inverted nipples, in compliance with modern medical knowledge.'

The content of the specialisation programme indicates that the aim of specialist training within the specialist module is also to acquire specific qualifications in the field of plastic surgery that enable, in compliance with modern medical knowledge, the provision of highly specialised medical and preventive services in the field of plastic, reconstructive and aesthetic surgery.

The literal wording of the specialist training programme clearly indicates that specialist competences acquired during plastic surgery specialisation are necessary for performing breast implant procedures, as well as when using flap techniques and tissue transplantation within the female breasts.⁶⁸ However, in many cases, plastic surgery specialisation is not required for the performance of procedures correcting anatomical structures. For example, gynaecologists may perform labiaplasty, hoodoplasty, hymenotomy or postpartum scar correction.⁶⁹ In addition

⁶⁵ See <https://nil.org.pl/dla-lekarzy/prawo/medycynaestetyczna/5296-propozycja-definicji-medycyny-estetycznej> (accessed: 29 December 2023).

⁶⁶ The duty of care constitutes the basic duty for persons practising the profession of a physician and a dentist. In accordance with Article 4 APD, 'Physicians are obliged to practise the profession in compliance with the recommendations of modern medical knowledge, available methods of disease prevention, diagnosis and treatment, pursuant to the principles of professional ethics and the duty of care'.

⁶⁷ <https://www.cmkp.edu.pl/wp-content/uploads/2023/03/0738-program-1-.pdf> (accessed: 28 December 2023).

⁶⁸ M. Noszczyk, *Medycyna piękności*, Warszawa, 2016, p. 213; U. Kalina-Prasznic, *Wpływ zmian społecznych, gospodarczych i ustrojowych na system prawa*, Wrocław, 2018, p. 54.

⁶⁹ In accordance with the curriculum of specialisation in obstetrics and gynaecology for physicians who do not have an adequate specialist status (this applies to physicians who started specialist training as a result of the qualification procedure in spring 2023), practical skills in gynaecology include, *inter alia*, performing plastic surgery of the anterior and posterior vaginal wall and perineum. See <https://www.cmkp.edu.pl/wp-content/uploads/2023/03/0724-program-1-.pdf> (accessed: 23 September 2023).

to surgical techniques, aesthetic gynaecology treatments also use CO₂ and Nd:YAG lasers, focused ultrasound HIFU, radiofrequency, IPL, hyaluronic acid, fat and platelet-rich plasma, and lifting threads.

Procedures aimed at modifying and supplementing the anatomical structure not involving the implantation of breast prostheses, the use of flap techniques or tissue transplantation may be performed as part of medical procedures by persons who do not specialise in plastic surgery or general surgery. Modification or supplementation of anatomical structures within the female breasts is possible with the use of non-surgical techniques, including the administration of preparations classified as medical devices, for example the modification of anatomical structures within the breast based on the medical device Aquafilling withdrawn from the market (later called Los Deline), which is classified as a Class III medical device.⁷⁰

In the ruling of 26 May 2021, case No. I KK 23/21,⁷¹ the Supreme Court expressed its opinion on the advisability of performing 'breast augmentation' procedures with the use of Aquafilling B by dentists. The Court emphasised that the guidelines for Aquafilling explicitly stated that only specialists who have relevant certificates and the necessary qualifications could administer it.

In accordance with the regulations in force, i.e. Article 2(2) APD, a dentist's area of practice includes the teeth, facial skeleton and adjacent areas. Given this limitation, a dentist is not qualified to operate outside this area. It is worth emphasising that the Aquafilling preparation, before its withdrawal from sale and use due to serious complications resulting from its application and due to the risk to the health and life of patients, was available in two versions: Aquafilling F (intended for use on the face) and Aquafilling B, used for 'filling' breasts and other body parts. The Supreme Court's ruling that breast augmentation procedures with the use of Aquafilling B cannot be performed by a dentist resulted from the need to perform a number of pre-procedural as well as post-procedural measures aimed at reducing health risks. The Supreme Court pointed out that prior to the Aquafilling procedure, a patient must undergo a series of tests: a complete blood count, AIDS, HBs Ag, WR test, an ECG, a blood clotting test, a urine test, as well as a breast USG or mammogram. The list of contraindications to the administration of this medical device is also extensive. Furthermore, the Supreme Court emphasised that breast augmentation with the use of the aforementioned preparation falls within the statutory definition of a health service due to its invasive nature and the requirements for its performance. At the same time, the Court emphasised that it expressed this position in full awareness of the lack of precise legal regulations regarding the performance of the so-called non-therapeutic aesthetic medicine procedures, and that the area in question requires urgent legislative intervention.

In conclusion, it should be emphasised that only physicians have the competence to perform procedures involving the administration of preparations supplementing

⁷⁰ '(...) Surgical invasive medical devices intended for short-term use are classified as Class IIa; however, they are classified as Class IIIa when they are intended (...) to produce biological effects or to be absorbed in whole or in part.' See Regulation of the Minister of Health on the method of classifying medical devices of 5 November 2010, Journal of Laws of 2010, No. 215, item 1416.

⁷¹ Supreme Court ruling of 26 May 2021, case No. I KK 23/21, LEX No. 3229514.

anatomical structures, and it is irrelevant whether they have completed specialisation in performing surgical procedures or are not specialists at all in the strict sense.

It should be noted, in this context, that the administration of a medical device to modify anatomical structures is a very common practice in aesthetic procedures, for example procedures aimed at performing facial volumetry, which involves the administration of a preparation (a medical device) without the use of surgical instruments, such as a cannula. Procedures to modify anatomical structures in the facial area are currently very common and are generally not associated with invasive procedures; however, this does not exclude the risk of adverse events. The lack of clear legal regulations, as well as the inappropriateness of using disruption of the epidermal barrier as a variable defining the list of persons authorised to perform specific types of procedures, means that aesthetic services involving the violation of bodily integrity and penetration into the human body can be performed, due to their non-therapeutic nature, not only by persons practising medical professions.

CONCLUSIONS

The legal regulations in force, the doctrine and case law⁷² do not indicate the classification of aesthetic activities, treatments and services within the category of healthcare services. The ambiguity of the nature of aesthetic services led the Supreme Medical Council to submit a proposal to amend the definition of healthcare services, in accordance with which healthcare services should be understood as:

'Actions aimed at preserving, saving, restoring or improving health, and other medical activities resulting from a treatment process, or separate provisions regulating the principles of their performance, as well as actions aimed at restoring or improving the physical or mental well-being and social functioning of a patient by means of changing their appearance, involving intervention in human tissue'.⁷³

The change of the definition would allow aesthetic services to be classified as part of the catalogue of healthcare services, which would also eliminate controversies over the eligibility to perform them.

However, it is necessary to point out that the concept of a healthcare service defined in Article 3(1)(10) of the Act on Therapeutic Activities⁷⁴ has not been

⁷² See, *inter alia*, the judgement of the Voivodeship Administrative Court in Warsaw of 30.05.2016, case No. VII SA/Wa 385/16, LEX no. 2113957; the ruling of the Supreme Administrative Court of 19.12.2012, case No. I FSK 259/12, <https://inforfk.pl/dok/tresc,NSA.2012.001.100583144,Wyrok-NSA-z-dnia-20-grudnia-2012-r-sygn-II-FSK-764-11.html>; the Supreme Court ruling of 26.05.2021, case No. I KK 23/21, <https://www.sn.pl/sites/orzecnictwo/orzeczenia3/i%20kk%2023-21.pdf>

⁷³ See D. Lesner, 'Medycyna estetyczna czeka na swoje prawo, a kontrowersji duzo', *Prawo.pl*, 20 March 2021; <https://www.prawo.pl/zdrowie/medycyna-estetycznabeda-zmiany-w-prawie-ale-kontrowersji-duzo,507050.html> (accessed: 8 December 2023).

⁷⁴ Act on Therapeutic Activities of 15 April 2011, consolidated text, Journal of Laws of 2025, item 450.

amended to date and therefore does not include elements concerning a change or modification of external appearance.

Regardless of the above, it is necessary to standardise the nomenclature of aesthetic services, procedures, invasive procedures and high-risk procedures. At the same time, it seems essential to clearly define which procedures can only be performed by persons practising medical professions and authorised to provide healthcare services, and which, due to their purpose, can be performed by persons who have acquired practical skills and qualifications that do not stem from traditional healthcare education.

An attempt to define the competences necessary to provide aesthetic and restorative medicine services in more detail was undertaken in the Regulation of the Minister of Health on the professional skills of physicians and dentists (hereinafter referred to as 'the RPSPD').⁷⁵ The aforementioned Regulation specifies the types and codes of professional skills in which physicians and dentists can obtain certificates of professional competence. The Regulation refers to 'aesthetic and restorative medicine' and 'lifestyle medicine'. Applying for a certificate of professional competence in the former area is possible for all persons licensed to practise medicine regardless of their specialisation, as well as those who have not completed any specialist training. A literal and teleological interpretation of the provisions of the RPSPD allows for the assumption that the qualifications necessary to perform aesthetic and restorative medicine procedures can be acquired by any physician or dentist regardless of their level of postgraduate training. However, this does not resolve issues related to determining which aesthetic procedures can be performed exclusively by physicians, nor does it define the concept of aesthetic services. Furthermore, the introduction of the term 'aesthetic and restorative medicine' suggests expanding the catalogue of procedures aimed at improving appearance to include reconstructive procedures, which are generally the domain of specialists.

Contrary to opinions common in the medical community, the Regulation does not prohibit the performance of aesthetic procedures by persons other than physicians, including those who are not directly involved in healthcare, but aims to unify the sources of knowledge and skills acquired by physicians and dentists in the field of services related to aesthetic and restorative procedures.

The issue of defining the concept of aesthetic services, clearly specifying the qualifications necessary to perform them, and establishing simple rules of responsibility for performing activities that require the use of strictly defined formal qualifications remains open. The lack of consistent and unambiguous legal regulations not only increases the risk for persons undergoing aesthetic procedures, but also results in an unregulated market and the syncretisation of services that, although associated with the possibility of significant risk, can currently be provided not only as healthcare services for patients but also as services for consumers.

⁷⁵ Regulation of the Minister of Health of 13 June 2023 on professional skills of physicians and dentists, *Journal of Laws of 2023*, item 1189.

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THE BAN ON VETERINARY SURGEONS' ADVERTISING IN POLAND AND EUROPEAN UNION LAW: AN ANALYSIS OF THE COMPLIANCE OF NATIONAL REGULATIONS WITH EU LAW

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ABSTRACT

The purpose of this article is to analyse the compliance of Polish regulations prohibiting veterinary surgeons from advertising with EU law, particularly Directive 2006/123/EC on services in the internal market and Directive 2000/31/EC on certain aspects of electronic commerce. Particular attention is given to the impact of this compliance (or lack thereof) on disciplinary proceedings against members of the profession. The analysis indicates that Polish regulations, including Article 29 of the Act on Veterinary Facilities and Resolution No. 116/2008/IV of the National Veterinary Council, violate the EU principle of the free movement of services, specifically the right of veterinary surgeons to use commercial communications. This non-compliance necessitates the application of the principle of the primacy of EU law, meaning that disciplinary courts should consider EU regulations as 'more lenient laws' within the meaning of Article 4 § 1 of the Penal Code. The findings highlight the need to align Polish regulations with EU standards, ensuring that veterinary surgeons can use permissible forms of promotion in a manner consistent with professional ethics and the protection of the public interest.

Keywords: veterinary surgeons' advertising, commercial communication, regulated professions, European Union law, disciplinary proceedings

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INTRODUCTION

The advertising by veterinary surgeons is regulated under Article 29 of the Act of 18 December 2003 on Animal Healthcare Facilities¹ (hereinafter referred to as ‘the AHA Act’) and Resolution No. 116/2008/IV of the National Veterinary Council of 12 December 2008 on detailed rules for the public dissemination of information concerning the scope and types of veterinary services provided, opening hours, and the address of an animal healthcare facility² (hereinafter referred to as ‘the Resolution No. 116/2008/IV’). These provisions prohibit advertising, while allowing the publication of information concerning the services offered, opening hours, and the facility’s address, provided that such information does not have the characteristics of advertising. At the same time, the National Veterinary Council has been authorised to establish detailed rules for the dissemination of such information. Previous research has identified discrepancies between the Polish prohibition on veterinary surgeons’ advertising (Article 29 AHA Act and Resolution No. 116/2008/IV) and EU legal regulations, in particular Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 2006, p. 36) and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (e-Commerce Directive) (OJ L 178, 2000, p. 1, as amended) (hereinafter referred to as ‘the Directive 2006/123/EC’ and ‘the Directive 2000/31/EC’, respectively).³

Under the European Union legal framework, the profession of veterinary surgeon, as a regulated profession, should have the right to use commercial communications. The concept of commercial communication, as defined in EU directives, is broad and encompasses both indirect promotion, such as public relations advertising, and direct promotion, such as personal selling.⁴ By imposing a ban on advertising in this

¹ Consolidated text: Journal of Laws of 2019, item 24.

² Resolution No. 116/2008/IV of the National Veterinary Council of 12 December 2008 on the detailed rules for the public dissemination of information on the scope and types of veterinary services provided, opening hours, and the address of an animal healthcare facility; https://vetpol.org.pl/wp-content/images/uchwaly/uchwaly_IV_kadencja/Uchwa%C5%82a_Nr_116_w_spr_szczeg%C3%B3lnych_zasad_podawania_do_publicznej_wiadomo%C5%9Bci_inf.o_zakresie_i_rodzajach%C5%9Bwiadczonej_us%C5%82ug_weter_godz_otwarcia_i_adresie_ZLZ.pdf (accessed: 29 January 2025).

³ P.F. Piesiewicz, ‘Prohibition of Advertising by Veterinary Surgeons in Light of EU Legal Regulations’, *Studia Iuridica*, 2025, Vol. 106.

⁴ CJEU judgment of 5 April 2011, *Société Fiduciaire Nationale d’Expertise Comptable v Ministre du Budget, des Comptes Publics et de la Fonction Publique*, Case C-119/09, EU:C:2011:208; CJEU judgment of 4 May 2017, *Criminal proceedings against Luc Vanderborght*, Case C-339/15, EU:C:2017:335; P.F. Piesiewicz, *Prawne i etyczne aspekty reklamy adwokackiej*, Warszawa, 2021, pp. 251–255; European Commission, Green Paper on Online Gambling in the Internal Market, COM(2011) 128 final, p. 3; [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2011\)0128/com_com\(2011\)0128_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0128/com_com(2011)0128_en.pdf) (accessed: 14 November 2024); Commercial Communications in the Internal Market. Green Paper from the Commission, COM(96) 192 final, 8 April 1996; https://europa.eu/documents/comm/green_papers/pdf/com96_192_1_en.pdf (accessed: 14 November 2024); Press release; https://europa.eu/rapid/press-release_IP-96-396_en.html (accessed: 14 November 2024), where it is indicated that the concept of ‘commercial communications’

profession, the current Polish regulations are incompatible with EU requirements, which mandate the removal of all total prohibitions on commercial communications and ensure their compliance with the professional rules governing the regulated profession, including professional ethics. This indicates the need to align Polish law with European standards, ensuring that the regulations both comply with contemporary EU requirements and respect the unique nature and ethical principles of professions of public trust. The research problem addressed in this analysis concerns the extent to which Polish regulations prohibiting veterinary surgeons from advertising comply with EU law, in particular Directive 2006/123/EC and Directive 2000/31/EC. The aim of the study is to assess the degree of this compliance and to analyse its impact on the application of Polish and EU law in disciplinary proceedings. The issue of how the lack of compliance between EU and national law affects disciplinary proceedings concerning regulated professions has not been extensively discussed in the literature to date.⁵ This research problem

includes 'advertising, direct marketing, sponsorship, sales promotion and public relations'; D. Lubasz, 'Informacja handlowa', in: Lubasz D., *Handel elektroniczny. Bariery prawne*, Warszawa, 2013; D. Lubasz, W. Chomiczewski, 'Komentarz do art. 2 ustawy o świadczeniu usług drogą elektroniczną', in: Lubasz D., Namysłowska M. (eds), *Świadczenie usług drogą elektroniczną oraz dostęp warunkowy. Komentarz do ustaw*, Warszawa, 2011; X. Konarski, *Komentarz do ustawy o świadczeniu usług drogą elektroniczną*, Warszawa, 2004, pp. 54–55; M. Świerczyński, 'Komentarz do art. 2', in: *Ustawa o świadczeniu usług drogą elektroniczną. Komentarz*, LEX, 2009; P. Litwiński, 'Zasady postępowania się informacją handlową', in: Podrecki P. (ed.), *Prawo Internetu*, 2nd ed., Warszawa, 2007; A. Frań-Adamek, 'Komentarz do art. 2', in: Frań-Adamek A., *Świadczenie usług drogą elektroniczną. Komentarz*, LEX, 2012.

⁵ J. Nowak-Kubiak, *Ustawa o działalności leczniczej. Komentarz do art. 14*, Warszawa, 2012, Legalis; F. Grzegorzczak, in: Dulińska M., Głab T., Potoczny M., Rytlewski T., Walasek-Walczak U., Grzegorzczak F. (eds), *Ustawa o działalności leczniczej. Komentarz*, Warszawa, 2013, Article 14; <https://sip.lex.pl/#/commentary/587537960/335400/grzegorzczak-filip-red-ustawa-o-dzialalnosc-leczniczej-komentarz?pit=2023-04-06&cm=URELATIONS> (accessed: 20 November 2024); T. Rek, in: Dercz M., Rek T., *Ustawa o działalności leczniczej. Komentarz*, 3rd ed., Warszawa, 2019, Article 14; <https://sip.lex.pl/#/commentary/587319041/586293/dercz-maciej-rek-tomasz-ustawa-o-dzialalnosc-leczniczej-komentarz-wyd-iii?pit=2023-04-06&cm=URELATIONS> (accessed: 20 November 2024); M. Paszkowska, 'Prawne ograniczenia reklamy świadczeniodawców rynku usług medycznych', *prawo.pl*, 26 June 2016; <https://sip.lex.pl/#/publication/469861290> (accessed: 20 November 2024); M. Barańska, 'Kontrowersje wokół wizerunku lekarza w reklamie – podejście normatywne', *Marketing i Rynek*, 2019, No. 4, pp. 42–43; S. Ostrowska, 'Kształtowanie wizerunku podmiotu działalności leczniczej', *Studia Ekonomiczne*, 2014, Vol. 185, pp. 142–150; I. Ozimek, J. Szlachciuk, A. Bobola, 'Reklama wybranych dóbr i usług w świetle regulacji prawnych i kodeksu etyki reklamy', *Studia Ekonomiczne*, 2017, Vol. 330, pp. 162–172; P. Piesiewicz, 'Zmiany w zakresie regulacji podawania do publicznej wiadomości informacji o zakresie i rodzajach udzielanych świadczeń zdrowotnych', in: Gardocka T., Maksymiuk T., Skrzypczak J. (eds), *Zdrowie: problem medyczny, prawny, polityczny*, Warszawa–Poznań, 2012, pp. 297–305; E. Zielińska, 'Ogłaszanie i reklamowanie się lekarzy', *Prawo i Medycyna*, 2000, No. 6–7, pp. 105–123; C.P. Kłak, 'Reklama w ustawie o działalności leczniczej', *Prawo i Medycyna*, 2017, Vol. 19, No. 3, pp. 8–22; C.P. Kłak, 'Informacja o zakresie i rodzajach udzielanych świadczeń zdrowotnych a reklama w świetle ustawy o działalności leczniczej', in: Namysłowska-Gabrysia B., Syroka-Marczewska K., Walczak-Zochowska A. (eds), *Prawo wobec problemów społecznych. Księga Jubileuszowa Profesora Eleonory Zielińskiej*, Warszawa, 2016; M. El-Hagin, 'Dyrektywa 2005/29/WE o nieuczciwych praktykach handlowych w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej – część I', *Studia Prawnicze*, 2021, Vol. 223, No. 1, pp. 123–169; P.F. Piesiewicz, 'Problematyka zakazu reklamowania się podmiotów leczniczych oraz lekarzy w świetle Kodeksu Etyki Lekarskiej, prawa krajowego oraz prawa unijnego', *Zeszyty Naukowe Uniwersytetu Jagiellońskiego*.

has led to the hypothesis that, in cases of conflict between national regulations and EU law, disciplinary courts should apply the provisions of Directive 2000/31/EC and Directive 2006/123/EC. Furthermore, if such a conflict is established, these directives should be regarded in disciplinary proceedings against veterinary surgeons as more lenient laws (*lex mitior*) within the meaning of Article 4 § 1 of the Polish Penal Code, meaning that they may directly influence the outcome of such proceedings. Given this research hypothesis, it was necessary to address a range of key questions. First and foremost, a key questions concerns how the removal of all total prohibitions on the use of commercial communications by veterinary surgeons should be interpreted in light of EU law. Another significant question is whether national regulations, such as Article 29 of the AHA Act and Resolution No. 116/2008/IV, are incompatible with Article 8 of Directive 2000/31/EC and Article 24 of Directive 2006/123/EC, and, if so, to what extent. Additionally, it is essential to analyse whether, in cases where EU law mandates the removal of such prohibitions, EU law takes precedence over national law.

THE REMOVAL OF ALL TOTAL PROHIBITIONS ON THE USE OF COMMERCIAL COMMUNICATIONS BY VETERINARY SURGEONS

Article 8 of Directive 2000/31/EC imposes an obligation on Member States to ensure that representatives of regulated professions, including veterinary surgeons, may use commercial communications. Similarly, Article 24(1) of Directive 2006/123/EC requires Member States to remove all total prohibitions on commercial communications by representatives of such professions. The essence of both provisions is similar – they aim to enable regulated professionals to use commercial communications, i.e. to promote goods, services, or their professional image, either directly or indirectly. However, the terms ‘use’ in Article 8 of Directive 2000/31/EC and ‘removal of all total prohibitions’ in Article 24(1) of Directive 2006/123/EC emphasise different aspects. The term ‘use’ refers to the right of regulated professionals to actively engage in commercial communication to promote their services. In contrast, ‘removal of all total prohibitions’ highlights the necessity of eliminating barriers that restrict access to such information, thereby granting professionals the right to use it freely. In practice, both provisions serve the same purpose: ensuring that representatives of regulated professions can use commercial communications within the framework of information society services. To comply with these obligations, Member States must repeal any national laws that impose a total prohibition on the use of commercial communications by such professionals, including veterinary surgeons. Instead, they must introduce legislation explicitly allowing such communications while imposing only proportionate and justified restrictions aligned with the specific nature of

Prace z Prawa Własności Intelektualnej, 2019, No. 3, pp. 122–144; P.F. Piesiewicz, *Prawne i etyczne aspekty reklamy adwokackiej*, Warszawa, 2021; P.F. Piesiewicz, W. Płowiec, ‘Reklama lekarzy po zmianach Kodeksu etyki lekarskiej z 2024 roku z perspektywy prawa Unii Europejskiej’, *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2024, Vol. 86, No. 3, pp. 35–55; <https://doi.org/10.14746/rpeis.2024.86.3.03> (accessed: 20 November 2024).

the veterinary profession.⁶ According to the Court of Justice of the European Union (CJEU), both the objective of Article 24 of Directive 2006/123/EC and its broader legal context indicate that the EU legislator intended not only to remove all total prohibitions on commercial communications by regulated professions in any form but also to eliminate restrictions on specific forms of commercial communication, as defined in Article 4(12) of Directive 2006/123/EC, in particular advertising, direct marketing, and sponsorship.⁷ In light of recital 100 of Directive 2006/123/EC, total prohibitions that contravene Article 24(1) of the Directive include professional rules that impose a blanket restriction on the dissemination of information about a service provider or their activities through one or more communication channels.⁸ The CJEU has also interpreted Article 8 of Directive 2000/31/EC in a similar manner, ruling that this Directive precludes national provisions that impose a general and total prohibition on all advertising, to the extent that such rules prohibit any form of commercial communication conveyed electronically, including via websites.⁹ Restrictions on the use of commercial communications by regulated professionals may only concern the content of such communications (see recital 100 of Directive 2006/123/EC) and must be introduced in accordance with the principles of proportionality, justification, and non-discrimination, as outlined in Article 24(2) of Directive 2006/123/EC. Additionally, such restrictions should follow the procedures set out in Chapter 6a of the Act of 22 December 2015 on the Principles of Recognition of Professional Qualifications Acquired in the Member States of the European Union,¹⁰ titled 'Ensuring the Proportionality, Justification, and Non-Discriminatory Nature of Regulatory Provisions and Requirements for the Provision of Cross-Border Services'.¹¹

NON-COMPLIANCE OF ARTICLE 29 OF THE AHA ACT AND RESOLUTION NO. 116/2008/IV WITH ARTICLE 8 OF DIRECTIVE 2000/31/EC AND ARTICLE 24 OF DIRECTIVE 2006/123/EC

Under Article 29(1) of the AHA Act, 'An animal healthcare facility may publicly provide information regarding the scope and types of veterinary services offered, its opening hours, and its address. The form and content of such information must

⁶ The adoption of the provisions must comply with the procedure outlined in Chapter 6a of the Recognition of Qualifications Act, titled 'Ensuring the Proportionality, Justification, and Non-Discriminatory Nature of Regulatory Provisions and Requirements for the Provision of Cross-Border Services'.

⁷ *Société Fiduciaire*, Case C-119/09, op. cit.

⁸ *Ibidem*.

⁹ *Vanderborght*, Case C-339/15, op. cit.

¹⁰ Consolidated text: Journal of Laws of 2023, item 334.

¹¹ It is worth noting that Poland officially joined the European Union in 2004, at a time when Directive 2000/31/EC was already in force. Meanwhile, Directive 2006/123/EC was required to be transposed by 28 December 2009 (Article 44). This means that with regard to the national prohibition on the use of commercial communications (advertising) online, such restrictions have not been in force since Poland's accession to the EU, while in all other respects, they ceased to apply as of 28 December 2009.

not have the characteristics of advertising.’ In turn, Article 29(2) states that ‘The National Veterinary Council shall determine, by way of resolution, the detailed rules for the public dissemination of the information referred to in paragraph 1, taking into account the scope of veterinary services provided by animal healthcare facilities.’ The detailed rules governing the public dissemination of information, as mentioned in Article 29(1) of the AHA Act, are set out in Resolution No. 116/2008/IV. This resolution specifies the format and content of information regarding the scope and types of veterinary services provided, opening hours, and the facility’s address. It defines such information as ‘public information’ and precisely outlines what data may be included. At the same time, § 3 of the resolution stipulates that ‘Public information may not: (1) have the characteristics of advertising; (2) contain pricing information.’

An analysis of Article 29 of the AHA Act and Resolution No. 116/2008/IV suggests that certain forms of promotion are permissible. Firstly, this follows from the fact that the statutory authority granted to the National Veterinary Council pertains exclusively to the public dissemination of information on the scope and types of veterinary services provided, the opening hours, and the facility’s address. This means that only publicly disseminated information must not have the characteristics of promotional (advertising) content. Secondly, the wording of Article 29 of the AHA Act and Resolution No. 116/2008/IV indicates that these provisions do not impose a general ban on all promotional activities but only restrict those that are public and constitute advertising as defined in these regulations. Other forms of promotion, such as direct contact or informational activities not addressed to a broad audience, are not subject to these restrictions. Promotional communication in the form of solicitation (direct client acquisition) may therefore be considered compatible with Article 29 of the AHA Act and Resolution No. 116/2008/IV.

A key question remains: does the limited ability of veterinary surgeons to promote their services comply with Article 8 of Directive 2000/31/EC and Article 24 of Directive 2006/123/EC? The answer to this question is negative. This issue must be interpreted in light of recital 100 of Directive 2006/123/EC, which states:

‘It is necessary to put an end to total prohibitions on commercial communications by the regulated professions, not by removing bans on the content of a commercial communication, but rather by removing those bans which, in a general way and for a given profession, forbid one or more forms of commercial communication, such as a ban on all advertising in one or more given media. As regards the content and methods of commercial communications, it is necessary to encourage professionals to draw up, in accordance with Community law, codes of conduct at Community level.’

As a result, the provisions of the directives, interpreted in accordance with recital 100 of Directive 2006/123/EC, require the removal of all total prohibitions on the use of commercial communications by veterinary surgeons. This means that national regulations must not impose restrictions that prevent professionals from using specific forms of commercial communication, such as advertising in certain media. However, this recital does not prohibit restrictions on the content of commercial communications, particularly where such restrictions are justified by public interest protection (as set out in Article 8 of Directive 2000/31/EC and Article 24(2) of

Directive 2006/123/EC). For the same reasons, Article 7 of the Code of Ethics for Veterinary Surgeons,¹² which states that 'a veterinary surgeon does not use and does not allow their name and professional title to be used to advertise goods and services', is also incompatible with EU law insofar as it prohibits veterinary surgeons from using their name and professional title to promote their services. This provision effectively prevents direct client solicitation (acquisition). The CJEU has ruled, with reference to recital 100 of Directive 2006/123/EC, that Member States may not impose professional rules that prohibit the dissemination of information about a service provider or their activities through one or more communication channels. Total bans – such as a total exclusion of advertising in online media, print media, or television – are inconsistent with the principle of the free movement of services. The CJEU's position regarding prohibitions on commercial communication is clear: national provisions introducing total prohibitions on commercial communications are incompatible with EU law. The CJEU has emphasised that the purpose of these directives is to ensure that members of regulated professions (such as veterinary surgeons) have the right to use various forms of commercial communication. This means that national regulations prohibiting advertising or other promotional activities conflict with EU law.¹³

THE PRINCIPLE OF THE PRIMACY OF EU LAW AND THE REMOVAL OF ALL TOTAL PROHIBITIONS ON COMMERCIAL COMMUNICATIONS

The principle of the primacy of European Union law, also referred to as the 'supremacy' of EU law, is based on the concept that, in the event of a conflict between EU law and the national legal system of a Member State, EU law prevails. If this were not the case, Member States could introduce national laws overriding primary or secondary EU legislation, rendering the implementation of EU policies unworkable.¹⁴ According to the case law of the Court of Justice of the European Union, the primacy of EU law applies to all national legal acts. In situations where EU law takes precedence over national law, national provisions are not automatically repealed or invalidated. Instead, competent authorities and national courts must refrain from applying such provisions for as long as the superior EU legal norms remain in force.¹⁵ It can therefore be concluded that disciplinary courts

¹² Resolution No. 3/2008/VII of the Extraordinary VII National Congress of Veterinary Surgeons of 26 January 2008 on the Adoption of the Code of Ethics for Veterinary Surgeons, including the Annex – Code of Ethics for Veterinary Surgeons; <https://vetpol.org.pl/wp-content/uploads/2023/09/Kodeks-etyki-lekarza-weterynarii.pdf> (accessed: 29 January 2025).

¹³ *Société Fiduciaire*, Case C-119/09, op. cit.

¹⁴ J. Lindeboom, 'Why EU Law Claims Supremacy', *Oxford Journal of Legal Studies*, 2018, Vol. 38, No. 2, pp. 328–356; <https://doi.org/10.1093/ojls/gqy008>; P. Eleftheriadis, 'The Primacy of EU Law: Interpretive, Not Structural', *European Papers*, 2023, Vol. 8, No. 3, pp. 1255–1291; <https://doi.org/10.15166/2499-8249/717>.

¹⁵ CJEU judgment of 15 July 1964, *Flaminio Costa v ENEL*, Case 6/64, EU:C:1964:66; CJEU judgment of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratss-*

of the veterinary profession, as entities applying EU law, qualify as national courts under EU law, given their statutory basis, permanence, jurisdictional authority, and application of legal provisions.¹⁶ When analysing Article 8 of Directive 2000/31/EC and Article 24 of Directive 2006/123/EC in light of the principle of the primacy of EU law, it follows that due to the conflict between national provisions, namely Article 29 of the AHA Act and Resolution No. 116/2008/IV, and the relevant EU legal provisions, EU law takes precedence. As a result, disciplinary courts must disregard conflicting national provisions and apply EU law directly in matters concerning the commercial communication rights of veterinary surgeons.

THE SCOPE OF THE TERM 'ACT' WITHIN THE MEANING OF ARTICLE 4 § 1 OF THE PENAL CODE AND SECONDARY LEGISLATION OF THE EUROPEAN UNION

Pursuant to Article 62(2) of the Act on Veterinary Surgeons, in matters not regulated by this Act, the provisions of Chapters I–III and Article 53 of the Penal Code shall apply accordingly to proceedings concerning professional liability. Chapter I of the Penal Code, titled 'General Principles of Criminal Liability', includes Article 4, which regulates the intertemporal application of criminal law. According to Article 4 § 1 of the Penal Code: 'If at the time of adjudication the law in force is other than that in force at the time of the commission of the offence, the new law shall be applied. However, the former law should be applied if it is more lenient to the perpetrator.' Therefore, it is necessary to analyse whether the term 'act' in Article 4 § 1 of the Penal Code encompasses secondary legislation of the European Union, including directives and regulations. This issue is closely related to the principle of the primacy of EU law.

Legal acts of the European Union are enumerated in Article 288 of the Treaty on the Functioning of the European Union (TFEU). These include regulations, directives, decisions, recommendations, and opinions. The institutions of the Union may adopt these legal acts only when empowered to do so by the provisions of the Treaties. The principle of conferral, delineating the limits of the Union's competences, is explicitly stated in Article 5(1) of the Treaty on European Union (TEU). Although

telle für Getreide und Futtermittel, Case 11/70, EU:C:1970:114; CJEU judgment of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case 106/77, EU:C:1978:49; CJEU judgment of 22 October 1998, *Ministero delle Finanze v INCOGE '90 SRL and others*, Case C-10/97, EU:C:1998:498; CJEU judgment of 19 June 1990, *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others*, Case C-213/89, EU:C:1990:257; CJEU judgment of 13 November 1990, *Marleasing SA v La Comercial Internacional de Alimentacion SA*, Case C-106/89, EU:C:1990:395; CJEU judgment of 19 November 2019, *A.K. v National Council of the Judiciary and C.P. and D.O. v Supreme Court*, Case C-585/18, EU:C:2019:982.

¹⁶ The issue of whether a disciplinary court of a self-governing body of a public trust profession qualifies as a national court within the meaning of EU law was resolved in the CJEU judgment of 13 January 2022, *Proceedings initiated by the Minister of Justice*, Case C-55/20, EU:C:2022:6. In this case, which concerned the disciplinary court of the Polish Bar, the CJEU expressly held that it meets the criteria of a national court within the meaning of EU law.

it has traditionally been assumed that criminal law matters were not directly regulated under the first pillar of the EU, this assertion – while partially accurate – does not exclude the possibility of the EU indirectly influencing the criminal legislation of Member States. Such influence may occur through changes in legal regulations that initially governed certain social relations but later became relevant to criminal law. For example, amendments in economic law introduced by the EU may have repercussions in criminal law. Member States are frequently required to harmonise their legal systems in accordance with EU directives, which may lead to modifications in national criminal legislation. Additionally, Member States may be obliged to apply secondary EU law directly, particularly in the form of regulations. It is important to emphasise that Article 4 § 1 of the Penal Code does not exclusively refer to criminal statutes, which necessitates a broad interpretation of the term 'act'.¹⁷ According to the prevailing case law on Article 4 § 1 of the Penal Code, the term 'act' should be interpreted broadly. The jurisprudence correctly highlights that this provision refers to the entire legal framework that, from a material law perspective, determines the criminal liability of an offender.¹⁸ As a result, legal scholarship does not question the view that EU regulations and directives may influence the scope of criminal liability and must be assessed within the framework of Article 4 § 1 of the Penal Code.¹⁹ This results, *inter alia*, from the obligation of Member States to 'not obstruct the direct effectiveness required with regard to regulations and other rules of Community law'. Furthermore, CJEU case law indicates that it is prohibited to use any legal techniques that would obscure the EU nature of a particular legal rule.²⁰ As a result, secondary EU law (regulations and directives) may be considered an 'act' within the meaning of Article 4 § 1 of the Penal Code. This interpretation is supported by both legal scholarship and case law. Additionally, this reasoning is grounded in the principle of the primacy of EU law.

Comparing these EU legal provisions with Article 29(1) and (2) AHA Act, in conjunction with § 3 of Resolution No. 116/2008/IV, which establishes a total prohibition on commercial communications, it must be concluded that EU directives may, in certain cases, be more lenient for the accused within the meaning of Article 4 § 1 of the Penal Code. This is because Article 8 of Directive 2000/31/EC and Article 24 of Directive 2006/123/EC explicitly require the removal of all total prohibitions on

¹⁷ S. Żółtek, in: Królikowski M., Zawłocki R. (eds), *Kodeks karny. Część ogólna. Komentarz*, 5th ed., Warszawa, 2021, Legalis.

¹⁸ Judgment of the Supreme Court of Poland of 1 July 2004, Case II KO 1/04, LEX No. 121666; judgment of the Supreme Court of Poland of 4 July 2001, Case V KKN 346/99, LEX No. 51679; judgment of the Supreme Court of Poland of 12 May 2021, Case II KK 47/21, LEX No. 3289295.

¹⁹ S. Żółtek, in: Królikowski M., Zawłocki R. (eds), *Kodeks karny...*, op. cit.; T. Sroka, in: Barczak-Oplustil A., Sroka T. (eds), *Odpowiedzialność publicznoprawna. System Prawa Medycznego*, Vol. 6, Warszawa, 2023, Legalis; J. Lachowski, in: Konarska-Wrzošek V. (ed.), *Kodeks karny. Komentarz*, 4th ed., Warszawa, 2023, LEX.

²⁰ CJEU judgment of 10 October 1973, *Fratelli Variola S.p.A.*, Case C-34/73, EU:C:1973:101; see also CJEU judgment of 21 December 2011, *Danske Svinproducenter*, Case C-316/10, EU:C:2011:863 and CJEU judgment of 14 October 2004, *Commission v Netherlands*, Case C-113/02, EU:C:2004:616; A. Nowak-Far, 'Podstawowe zasady stosowania prawa unijnego przez administrację publiczną', in: Jagielski J., Wierzbowski M. (eds), *Prawo administracyjne*, Warszawa, 2022, LEX.

commercial communications by veterinary surgeons. In practice, this means that a disciplinary court ruling on a case against a veterinary surgeon should, in accordance with Article 4 § 1 of the Penal Code, apply Article 8 of Directive 2000/31/EC and Article 24 of Directive 2006/123/EC as the more lenient acts. Consequently, a disciplinary court, applying Article 4 § 1 of the Penal Code and relying on the principle of the primacy of EU law, should disregard national provisions that contradict EU directives and base its ruling on EU law. This would lead to the acquittal of a veterinary surgeon charged with violating the advertising ban.

PROCEDURAL REQUIREMENTS FOR ADOPTING REGULATORY PROVISIONS ON COMMERCIAL COMMUNICATIONS

Member States may introduce certain restrictions on the use of commercial communications by regulated professions. However, the rules governing the use of commercial communications must comply with requirements concerning independence, dignity, professional integrity, and professional secrecy, while also being tailored to the specific nature of each profession, in accordance with EU law. At the same time, rules on professional conduct in relation to commercial communications must be non-discriminatory, justified by an overriding reason relating to the public interest, and proportionate, as stipulated in Article 24(2) of Directive 2006/123/EC. Consequently, their adoption must be preceded by the procedure set out in Chapter 6a of the Recognition of Qualifications Act, titled 'Ensuring the Proportionality, Justification, and Non-Discriminatory Nature of Regulatory Provisions and Requirements for the Provision of Cross-Border Services'. The principle of proportionality, derived from Article 5(4) of the Treaty on European Union (TEU), requires that measures taken by EU institutions and Member States must be appropriate for achieving the intended objective and must not exceed what is necessary to achieve it. In practice, this means that restrictions on individual rights must be appropriate to the objective pursued and must not be more restrictive than necessary (Article 50b of the Recognition of Qualifications Act).²¹ Restrictions on the freedoms of the internal market, including the use of commercial communications, may be justified if they serve to protect important public interests, such as public health, consumer protection, public order, or the protection of the environment or animals, among others.²² To ensure compliance with the principle

²¹ See also CJEU judgment of 30 November 1995, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Case C-55/94, EU:C:1995:411; CJEU judgment of 13 April 2000, *Proceedings initiated by Kjell Karlsson and others*, Case C-292/97, EU:C:2000:202.

²² CJEU judgment, Case C-55/94, op. cit.; CJEU judgment of 30 January 2018, *College van Burgemeester en Wethouders van de Gemeente Amersfoort v X BV and Visser Vastgoed Beleggingen BV v Raad van de Gemeente Appingedam*, Case C-360/15, EU:C:2018:44; CJEU judgment of 12 December 2013, *Ragn-Sells AS v Sillamäe Linnavalitsus*, Case C-292/12, EU:C:2013:820; CJEU judgment of 13 April 2000, *Proceedings initiated by Kjell Karlsson and others*, Case C-292/97, EU:C:2000:202; CJEU judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, Case C-64/16, EU:C:2018:117; CJEU judgment of 29 May 2018, *Liga van Moskeëen en Islamitische*

of non-discrimination, restrictions introduced by national regulations must not discriminate against veterinary surgeons from other EU Member States (Article 50d of the Recognition of Qualifications Act).²³ For regulatory provisions concerning commercial communications by veterinary surgeons to be considered compliant with the principles of proportionality, justification, and non-discrimination, as set out in Article 24(2) of Directive 2006/123/EC, they must meet two key requirements under Article 50f(1) and (2) of the Recognition of Qualifications Act: (1) A detailed justification for compliance with these principles must be provided in the explanatory memorandum of the draft legal act (or in an annex to the regulatory impact assessment), allowing for verification of this compliance, supported by qualitative data and, where possible, quantitative data; (2) mandatory consultations must be conducted on the draft legal act containing these provisions. Without fulfilling the procedural requirements set out in Chapter 6a of the Recognition of Qualifications Act, provisions on commercial communications (advertising) cannot be considered compliant with the principles of proportionality, justification, and non-discrimination. It is worth noting that both the Bar Association and the National Chamber of Legal Advisers, after completing the required procedure, have recently adopted new regulations allowing advertising for legal professions.²⁴ The veterinary profession itself has also acknowledged the need for legislative amendments.²⁵

SUMMARY

Both Article 29 of the AHA Act and Resolution No. 116/2008/IV violate the EU principle of the free movement of services and the right of regulated professions to use commercial communications. These provisions restrict the promotion of veterinary services, allowing only the public dissemination of strictly limited information, such as the facility's address, opening hours, and the scope of services provided. As demonstrated above, the source of this inconsistency lies in Article 8 of Directive 2000/31/EC and Article 24 of Directive 2006/123/EC, which explicitly

Organisaties Provincie Antwerpen VZW and others v Vlaams Gewest, Case C-426/16, EU:C:2018:335; CJEU judgment of 29 July 2024, *Asociación para la Conservación y Estudio del Lobo Ibérico (ASCEL) v Administración de la Comunidad de Castilla y León*, Case C-436/22, EU:C:2024:655.

²³ See CJEU judgment of 19 January 2010, *Küçükdeveci v Swedex GmbH & Co KG*, Case C-555/07, EU:C:2010:21.

²⁴ The Supreme Bar Council (NRA) has removed all total prohibitions on commercial communications by advocates, cf. <https://www.adwokatura.pl/z-zycia-nra/nra-zniosla-calkowitezakazy-korzystania-z-informacji-handlowych-przez-adwokatow/> (accessed: 29 January 2025); *Zmiany w Kodeksie Etyki Adwokackiej w zakresie reklamy – pełna dokumentacja*; <https://www.adwokatura.pl/z-zycia-nra/zmiany-w-kodeksie-etyki-adwokackiej-w-zakresie-reklamy-pelna-dokumentacja/> (accessed: 29 January 2025).

²⁵ W. Hildebrand, 'Materiały na XXI Okręgowy Zjazd Sprawozdawczy Lekarzy Wet. DIL-Wet. Sprawozdanie Prezesa z działalności Rady DIL-Wet. VII kadencji za rok 2018', *Biuletyn DIL-Wet.*, 2019, Vol. 29, No. 1 (113), p. 7; https://mail.dilwet.pl/images/Biuletyn_2019_1kw_kolor.pdf (accessed: 16 February 2026); A. Zalesińska, 'Interpretacje zapisów Kodeksu Etyki Lekarza Weterynarii (tezy)', *Biuletyn DIL-Wet.*, 2019, 29, No. 1 (113), p. 58; https://mail.dilwet.pl/images/Biuletyn_2019_1kw_kolor.pdf (accessed: 16 February 2026).

require Member States to ensure that representatives of regulated professions can use commercial communications. EU law not only recognises advertising as an integral part of service activities but also mandates the elimination of all total prohibitions on its use. In contrast, Polish regulations completely prohibit veterinary surgeons from advertising, thereby violating these provisions and creating a situation in which national restrictions conflict with the overriding provisions of EU law. This inconsistency has far-reaching consequences, particularly in disciplinary proceedings. In light of the principle of the primacy of EU law, Polish provisions prohibiting veterinary surgeons from advertising should not be applied if they contradict EU regulations. In practice, this means that disciplinary courts should take into account the provisions of Directives 2006/123/EC and 2000/31/EC as the more lenient acts within the meaning of Article 4 § 1 of the Penal Code, which may lead to the acquittal of veterinary surgeons accused of violating the advertising ban. According to the interpretation of the CJEU, advertising bans cannot encompass all forms of commercial communication, especially when such restrictions are disproportionate and do not serve overriding public interests, such as health protection or professional ethics. Ultimately, this analysis has shown that Polish regulations currently in force do not meet EU legal standards and require adjustment in order to comply with EU law. The total prohibition on veterinary advertising under Polish law should be replaced with regulations allowing advertising in a manner consistent with professional ethical principles.

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AWAITING THE EUROPEAN COURT OF HUMAN RIGHTS' JUDGMENT ON PUSHBACKS ON THE BORDER WITH BELARUS

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ABSTRACT

This article reconstructs and critically assesses the evolution of the European Court of Human Rights' case law on the contemporary 'migration crisis'. It aims to predict the Court's upcoming ruling on pushbacks on the border with Belarus. The Grand Chamber, the largest adjudicating formation, will render a judgment in three applications against Poland, Lithuania and Latvia. Two previous key cases – *Khlaifia and Others v. Italy*, and *N.D. and N.T. v. Spain* – were heard first by a seven-judge Chamber and then by the Grand Chamber. The judgments reached different conclusions: the Chambers found a violation of the provisions of the European Convention on Human Rights, while the Grand Chamber found no violation. The Grand Chamber's rulings have reshaped the Convention's legal standards, particularly regarding the prohibition of collective expulsions. These standards will be applied to the three cases concerning pushbacks on the border with Belarus.

Keywords: migrants, pushbacks, European Court of Human Rights, European Convention on Human Rights, prohibition of collective expulsions

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INTRODUCTION

The situation on the Polish-Belarusian border has been stirring up emotions not only of a legal nature, although fortunately these are now less intense. The events have also led to several legal proceedings. This study will focus solely on the applications filed by several migrants to the European Court of Human Rights (hereinafter referred to as 'the Court' or 'ECtHR') under the European Convention on Human Rights (hereinafter referred to as 'the Convention').¹ Importantly, and worth emphasising, these applications were filed not only against Poland,² but also against Lithuania and Latvia.³ This indicates similarity of events at the border between the three countries and Belarus, as well as the identity of the legal issues underlying the applications.

Despite this similarity, the applications filed against the three countries were not joined for simultaneous hearing.⁴ However, they are being heard in parallel and, most importantly, by the Grand Chamber, the largest adjudicating formation of the Court (17 judges). The seven-member Chambers initially entrusted with the examination of the applications decided to relinquish their jurisdiction due to the emergence of a serious legal question concerning the interpretation of the Convention (Article 30). This procedural decision should be assessed unequivocally positively. Previously, in two cases crucial to shaping the Convention standard in the area of contemporary migration, judgments were first rendered by a Chamber and then – following a successful request for referral lodged by the State – the case was re-examined by the Grand Chamber.⁵ These two cases, which will be reconstructed in this article, resulted in different ECtHR rulings. First, the Chambers found that the Convention had been violated, and then the Grand Chamber formations ruled in favour of the States. This difference may illustrate several issues. First, the uncertainty of the Convention legal standard, especially when that standard, in the absence of sufficiently developed earlier case law, is still being shaped. Second, one may speak of the hastiness of the first ruling (the Chamber), in which the new phenomena and circumstances accompanying contemporary migration were not adequately taken into account. Third, we may be witnessing a radical shift in the legal paradigm related to the rights and guarantees enjoyed by migrants. I will address these three issues in this paper. Furthermore, I will formulate a hypothesis

¹ ETC No. 5, as amended. The full name of the treaty is the European Convention for the Protection of Human Rights and Fundamental Freedoms.

² *R.A. and Others v. Poland*, application no. 42120/21.

³ *C.O.C.G. and Others v. Lithuania*, application no. 17764/22, and *H.M.M. and Others v. Latvia*, application no. 42165/21, respectively.

⁴ It is allowed by Rule 42(1) of the Rules of the Court, which also applies to proceedings before the Grand Chamber (Rule 71(1)). However, it was decided that three cases would be heard concurrently by identical judicial panels (Rule 42(2)).

⁵ Under the Convention framework, there is no 'right of appeal'. However, a party to proceedings concluded by a Chamber judgment may request referral of the case to the Grand Chamber. The decision is issued by a panel of five judges of the Court and is very rarely positive. The panel accepts the referral request if the case raises a serious question affecting the interpretation or application of the Convention or a serious issue of general importance (Article 43).

regarding the likely conclusion of the Court's forthcoming ruling on pushbacks at the border with Belarus. The Grand Chamber is expected to deliver its judgments in early 2026.

In my introductory remarks, I will highlight one further issue. The fundamental legal instrument concerning migrants is the Geneva Convention of 28 July 1951 relating to the legal status of refugees (the Geneva Convention of 1951),⁶ subsequently amended by the New York Protocol of 1967.⁷ It refers to a specific, yet crucial, category of migrants, namely refugees, i.e. individuals residing outside their country of origin and having a well-founded fear of persecution in that country due to race, religion, nationality, membership of a particular social group, or political views. The current phenomenon of mass migration is not exclusively, or even primarily, related to individuals fleeing persecution. Most often, people move for economic reasons, escaping poverty and seeking a better life. This process of 'non-refugee migration' will intensify. Moreover, assuming negative scenarios related to climate change, it may be assumed that a new category of climate migrants (refugees) will emerge.⁸

The Court does not, of course, apply the provisions of the 1951 Geneva Convention. However, it does refer to this instrument of international law when considering applications based on the provisions of the European Convention. Certain Convention guarantees also exist for migrants who do not meet the criteria for asylum or other forms of international protection.

CASE OF *KHLAIFIA AND OTHERS V. ITALY*⁹

The application was filed by three Tunisian citizens who, following the events dubbed the 'Arab Spring', arrived on the Italian island of Lampedusa in September 2011. They were detained in a centre for foreigners that was overcrowded and lacked adequate sleeping and food facilities. Water was available only through external connections, and the toilets were neither locked nor cleaned. The centre was guarded by the police. Two days later, a riot broke out and the centre was set on fire. Following these events, the refugees were first transferred to a stadium and then to ships anchored in the roadstead of Palermo, Sicily. The applicants claimed that conditions on the ships were also poor: they could only stay in the restaurant

⁶ United Nations Treaty Series, Vol. 189, No. 2545. As many as 146 states are parties to the Convention (as of 1 September 2025).

⁷ United Nations Treaty Series, Vol. 606, No. 8791. As many as 147 states are parties to the Protocol (as of 1 September 2025).

⁸ On the need for a new treaty addressing not only refugees but also displaced or fleeing persons, see, for example, J.I. Goldenziel, 'Displaced: A Proposal for International Law to Protect Refugees, Migrants, and States', *Berkeley Journal of International Law*, 2017, Vol. 35, No. 1; A.I. Schoenholtz, 'The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century', *Chicago Journal of International Law*, 2015, Vol. 16, No. 1; S. Leszczuk, 'The Definition and the Issue of Climate Refugees in the Light of International Law', *Eastern European Journal of Transnational Relations*, 2021, Vol. 5, No. 1.

⁹ Application no. 16483/12, Chamber judgment of 1 September 2015, judgment of the Grand Chamber of 15 December 2016.

area, where makeshift beds were set up overnight. Long lines formed in front of the toilets. Foreigners were allowed a few minutes each day to go to the balconies. They also claimed that they were insulted by police officers. After several days, the refugees were transferred to Palermo, where the Tunisian consul identified each person. All Tunisians were then deported to their homeland. This expedited and simplified procedure was provided for in the Italian–Tunisian agreement signed on 5 April 2011. The deportees could file an appeal to the court within 60 days, but this did not suspend the immediate implementation of the decision.

In their application to the Court, the Tunisians raised several allegations. The first concerned ill-treatment both during their stay at the refugee centre in Lampedusa and on ships anchored in Palermo. In considering this allegation, the Chamber noted the exceptional situation on the small island of Lampedusa – over 55,000 people arrived there illegally in 2011. This must have placed an enormous burden on the Italian authorities, not only at the local level. However, even such exceptional circumstances do not absolve the State from fulfilling the fundamental obligation enshrined in Article 3, which prohibits ill-treatment. The conditions in the centre in Lampedusa, even though the applicants stayed there for only a few days, did not meet the standard required by the Convention, especially considering the specific situation of individuals who, exposed to numerous dangers, undertook the sea crossing. On the other hand, the refugees were provided with the required standard of care while on the ships in Palermo.

The other two allegations concerned the right to personal liberty and security (Article 5) and the prohibition of collective expulsion of aliens (Article 4 of Protocol No. 4 to the Convention).¹⁰ The first allegation was analysed from several legal perspectives. Primarily, the applicants argued that they had been forcibly deprived of their liberty by being placed in a closed detention centre in Lampedusa and on ships in Palermo. Therefore, this was not – as the Italian authorities claimed – merely a ‘transfer’ after being rescued at sea to a place where the refugees were to be provided with assistance and care. In such a situation, the deprivation of liberty must meet one of the purposes expressly set out in Article 5(1) of the Convention. These include the lawful arrest or detention of an individual in order to prevent their illegal entry into the territory of a State, or deprivation of liberty when deportation or extradition proceedings are pending against the individual. The Court was prepared to accept that this purpose was applicable in the case at hand. However, in such case, individual decisions regarding deprivation of liberty are necessary. This deprivation of liberty was not short-term and was not limited to episodic identification of the individual and the provision of assistance after being intercepted at sea (in which case Article 5 would not apply to such ‘*ad hoc*’ or ‘episodic’ detention), but lasted approximately 20 days in total. Such detention lacked a legal basis in Italian law. Nor did the agreement between Italy and Tunisia provide such a basis, as its content was unknown to the refugees and it

¹⁰ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 46.

did not contain the required safeguards against arbitrary action by the authorities. Therefore, there was a violation of Article 5(1).

The Court also examined whether the detained person had been informed promptly and in a language they understood of the reasons for their detention and the charges brought against them (Article 5(2)). The official documents provided to the refugees referred only to their illegal entry into Italian territory and the refusal of entry. They did not refer in any way to the reasons for their deprivation of liberty. This led to another violation of Article 5. Finally, applicable provisions state that every detained or arrested person has the right to appeal to a court in order to obtain a review of the decision taken against them and to secure their release if the deprivation of liberty is unlawful (Article 5(4)). However, since there were no individual decisions regarding deprivation of liberty, nothing could be challenged before a court. This situation therefore constituted another violation of Article 5.

The Court also had to address the allegation of a violation of the prohibition of collective expulsion of foreigners. As a rule, the adoption by State authorities of identical decisions regarding foreigners does not constitute a violation of Article 4 of Protocol No. 4, if such decisions are individual in nature and were preceded by consideration of the circumstances of each case (each person's situation). However, the procedure was limited solely to establishing the identity of individual refugees under the simplified procedure provided for in the Italian–Tunisian Agreement, with the participation of the Tunisian consul, which then served as the basis for the deportation decisions. This procedure, which did not involve obtaining information about the refugees' individual situation, did not meet the requirements of the Convention.

The Chamber further found that Italy had violated Article 13 of the Convention, which requires the existence of an effective remedy to protect the rights and freedoms guaranteed by the Convention. Such a remedy – in the context of the prohibition of ill-treatment (Article 3) and the prohibition of collective expulsion (Article 4 of Protocol No. 4) – did not exist in Italian law.

The multiple violations of the Convention found by the Court led to an award of €10,000 to each of the applicants as just satisfaction (Article 41). This is a considerable sum, but fully understandable in light of existing Strasbourg case law. If the judges find that fundamental Convention guarantees – namely the prohibition of ill-treatment and the right to personal liberty – have been violated, this entails awarding the applicants amounts that are not merely symbolic.

While the Chamber's judgment was unanimous in the part concerning the right to personal liberty (violation of Article 5 in all its aspects) and the conditions on board the ships in Palermo (no violation of Article 3), the judges were divided in their assessment of the other allegations. Two judges – András Sajó of Hungary and Nebojša Vučinić of Montenegro – disagreed with the conclusions regarding the degrading treatment of refugees resulting from the conditions at the Lampedusa detention centre (Article 3) and the violation of the prohibition of collective expulsion of foreigners. The judgment in this part was therefore delivered by a majority of five votes to two. The dissenting judges expressed their reasons for disagreement in a separate opinion appended to the judgment. They pointed out that the short-term (four days) poor conditions in Lampedusa did not reach the minimum threshold

of severity necessary to constitute degrading treatment. The applicants were young people; in the centre they had freedom of movement and access to food and sanitary facilities. It should also be noted that the Italian authorities were confronted with an exceptional and grave humanitarian crisis. This circumstance must be adequately taken into account when analysing the allegations. In the context of the prohibition of collective expulsion of foreigners, it was noted that in previously decided cases the Court had been rigorous in its analysis, which resulted in only four previous findings of a violation of Article 4 of Protocol No. 4. This rigorous approach corresponded with the position adopted in public international law. In its case law, the Court therefore linked collective expulsions of foreigners either to their national or ethnic affiliation (foreigners were deported on the basis of that affiliation)¹¹ or to the failure of national authorities to establish the identity of the persons subject to expulsion.¹² However, in the judgment relating to the Tunisians' allegations, the understanding of collective expulsions was broadened. Meanwhile, the Italian authorities were entitled, also due to the scale of migration, to limit themselves to establishing a person's identity, the fact of illegal entry into Italy, and that they came from a so-called safe country. A further individualised analysis of each case was therefore not necessary. Two judges also voted against awarding the applicants the just satisfaction granted by the Court; in this part of the judgment, a third judge (the Belgian Paul Lemmens) joined them, criticising what he considered to be a particularly high amount of compensation. The decision in this section was therefore reached by a narrow majority of four votes to three.

The seven-member Chamber's judgment in the *Khlaifia* case did not become final, as the Italian Government's request for referral of the case to the Grand Chamber was granted (decision of 1 February 2016). The Grand Chamber's judgment, delivered on 15 December 2016, was unanimous on almost all points.¹³

The Chamber's earlier conclusion of three violations of Article 5 was upheld, due to the lack of a legal basis in Italian law for the arrest and subsequent detention (Article 5(1)), the lack of prompt and comprehensible information on the reasons for the arrest and the charges (Article 5(2)), and the lack of a right of appeal to a court (Article 5(4)).

¹¹ Judgment of the ECtHR of 5 February 2002, *Čonka v. Belgium*, application no. 51564/99, ECHR 2002-I (deportation of Roma), and judgment of the Grand Chamber of the ECtHR of 3 July 2014, *Georgia v. Russia (No. 1)*, application no. 13255/07, ECHR 2014 (deportation of Georgians).

¹² Judgment of the Grand Chamber of the ECtHR of 23 February 2012, *Hirsi Jamaa and Others v. Italy*, application no. 27765/09, ECHR 2012-II, and judgment of the ECtHR of 21 October 2014, *Sharifi and Others v. Italy and Greece*, application no. 16643/09.

¹³ In a concurring opinion, Judge Dmitriy Dedov emphasised, however, that the reason for his vote in favour of finding a violation of Article 5 lay the shortcomings of Italian law. If Italy had not disputed the deprivation of personal liberty, it would have been difficult to expect that, given the mass influx of migrants, all legal procedures could be completed within a short period (48 hours), especially since the migrants themselves showed no willingness to cooperate with the competent authorities and were even ready to take violent action. The Russian judge accepted that the migrants themselves had placed themselves in an 'illegal situation' and that the State was fully entitled to take steps to defend its borders. For that reason, he subsequently voted against awarding the applicants just satisfaction.

In the section concerning the prohibition of ill-treatment (Article 3), the Grand Chamber unanimously ruled that the conditions on board the ships moored in the port of Palermo did not give rise to a finding of a violation of Article 3. The Chamber had previously assessed the situation in the same way. However, the Grand Chamber did not uphold the Chamber's conclusion that the conditions at the Lampedusa centre could be classified as degrading treatment contrary to Article 3. The Grand Chamber began by analysing the situation in Lampedusa, which in 2011 received more than 51,000 refugees. It disagreed with the applicants' position that the circumstances of the events could not be described as exceptional. The judges noted that it was understandable that persons rescued at sea were transported to the nearest place where basic care could be provided.

Although conditions at the centre were insufficient and could raise many concerns, they should be assessed in the context of the specific migration situation. The migration centre was overcrowded, and the migrants were forced to stay and sleep in rooms with many people; access to bathrooms and toilets was difficult. However, the migrants could move freely within the centre, shop, use telephones, seek medical assistance, which they received, and contact lawyers and humanitarian workers. Therefore, the conditions cannot be compared to prison conditions. Furthermore, even though the applicants had endured a difficult and dangerous sea crossing, they were young men aged between 23 and 28 who did not suffer from any illnesses or medical conditions. It should also be noted that their stay in the centre lasted three to four days. Therefore, in the judges' opinion, the circumstances of their stay in the centre did not reach the minimum threshold of severity required for a violation of Article 3.

Regarding the allegation concerning the prohibition of collective expulsion, the Italian authorities first raised a preliminary objection that the domestic procedure applied consisted of 'refusal of entry combined with removal', and therefore Article 4 of Protocol No. 4 did not apply. The Grand Chamber rejected this position, pointing out that expulsion should be understood as an act imputable to a State, consisting of the removal of an individual from the territory of that State.¹⁴ This was the nature of the actions undertaken against the applicants. It therefore remained to be determined whether the expulsions were collective in nature.

The judges noted that the applicants (and other migrants) had been identified twice. First, they were fingerprinted and photographed during their stay at the centre and on the ships. Later, the identification was carried out by the Tunisian consul before the applicants boarded their flights to Tunisia. However, the applicants argued that Article 4 of Protocol No. 4 required something more – namely an individual interview with each migrant, during which the individual's situation and reasons for arrival would be identified and assessed. The Grand Chamber disagreed with this view. It indicated that it was sufficient for the foreigner to be provided with a 'genuine and effective' opportunity to independently (on his or

¹⁴ In this context, reference was made to the definition of expulsion developed in 2014 by the UN International Law Commission in the Draft Articles on the Expulsion of Aliens. The text of the Draft Articles was noted by the UN General Assembly in Resolution A/RES/69/119 (10 December 2014).

her own initiative) present the reasons for remaining in the country in which they had found themselves. The applicants had this opportunity during their several-day (9–11 days) stay in Italy – they could approach numerous social workers and centre officials and could also raise their concerns during contacts with the consul.¹⁵ The judges noted that some individuals raised asylum or international protection issues and remained in Italy. At the same time, it was of no importance to the Grand Chamber that the expulsion decisions consisted of identical formulas of only a few sentences and that a large number of people were expelled on the same day. It was indicated that this was a consequence of the migrants' failure to raise grounds relating to asylum, refugee status, or other forms of protection. No such grounds were identified during the proceedings before the Court. Only one judge out of seventeen (the Cypriot judge Georgios A. Serghides) voted that the prohibition of collective expulsion had been violated.¹⁶

Finally, the judgment addressed the issue of the lack of an effective remedy (Article 13), analysed in connection with allegations of ill-treatment and collective expulsion. The Court acknowledged that Italian law lacked a legal remedy available to migrants who considered that they had been subjected to degrading and inhuman treatment (such as the conditions in the detention centre in Lampedusa and on the ships in Palermo). On this point, the Grand Chamber agreed with the position adopted earlier by the Chamber. However, it disagreed with the assessment that Italian law lacked an effective remedy to defend against collective expulsion. An interlocutory appeal against a deportation decision could be lodged with a court. However, the applicants argued that Article 13 requires that such an appeal have suspensive effect on the execution of the decision. The Grand Chamber disagreed with this position. It indicated that suspensive effect is necessary when an individual alleges that deportation would expose him or her to a risk of death or ill-treatment in the country to which they are being returned, but not when an allegation of collective expulsion is made.

The violations of Articles 5 and 13 of the Convention (in conjunction with Article 3) resulted in the applicants being awarded €2,500 each in just satisfaction. They also received €15,000 for legal expenses and costs.

The *Khlatifa* judgment is crucial for defining the Convention standard relating to legal guarantees for migrants.¹⁷ Both the Chamber and the Grand Chamber indicated that the prohibition of ill-treatment contained in Article 3 is absolute and applies in all situations, including those of a crisis or humanitarian disaster. However, unlike the Chamber, seventeen judges found that the context of mass

¹⁵ The Grand Chamber's reasoning largely echoes the conclusions of András Sajó and Nebojša Vučinić, the dissenting judges in the earlier Chamber judgment.

¹⁶ See also the critical assessment of this part of the judgment by J.I. Goldenziel in her comments on the judgment published in *American Journal of International Law*, 2018, Vol. 112, No. 2. She notes that the judgment may erode procedural guarantees for individuals.

¹⁷ Several organisations and entities joined the proceedings before the Grand Chamber (Coordination Française pour le droit d'asile, the Centre for Human Rights and Legal Pluralism of McGill University, the AIRE Centre, and the European Council on Refugees and Exiles), attempting to convince the 17 judges to uphold the protective standard of the Chamber judgment. However, the Grand Chamber decided differently.

migration has a significant impact on the assessment of the actions and omissions of public authorities. Hence, the Grand Chamber found that there had been no violation of Article 3. It also ruled, again departing from the conclusion contained in the Chamber judgment, which had established far-reaching requirements for individualised analysis at the national level before deciding to deport a foreigner, that there had been no violation of the prohibition of collective expulsions (Article 4 of Protocol No. 4).¹⁸ Finally, there is a clear indication that an appeal to a court against a decision challenged by a foreigner as inconsistent with the prohibition of collective expulsions does not need to have suspensive effect in order to be considered an effective remedy.

CASE OF *N.D. AND N.T. V. SPAIN*¹⁹

The applicants were a Malian national and an Ivorian citizen who, together with a large group of other individuals, made several attempts to enter Melilla illegally, a Spanish enclave in Africa bordering Morocco. To do so, they had to overcome a multi-stage barrier constructed at the border. During one attempt (in August 2014), they managed to reach the top of the last section of the barrier adjacent to Spanish territory. After sitting on this structure for several hours, they agreed to descend to the ground using ladders provided by Spanish Guardia Civil officers. The migrants were then handed over to the Moroccan side. In late 2014, both applicants managed to reach Melilla, where they were detained. They were subsequently issued deportation orders. The first applicant was deported to Mali after the expulsion decision became final and the refusal to grant international protection had also become final. The final deportation order against the second applicant could not be enforced because he had gone into hiding after being released from the deportation centre, and his whereabouts were unknown.

The Court first had to ascertain whether, during their attempt to cross the border in August 2014, the applicants could be considered persons subject to the jurisdiction of the Spanish State within the meaning of Article 1 of the Convention. The Chamber found it unnecessary to determine whether the two migrants were expelled after entering Spanish territory or whether they were turned away at the border. Another crucial factor was that the applicants, who had come under

¹⁸ Another 'critical difference' in the approach of the Chamber and the Grand Chamber should also be noted. For the former, interstate agreements, such as the agreement between Italy and Tunisia establishing a simplified expulsion procedure, proved irrelevant. An individualised analysis of each person's situation was therefore essential. Had this standard later been upheld by the 17 judges, it would have had enormous consequences. At the European Council summit held on 17–18 March 2016, agreements were reached with Turkey to stem the wave of refugees flowing into the European Union. Refugees would be returned (transferred) to Turkey, where procedures would be carried out to verify whether a given individual met the refugee criteria. This relieves EU Member States of the need to conduct an individualised analysis of the situation of individual migrants. The Grand Chamber's position means that such agreements will not be challenged in Strasbourg.

¹⁹ Applications nos. 8675/15 and 8697/15, Chamber judgment of 3 October 2017, judgment of the Grand Chamber of 13 February 2020.

the 'constant and exclusive' control of Spanish services, were removed and returned to Morocco against their will. This constituted an expulsion within the meaning of Article 4 of Protocol No. 4. It was also necessary to determine whether this expulsion could be classified as collective for the purposes of the Convention. In this context, the judges indicated that to provide a positive answer it was sufficient that the applicants had acted as part of a group of approximately 75–80 individuals, against whom the border guards had applied 'a general measure consisting in containing and repelling the migrants' attempts to cross the border illegally' (para. 107). Directing action against a group of individuals, regardless of how this action was implemented against particular individuals (discouraging migrants from approaching the barrier, stopping them on the Moroccan side of the last section of the barrier, or allowing them to descend on the Spanish side and immediately handing them over to Moroccan border guards), was sufficient for the applicants' expulsion to be regarded as collective. The collective nature of the action is determined not by its repetition, but by its context. Therefore, even if the applicants had been the only members of the group who managed to reach the top of the last section of the fence and stand on its Spanish side, the conduct of the Spanish authorities would still have been collective in nature. Since the action thus classified was not accompanied by any procedures or formal decisions, Article 4 of Protocol No. 4 was violated. The Chamber reached this conclusion unanimously. Similarly, a violation of Article 13 was found, namely the lack of an effective remedy concerning the prohibition of collective expulsions. The applicants were also awarded €5,000 each in respect of non-pecuniary damage.²⁰

Spain successfully convinced the five-judge panel that the case should be referred to the Grand Chamber. Following this decision, a number of entities joined or continued to participate in the proceedings as third parties: the governments of Belgium, France, and Italy, the Council of Europe Commissioner for Human Rights, the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the Spanish Commission for Assistance to Refugees, the Centre for Advice on Individual Rights in Europe, Amnesty International, the European Council on Refugees and Exiles, the International Commission of Jurists, and the Dutch Refugee Council.

During the Grand Chamber proceedings, Spain argued that the applicants had failed to prove that they were among the group of persons attempting to enter the Spanish enclave. In response to this preliminary objection, the Court noted that the individuals detained and immediately handed over to Moroccan border guards had not been identified in any way by the Guardia Civil officers. Therefore, other evidence corresponding to the circumstances of the incident should be used. It is sufficient that the applicants, by describing the attempted border crossing, presented *prima facie* evidence of their participation in that attempt. The fact of the collective attempt to cross the border was not disputed.

²⁰ Only the Russian judge Dmitriy Dedov, in a dissenting opinion, found that the Chamber should have confined itself to finding a violation of the Convention without awarding financial compensation.

Of much greater significance for the admissibility of the application was the objection under Article 1 of the Convention. Spain argued that although the events occurred on its territory, the multi-stage barriers constituted a so-called 'operational border' and were constructed to prevent the unauthorised entry of foreigners. After introducing this border control system, Spain claimed that the scope of its 'jurisdiction' began only beyond the police line as part of 'measures against persons who [had] crossed the border illegally' within the meaning of Article 13 of the Schengen Borders Code.²¹ In other words, the jurisdiction of the Spanish State was said to begin only when migrants had crossed all three fences constituting the border control system and, in addition, had passed the police line. Only from that point was Spain bound by the Convention's obligation to identify individuals and the procedural guarantees applicable to expulsion procedures. Adopting a different approach, according to Spain, would have led to a humanitarian crisis of grave proportions. The applicants maintained, however, that the events had occurred on Spanish territory, and the barriers themselves were also located there. A State's jurisdiction covers its entire territory, and there can be no exceptions or derogations from this principle.

Three states supported Spain's position. France considered that the exercise of jurisdiction presupposes a certain degree of 'effectiveness and continuity'. A form of control confined to a brief, limited intervention in the context of action to defend the country's land borders and return migrants at the border could not give rise to extraterritorial application of the Convention. The Italian Government argued similarly, emphasising the lack of stay, which alone would justify the application of the so-called Return Directive (concerning individuals who entered the country illegally).²² Belgium emphasised that the actions of the Spanish authorities were connected exclusively with the surveillance and control of the border. It cannot be assumed that individuals who found themselves at the border are entitled to cross it illegally and that the State is obligated to admit them. The positions of the states were opposed by non-governmental organisations and UN agencies participating in the proceedings. In their opinion, the actions of the Spanish services, which consisted in preventing border crossings, should be attributed to the State, and thus the State's jurisdiction must be recognised. There is no basis for distinguishing situations in which state services prevent migrants from crossing the border at sea and even push them back from territorial waters from actions taken at the land border.

Referring to the positions of the parties and other participants in the proceedings, the Court indicated that the understanding of jurisdiction within the meaning of Article 1 of the Convention essentially covers the entire territory of the State, and only in exceptional situations is it possible to depart from this view (northern Cyprus, Transnistria, Abkhazia, and South Ossetia). It noted that the Spanish authorities had never referred to such an exceptional situation. The construction of

²¹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, p. 1, as amended.

²² Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98.

protective structures on the border does not affect the scope of the State's territorial authority. Nor does the migration crisis justify departing from this position. The adoption of a different view would undermine the principle of effective protection of human rights within the borders of the State.

The issue of jurisdiction, however, was not the only one that could have led the Court to find that it lacked jurisdiction to hear the application under Article 4 of Protocol No. 4. The Spanish Government argued that the scope of this provision had been unjustifiably broadened in the Court's case law. The prohibition on collective expulsion of aliens applies only to individuals who entered a State's territory legally and 'peacefully'. A very strong argument was made here: the UN Charter recognises the right of a State to self-defence in the event of an attack on its territory (Article 51).²³ Article 4 of Protocol No. 4, on the other hand, requires that the alien find himself or herself in a dangerous situation, either as a result of persecution in the country of origin or as a result of travel by sea. In other words, the application of this provision is generally possible only in the case of individuals eligible for asylum or another form of international protection. For economic (earning) purposes, the applicants could have applied for entry and work permits by submitting appropriate applications at consular offices and at border crossings, where special reception centres had been established. Instead, they attempted to cross the border illegally. In summary, the relevant border services did not deport people but merely carried out activities aimed at preventing illegal crossings of the State's borders.

Responding to this position, the applicants pointed out that neither the *travaux préparatoires* of Article 4 of Protocol No. 4 nor the Court's case law provided a basis for distinguishing between the situations of refugees and persons not qualifying as refugees, and between legal and illegal migrants. They further argued that expulsion meant 'removal from a certain place'; therefore, the distinction suggested by Spain between expulsion, refusal of entry, and prevention of illegal entry was irrelevant. In each case, the competent authorities were obliged to issue an individual decision after considering the circumstances of the case and providing the foreigner with an opportunity to present their position.

The positions of the remaining participants in the proceedings are also noteworthy. Three countries justified their view of the inapplicability of Article 4 of Protocol No. 4 in different ways: the Spanish services protected the border, and foreigners could enter Spanish territory or submit appropriate applications at border crossings (Belgium); the foreigners had committed illegal acts, therefore the guarantees relating to the prohibition of collective expulsions, which presuppose prior legal entry into the territory of the State, did not apply to them (France); the Convention does not guarantee the right to asylum, and the response of the Spanish services was focused on protecting the State's security and sovereignty, fulfilling the obligation to control the external borders of the European Union, and combating human trafficking and illegal migration (Italy). The remaining participants (UN agencies and non-governmental organisations) argued that the Spanish practice was inconsistent with the requirements of refugee law and human rights; in

²³ United Nations Treaty Series, 1 UNTS XVI.

each case, an analysis of all the circumstances and an individual decision, while ensuring procedural guarantees for the foreigner, are necessary. The lack of practical opportunities to submit applications for asylum and international protection at existing border crossings was also pointed out.

With reference to the positions submitted, the Court noted that for the first time it was confronted with a case involving the immediate and forcible return of migrants from the border, following an attempt to enter a State's territory illegally and collectively. Although Spain invoked the right to self-defence, as enshrined in the UN Charter, it did not refer the matter to the UN Security Council, as provided for in Article 51 of the Charter. Therefore, the Court concluded that it was not necessary to address this argument. The Court's position (allowing for the hypothesis that a State may exercise its right to self-defence) does not, however, preclude the possibility of a State invoking that right; nevertheless, this would require that the migrant attack be armed or involve the use of violence. At the same time, the Court emphasised the State's right to protect its borders and to develop appropriate policies in this regard. It also recognised the threats arising from the current mass economic migration from Africa and the Middle East. The issues experienced cannot, however, justify practices that are inconsistent with the Convention guarantees.

Following this preliminary analysis, the Court moved on to address several terminological issues crucial to the case under consideration. It referred, among other things, to the Draft Articles on the Expulsion of Aliens prepared by the UN International Law Commission. According to the commentary to this document, the terms 'expulsion', 'bringing to the border', and 'refoulement' are used interchangeably. 'Expulsion' is a general term encompassing all situations referred to by the three previously mentioned terms, as well as a number of others. At the same time, the words 'refugee' and 'alien' refer to individuals who entered the territory of a foreign State both legally and illegally.

Consequently, the Court concluded that since the barriers the applicants reached were located on Spanish territory and the applicants were subsequently returned and handed over to the Moroccan authorities, an expulsion had occurred. Article 4 of Protocol No. 4 therefore applies in a case if, in addition, the expulsions carried out can be classified as collective. This latter characteristic is identified through the notion of a group. The group does not have to reach a certain minimum size, nor do its members have to share certain common characteristics, such as nationality, skin colour, or religion. However, the mere repetition of decisions by the competent authorities regarding group members does not necessarily constitute prohibited collective deportations. The decisive factor is whether individual decisions were issued, preceded by an analysis of the individual's situation, and whether the individual was provided with a genuine opportunity to present their own position and arguments against expulsion. The foreigner's conduct is also significant – whether they apply for international protection and presents legal and factual circumstances justifying their stay in the receiving country. The lack of such activity entitles public authorities to dispense with individual interviews as part of the decision-making process. In summarising this part of its own case law, the Court noted that it may be relevant to the analysis of the case that the foreign national decided to cross the border unlawfully

with other individuals in a manner that violated public order, when they could have entered the country legally through existing border crossings or obtained the required permits elsewhere. The foreign national is obliged to justify convincingly why he or she was unable or unwilling to use such legal means.

Having summarised and clarified its previous case law, the Court proceeded to analyse the circumstances of the complaint. It initially rejected the Spanish authorities' position that the expulsion could not be classified as collective, since the application had been filed by only two individuals. It indicated that the applicants were members of a larger group subjected to similar treatment by the border authorities.

The key to the analysis of the alleged violation of the prohibition of collective expulsions was the applicants' conduct, namely, their illegal border crossing, considered in the context of the possibility of lawfully arriving in Melilla. Such a possibility had to be real and effective. The Court conducted a detailed analysis of the practice at border crossings. It noted that even before the Spanish authorities established a special unit for receiving asylum applications (1 September 2014), such applications were submitted and applicants were transported to Melilla for further examination and processing. Applications could also be submitted at Spanish diplomatic and consular missions in both Morocco and the foreigners' countries of origin. At the key border crossing (Beni Enzar), 404 asylum applications were filed between 1 September 2014 and the end of the year; all of them were filed by Syrians. In subsequent years, individuals from sub-Saharan Africa, such as the applicants, either did not submit such applications at all or their numbers were negligible. Statistics regarding Spanish consular and diplomatic missions were similar.

The Court found that the applicants could realistically and effectively use the existing border crossings to submit applications for international protection and present arguments against expulsion (the latter being understood as the foreigner being sent back from the border or not being allowed to enter Melilla). Furthermore, the statistics presented during the proceedings by the Spanish authorities and the procedures used by consular and diplomatic missions to process identical applications also demonstrated the effectiveness of the existing procedures. However, the applicants chose to enter Melilla illegally. The lack of individual expulsion decisions was a consequence of their failure to use available and effective official entry procedures. Consequently, there was no violation of Article 4 of Protocol No. 4. Nor was there a violation of Article 13 of the Convention. Both conclusions were reached unanimously, which is unusual in the Grand Chamber's judicial practice.

The Spanish case is crucial for shaping the Convention standard concerning the prohibition of collective expulsions. First, the Grand Chamber departed from the rigour of the earlier Chamber judgment, which required that in every case, including illegal border crossings, the procedural guarantees derived from Article 4 of Protocol No. 4 apply to foreigners. At the same time, the Grand Chamber disagreed with the narrowing of the scope of application of the concept of expulsion. It is broadly understood as encompassing any decisions and actions resulting in the denial of residence or entry into the territory of a State. Second, the Grand Chamber linked the State's compliance with the obligations under Article 4 of Protocol No. 4 to the foreigner's conduct. As a rule, migrants must use legal channels to obtain residence

permits at border crossings and at the State's consular and diplomatic missions. The Court simultaneously verifies whether such legal channels are realistically and effectively available to foreigners. If the answer is positive, the foreigner's attempt to enter the country illegally exempts the State from the requirement to issue individual deportation decisions in a specific manner. In this context, one may ask whether, following the Spanish judgment, Article 4 of Protocol No. 4 would authorise public authorities to expel, without following certain procedures, also individuals who have already entered the country (and thus, in the Spanish case, crossed the 'police line'). If so, the Convention standard would be minimal, and 'stronger requirements' would arise only from other legal acts, e.g. the Return Directive and national legislation. Third, despite the link established between Article 4 of Protocol No. 4 and the foreigner's conduct, where real and effective opportunities exist to obtain permission for 'lawful entry', the concept of State jurisdiction, as used by the Court, broadens the circle of persons who become beneficiaries of procedural guarantees against collective expulsions. These now include all persons seeking to enter the territory of the State. Fourth, although the Grand Chamber links its analysis of the procedural guarantees of Article 4 of Protocol No. 4 to the principle of non-refoulement, it appears to broaden its justification, thus ceasing to link expulsion with the prohibition of exposing an individual to a real risk of treatment contrary to Article 2 (the right to life) and Article 3 of the Convention (the prohibition of ill-treatment). The Court links the provisions of the Convention 'systemically' with other instruments of international law, particularly the 1951 Geneva Convention, and thereby with the right to asylum or other forms of international protection.²⁴ The adoption of such a broader legal perspective gives rise to the considerations contained in the Grand Chamber judgment regarding the scope and effectiveness of procedures for obtaining permission to cross the border legally and receive international protection. The negative obligations arising from non-refoulement, i.e. protection against acts contrary to Articles 2 and 3 of the Convention, are replaced by expanded positive obligations of the States Parties to the Convention. This change (and the resulting legal analysis) was criticised by Judge Pauliine Koskelo in her dissenting opinion. She points to the one-sided approach adopted by the Court. The Strasbourg judges connect the systemic reading of Article 4 of Protocol No. 4 with issues relating to asylum and international protection, but omit other areas of law, particularly those concerning the rights (but also obligations) of States to control borders, ensure State security, territorial integrity, and public order. According to the Finnish judge, the material scope of application of Article 4 of Protocol No. 4 (*ratione materiae*) is limited; it should be combined only with the principle of non-refoulement, i.e. exposing an individual to acts contrary to Articles 2 and 3 of the Convention. Only to that extent would collective expulsions be prohibited. The individual would have to demonstrate and substantiate that, following deportation, their life or protection against ill-treatment would be at risk. Therefore, the Finnish

²⁴ On the presence of this issue in the case law of the ECtHR, see P. Domagała, 'The Migration Crisis in the Case Law of the ECHR – Some Remarks on the Obligations of Countries to Refugees and Immigrants', *Polish Review of International and European Law*, 2018, Vol. 7, No. 2, pp. 177–179.

judge concluded that, since the Chamber (and, following it, the Grand Chamber) found the complaint of a violation of Article 3 of the Convention raised by N.D. and N.T. inadmissible, the part of the application relating to Article 4 of Protocol No. 4 should also automatically be declared inadmissible.

CASES CONCERNING PUSHBACKS AT THE BORDER WITH BELARUS

Before relating the legal standard developed in the two Grand Chamber judgments to the complaints concerning pushbacks at the border with Belarus, it is worth summarising what happened in the Italian and Spanish cases.

The influx of refugees into Europe, currently massive and rightly described as a crisis or even a humanitarian catastrophe, tests the legal rules and standards stemming from the European Convention on Human Rights. The first group of considerations concerns the radical differences between the rulings adopted by the Chamber and those later adopted by the Grand Chamber. The approach of the seven-member Chambers could be described as idealistic or static. It does not sufficiently take into account the context of the specific migration situation in Europe today. The Grand Chamber conducts a more realistic analysis, leading to a finding – unlike that of the Chamber – that there was no violation of the provisions of the Convention. This shift in perspective may be attributed to the more comprehensive reflection undertaken by the largest formation of the ECtHR, but it can also be linked to the negative reaction not only of the State concerned by the Chamber judgment, but also of other States that considered the Chamber ruling a dangerous precedent. It is therefore not surprising that three States supporting Spain joined the proceedings before the Grand Chamber in the case of *N.D. and N.T.*

The second group of considerations concerns the choice of ‘judicial strategy’ by the Strasbourg judges. They do not wish their interpretation of the Convention to lead the Court to declare itself incompetent to hear ‘migration complaints’. Hence the extremely broad interpretation of the concept of expulsion, according to which any authoritative decision by border services refusing entry into a country may be classified as expulsion, thereby giving rise to the obligation to implement the procedural guarantees derived, in the Court’s case law, from Article 4 of Protocol No. 4. The Court thereby becomes competent *ratione materiae*, but issues that reflect a more realistic perspective subsequently become part of the examination of the complaint on its merits. Consequently, the conduct of the foreigner – including illegal border crossing or participation in a group attacking border installations – may lead to the conclusion that in such circumstances the procedural guarantees of Article 4 of Protocol No. 4 do not apply. However, such exclusion is conditional: there must simultaneously exist real and effective opportunities for the migrant to submit an application for asylum or other international protection at border crossings or at consular or diplomatic missions. When such opportunities do not exist, the foreigner illegally crossing the border once again becomes a beneficiary of the procedural guarantees related to the prohibition of collective expulsions.

Importantly, the Court linked real and effective procedures for obtaining entry permits to the right to submit an application for asylum or another form of

international protection. This systemic interpretation of the guarantees contained in Article 4 of Protocol No. 4 – made with due regard to the 1951 Geneva Convention – was criticised by Judge Pauliine Koskelo in her dissenting opinion appended to the Grand Chamber judgment in the Spanish case. She noted the selectivity of the systemic interpretation – the Court ignored numerous rules of international law relating to the protection of state borders, territorial integrity, and public order. Furthermore, according to the Finnish judge, the Court should link the principle of non-refoulement solely with the protection of an individual against acts constituting a violation of the right to life or the prohibition of ill-treatment (Articles 2 and 3 of the Convention). Only in these two situations – that is, when a foreigner invokes them – would the safeguards against collective expulsions (Article 4 of Protocol No. 4) be triggered.

At first glance, following the two Grand Chamber judgments, the Court appears to have the necessary tools and tests to deal with the applications concerning pushbacks at the border with Belarus. Undoubtedly, actions by State authorities aimed at preventing foreigners from crossing the border engage the State's responsibility under Article 4 of Protocol No. 4, even if the pushback concerns a single individual. Such an attempt to cross the border is one of many undertaken by foreigners, which renders the State's response 'collective'. Next, it must be examined whether the migrant had realistic opportunities to submit an application for international protection and enter the State's territory at consular offices, border crossing points, or other locations. The Chamber's decision to relinquish jurisdiction in favour of the Grand Chamber may therefore appear surprising, as it suggests the existence of a new and serious legal issue concerning the interpretation of the Convention.

I believe the Court recognised that, despite certain similarities to the Spanish case, the 'Belarusian complaints' are different. In their background there is also the active role of Belarus (and the Russian Federation) as a State facilitating – and even organising – illegal border crossings into the three neighbouring countries. This means that issues relating to border control, State security, territorial integrity, and public order gain further importance. These issues have often been neglected or downplayed in Strasbourg jurisprudence, but were emphasised as crucial in the dissenting opinion of Judge Pauliine Koskelo.

The extent of 'Koskelinisation' in the forthcoming judgments concerning events on the border with Belarus will be particularly interesting. It may be limited and consist merely in expanding the rhetoric concerning border control as a State prerogative while maintaining the conditional approach adopted in the Spanish case – namely the requirement to ensure a realistic opportunity to submit an application for international protection. Only under such circumstances would pushing back illegal migrants not constitute a violation of Article 4 of Protocol No. 4. However, taking into account the Finnish judge's perspective could lead to a deeper shift. In such a scenario, Belarus's hostile role could result in the exclusion of the Court's conditional acceptance. A country subjected to organised migration pressure might not be required to create mechanisms enabling migrants to submit applications in a genuinely effective manner; it might be sufficient that such opportunities exist – as is standard practice – at consular offices.

The Court's choice between these options will, of course, be influenced by the legal arguments and factual documentation submitted by the respondent State.

However, there is also another factor worth emphasising. A large number of entities joined the proceedings concerning pushbacks at the border with Belarus as so-called third parties. In the Spanish case, these were three countries that supported Spain and presented important comments and proposals concerning the reconstruction of Convention standards. With regard to the situation on the Belarusian border, Poland received support from 11 countries, Lithuania from 8, and Latvia from 9. At the same time, numerous public bodies and non-governmental organisations presented different legal perspectives supporting the applicants; these included, among others, the United Nations High Commissioner for Refugees, the Council of Europe Commissioner for Human Rights, the Polish Ombudsman, the Dutch Refugee Council, and the Helsinki Foundation for Human Rights.

Finally, as regards the likely outcome of the judgments concerning pushbacks at the Belarusian border, observing the ECtHR's shift from an idealistic to a more realistic approach, it may be assumed with a very high degree of probability that the Court will find no violation of Article 4 of Protocol No. 4. These rulings may even be unanimous. Moreover, in the applicants' case there were no circumstances suggesting a threat to the right to life (Article 2) or a violation of the prohibition of ill-treatment (Article 3). At the same time, however, the Court will not adopt the position advanced by Pauliine Koskelo that, in the case (in its factual circumstances), the provision prohibiting collective expulsions is not applicable at all.

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ACTIO PAULIANA: A LEGAL REMEDY FOR INDIVIDUAL CREDITORS OR FOR ALL THE CREDITORS? FROM ROMAN LAW TO THE PRESENT DAY*

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ABSTRACT

The article analyses whether, if a debtor divests themselves of their assets and thereby renders satisfaction of creditors impossible, the right to challenge the debtor's acts should be vested exclusively in all creditors jointly, appropriately represented, or whether individual creditors should retain the possibility of relying on individual legal remedies. To answer this question, the authors use the dogmatic method, the historical method, and the comparative method.

The first section of this paper discusses how creditors were protected under Roman law. After an analysis of the legal remedies available in classical law, the standing to bring an *actio Pauliana* in Justinian's law is discussed. Such an *actio* was available to the *curator bonorum* acting on behalf of all creditors, but it could also be brought by individual creditors.

In contemporary law, the issue discussed in this article arises when a debtor is declared bankrupt. In such a situation, German law does not allow individual creditors to bring or continue individual actions. Until recently, the position under Polish law was similar, but following a recent resolution adopted by the Supreme Court, the prohibition has been relaxed and creditors are allowed to make auxiliary use of individual legal remedies. This is possible primarily when the receiver is unwilling or unable to bring an action on behalf of the bankruptcy estate. The latter approach merits approval, as it properly balances the interests of the parties concerned.

* J. Misztal-Konecka wrote sections 1–3; M. Krajewski wrote section 5; the remaining sections of the article were written by both authors.

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1. INTRODUCTION

Debtors' dishonest actions, consisting in deliberate, often ostensible, disposal of assets to prevent effective enforcement, have been known for centuries. For a long time, legislators have also sought not only means of compulsory enforcement of obligations, but also effective methods to prevent dissipation of assets that would otherwise be available for enforcement, providing various instruments under different branches of law.¹ It is worthwhile to bring into focus civil law instruments in this area, namely *actio Pauliana*. Although Roman law scholars consider regulations relating to *actio Pauliana* to be among the least clear in Roman law,² in the course of legal development it ultimately proved to be a lasting and valuable element of Roman heritage.

In Roman law, acting to the detriment of creditors was known as *fraus creditorum*. It meant that a debtor performed a juridical act or took another step with the aim of defrauding creditors (*consilium fraudis*), thereby preventing effective enforcement against him. The detriment to creditors consisted in the debtor becoming insolvent or even more insolvent (*eventus damni*).³ Any measure taken with the intention of worsening the creditor's position was considered detrimental to the creditor.⁴ Examples included: establishing a dowry,⁵ disposing of property,⁶ releasing a debt,⁷ releasing a pledge,⁸ assuming a liability (sale contract, lease, etc.),⁹ repaying a debt that was not yet due or repaying a debt after enforcement proceedings had begun,¹⁰ procedural neglect leading to depletion of assets (deliberately losing a lawsuit),¹¹ making a donation,¹² etc. Although the prevailing view in the literature is that

¹ M. Pyziak-Szafnicka, *Ochrona wierzyciela w razie niewypłacalności dłużnika*, Warszawa, 1995, pp. 12–13.

² H. Ankum, "Interdictum fraudatorium" et "restitutio in integrum ob fraudem", in: Guarino A., Labruna L. (eds), *Syntelesia Arangio Ruiz*, Napoli, 1964, p. 779, even described them as 'les plus obscurs de droit romain'. Similarly, C. Ferrini, *Di una nuova teoria sulla revoca degli atti fraudolenti compiuti dal debitore secondo il diritto romano*, Milano–Napoli, 1887, p. 3; X. d'Ors, *El interdicto fraudatorio en el derecho romano clasico*, Roma–Madrid, 1974, p. 1; A.D. Centola, 'A proposito del consilium fraudis nella revoca degli atti in frode ai creditori', *Studia et Documenta Historiae et Iuris*, 2015, Vol. 81, p. 361.

³ M. Kaser, *Roman Private Law*, transl. Dannenbring R., Durban, 1965, p. 52; W. Litewski, *Rzymskie prawo prywatne*, 2nd ed., Warszawa, 1994, p. 297; W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, 3rd ed., Warszawa, 2018, p. 594.

⁴ D. 42,8,1 pr.: *quae fraudationis causa gesta erunt*; D. 42,8,17,1: *Omnes debitores, qui in fraudem creditorum liberantur, per hanc actionem revocantur in pristinam obligationem*.

⁵ D. 42,8,25,1.

⁶ D. 42,8,1,2.

⁷ D. 12,2,9,5; D. 42,8,1,2. D. 42,8,17 pr.; D. 42,8,10,22; D. 42,8,25 pr.

⁸ D. 42,8,2.

⁹ D. 42,5,25; D. 42,8,6,5; D. 42,8,7.

¹⁰ D. 42,8,10,12; D. 42,8,6,7; D. 42,8,10,16.

¹¹ D. 42,8,3,1; D. 42,8,3 pr.

¹² D. 42,8,6,11.

this applied exclusively to fraudulent acts committed after creditors had taken possession of the debtor's assets for the purpose of enforcement (*missio in bona*),¹³ as A.M. Manzo has shown,¹⁴ and (at least some) chronologically earlier acts could also be challenged.

For the sake of clarity, before presenting the key issue of entities to which *actio Pauliana* was applicable in Roman law and is applicable in contemporary law, it is worth noting that the term *actio Pauliana*¹⁵ itself is mentioned only once in the Digests – D. 22,1,38,4.¹⁶ Nevertheless, the term has become very popular in almost all legal systems in Europe and is still commonly used today.¹⁷

2. REMEDIES AGAINST FRAUS CREDITORUM IN CLASSICAL ROMAN LAW

There is no information in the sources on how measures that depleted assets were counteracted in earlier periods of Roman law development, which is probably due to the fact that initially liability for debts was personal – the debtor was liable for their debts with their person, i.e. their life and freedom.¹⁸ When enforcement

¹³ Thus, e.g. C. Ferrini, *Di una nuova teoria...*, op. cit., p. 4.

¹⁴ The source texts confirming A.M. Manzo's position are D. 42,6,6,13 (... *deinde eius bona venierint* ...), D. 42,8,9 (... *cuius bona possessa <non> sunt* ...) and, with a much more general application: D. 42,8,1,2; D. 42,8,3; D. 42,8,1,1. For more, see the considerations in A. Manzo, 'Curatori bonorum vel ei, cui de ea re actionem dare oportebit. Spunti di riflessione sulla legittimazione attiva della tutela processuale prevista in Ulp. 66 ad ed. D. 42.8.1 pr.', *Studia et Documenta Historiae et Iuris*, 2017, pp. 459–463. This position is also indirectly supported by D. 42,8,6,7, where the payment of a debt before *missio in bona* was recognised as unchallengeable; since Julian and Ulpian considered this a case of the debtor's impoverishment, it should be beyond doubt that other alienations before *missio in bona* could be challenged.

¹⁵ For more on the origin of the name, see, e.g. G. Impallomeni, 'Pauliana actio', *Paulys Realencyclopädie der classischen Altertumswissenschaft*, 1970, Vol. S XII, pp. 1009–1010, and the literature cited therein; X. d'Ors, *El interdicto...*, op. cit., pp. 15, 47–54; C. Willems, *Actio Pauliana und fraudulent conveyances. Zur Rezeption kontinentalen Gläubigeranfechtungsrechts in England*, Berlin, 2012, pp. 26–30.

¹⁶ D. 22,1,38,4 (*Paulus libro 6 ad Plautium*) – *In Fabiana quoque actione et Pauliana, per quam quae in fraudem creditorum alienata sunt revocantur, fructus quoque restituuntur: nam praetor id agit, ut perinde sint omnia, atque si nihil alienatum esset: quod non est iniquum (nam et verbum 'restituas', quod in hac re praetor dixit, plenam habet significationem), ut fructus quoque restituuntur.* [In both the Fabian and Paulian Actions, by means of which property which has been disposed of for the purpose of defrauding creditors is recovered, the produce of said property must also be returned; for the Praetor uses his authority to place everything in the same condition as if nothing had been alienated; and this is not unjust, for the words 'you shall return', which the Praetor makes use of in this matter, have a broad signification, so that the produce of the property must also be surrendered]. All English translations of the *Digests: The Digest or Pandects of Justinian*, Samuel P. Scott, Cincinnati, 1932; https://droitromain.univ-grenoble-alpes.fr/Anglica/digest_Scott.htm (accessed: 10 March 2026).

¹⁷ See also M. Radin, 'Fraudulent Conveyances at Roman Law', *Virginia Law Review*, 1931, No. 2, p. 110.

¹⁸ J. Fiema, *O zaskarżaniu czynności dłużnika działających ze szkodą wierzycieli*, Lwów, 1937, pp. 9–10; G. Impallomeni, 'Azione revocatoria (diritto romano)', *Nuovo Digesto Italiano*, 1956, Vol. 2, p. 147; M. Pyziak-Szafnicka, *Ochrona...*, op. cit., p. 15; A. Manzo, 'Curatori...', op. cit., pp. 449–450.

against property replaced personal enforcement, classical law recognised three legal instruments, developed in praetorian practice, to protect creditors' rights against the debtor's fraudulent actions: *in integrum restitutio*,¹⁹ *interdictum fraudatorium*²⁰ and **denegatio actionis*.²¹ These remedies supplemented the protection system in civil law, which, at the end of the Republic, proved to be insufficient in many respects. The aim of the praetors, as Ulpian declares in *D. 42,8,1,1*, was to protect creditors from the effects of acts of disposal made by the debtor with the intention of defrauding them.²²

In integrum restitutio, an action was brought to remove the effects of juridical acts (especially alienation) performed with the purpose of defrauding creditors, if the third party was aware of the purpose of such acts. In the case of gratuitous acts, *actio in factum* was used, and the good faith of the purchaser did not protect a gratuitous acquisition. *Restitutio in integrum* was available (most likely only) to the *curator bonorum*²³ and was used during enforcement proceedings.²⁴ It can be assumed that it was considered inappropriate to involve a third party in numerous proceedings with individual creditors if, once restitution was granted, it applied to the challenged act as

¹⁹ Thus, for example, O. Lenel, *Das Edictum Perpetuum. Ein Versuch zu dessen Wiederherstellung*, 3rd ed., Leipzig, 1927, pp. 436–439; M. Talamanca, 'Azione revocatoria. Diritto romano', *Enciclopedia del Diritto*, 1959, Vol. 4, p. 884; J.A. Ankum, *De geschiedenis der Actio Pauliana*, Zwolle, 1962, pp. 38–51; H. Ankum, 'Interdictum...', op. cit., p. 779. Initially, this position was also supported by G. Impallomeni, 'Azione...', op. cit., p. 147; G. Impallomeni, *Studi sui mezzi di revoca degli atti fraudolenti nel diritto romano classico*, Padova, 1958, p. 12. However, it should be noted that in the literature the view that *restitutio in integrum* was provided for in praetorian law is sometimes questioned; it is recognised that an *actio* was provided for in the praetorian edict; see, e.g. G. Impallomeni, 'Pauliana...', op. cit., cols 1011–1013; C. Willems, *Actio...*, op. cit., pp. 25–26, and the literature cited therein.

²⁰ See, e.g. J.A. Ankum, *De geschiedenis...*, op. cit., pp. 52–60; X. d'Ors, *El interdicto...*, op. cit., passim.

²¹ See, e.g. J.A. Ankum, *De geschiedenis...*, op. cit., pp. 60–62. Beyond the scope of this discussion is the invalidation of the manumission of slaves to the detriment of creditors or for the purpose of reducing the patron's legitime. The *Lex Aelia Sentia* of AD 4 considered the manumission of slaves by an excessively indebted debtor for the purpose of defrauding creditors or reducing the legitime due to his patron to be invalid. For more, see, e.g. F. Schulz, 'Die fraudatorische Freilassung im klassischen und justinianischen römischen Recht', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, 1928, pp. 197–284; A. Metro, 'La lex Aelia Sentia e le manomissioni fraudolente', *Labeo*, 1961, No. 2, pp. 147–200; G. Impallomeni, 'In tema di manomissioni fraudolente', in: Impallomeni G., *Scritti di diritto romano e tradizione romanistica*, Padova, 1996, pp. 99–109 (reprint from 1964); G. Impallomeni, 'Nota minima in tema di manomissioni fraudolente', in: Impallomeni G., *Scritti di diritto romano e tradizione romanistica*, Padova, 1996, pp. 265–268 (reprint from 1971); W. Litewski, *Rzeczni...*, op. cit., pp. 120, 297; W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo...*, op. cit., pp. 143–144; F. del Pino-Toscano, *Recursos procesales contra el fraude creditorum en derecho romano clásico*, Sevilla, 2002, pp. 65–222.

²² *D. 42,8,1,1 (Ulpianus libro 66 ad ed.) – Necessario praetor hoc edictum proposuit, quo edicto consulit creditoribus revocando ea, quaecumque in fraudem eorum alienata sunt.* [The Praetor was compelled to introduce this Edict in order to protect the rights of creditors, by revoking any alienations of property which had been made for the purpose of defrauding them.]; see also A. Manzo, 'Curatori...', op. cit., pp. 450–451.

²³ O. Lenel, *Das Edictum...*, op. cit., pp. 437–439; W. Litewski, *Rzeczni...*, op. cit., p. 297; W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo...*, op. cit., p. 594. Differently, cf. H. Ankum, 'Interdictum...', op. cit., p. 783; similarly, M. Talamanca, 'Azione...', op. cit., p. 885, who notes, however, that it is impossible to determine whether creditors' standing was individual or collective.

²⁴ G. Impallomeni, 'Azione...', op. cit., p. 148; M. Kaser, *Roman...*, op. cit., p. 52.

a whole: the effect of *restitutio in integrum* was to restore the previous state of affairs, and thus to restore the alienated elements of the debtor's assets to the bankruptcy estate, enabling them to be used to satisfy all creditors.²⁵ It was therefore an extraordinary legal measure applied by the praetor, producing effects in the area of *ius civile* and giving rise to an obligation to return the performances received: any goods sold were re-included in the debtor's assets, any obligations incurred were deemed non-existent, while any releases from obligations were considered invalid.²⁶

Interdictum fraudatorium was available to any creditor seeking enforcement who had suffered detriment as a result of fraudulent acts and who, despite participating in enforcement proceedings (*venditio bonorum*), had not been repaid by the purchaser of the debtor's assets.²⁷ This interdict could be directed against a person who had benefited from the act and was aware of the debtor's actions to the detriment of creditors; however, in the case of challenging gratuitous acts, *actio in factum* was used. The *interdictum* therefore led – after enforcement proceedings had been completed – to the removal of the still existing effects of the fraudulent act.²⁸ The effect of the interdict was annulment of the act and the return of anything that the parties had gained as a result of it.²⁹ Sometimes, following S. Solazzi, it is assumed in the literature that, even though only one of the creditors applied for an interdict, after recovering the object of the fraudulent act that creditor was obliged to settle proportionally with the other creditors participating in the enforcement proceedings.³⁰

Finally, if the debtor assumed a liability in order to defraud creditors, the praetor refused the action (**denegatio actionis*) brought against the entity that had acquired the debtor's property in the course of enforcement (*bonorum emptor*).³¹

²⁵ O. Lenel, *Das Edictum...*, op. cit., pp. 437–438; W. Dajczak, T. Giaro, F. Longchamps de Bériér, *Prawo...*, op. cit., p. 144.

²⁶ For more, see also G. Impallomeni, *Studi sui mezzi...*, op. cit., pp. 12–62; H. Ankum, 'Interdictum...', op. cit., pp. 779–784.

²⁷ Thus, e.g. F. Palumbo, *L'actio Pauliana nel diritto romano e nel diritto vigente*, Napoli, 1935, p. 95; see S. Solazzi, *La revoca degli atti fraudolenti nel diritto romano*, Vol. 2, 3rd ed., Napoli, 1945, p. 68; G. Impallomeni, 'Azione...', op. cit., p. 148; G. Impallomeni, *Studi sui mezzi...*, op. cit., pp. 75–79; M. Talamanca, 'Azione...', op. cit., p. 885; G. Impallomeni, 'Pauliana...', op. cit., cols 1014–1016.

However, differently, cf. X. d'Ors, *El interdicto...*, op. cit., pp. 152–159, according to whom this remedy could only be brought by the *curator bonorum*, and references to the rights of individual creditors supposedly originated only from the compilers.

²⁸ M. Kaser, *Roman...*, op. cit., p. 52; W. Litewski, *Rzyskie...*, op. cit., p. 297; W. Dajczak, T. Giaro, F. Longchamps de Bériér, *Prawo...*, op. cit., pp. 144, 594.

²⁹ D. 42,8,10,19–22; D. 42,8,25,4.

³⁰ It seems that the basis for settlements could have been either *actio mandati* or *actio negotiorum gestorum*. See S. Solazzi, *La revoca...*, op. cit., pp. 69–70; M. Talamanca, 'Azione...', op. cit., p. 885.

³¹ The text of the edict is presented in D. 42,5,25. Meanwhile, the second part of the fragment D. 12,2,9,5 sets out the facts justifying *denegatio actionis*. For more details, see G. Impallomeni, *Studi sui mezzi...*, op. cit., pp. 6–11; M. Talamanca, 'Azione...', op. cit., p. 884; J.A. Ankum, *De geschiedenis...*, op. cit., p. 60; H. Ankum, 'Denegatio actionis', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, 1985, pp. 453–469; W. Litewski, *Rzyskie...*, op. cit., p. 297.

3. STANDING TO BRING AN *ACTIO PAULIANA* UNDER JUSTINIAN'S LAW

The next stage in the development of creditor protection against debtors' fraudulent activities was Justinian's codification. Title 42.8 of the Digests and Title 7.75 of the Code contain regulations aimed at restoring the debtor's property (*quae in fraudem creditorum facta sunt ut restituantur*) in order for it to be used for the benefit of creditors.³²

In Justinian's law,³³ the system of creditor protection was reorganised – *in integrum restitutio* and *interdictum fraudatorium* were replaced by a uniform *actio*.³⁴ The purpose of this *actio* was extremely important, as it was even deemed necessary that it be explained in a textbook for novice lawyers.

I. 4,6,6: *Item si quis in fraudem creditorum rem suam alicui tradiderit, bonis eis a creditoribus ex sententia praesidis possessis, permittitur ipsis creditoribus, rescissa traditione, eam rem petere, id est dicere eam rem traditam non esse et ob id in bonis debitoris mansisse.* [Similarly, if a person conveys away his property in fraud of creditors, the latter, on obtaining from the governor of the province a decree vesting in them possession of the debtor's estate, are allowed to avoid the conveyance, and sue for the recovery of the property; in other words, to allege that the conveyance has never taken place, and that the property consequently still belongs to the debtor].³⁵

The Institutes briefly indicated that the legal remedy was aimed at annulling the effects of the act making the debtor insolvent or even more insolvent, emphasising that it concerned acts performed with the intention to defraud creditors.³⁶ The effect of the action was therefore to annul the effects of the act and return the property to the debtor's estate. Much broader considerations on challenging fraudulent acts were contained in the Digests.

D. 42,8,1 pr. (Ulpianus libro 66 ad ed.) – *Ait praetor: 'Quae fraudationis causa gesta erunt cum eo, qui fraudem non ignoraverit, de his curator bonorum vel ei, cui de ea re actionem dare oportebit, intra annum, quo experiundi potestas fuerit, actionem dabo. idque etiam adversus ipsum, qui*

³² *Actio Pauliana* was constructed as an arbitrary complaint, hence a third party could return the obtained gain, but if they did not do so, they were ordered to pay a specified amount of money. J. Fiema, *O zaskarżaniu...*, op. cit., p. 12; B. Biondi, *Studi sulle actiones arbitrarie e l'arbitrium iudicis*, Roma, 1970, pp. 172–178; M. Pyziak-Szafnicka, *Ochrona...*, op. cit., p. 18; C. Willems, in: Babusiaux U., Baldus C., Ernest W., Meissel F.-S., Platschek J., Rüfner T. (eds), *Handbuch des Römischen Privatrechts*, Vol. 1–3, Tübingen, 2023, p. 487.

³³ There is no consensus in the literature as to when the *actio Pauliana* took its final shape. The prevailing view seems to be that the uniform action presented in the Digests is owed to the work of Justinian's compilers, but there are also views linking the emergence of the *actio Pauliana*, among others, with the activities of the praetor Lucius Aemilius Paulus (praetor in 191 BC) or Lucius Aemilius Lepidus Paulus (praetor in 53 BC). For more, see G. Impallomeni, 'Azione...', op. cit., p. 148; C. Willems, *Actio...*, op. cit., pp. 26–30.

³⁴ Also *denegatio actionis* was still maintained. See also J.A. Ankum, *De geschiedenis...*, op. cit., p. 63; G. Impallomeni, 'Pauliana...', op. cit., col. 1017.

³⁵ See https://www.gutenberg.org/files/5983/5983-h/5983-h.htm#link2H_4_0090 (accessed: 10 March 2026).

³⁶ J. Fiema, *O zaskarżaniu...*, op. cit., p. 13.

fraudem fecit, servabo. [The Praetor says: 'I will grant an action to the curator of property, or to anyone else to whom it is necessary to grant one, in a case of this kind, within the year in which he has a right to institute such a proceeding, where any act has been committed for the purpose of fraud with anyone who was not ignorant of said fraud, and I will also maintain this right of action against the party himself who committed it.']³⁷

The action mentioned by Ulpian in D. 42,8,1 pr. is commonly identified with the *actio Pauliana* mentioned in D. 22,1,38,4.³⁸ In the Digests, the *actio Pauliana* took its mature shape, taking into account such elements as disposal (*alienatio*) with detriment (*eventus fraudi*),³⁹ the intention of the debtor to defraud creditors (*fraus*),⁴⁰ and the awareness of a third party (*participatio fraudis*).⁴¹ A third party acting in good faith was liable only if they had received something free of charge, and their liability was limited to the enrichment obtained,⁴² although there was probably a dispute among jurists on the latter issue.⁴³ It is believed that this action could be brought against *missio in bona*,⁴⁴ within one year from the date of *venditio bonorum*.⁴⁵

For such an action to be effective, it required correct identification of both the person entitled to bring it and the person against whom it should be directed. While there is no doubt that the purchaser and the debtor himself had standing to be sued,⁴⁶ the issue of standing to sue raises many more questions. In classical law, the latter varied depending on the remedy that was available.

For an analysis of the issues of standing to sue that are of interest to us, the above-mentioned passage – D. 42,8,1 pr. – from Ulpian's commentary on the edict is important. The first thing that comes to mind is the clear indication that the action

³⁷ See also D. 42,8,10 pr.

³⁸ W. Litewski, *Rzymskie...*, op. cit., p. 298; F. Longchamps de Bériér, 'Prawnospadkowe pochodzenie actio Pauliana? Na marginesie pracy C. Masi Doria "Bona libertorum". Regimi giuridici e realtà sociali, Napoli 1996', *Czasopismo Prawno-Historyczne*, 1998, No. 1, p. 302; W. Dajczak, T. Giaro, F. Longchamps de Bériér, *Prawo...*, op. cit., p. 594; A. Manzo, 'Curatori...', op. cit., p. 451; C. Willems, in: Babusiaux U., Baldus C., Ernest W., Meissel F.-S., Platschek J., Rüfner T. (eds), *Handbuch...*, op. cit., p. 509. However, differently, cf. E. Serafini, *Della revoca degli atti fraudolenti compiuti dal debitore secondo il diritto romano*, Vol. 1, Pisa, 1887, pp. 79–83.

³⁹ See, e.g. J.A. Ankum, *De geschiedenis...*, op. cit., pp. 102–103.

⁴⁰ J. Fiema, *O zaskarżaniu...*, op. cit., p. 13.

⁴¹ For more on the criteria of *actio Pauliana* in Roman law, see, for example, G. Impallomeni, 'Pauliana...', op. cit., col. 1017; G. Impallomeni, 'Azione...', op. cit., pp. 149–150; A.M. Alemán Monterreal, 'El *fraus creditorum*, ¿praesumptio?', in: Sánchez J.G. (ed.), *Fundamentos romanísticos del derecho contemporáneo*, Vol. 4, Madrid, 2021, pp. 1159–1168.

⁴² D. 42,8,6,11; C. 7,75,5; C. Willems, in: Babusiaux U., Baldus C., Ernest W., Meissel F.-S., Platschek J., Rüfner T. (eds), *Handbuch...*, op. cit., p. 509; W. Litewski, *Rzymskie...*, op. cit., p. 298; W. Dajczak, T. Giaro, F. Longchamps de Bériér, *Prawo...*, op. cit., p. 144.

⁴³ The existence of a dispute between jurists is indicated by D. 42,8,9.

⁴⁴ D. 42,8,6,7. See also M. Pyziak-Szafnicka, *Ochrona...*, op. cit., p. 18; C. Willems, in: Babusiaux U., Baldus C., Ernest W., Meissel F.-S., Platschek J., Rüfner T. (eds), *Handbuch...*, op. cit., p. 488.

⁴⁵ D. 42,8,6,14; J.A. Ankum, *De geschiedenis...*, op. cit., p. 101; C. Willems, *Actio...*, op. cit., p. 31.

⁴⁶ D. 42,8,9; D. 42,8,25,7; M. Talamanca, 'Azione...', op. cit., pp. 885–886; J.A. Ankum, *De geschiedenis...*, op. cit., p. 82; W. Litewski, *Rzymskie...*, op. cit., p. 298; W. Dajczak, T. Giaro, F. Longchamps de Bériér, *Prawo...*, op. cit., p. 144.

could be brought by the *curator bonorum distrahendorum*,⁴⁷ who managed the property in the creditors' possession. As part of his duties, the *curator* liquidated the debtor's property⁴⁸ on behalf of creditors and could request that an act detrimental to creditors be annulled. Therefore, the competence of the *curator bonorum* is beyond doubt, also in light of the institution of *in integrum restitutio*, which already existed in the classical period. It also fits perfectly with the characteristic trend of Roman law to protect all creditors of a debtor; moreover, it emphasises the role of the *curator*. Finally, it represents efforts to simplify proceedings when it is not necessary to conduct them with participation of numerous competing creditors.⁴⁹

Apart from the aforementioned *curator*, Justinian's compilers also mentioned a person referred to as *ei, cui de ea re actionem dare oportebit*,⁵⁰ that is, anyone else to whom it is necessary to grant the right to institute such a proceeding. It is hard not to notice that this wording is exceptionally enigmatic and unclear. Undoubtedly, the purpose of this interpolation was to enable other entities affected by the debtor's fraudulent actions, apart from the *curator bonorum*, to institute proceedings.⁵¹ It was a reference to the solution previously used in the case of *interdictum fraudatorium*, which was reserved precisely for creditors who had suffered detriment.

The intention behind the change introduced by the compilers was to standardise and extend protection previously granted to creditors, while the very general wording they chose allows us to conclude that the person who should be granted the right to institute proceedings should be a creditor who takes action:

- if the *curator bonorum* is inactive;
- if no *curator* has been appointed;
- when, after completion of *distractio bonorum*, the *curator* has terminated their function and the creditor's claim has not been satisfied.⁵²

Finally, standing to bring an *actio Pauliana* must also have been granted to the creditor's heirs as parties directly interested in the enforcement of the inherited claims.⁵³

Since the act was challengeable because it had been performed with the intention of defrauding creditors, those who became creditors of the debtor after the fraudulent act did not have the right to bring an action unless the funds transferred by them were used to satisfy earlier creditors or it could be demonstrated that the debtor

⁴⁷ G. Impallomeni, 'Pauliana...', op. cit., col. 1017.

⁴⁸ S. Solazzi, *La revoca...*, op. cit., p. 16.

⁴⁹ C. Ferrini, *Di una...*, op. cit., p. 6; G. Impallomeni, *Studi sui mezzi...*, op. cit., p. 28.

⁵⁰ This fragment is almost universally considered to be an interpolation; see C. Ferrini, *Di una...*, op. cit., p. 6; O. Lenel, *Das Edictum...*, op. cit., pp. 436–437; F. Palumbo, *L'actio...*, op. cit., p. 95; S. Solazzi, *La revoca...*, op. cit., pp. 16, 72; G. Impallomeni, *Studi sui mezzi...*, op. cit., pp. 27–28; F. Eisele, 'Exceptio rei iudicatae vel in iudicium deductae', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, 1990, p. 7.

⁵¹ W. Litewski, *Rzymskie...*, op. cit., p. 298; C. Willems, in: Babusiaux U., Baldus C., Ernest W., Meissel F.-S., Platschek J., Rüfner T. (eds), *Handbuch...*, op. cit., p. 509; A. Manzo, 'Curatori...', op. cit., pp. 464–465.

⁵² S. Solazzi, *La revoca...*, op. cit., p. 17; J.A. Ankum, *De geschiedenis...*, op. cit., pp. 44–45; G. Impallomeni, 'Azione...', op. cit., p. 148; C. Willems, *Actio...*, op. cit., p. 36.

⁵³ D. 42,8,10,25 (Ulpianus libro 73 ad ed.): *Haec actio heredi ceterisque successoribus competit: sed et in heredes similesque personas datur*. See also S. Solazzi, *La revoca...*, op. cit., p. 29.

had acted deliberately with the intention of also defrauding those creditors whose claims would arise later.⁵⁴

Referring to the relationship between the rights of the *curator* and the creditors, G. Impallomeni indicated that priority was given to the *curator*, and that only if no *curator* had been appointed were the creditors granted the right.⁵⁵ However, this assumption does not seem reasonable, primarily because there is no such reservation in the text provided in *D. 42,8,1 pr.* If the compilers modifying Ulpian's original statement had intended to introduce such a restriction, there was nothing to prevent them from stating it explicitly. Moreover, the presumption of such a restriction on creditors' standing to sue would largely undermine the purpose of expanding the circle of entities who had the right to bring an *actio Pauliana*.

4. CONTEMPORARY LAW

Actio Pauliana survived the fall of the Western Roman Empire and its significance is entrenched in legal systems of European countries, as well as outside Europe.⁵⁶ During the Middle Ages, only minor useful clarifications were made regarding the scope of protection granted: the presumption that a person who went bankrupt acted with the intention of defrauding creditors was accepted, and the principles protecting creditors if the debtor's refusal to accept an inheritance, bequest or donation were consolidated.⁵⁷

Legal remedies to protect creditors which stem from Roman traditions are currently regulated as part of civil codes (French, Belgian, Italian and Polish law) or separate statutes (German, Swiss and Austrian law). In modern legal systems, a clear distinction can be made between protection accorded to individual creditors who bring an *actio Pauliana* and protection accorded to all creditors, available (generally) in bankruptcy proceedings. Against the background of this distinction, there is a natural preference for protection of all creditors over protection sought individually. However, this preference may manifest itself in different ways when it comes to specific solutions, in particular with regard to the question of whether the possibility of the receiver seeking Pauliana protection on behalf of all creditors completely excludes the possibility of individual protection being sought by a particular creditor, or whether the possibility of individual protection remains available to some extent, especially if the receiver considers seeking protection to be pointless or, for any other reason, refrains from using the remedies that are available to them. A good illustration of differences between these solutions can be provided by a comparison of solutions adopted in German and Polish law, following the recent change in the case law of the Polish Supreme Court.

⁵⁴ E. Serafini, *Della revoca degli atti fraudolenti compiuti dal debitore secondo il diritto romano*, Vol. 2: *Dell'azione Pauliana*, Pisa, 1889, pp. 167–172.

⁵⁵ G. Impallomeni, *Studi sui mezzi...*, op. cit., pp. 30–31.

⁵⁶ C. Willems, *Actio...*, op. cit., p. 15, with references.

⁵⁷ W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo...*, op. cit., pp. 594–595. For more, see, for example, J.A. Ankum, *De geschiedenis...*, op. cit., pp. 104–187.

5. GERMAN LAW

In the German legal system, individual Pauliana protection of creditors is regulated in a separate act, whose full title is the *Act on Challenging Debtor's Juridical Acts Outside Bankruptcy Proceedings* (hereinafter referred to as 'the AnfG').⁵⁸ The scope of application of this statute is clear from its title alone – it enables challenging, outside bankruptcy proceedings, juridical acts performed by the debtor that are detrimental to creditors (§ 1(1) AnfG). As a rule, an act performed by the debtor no earlier than ten years prior to the challenge can be challenged if it was performed with the intention of defrauding creditors and the other party was aware of the debtor's intention at the time the act took place (§ 3(1) AnfG). The basic effect of a ruling issued as a result of the challenge of the debtor's act is that everything that has been removed from the debtor's estate as a result of that act must be made available to the creditor to the extent necessary to satisfy the creditor's claim (§ 11(1) AnfG).

In contrast, Pauliana protection in bankruptcy proceedings in the German legal system is regulated by §§ 129–147 of the *Insolvency Act* (hereinafter referred to as 'the InsO').⁵⁹ On this basis, juridical acts that were performed before the commencement of bankruptcy proceedings, to the detriment of creditors who reported their claims in the bankruptcy proceedings, can be challenged by the receiver. Apart from the case, resulting from § 133 InsO, where the debtor's acts are challenged in situations similar to those provided for in the aforementioned § 3(1) AnfG, German insolvency law also provides for further specific situations in which such acts may be challenged (§§ 130–132 and 134–137 InsO).⁶⁰ When the challenge is successful, as a rule, everything that has been removed from the debtor's estate as a result of the act must be returned to the bankruptcy estate.

German legal scholars emphasise that the remedies provided for in insolvency law go further, as they allow the receiver to take over the entire object of the fraudulent act, whereas a creditor seeking individual protection does not usually have this option.⁶¹ The purpose of the *actio Pauliana* in bankruptcy proceedings is partly different from that of an individual action, as it involves ensuring equal treatment of all creditors,⁶² while an individual action brought by one creditor is aimed at satisfying that creditor on a priority basis.⁶³ However, the similarities between the regulations in many cases support the adoption of similar principles of interpretation.⁶⁴

⁵⁸ *Gesetz über die Anfechtung von Rechtshandlungen eines Schuldners außerhalb des Insolvenzverfahrens*, dated 5 October 1994 (BGBl. I S. 2911).

⁵⁹ *Insolvenzordnung* dated 5 October 1994 (BGBl. I S. 2866).

⁶⁰ On the need for more broadly defined grounds for *actio Pauliana* applied in bankruptcy, see A. Weinland, *Münchener Kommentar zum Anfechtungsgesetz*, 2nd ed., München, 2022, margin number (mn.) 8 before § 1.

⁶¹ *Ibidem*, mn. 9 before § 1.

⁶² *Ibidem*, mn. 7 before § 1.

⁶³ L. Haertlein, in: Kindl J., Meller-Hannich C. (eds), *Gesamtes Recht der Zwangsvollstreckung. ZPO – ZVG – Nebengesetze – Europäische Regelungen – Kosten. Handkommentar*, 4th ed., Baden-Baden, 2021, mn. 3 before § 1 AnfG.

⁶⁴ A. Weinland, *Münchener...*, op. cit., mn. 12 before § 1. For a comparison of the application of both measures, see also W. Zenker, 'Geltendmachung der Insolvenz- und der Gläubigeranfechtung', *Neue Juristische Wochenschrift*, 2008, No. 15, pp. 1038 et seq.

The principle of absolute preference for legal remedies protecting all creditors in bankruptcy proceedings over individual legal remedies is set out in §§ 16–18 of the AnfG. According to these provisions, in the case of the debtor's bankruptcy, the receiver may continue proceedings in which an individual creditor has challenged the debtor's act; in this context the creditor is only entitled to claim reimbursement of the costs incurred in the legal dispute from the amount obtained as a result of the action (§ 16(1) AnfG). If proceedings initiated by a creditor's action are pending at the time when the debtor is declared bankrupt, they are suspended and may be resumed with the participation of the receiver (§ 17(1) AnfG), who is then entitled to extend the claim so that it corresponds to the effects of declaring the act ineffective as provided for in insolvency law (§ 17(2) AnfG). If the receiver refuses to join the pending proceedings, such proceedings may be resumed at the request of either party, but will then continue only with regard to the costs of those proceedings. The receiver's refusal to join the proceedings initiated by the creditor does not preclude the receiver from making a separate claim based on the provisions of insolvency law (§ 17(3) AnfG). This is because, when the receiver joins the proceedings, they are bound by the status of those proceedings at the time of joining and may consider it more advisable to bring a separate action.⁶⁵ If, at the time of the declaration of bankruptcy, several sets of proceedings are pending which were brought by creditors to have the same juridical act declared ineffective, the receiver may join only one of them and should refuse to join the others.⁶⁶

This regulation is understood in German literature to mean that during bankruptcy proceedings an individual creditor cannot seek Pauliana protection, except in special situations, e.g. when the object of the fraudulent act cannot be included in the bankruptcy estate.⁶⁷ Any individual action brought by a creditor after the declaration of bankruptcy would be dismissed as inadmissible,⁶⁸ which is equivalent to rejection of a claim in Polish civil proceedings.⁶⁹ Pending cases may either be taken over by the receiver or their scope may be limited solely to the costs of the proceedings. In any case, they cannot be continued in their current scope by the creditor who brought the action, regardless of whether the receiver decides to join the proceedings instituted by the creditor or refuses to do so.⁷⁰ This means

⁶⁵ L. Haertlein, in: *Gesamtes...*, op. cit., mn. 11 on § 17 AnfG; A. Weinland, *Münchener...*, op. cit., mn. 16 on § 17.

⁶⁶ L. Haertlein, in: *Gesamtes...*, op. cit., mn. 6 on § 17 AnfG; A. Weinland, *Münchener...*, op. cit., mn. 15 on § 17.

⁶⁷ L. Haertlein, in: *Gesamtes...*, op. cit., mn. 3 on § 16 AnfG; A. Weinland, *Münchener...*, op. cit., mn. 8 and 10 on § 16.

⁶⁸ 'Ist als unzulässig abzuweisen' (L. Haertlein, in: *Gesamtes...*, op. cit., mn. 6 on § 16 AnfG; decision of the Regional Court (*Landgericht*) in Neuruppin, of 24 April 2008, 4 T 147/07, ECLI:DE:LGNEURU:2008:0424.4T147.07.0).

⁶⁹ In German civil procedure, if there are no grounds for initiation of proceedings, the court issues a so-called 'procedural judgment' (*Prozessurteil*), dismissing the claim without examining its merits; see, e.g. H.J. Musielak, A. Hüntemann, in: Krüger W., Rauscher T. (eds), *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen*, Vol. 1, §§ 1–354, 7th ed., München, 2025, mn. 7 on § 300; similarly, L. Rosenberg, K.H. Schwab, P. Gottwald, *Zivilprozessrecht*, 18th ed., München, 2018, p. 558.

⁷⁰ L. Haertlein, in: *Gesamtes...*, op. cit., mn. 5 on § 16 AnfG.

that any creditor who challenges an act of an insolvent debtor before the debtor is declared bankrupt bears a certain risk, as another creditor who files for bankruptcy proceedings may nullify the effects of the individual *actio Pauliana*.⁷¹ Even if the creditor who reported a debt in bankruptcy proceedings has already obtained satisfaction or security under their *actio Pauliana* claim before the declaration of bankruptcy, they must return whatever they have obtained to the bankruptcy estate pursuant to § 130 InsO. In principle, this means an obligation to return if the security or satisfaction took place within three months before the bankruptcy petition was filed and, at that time, the debtor was insolvent and the creditor was aware of this (§ 17(2) AnfG).

Individual creditors regain the right to bring a Pauliana action which could have been brought by the receiver only upon the conclusion of bankruptcy proceedings; this does not apply to situations where, in the course of such proceedings, effective objections have been raised against the receiver's claim (§ 18(1) AnfG). This applies both to cases where the creditor had initiated the relevant proceedings before the bankruptcy proceedings were instituted and to situations where they had not been instituted at all.⁷²

Taking into account the presented regulation, German case law assumes that an individual creditor's right to challenge the debtor's acts temporarily expires upon the declaration of bankruptcy, but may be revived upon the conclusion of bankruptcy proceedings. This is sometimes explained by stating that, although during bankruptcy proceedings these rights do exist, they are non-actionable.⁷³

6. POLISH LAW

The *actio Pauliana* was adopted into the Polish legal system following the model of Roman law,⁷⁴ with inspiration drawn from German and Austrian law as well as French practice and scholarship.⁷⁵ In Polish law, protection against fraudulent acts is provided for both in the Civil Code and in the Act of 28 February 2003 – Bankruptcy Law, and many detailed principles resemble the way German law regulates this matter. For example, Polish law also expressly provides for the possibility of a receiver joining Pauliana proceedings initiated by an individual creditor prior to the declaration of bankruptcy.

However, as regards the relationship between protection of individual creditors and protection granted to all creditors jointly at the request of the receiver, the position of Polish law has recently evolved and is now not as radical as the approach adopted in German law.

⁷¹ A. Weinland, *Münchener...*, op. cit., mn. 10 before § 1.

⁷² *Ibidem*, mn. 8 et seq. on § 18.

⁷³ L. Haertlein, in: *Gesamtes...*, op. cit., mn. 5 on § 16 AnfG and the literature cited therein.

⁷⁴ R. Longchamps de Bériér, 'Uzasadnienie projektu Kodeksu zobowiązań z uwzględnieniem ostatecznego tekstu Kodeksu', in: Zakrzewski P., Misztal-Konecka J. (eds), *Roman Longchamps de Bériér. Dzieła wybrane*, Vol. II, Lublin, 2020, p. 401.

⁷⁵ W. Dajczak, T. Giaro, F. Longchamps de Bériér, *Prawo...*, op. cit., p. 595.

According to the older view, presented in the context of the Regulation of the President of the Republic of Poland of 24 October 1934 – Bankruptcy Law, after the declaration of bankruptcy, only the receiver could claim Pauliana protection.⁷⁶ At least with regard to actions brought after the declaration of bankruptcy of the debtor, this was clearly justified in the first sentence of Article 57(1) of that Regulation, which expressly stated that ‘the right to bring an action is reserved to the receiver’. Even then, however, legal scholars maintained that a creditor could continue proceedings initiated before the declaration of bankruptcy if the receiver decided not to join them.⁷⁷

The new Polish Act of 28 February 2003 – Bankruptcy Law no longer contains an express provision making the receiver the only person with the right to bring an *actio Pauliana* after the declaration of bankruptcy. Article 132(1) of this Act merely states that ‘the action may be brought by the receiver’, and the difference in relation to the first sentence of Article 57(1) of the 1934 *Bankruptcy Law* is that the word ‘only’ is not used. Despite this, traditional views, stemming from the formerly applicable laws, continued to be represented in the literature⁷⁸ and, to some extent, in case law.⁷⁹ At the same time, however, a different position was also evident in case law,⁸⁰ while the fundamental shift came about after the resolution adopted by seven Supreme Court judges of 14 June 2023.⁸¹ According to this resolution, if the debtor is declared bankrupt, this does not result in the creditor losing the right to bring an action to declare the debtor’s juridical act ineffective under the Civil Code. In the justification for this position, the Court relied primarily on the assumption that until the *actio Pauliana* is granted, the object of the challenged act is not part of the bankruptcy estate, and therefore there is no formal obstacle to an individual creditor seeking satisfaction of their claim against that object.

The above position merits approval, even though it was met with a mixed response from legal scholars.⁸² Avoiding repetition of detailed dogmatic arguments

⁷⁶ See, e.g. judgments of the Supreme Court of 24 May 2002, III CKN 998/99, and of 5 July 2007, II CSK 118/07.

⁷⁷ M. Allerhand, *Prawo upadłościowe. Prawo układowe. Komentarz. Orzecznictwo sądów polskich z lat 1936–1998. Wzory pism w postępowaniu upadłościowym. Przepisy wykonawcze i związkowe*, Bielsko-Biała, 1998, p. 208; D. Altman, *Prawo upadłościowe. Komentarz*, Warszawa, 1936, p. 74; G. Laurer, *Prawo upadłościowe i prawo o postępowaniu układowym. Komentarz*, Warszawa, 1935, p. 65.

⁷⁸ R. Adamus, *Prawo upadłościowe. Komentarz*, Warszawa, 2021, mn. 2 to Article 132; D. Chrapoński, in: Witosz A.J. (ed.), *Prawo upadłościowe. Komentarz*, Warszawa, 2021, mn. 1 on Article 132; A. Jakubecki, in: Jakubecki A., Zedler F., *Prawo upadłościowe i naprawcze. Komentarz*, Warszawa, 2010, mn. 1 on Article 132; D. Zienkiewicz, in: Zienkiewicz D. (ed.), *Prawo upadłościowe i naprawcze. Komentarz*, Warszawa, 2006, mn. 1 on Article 132

⁷⁹ Judgments of the Supreme Court of 3 October 2008, I CSK 93/08; of 28 May 2021, III CSKP 28/21; and, as a side note to the main line of reasoning, judgment of the Supreme Court of 23 February 2022, II CSKP 199/22.

⁸⁰ Judgments of the Supreme Court of 9 December 2021, V CSKP 276/21; procedural judgment of the Court of Appeal in Wrocław of 23 August 2012, I ACz 1515/12.

⁸¹ III CZP 84/22, OSNC 2024, No. 2, item 13.

⁸² Critical commentaries on this resolution were presented by R. Adamus (‘Legitymacja wierzyciela do wytoczenia powództwa pauliańskiego po ogłoszeniu upadłości dłużnika – glosa do uchwały (7) SN z 14 czerwca 2023 r., III CZP 84/22’, *Monitor Prawa Bankowego*, 2024, No. 3, pp. 63–70) and K. Ochocińska (‘Legitymacja do wytoczenia powództwa pauliańskiego w postę-

based on applicable Polish regulations, which were presented in another study,⁸³ it should only be pointed out that an individual creditor retaining the right to file an *actio Pauliana* also during the debtor's ongoing bankruptcy proceedings does not in any way violate the rights of all creditors, which may be exercised by the receiver. Pursuant to Article 133 of the 2003 Bankruptcy Law, the receiver, if they so wish, still has the option of taking over the proceedings instituted by the creditor, or more precisely, of substituting the claimant in a case initiated by a creditor who has challenged the acts of the bankrupt. The receiver may also bring a separate action, and if it is granted, the object of the challenged act will be transferred to the bankruptcy estate with priority over any rights of the individual creditor who might independently seek Pauliana protection.

All this means that the solution whereby the creditor retains the possibility of maintaining an *actio Pauliana* even after the debtor has been declared bankrupt may in fact only have a practical effect if the receiver is passive and not interested in challenging the debtor's act. This interpretative result merits approval, as it preserves the priority of all creditors to obtain proportional satisfaction from the object of the fraudulent act, without depriving an individual creditor of their chances if, for any reason, all creditors represented by the receiver do not wish to seek satisfaction by means of a Pauliana action. It also seems that this solution is closer to the Roman tradition, in which individual creditors were not deprived of their rights to seek satisfaction, not only when no *curator bonorum* was appointed, but also when he remained inactive.

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powaniu upadłościowym – glosa do uchwały Sądu Najwyższego z 14.06.2023 r., III CZP 84/22', *Glosa*, 2024, No. 4, pp. 66–73), while J. Waga presented a generally approving commentary ('Glosa do uchwały Sądu Najwyższego z dnia 14 czerwca 2023 r., III CZP 84/22', *Studia Prawnicze Katolickiego Uniwersytetu Lubelskiego*, 2025, No. 2, pp. 165–182).

⁸³ J. Misztal-Konecka, M. Krajewski, 'Bezskuteczność czynności w stosunku do masy upadłości a jej zaskarżenie przez wierzyciela', *Przegląd Ustawodawstwa Gospodarczego*, 2024, No. 6, pp. 25–33.

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SELECTED INCOME TAX RELIEFS AS INSTRUMENTS SUPPORTING SUSTAINABLE DEVELOPMENT IN POLAND

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ABSTRACT

Measures for sustainable development may involve both increasing taxes and introducing new taxes levied on taxpayers failing to pursue this goal, and preferential treatment for entities operating in a way that implements the sustainable development concept. This original scientific article analyses two income tax preferences – thermal modernisation tax relief and research and development tax relief – to verify whether the objectives for their introduction have been achieved. Special attention has been paid to issues experienced in practice in relation to the use of the aforementioned tax reliefs by taxpayers, leading to the conclusion that due to the number of doubts arising when trying to benefit from the tax reliefs and the often restrictive approach of tax authorities, these institutions do not provide optimal support for sustainable development goals. The applied research method was the dogmatic legal method, involving the determination of content, and the analysis, interpretation and exegesis of applicable law. Primary sources examined included foreign and national generally applicable legal acts, judgments, as well as individual and general tax rulings.

Keywords: sustainable development, income tax, thermal modernisation tax relief, research and development tax relief

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INTRODUCTION

Pursuant to Article 5 of the Constitution, the Republic of Poland safeguards the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, as well as the security of citizens, safeguard the national heritage, and ensure the protection of the natural environment, guided by the principle of sustainable development. In accordance with this principle, interference with the environment should be minimised, and the social benefits resulting from such interference should outweigh the damage.¹ The principle of sustainable development goes beyond issues strictly related to environmental protection.² It also covers, *inter alia*, infrastructure development, the strengthening of social ties, and the shaping of spatial order.³ The notion of ‘sustainable development’ originates from international documents drafted, among others, by the UN,⁴ and is reflected in the legal frameworks of the European Union and the work of the Council of Europe.⁵ As indicated in the Communication from the European Commission, the Europe 2020 Strategy includes three mutually reinforcing priorities: smart growth, sustainable growth and inclusive growth.⁶ Sustainable growth means promoting a more resource-efficient, greener and more competitive economy.⁷

The Resolution adopted by the General Assembly on 25 September 2015 – Transforming our world: the 2030 Agenda for Sustainable Development⁸ (hereinafter referred to as ‘the 2030 Agenda’) sets out 17 Sustainable Development Goals with 169 associated targets to be achieved worldwide by 2030. They concern achievements in five areas: people, planet, prosperity, peace and partnership. The aforementioned goals and associated targets are integrated and indivisible and ensure a balance between the three dimensions of sustainable development: economic, social and environmental. The goals of the 2030 Agenda include, *inter alia*, ensuring access to

¹ P. Tuleja, in: Czarny P., Florczak-Wątor M., Naleziński B., Radziejewicz P., Tuleja P., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd ed., LEX/el., 2021.

² See M. Supera-Markowska, *Instrumenty podatkowego wspierania założeń zrównoważonego rozwoju w prowadzeniu działalności gospodarczej*; <http://www.publikat.home.amu.edu.pl> (accessed: 18 March 2024).

³ M. Safjan, L. Bosek (eds), *Konstytucja RP. Komentarz*, Warszawa, 2016, p. 289.

⁴ This process was initiated by the conference in Rio de Janeiro in 1992.

⁵ A. Bałaban, ‘Konstytucyjna zasada zrównoważonego rozwoju’, in: Garlicki L., Szymt A. (eds), *Sześć lat Konstytucji RP*, Warszawa, 2003, pp. 19 et seq.

⁶ Europe 2020 – A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final – see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52010DC2020> (accessed: 4 March 2026).

⁷ See A. Miształ, ‘Podatki środowiskowe a zrównoważony rozwój polskich przedsiębiorstw transportowych’, *Gospodarka Materialowa i Logistyka*, 2020, No. 1, p. 32.

⁸ Resolution adopted by the General Assembly on 25 September 2015 – Transforming our world: the 2030 Agenda for Sustainable Development, United Nations, A/RES/70/1 of 21 October 2015. The resolution set new development goals. This process was initiated at the United Nations Conference on Sustainable Development that took place in Rio de Janeiro in June 2012, aiming at completing the Millennium Development Goals and setting the agenda for further global development after 2015 (Post-2015 Development Agenda); https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (accessed: 18 March 2024).

affordable, reliable, sustainable and modern energy for all (Goal 7) and building resilient infrastructure, promoting inclusive and sustainable industrialisation and fostering innovation (Goal 9). As part of Goal 7, the Resolution sets out five targets, including to substantially increase the share of renewable energy in the global energy mix (Target 7.2). Enhancing scientific research and upgrading technological capabilities, including by encouraging innovation and substantially increasing the number of research and development workers and public and private research and development spending (Target 9.5), as well as supporting domestic technology development, research and innovation (Target 9.b), are examples of targets contributing to the achievement of Goal 9. The implementation of these goals and targets requires individual states to introduce appropriate institutional mechanisms and to monitor the interrelations and effects of sectoral policies.

The concept (goals) of sustainable development may also be supported by the introduction of certain tax-law institutions.⁹ Such measures may include, first of all, the introduction of new taxes imposed on taxpayers who fail to pursue these goals, for example, in the field of environmental protection, often referred to as green or eco taxes.¹⁰ Secondly, they may take the form of preferential treatment for entities that operate in a manner implementing the concept of sustainable development, through appropriate modification of the structural elements of taxes, in particular by introducing tax reliefs and tax exemptions.¹¹ Against this background, it is possible to identify the stimulating function of taxes, consisting in shaping tax law in such a way that it influences taxpayers to undertake or refrain from certain activities.¹² The above constitutes an example of the implementation of the 'polluter pays' principle in tax law.¹³

This article is devoted to the analysis of income tax institutions that may be regarded as an attempt by the Polish legislator to implement the concept of sustainable development. These include the thermal modernisation tax relief introduced in the Personal Income Tax Act¹⁴ and the research and development (R&D) tax relief introduced in both the PIT Act and the Corporate Income Tax Act.¹⁵ The primary objective of the thermal modernisation tax relief is to support

⁹ J. Głuchowski, *Podatki ekologiczne*, Warszawa, 2002, p. 109.

¹⁰ B. Bartniczak, M. Ptak, *Oplaty i podatki ekologiczne: teoria i praktyka*, Wrocław, 2011; B. Kryk, L. Kłos, I. Łucka, *Oplaty i podatki ekologiczne po polsku*, Warszawa, 2011; P. Małecki, 'Podatki ekologiczne w Polsce na tle innych krajów Unii Europejskiej', *Optimum: Studia Ekonomiczne*, 2016, Vol. 80, pp. 3–15; P. Małecki, *Podatki i opłaty ekologiczne*, Kraków, 2006; D. Burzyńska, 'Ekopodatki podstawą reform systemu podatkowego', *Acta Universitatis Lodzianensis*, 2007, No. 208, p. 25; P. Urbanek, E. Walińska (eds), *Ekonomia i nauki o zarządzaniu w warunkach integracji gospodarczej*, Vol. 9, Warszawa, 2016, p. 139.

¹¹ See A. Goettel, 'Wybrane proekologiczne preferencje podatkowe', *Białostockie Studia Prawnicze*, 2015, No. 18, pp. 113–128.

¹² See A. Goettel, 'Proekologiczna polityka podatkowa jednostek samorządu terytorialnego', *Samorząd Terytorialny*, 2010, No. 12, p. 67.

¹³ In EU legislation, the 'polluter pays' principle is referred to in Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, pp. 56–75.

¹⁴ Act of 26 July 1991 on Personal Income Tax (Journal of Laws of 2024, item 226); hereinafter referred to as 'the PIT Act'.

¹⁵ Act of 15 February 1992 on Corporate Income Tax (Journal of Laws of 2023, item 2805); hereinafter referred to as 'the CIT Act'.

thermal modernisation projects in single-family residential buildings, while the research and development tax relief is intended to support the innovativeness of the Polish economy, both in the science sector and in enterprises, by enabling the deduction from the tax base of certain categories of expenditure (so-called eligible costs) incurred by the taxpayer for R&D activity.

In the opinion of the authors, both tax reliefs are important instruments supporting the implementation of the concept of sustainable development. This is confirmed by the report *Implementation of the Sustainable Development Goals in Poland. Report 2023*, adopted by the Council of Ministers on 2 June 2023,¹⁶ which classified the aforementioned tax reliefs among the main actions contributing to the achievement of the sustainable development goals set out in the 2030 Agenda.

1. THERMAL MODERNISATION TAX RELIEF

1.1. IDEA BEHIND THE INTRODUCTION OF THE THERMAL MODERNISATION TAX RELIEF

The thermal modernisation tax relief is an example of a tax-law institution introduced to reward pro-environmental attitudes and eliminate anti-ecological practices by providing support for the implementation of thermal modernisation projects, such as the thermal modernisation of single-family residential buildings and the accompanying replacement of inefficient solid-fuel heat sources with new heat sources meeting environmental standards, as well as the use of renewable energy sources.¹⁷ This tax preference was introduced into the Polish legal system at the beginning of 2019.¹⁸ As indicated in the justification to the act introducing this tax relief, the idea behind its introduction was to reduce the demand for heat and consequently reduce emissions of pollutants resulting from the combustion of fuels for heating purposes, to create incentives within personal income tax for the thermal modernisation of single-family residential buildings, and to provide financial incentives for citizens to become actively involved in the process of improving air quality in Poland.

If we analyse the few years during which the tax relief has been available, it is possible to notice that taxpayers' interest in the tax relief varied. As shown in the table below, in annual settlements for 2019 it was used by 219,000 taxpayers, for 2020 – by 466,000, and for 2021 – by as many as 597,000 taxpayers.¹⁹ There were

¹⁶ 2023 Report 'Implementation of the Sustainable Development Goals in Poland', adopted by the Council of Ministers on 2 June 2023, p. 93, see <https://www.gov.pl/attachment/1b373b2e-43b0-4d6a-baa8-15326ec3a614> (accessed: 5 March 2026).

¹⁷ J. Kiszka, 'Podatkowe instrumenty wsparcia przedsięwzięć termomodernizacyjnych – wybrane problemy', *Doradztwo Podatkowe. Biuletyn Instytutu Studiów Podatkowych*, 2020, No. 6, Legalis/el.

¹⁸ Act of 9 November 2018 on amendments to the Act on Personal Income Tax and the Act on Lump-Sum Income Tax on Certain Revenues Earned by Natural Persons (Journal of Laws of 2018, item 2246).

¹⁹ <https://www.prawo.pl/podatki/popularnosc-ulgi-termomodernizacyjnej-rosnie-ale-rozbudowa-domu,520573.html> (accessed: 18 March 2024).

several reasons behind this strong interest, including, in general, the energy crisis, the need to save energy, and the introduction of energy certificates for buildings. The number of taxpayers who benefited from the tax relief in settlements for 2022 decreased to 440,549, which should be attributed to the increase in prices of thermal insulation materials, windows and doors, modern heating systems, and services.

Table 1. Thermal modernisation tax relief in Poland, in the years 2016–2022

Description	2019	2020	2021	2022	Y/Y change 2019– 2020	Y/Y change 2020– 2021	Y/Y change 2021– 2022
Number of taxpayers who used the tax relief	195,928	452,686	595,396	440,549	131%	31%	-26%
Amount of deductions in PLN thousand	2,827,970	6,982,343	10,414,411	8,232,199	147%	49%	-21%
Average amount deducted by a taxpayer in PLN	14,434	15,424	17,492	18,686	7%	13%	7%

Source: Own materials, based on: Ministry of Finance, Income Tax Department, *Information on personal income tax settlement for 2019*, Warszawa, 2021; *Information on personal income tax settlement for 2020*, Warszawa, 2022; *Information on personal income tax settlement for 2021*, Warszawa, 2023; *Information on personal income tax settlement for 2022* (<https://www.podatki.gov.pl/pit/abc-pit/statystyki/>) (accessed: 18 March 2024).

A single provision on the tax relief in question included in the Act does not clarify all the doubts associated with its functioning in practice. The Minister of Finance, apparently noticing several doubts arising on the basis of this provision, has already referred to them in the guidance – for the first time in 2019²⁰ and then in 2023.²¹ The analysis of judgments and tax rulings indicates that problems arise mainly with respect to the type of costs to be deducted and the conditions that

²⁰ Ministry of Finance, *Objaśnienia podatkowe z dnia 9.09.2019 r. Nowe preferencje w podatku dochodowym od osób fizycznych wspierające przedsięwzięcia termomodernizacyjne*; <https://www.podatki.gov.pl/media/5262/obja%C5%9Bnienia-podatkowe-z-9-wrze%C5%9Bnia-2019-r-w-sprawie-ulgi-termomodernizacyjnej.pdf> (accessed: 18 October 2023); hereinafter referred to as the ‘Guidance of 9 September 2019’ (accessed: 18 March 2024).

²¹ Ministry of Finance, *Objaśnienia podatkowe z 30.03.2023 r. Formy wsparcia przedsięwzięcia termomodernizacyjnego w podatku dochodowym od osób fizycznych*; <https://www.gov.pl/attachment/8e7ad7b0-dc04-4e90-8aab-3d453b19895f> (accessed: 18 October 2023); hereinafter referred to as the ‘Guidance of 30 March 2023’ (accessed: 18 March 2024).

must be met by a taxpayer in order to benefit from the tax preference. Pursuant to Article 26h of the PIT Act, a taxpayer who is the owner or co-owner of a single-family residential building is entitled to deduct from the tax base determined in accordance with Article 26(1) or Article 30c(2) the costs incurred during the tax year for construction materials, equipment, and services related to the implementation of a thermal modernisation project in this building, specified in regulations issued on the basis of section 10, provided that the project is completed within 3 consecutive years from the end of the tax year in which the first cost was incurred.²² The notion of a thermal modernisation project should generally be understood to mean a project that actually reduces the demand for energy or limits energy losses, or replaces traditional energy sources with renewable sources.²³

1.2. PERSONS ENTITLED TO THE THERMAL MODERNISATION TAX RELIEF

First of all, it is necessary to look at the persons entitled to the preference in question. In accordance with the aforementioned provision, taxpayers – owners or co-owners – whose income is subject to tax according to the tax scale or at a flat rate of 19%, as well as taxpayers paying lump-sum tax on recorded revenues, have the right to deduct the costs. This provision does not introduce a condition that in the case of co-ownership the person benefiting from the tax relief must have a specific share – any share in the co-ownership provides a basis for using the preference. However, the time of acquisition of the ownership title matters – a given person must acquire the status of an owner no later than upon applying the tax relief in the tax return submitted for the year in which the taxpayer incurred costs eligible for the tax relief.²⁴

1.3. BUILDING TYPE

The tax relief in question applies only to the so-called single-family residential building, referring to the meaning of this term in the Act – Construction Law.²⁵ Pursuant to Article 3(2a) of the Act – Construction Law, whenever the Act mentions a single-family residential building, it should be understood to mean a detached building or a building in semi-detached, terraced or group development, serving residential needs, constituting a structurally independent whole, in which it is permitted to separate no more than two residential units or one residential unit

²² With respect to the definition of a thermal modernisation project, Article 5a(18c) of the PIT Act refers to the Act of 21 November 2008 on Supporting Thermal Modernisation Projects and Renovation of Buildings, and on the Central Register of Building Emissivity of Buildings (consolidated text: Journal of Laws of 2023, item 2496, as amended).

²³ See T. Krywan, R. Wienconek, *Ułga termomodernizacyjna na przykładach*, LEX/el., 2024.

²⁴ Tax ruling of 1 July 2022 issued by the Director of the National Tax Information, 0113-KD IPT2-2.4011.354.2022.2.SR.

²⁵ In accordance with Article 5a(18b) of the PIT Act, a single-family residential building referred to in Article 26h(1), is a single-family residential building within the meaning of Article 3(2a) of the Act of 7 July 1994 – Construction Law Act.

and one commercial unit with a surface area not exceeding 30% of the total surface area of the building.²⁶

It should be noted that the regulations governing the thermal modernisation tax relief do not refer in their wording to a newly constructed single-family residential building. In order to use the tax relief in question, the cost must be related to the implementation of a thermal modernisation project with respect to a building that already exists, is used for residential purposes and constitutes a structurally independent whole.²⁷ The above results from the analysis of the meaning of the notions of 'modernisation' and 'thermal modernisation project'. In accordance with the dictionary definition, modernisation means the renovation or upgrading of something, e.g. a product, or the permanent improvement of something, e.g. an existing building, resulting in an increase in its use value. It includes works aimed at increasing the aesthetic and functional qualities of a building or another product. A thermal modernisation project also means, *inter alia*, an improvement that reduces the demand for energy for water heating and space heating in residential buildings, a complete or partial replacement of energy sources with renewable sources, or the use of high-efficiency cogeneration. Thus, only something that already exists can be modified or modernised.²⁸ This is consistent with the linguistic meaning of the notion of modernisation, as modernisation is defined as upgrading and improving something,²⁹ or adding modern features by replacing old elements with new ones or introducing new technical solution.³⁰ This was also the intention of the initiators of the Act, because, in accordance with the justification of the bill, the programme for renovation and thermal modernisation of residential buildings was aimed at improving the technical condition of the existing housing stock.³¹ The decisive factor for the possibility of benefiting from the aforementioned tax relief is incurring the costs after the actual completion of the construction of the residential building, rather than merely fulfilling the investor's formal obligations after the construction of the building.³² The tax authorities assess compliance with this principle very strictly, indicating that even if the building has already been constructed and put into use but has not yet been finished – for example, there is no gas furnace and heating pipes have

²⁶ It is worthwhile to emphasise that even if business activities are conducted in the building, this should not exclude the possibility of using the tax relief. This is because, in accordance with the definition of a residential building, the building will not lose its 'residential' character even if business activities are conducted there, provided that two parts are separated, of which only one is used for business activities and its total surface area does not exceed 30% of the total surface area of the building – see judgment of the Voivodeship Administrative Court in Wrocław of 22 September 2022, I SA/Wr 1089/21.

²⁷ Article 3(2a) of the Act – Construction Law.

²⁸ This was also indicated by the Voivodeship Administrative Court in Wrocław in the judgment of 7 September 2023, I SA/Wr 128/23.

²⁹ *Słownik Języka Polskiego*, PWN; <https://www.sjp.pwn.pl> (accessed: 18 March 2024).

³⁰ *Wielki Słownik Języka Polskiego*; <https://www.wsjp.pl> (accessed: 18 March 2024).

³¹ Sejm print No. 321 of 4 March 2008.

³² At this point, it is worthwhile to refer to the opinion of the Director of the National Tax Information expressed in the individual tax ruling of 5 March 2019, according to which the provisions of Article 26h(1) exclude the possibility of using this tax relief in the case of costs of construction materials, equipment and services related to the implementation of a thermal modernisation project in a single-family residential building under construction, 0112-KDIL3-2.4011.15.2019.2JK.

not been installed, water and sewage pipes have not been installed, and floors have not been finished – the construction process has not actually been completed in a way that would enable moving in and using the residential building. Consequently, it cannot be concluded that the building already fulfils its function, i.e. serves residential needs.³³

In this context, it is impossible to agree with the positions taken by the authorities, which make the admissibility of deductions dependent on the formal completion of the construction process.³⁴ In accordance with this position, as the Act stipulates that the use of a building whose construction requires a construction permit or a construction notification may commence (with certain reservations) after notifying the construction supervision authority of the completion of the construction process, provided that this authority does not raise an objection by way of a decision within 14 days of the date of delivery of the notification, and, in specific cases, when the investor obtains a final decision granting a permit to use the building, if the taxpayer incurred costs and completed the thermal modernisation project before obtaining the permit to use the building from the competent construction supervision authority, the taxpayer is not entitled to deduct the incurred costs under the thermal modernisation tax relief. This issue was analysed by the Voivodeship Administrative Court in Wrocław in the judgment of 7 September 2023.³⁵ The court found that the submission of a formal notification of the completion of construction of a single-family residential building to the construction supervision authority does not prejudice the possibility of using the thermal modernisation tax relief.³⁶ Moreover, it was emphasised that incurring the costs after the construction process of the residential building has actually been completed is of decisive importance in the context of benefiting from the aforementioned relief. Whether the erected building was used, or whether such use commenced after fulfilling all obligations by the user, is not covered by the hypothesis of the norm regulating the so-called thermal modernisation tax relief, in particular as a condition for using the deduction available thereunder.

1.4. TYPES OF COSTS TO BE DEDUCTED

Thermal modernisation may be commonly associated with additional thermal insulation of a building or the installation of a photovoltaic system, but the definition of a thermal modernisation project is much broader and includes, *inter alia*, 'a complete or partial replacement of energy sources with renewable sources'.³⁷ Based on Article 26h(10) of the PIT Act, the Minister of Investments and Development

³³ Tax ruling of 27 October 2023 issued by the Director of the National Tax Information, 0111-KDSB2-1.4011.336.2023.3.DK; tax ruling of 24 October 2023 issued by the Director of the National Tax Information, 0113-KDIPT2-2.4011.586.2023.3.AKU.

³⁴ Such an opinion was expressed, *inter alia*, in the tax ruling of 14 May 2020 issued by the Director of the National Tax Information, 0115-KDIT2.4011.121.2020.3.ŁS.

³⁵ Judgment of the Voivodeship Administrative Court in Wrocław of 7 September 2023, I SA/Wr 128/23, LEX 3606073.

³⁶ *Ibidem*.

³⁷ Tax ruling of 5 March 2021 issued by the Director of the National Tax Information, 0115-KDIT2.4011.932.2020.2.KC, LEX 57939.

issued the Regulation of 21 December 2018 laying down a list of types of construction materials, equipment and services related to the implementation of thermal modernisation projects.³⁸ The list drawn up by the Minister in this regulation is exhaustive.³⁹ The regulation lists construction materials and equipment (e.g. a heat distribution centre with a temperature programmer; a gas or oil tank; a service line to the heat distribution or gas network; materials forming part of the heating system), as well as services (e.g. performance of an energy audit of the building before the implementation of the thermal modernisation project; thermographic analysis of the building; preparation of design documentation relating to thermal modernisation works; installation of a heat pump; installation of a solar collector).⁴⁰ Tax authorities interpret this list in a very rigorous manner, for example by refusing the right to use the tax relief in the case of replacing window panes, as the list of costs in the regulation includes only the replacement of window joinery, i.e. whole windows, rather than only selected window elements.⁴¹

In accordance with the literal interpretation of Article 26h(3), costs incurred by the taxpayer may be documented only by invoices issued by a payer of tax on goods and services who is not exempt from this tax.⁴² In this context, it is worth noting the judgment that extends this literal interpretation. In the judgment of 27 June 2023,⁴³ the Voivodeship Administrative Court referred to a situation where the costs could have been documented only by an advance payment invoice due to the death of the entrepreneur who carried out the modernisation project. When analysing the facts of the case, the court emphasised that if the law does not provide for the possibility of issuing an invoice, and such a situation occurs in the case of the taxpayer's death, the tax authority cannot apply the literal wording of Article 26h(3) of the Act, because it pertains to a situation where obtaining an invoice is possible under applicable legal regulations. As obtaining an invoice is impossible and excluded by law (there are no grounds for issuing an invoice by potential heirs), it is impossible to require possession of such an invoice. The court also indicated that the appellant, as the taxpayer, should be treated like any other taxpayer who incurred costs for the thermal modernisation of their house. After all, citizens are equal before the law in terms of their rights and obligations, and the death of the contractor is independent of the appellant and cannot be predicted. The legislator cannot impose on the taxpayer an impossible obligation – in this case, the presentation of an invoice. This position deserves acceptance, because adopting the literal wording of Article 26h(3) of the PIT Act leads to the conclusion that in the event of the inability to obtain an invoice for

³⁸ Journal of Laws of 2023, item 273.

³⁹ The taxpayer is entitled to the thermal modernisation tax relief only with respect to costs of materials, equipment and services listed in the regulation. Such an opinion was expressed by the Director of the National Tax Information, for instance in the tax ruling of 24 December 2019, 0112-KDIL3-2.4011.438.2019.2.MKA.

⁴⁰ See J. Kiszka, 'Ulga termomodernizacyjna – wybrane problemy stosowania', *Doradztwo Podatkowe. Biuletyn Instytutu Studiów Podatkowych*, 2023, No. 10, Legalis/el.

⁴¹ Tax ruling of 24 October 2022 issued by the Director of the National Tax Information, 0113-KDIPT2-2.4011.738.2022.1.SR.

⁴² Article 26h(3) of the PIT Act.

⁴³ I SA/GI 1307/22, LEX 3580761.

the work performed, the taxpayer is excluded from using the tax relief referred to in this provision, which constitutes a breach of the fundamental rights of the taxpayer.

Doubts arise in a situation where the invoice is issued to one of the spouses.⁴⁴ The Director of the National Tax Information indicates that in the case of invoices issued to both spouses, for the purposes of the thermal modernisation tax relief each spouse is entitled to deduct only 50% of the incurred costs.⁴⁵ Another interpretation emphasises that there are no obstacles to deducting the entire amount of costs incurred by one spouse by the other spouse, if the former does not have sufficient income to deduct the entire amount of the costs incurred (up to the applicable limit).⁴⁶ The Director of the National Tax Information emphasised that it is irrelevant to whom the invoice was issued – the issuance of an invoice to either spouse is of secondary importance in a situation where the cost is incurred from the joint property of the spouses and intended for the joint property.⁴⁷ Such a position was also included in the Guidance of the Minister of Finance of March 2023, emphasising that issuing an invoice with the first name and surname of one spouse does not affect the possibility of using the tax relief. At the same time, this applies to the situation where the cost relates to a building belonging to the joint property and was incurred from the joint property. It should also be noted that the unused part of the limit available to one spouse does not increase the limit of the other spouse.⁴⁸

Tax authorities confirm that spouses who are co-owners of a single-family residential building, incur costs subject to the thermal modernisation tax relief and meet the other conditions of this relief, may deduct PLN 106,000 in total. An example is the individual tax ruling of 9 January 2023,⁴⁹ which states that the limit of the thermal modernisation tax relief is not related to a single investment project or a single thermal modernisation project, but is determined for a given taxpayer, regardless of the number of thermal modernisation investment projects. This limit applies to each spouse separately, i.e. each of the spouses has the right to deduct a maximum amount of PLN 53,000 (PLN 106,000 in total). Where the costs of the project are covered from the joint property but relate to real estate belonging to the personal property of one of the spouses, the spouse who does not hold title to the property cannot benefit from the tax relief.⁵⁰

⁴⁴ See M. Brzostowska, P. Kubiesa, *Ustawa o podatku dochodowym od osób fizycznych. Komentarz*, LEX/el., 2024.

⁴⁵ See tax rulings of the Director of the National Tax Information: of 28 April 2020, 0115-KDIT2.4011.44.2020.3.ŁS, LEX 538302, and of 30 April 2020, 0115-KDIT1.4011.125.2020.1.MT, LEX No. 539091.

⁴⁶ Tax ruling of 7 April 2022 issued by the Director of the National Tax Information, 0115-KDIT3.4011.83.2022.2.AWO.

⁴⁷ Tax ruling of 7 April 2022 issued by the Director of the National Tax Information, 0114-KDIP3-2.4011.214.2022.3.AC, LEX No. 642470.

⁴⁸ Tax ruling of 27 February 2024 issued by the Director of the National Tax Information, 0115-KDIT2.4011.6.2024.1.ŁS.

⁴⁹ Tax ruling of 9 January 2023 issued by the Director of the National Tax Information, 0115-KDIT2.4011.704.2022.2.ŁS.

⁵⁰ Tax ruling of 28 November 2023 issued by the Director of the National Tax Information, 0112-KDIL2-1.4011.748.2023.2.AK.

With regard to the possibility of deducting the costs, the legislator decided to introduce a time limit. The taxpayer must complete the project within three years from the end of the tax year during which the first cost was incurred. Failure to meet this time limit has serious consequences – in such a case, the taxpayer must return the tax relief by adding the amounts previously deducted to the income for the year during which the time limit for completing the project expired. As the Director of the National Tax Information emphasised, the limit is not renewed every year. The deduction amount cannot exceed PLN 53,000, taking into account thermal modernisation projects already completed and deducted from the tax base in previous years.⁵¹

2. RESEARCH AND DEVELOPMENT TAX RELIEF

2.1. IDEA BEHIND THE INTRODUCTION OF THE RESEARCH AND DEVELOPMENT TAX RELIEF

Investing in knowledge and building a knowledge-based economy are among the major challenges of our time. As P.F. Drucker noted many years ago, knowledge will not be the only source of competitive advantage,⁵² but it will certainly be the most important one. In the literature, a knowledge-based economy is defined as an innovative economy in which the share of R&D expenditure amounts to about 3% of GDP. At the same time, it is emphasised that innovation is a function of at least three variables: human creativity, demand for innovation and an appropriate pro-innovation environment created by the state.⁵³ The creation of conditions supporting the undertaking of R&D activity by entrepreneurs may be carried out by the state through various methods. One of them is the appropriate use of the stimulating function of taxes, through the creation of appropriate financial incentives to undertake and conduct such activities. This is the purpose of the R&D tax relief introduced into the Polish tax system in 2016.⁵⁴ This tax relief replaced the tax relief for the acquisition of new technologies⁵⁵ which, due to rather strict conditions for its use and the relatively low limit for deducting costs incurred by the taxpayer for the purchase of a new technology from the tax base – up to 50% – did not enjoy much interest among entrepreneurs. It also failed to achieve the intended objectives and, in particular, it did not encourage entrepreneurs to undertake and conduct independent R&D activity in Poland, but instead promoted the acquisition of

⁵¹ Tax ruling of 29 August 2022 issued by the Director of the National Tax Information, 0112-KDIL2-1.4011.632.2022.2.JK.

⁵² P.F. Drucker, *Spółeczeństwo pokapitalistyczne*, transl. Kranas G., Warszawa, 1999, pp. 7–8.

⁵³ A. Skrzypek, 'GOW – przyczyny i uwarunkowania', *Annales Universitatis Mariae Curie-Skłodowska. Sectio H, Oeconomia*, 2012, Vol. 46, No. 2; based on: J. Kleer, 'Co to jest GOW', in: Kukliński A. (ed.), *Gospodarka oparta na wiedzy*, Warszawa, 2003.

⁵⁴ The R&D tax relief was introduced based on the Act of 25 September 2015 on Amendments to Certain Acts Related to Supporting Innovation (Journal of Laws of 2015, item 1767), amending, in this respect, the Act of 26 July 1991 on Personal Income Tax and the Act of 15 February 1992 on Corporate Income Tax.

⁵⁵ The tax relief was available in the years 2006–2015.

new technologies from external entities, mainly foreign ones.⁵⁶ The R&D tax relief introduced an entirely new approach in this respect. It created the possibility of deducting the so-called eligible costs incurred within an enterprise conducting R&D activity from the tax base.⁵⁷ The structure of the R&D tax relief was based on identical solutions in both income tax acts, i.e. in the PIT Act and the CIT Act, in particular with regard to the definitions of concepts such as research and development activity, eligible costs, or the amount of costs that can be deducted. The essential elements of the R&D tax relief structure were amended several times (in 2017 and 2018), and their current form was introduced by the Act of 29 October 2021 amending the PIT and CIT Acts.⁵⁸

The introduction of the R&D tax relief in Poland was consistent with the 'Europe 2020' strategy⁵⁹ adopted in 2010, in which the EU set the path to achieving three mutually reinforcing priorities – smart growth, sustainable growth and inclusive growth. With these priorities in mind, five headline targets were set for the EU, including one related to R&D activity. In accordance with this target, by the end of 2020, 3% of the EU's GDP should have been invested in R&D. The national target adopted for Poland was 1.7% of GDP.⁶⁰ In 2009, i.e. in the year preceding the adoption of the 'Europe 2020' strategy, these indicators reached the level of 1.97% of GDP for the EU and 0.66% of GDP for Poland, respectively, while in 2015, i.e. in the year preceding the entry into force of the R&D tax relief, these indicators reached the level of 2.12% of GDP for the EU and 1% of GDP for Poland, respectively.⁶¹ In both instances, these indicators were quite far from the targets set for the end of 2020.

During less than a decade of the R&D tax relief being in force, it was possible to observe an increase both in domestic investments in R&D activity expressed as a share of GDP (Table 2), as well as in the number of taxpayers and the amounts of deductions from income under the tax relief (Table 3). The latest data disclosed by the Ministry of Finance (for 2022) came as a surprise, as they showed a decrease in the number of PIT taxpayers benefiting from the tax relief (with a simultaneous increase in the total amount of deductions made). It seems that this may be related to numerous interpretative doubts regarding concepts crucial for using the tax relief, in particular such as 'R&D activity' and 'eligible costs', as well as the related risk of incorrect settlement of the tax relief by taxpayers.

⁵⁶ Justification of the bill on amending certain acts related to supporting innovation, Sejm of the 7th term, Sejm print No. 3286, pp. 6–7.

⁵⁷ The aim was to create financial incentives for entrepreneurs to undertake and conduct independent innovative activities within enterprises, which constitute the main driver of the country's economic prosperity and competitiveness, and to increase spending on R&D activity.

⁵⁸ Act of 29 October 2021 on amendments to the Act on Personal Income Tax, Act on Corporate Income Tax and Certain Other Acts (Journal of Laws of 2021, item 2105).

⁵⁹ Communication from the Commission, Europe 2020 – A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, 3 March 2010.

⁶⁰ National Reform Programme for the implementation of the 'Europe 2020' strategy adopted by the Council of Ministers, 26 April 2011, p. 7.

⁶¹ Eurostat, Gross domestic expenditure on R&D by sector; https://ec.europa.eu/eurostat/databrowser/view/sdg_09_10/default/table (accessed: 25 May 2024).

Table 2. R&D activity in Poland, in the years 2016–2022

Description	2016	2017	2018	2019	2020	2021	2022
Gross domestic expenditure on R&D (GERD) in PLN million	17,943	20,578	25,648	30,285	32,402	37,676	44,702
Gross domestic expenditure on R&D (GERD) to GDP in %	0.96	1.03	1.21	1.32	1.39	1.43	1.46
Internal expenditure on R&D per capita in PLN	467	536	668	789	845	992	1,182
Number of R&D entities	4,871	5,102	5,779	5,863	6,381	7,370	7,431
Internal R&D personnel per 1000 employees	6.9	7.4	8.0	8.3	8.7	9.3	9.8

Source: Own materials, based on data from Statistic Poland; <https://stat.gov.pl/obszary-tematyczne/nauka-i-technika-spoleczenstwo-informacyjne/nauka-i-technika/dzialalnosc-badawcza-i-rozwojowa-w-polsce-w-2022-roku,8,12.html> (accessed: 8 May 2024).

Table 3. Deductions of eligible costs from the tax base – PIT and CIT, in the years 2016–2022

Year	PIT			CIT		
	Number of taxpayers who made a deduction	Amount of deductions in PLN thousand	Average amount deducted by a taxpayer in PLN	Number of taxpayers who made a deduction	Amount of deductions in PLN thousand	Average amount deducted by a taxpayer in PLN thousand
2016	264	7,722	29,250	264	198,334	751
2017	524	40,606	77,492	565	543,329	962
2018	893	178,669	200,077	951	1,675,055	1,761
2019	1,195	293,121	245,290	1,434	2,621,102	1,828
2020	1,518	405,393	267,057	1,643	3,135,967	1,909
2021	1,539	395,484	256,974	2,064	4,282,904	2,075
2022	1,264	430,328	340,449	2,413	6,855,672	2,841

Source: Own materials, based on: Ministry of Finance, Income Tax Department, Information on personal income tax settlement for 2016, 2017, <https://dane.gov.pl/pl/dataset/191,informacje-dotyczace-rozliczenia-podatku-dochodowego-od-osob-fizycznych> (accessed: 4 September 2023); for 2018, 2019, 2020, 2021, <https://www.podatki.gov.pl/pit/abc-pit/statystyki/> (accessed: 4 September 2023); for 2022, <https://www.podatki.gov.pl/media/9684/informacja-cit-za-2022-r.pdf> (accessed: 10 May 2024); Information on corporate income tax settlement for 2016, 2017, <https://dane.gov.pl/pl/dataset/162,informacje-dotyczace-rozliczenia-podatku-dochodowego-od-osob-prawnych> (accessed: 6 September 2023); for the years 2018, 2019, 2020, 2021, <https://www.podatki.gov.pl/cit/abc-cit/statystyki-cit/> (accessed: 6 September 2023); for 2022, <https://www.podatki.gov.pl/media/9684/informacja-cit-za-2022-r.pdf> (accessed: 7 May 2024).

2.2. ESSENCE OF THE RESEARCH AND DEVELOPMENT TAX RELIEF

The essence of the R&D tax relief is that a taxpayer carrying out R&D activity may deduct from the tax base certain spending (eligible costs) incurred in relation to these activities and previously recognised as tax-deductible costs. This means that costs incurred for R&D activity may be deducted by the taxpayer twice: first, they reduce the taxpayer's income by being recognised as tax-deductible costs, and second – as a result of using the tax relief – a certain percentage of these costs also reduces the tax base forming the starting point for calculating the tax due in the annual tax return.⁶² The R&D tax relief may be used by entrepreneurs who, as part of their non-agricultural business activity, conduct R&D activity and are taxpayers of personal income tax whose income is subject to taxation according to the tax scale or at a flat rate of 19%, or taxpayers of corporate income tax who earn income other than income from capital gains.

2.3. NOTION OF RESEARCH AND DEVELOPMENT ACTIVITIES

The *sine qua non* condition for an entrepreneur to use the R&D tax relief is to conduct R&D activity. Both tax acts define this notion in the same way. Research and development activities should be understood to mean creative activities comprising scientific research or development work, carried out on a systematic basis, undertaken in order to increase the stock of knowledge and to use the stock of knowledge to devise new applications. This definition is rather enigmatic, and the only clarification (also very general) is the indication that scientific research may take the form of basic research or applied research, within the meaning of the definitions of these notions included in the Act – Law on Higher Education and Science⁶³ (Article 4(2)(1), (2) and (3), respectively). Under the aforementioned Act, basic research means empirical or theoretical work aimed, above all, at acquiring new knowledge about the fundamentals of phenomena and observable facts, without focusing on direct commercial use. Applied research means work aimed at acquiring new knowledge and skills, focused on the development of new products, processes or services, or significant improvements thereof. At the same time, development work is defined as activities comprising the acquisition, combination, adaptation and application of currently available knowledge and skills, including IT tools or software for production planning, as well as designing and creating modified, improved or new products, processes or services, excluding activities comprising routine and periodic modifications thereto, even if such modifications demonstrate features of improvements.

⁶² M. Brzostowska, P. Kubiesa, *PIT. Komentarz*, 2nd ed., LEX/el., 2023; P. Małecki, M. Mazurkiewicz, *CIT. Komentarz. Podatki i rachunkowość*, 14th ed., LEX/el., 2023.

⁶³ Act of 20 July 2018 – Law on Higher Education and Science (consolidated text: Journal of Laws of 2023, item 742, as amended); hereinafter referred to as 'Act – Law on Higher Education and Science'.

When drafting the definition of R&D activity, the legislator did not use easily identifiable criteria. For example, the definition does not explicitly indicate that the tax relief is addressed exclusively to entities conducting activities in areas intuitively associated with characteristics such as modernity and innovation, that it is addressed exclusively to entities conducting complex scientific research rather than to taxpayers conducting only development work, or that the conducted activities must be successful. From the point of view of a taxpayer, the lack of precision of this definition can be considered both its disadvantage and its advantage. The disadvantage is the lack of certainty as to whether a given taxpayer's activity is actually R&D activity within the meaning of the Tax Act and, consequently, whether the deductions applied by the taxpayer are justified. The advantage of this ambiguous definition is the very wide group of entities that can benefit from the tax relief in question.⁶⁴ In this situation, it is not surprising that taxpayers, wishing to avoid negative consequences, increasingly decide to apply to the Director of the National Tax Information for an individual tax ruling, seeking confirmation whether their activity constitutes R&D activity within the meaning of the aforementioned regulations.⁶⁵ At this point, it is worth noting that the Director of the National Tax Information issued as many as 3,118 individual tax rulings⁶⁶ pertaining to the R&D tax relief and the related preferential taxation of income generated by intellectual property rights (so-called IP Box). A significant part of these tax rulings concerned the determination whether the R&D work described in the applications and carried out by the applicants constitutes R&D activity within the meaning of the provisions of the aforementioned acts. Somewhat surprisingly, for some time the Director of the National Tax Information took the position that the structure of the provisions of the tax acts defining R&D activity did not allow him to decide whether the activities presented in taxpayers' applications constituted R&D activity. He argued that the Director was not authorised to make a legal qualification from the point of view of a non-tax act (i.e. the Act – Law on Higher Education and Science) and the notions defined therein, because pursuant to Article 14b § 1 of the Tax Ordinance⁶⁷ the Director of the National Tax Information may issue individual tax rulings only with respect to provisions of tax law.⁶⁸ Consequently, he sent requests to the applicants

⁶⁴ P. Małecki, M. Mazurkiewicz, in: Małecki P., Mazurkiewicz M., *CIT. Komentarz. Podatki i rachunkowość*, 14th ed., Warszawa, 2023, Article 4(a); <https://sip.lex.pl/#/commentary/587279168/732954?pit=2024-06-17&toHit=1&cm=URELATIONS> (accessed: 18 April 2024).

⁶⁵ Cf. Tax Guidance of 15 July 2019 on preferential taxation of income from intellectual property rights – IP Box. In this document, the Minister of Finance included the following recommendation: 'A taxpayer intending to benefit from the IP Box preference with respect to income from copyright to a computer programme and acquire relevant tax and legal protection in this respect should file an application for an individual tax ruling with the Director of the National Tax Information' (p. 32); <https://www.podatki.gov.pl/media/5137/obja%C5%9Bnienia-podatkowe-z-15-lipca-2019-r-w-sprawie-ip-box.pdf> (accessed: 6 September 2023).

⁶⁶ Data from the EUREKA Customs and Tax Information System; <https://eureka.mf.gov.pl/> (accessed: 25 May 2024).

⁶⁷ Act of 29 August 1997 – Tax Ordinance (consolidated text: Journal of Laws of 2023, item 2383, as amended).

⁶⁸ Individual tax ruling of 26 March 2020 issued by the Director of the National Tax Information, 0113-KDIPT2-1.4011.34.2020.2.MAP.

asking them to clarify the description of the facts or future event by indicating whether a given activity includes so-called scientific research or so-called development work within the meaning of the Act – Law on Higher Education and Science. This meant that – in the opinion of the Director of the National Tax Information – the applicant should determine on their own whether their activity meets the individual conditions to be classified as R&D activity, as part of the description of the facts of the case or future event. At the same time, the lack of an explicit assessment on the part of the applicant usually resulted in the Director of the National Tax Information issuing a decision to leave the application without consideration, because, in the opinion of the authority, this is information necessary to determine under the PIT Act and the CIT Act that the taxpayer conducts R&D activity. This practice raised certain concerns and could become a factor inhibiting the initiative of entrepreneurs in the field of undertaking R&D activity and using the R&D tax relief. However, an increasing number of decisions of the Director of the National Tax Information have been overturned by judgments issued by administrative courts. The courts point out that the obligation of the tax authority to provide a written tax ruling pertaining to the scope and manner of application of tax law cannot be limited solely to acts containing the term ‘tax law’ in their title, because it is not only in these acts that the elements on which taxation and its amount depend are regulated.⁶⁹ It is also necessary to agree with the position of the courts that it is impossible to require a taxpayer applying for an individual tax ruling to decide on their own whether the activities undertaken constitute R&D activity,⁷⁰ since they have doubts⁷¹ in this respect and expect, as is their right, their resolution by the tax authority. The actions of the tax authorities refusing to issue a tax ruling were considered to be in breach of the law and to undermine the purpose of issuing tax rulings. As the Supreme Administrative Court (NSA) concluded in the judgment of 23 November 2021,⁷² the authority issuing the tax ruling may request the taxpayer only to clarify the factual circumstances pertaining to the activities carried out and, based thereon, assess whether the taxpayer conducts R&D activity, while the authority’s obligation is to provide the taxpayer with a response to the interpretative doubts raised. This judgment should be considered crucial, as – on the one hand – it confirms the

⁶⁹ Cf. judgments of the Voivodeship Administrative Court in Gliwice: of 5 March 2021, I SA/GI 24/21; of 9 May 2021, I SA/GI 544/21; of 4 November 2021, I SA/GI 992/21; judgment of the Supreme Administrative Court of 15 January 2020, II FSK 345/18; judgments of the Voivodeship Administrative Court in Gdańsk of 9 September 2021, I SA/Gd 631/21 and of 7 September 2021, I SA/Gd 876/21; judgment of the Voivodeship Administrative Court in Rzeszów of 5 August 2021, I SA/Rz 425/21; judgment of the Voivodeship Administrative Court in Bydgoszcz of 3 August 2021, I SA/Bd 348/21; and judgment of the Voivodeship Administrative Court in Kraków of 18 March 2021, I SA/Kr 178/21.

⁷⁰ Within the meaning of Article 5a(38)–(40) of the PIT Act and Article 4(26)–(28) of the CIT Act, respectively.

⁷¹ Cf. judgment of the Voivodeship Administrative Court in Gliwice of 23 February 2023, I SA/GI 1506/22. The Director of the National Tax Information filed a cassation appeal against this judgment to the Supreme Administrative Court. The proceedings were discontinued as the appellant withdrew the appeal – see decision of the Supreme Administrative Court of 14 November 2023, II FSK 1208/23.

⁷² Judgment of the Supreme Administrative Court of 23 November 2021, II FSK 1049/21.

taxpayers' right to obtain an individual tax ruling pertaining to the classification of a given activity as R&D activity, providing a basis for using the R&D tax relief, and – on the other hand – it imposes on tax authorities the obligation to independently assess whether the taxpayer conducts (or intends to conduct) such activity based on the facts described by the taxpayer. The individual tax ruling (in accordance with Articles 14k–14nb of the Tax Ordinance) has a protective function, provided that the taxpayer's situation complies with (is identical to) the description of the facts or future events included in the application for issuing the tax ruling, and that the taxpayer complies with the tax ruling. For this reason, the taxpayer's right to obtain an individual tax ruling on classifying a given activity as R&D activity, especially in the context of minimising the risk related to using tax preferences which, in the case of the R&D tax relief (and the related IP Box tax relief or the prototype tax relief), may be particularly significant, is very important.

2.4. ELIGIBLE COSTS

In order to use the R&D tax relief, during the tax year the entrepreneur must incur costs related to R&D activity, the so-called eligible costs, which were previously recognised as tax-deductible costs.⁷³ Costs of R&D activity must fall within the exhaustive list of eligible costs, and if they were incurred as part of basic research, the research must be conducted on the basis of a contract or agreement with a scientific unit within the meaning of the Act – Law on Higher Education and Science. For instance, eligible costs include:

- (a) wages and salaries of employees in the part related to R&D activity, together with social insurance contributions, in the part in which the time allocated to the performance of R&D activity remains within the employee's total working time in a given month;
- (b) remuneration under personal services contracts or specific task contracts in the part related to R&D activity, together with social security contributions, in the part in which the time allocated to the performance of a service related to R&D activity remains within the total time allocated to the performance of the service under a personal services contract or a specific task contract in a given month;
- (c) costs incurred to purchase specialist equipment (which is not a fixed asset), as well as supplies and raw materials that are directly related to the conducted R&D activity, in particular laboratory glassware and accessories, as well as measuring instruments;
- (d) costs of expert opinions, opinions, advisory services and equivalent services provided or performed on the basis of a contract, as well as costs of acquiring the results of scientific research conducted on the basis of contracts, for the purposes of R&D activity.⁷⁴

⁷³ In accordance with their definition included in the PIT Act – Article 22 or in the CIT Act – Article 15, respectively.

⁷⁴ The list of eligible costs is determined in Article 26e(2)–(3) of the PIT Act and in Article 18d(2)–(3) of the CIT Act.

Moreover, in order to use the R&D tax relief, the taxpayer must separately record the costs of R&D activity in the accounting records, in compliance with the provisions of the PIT Act⁷⁵ or the CIT Act.⁷⁶ In addition, the taxpayer must disclose eligible costs subject to deduction in the tax return, whereas the amount of costs incurred for R&D activity subject to deduction as eligible costs is limited and amounts to 100% or 200% of eligible costs, depending on the taxpayer's status and the type of costs. An entrepreneur with the status of a research and development centre (RDC), who at the same time is a micro-, small- or medium-sized enterprise, may deduct eligible costs up to 200%. Other RDCs are entitled to a deduction of 200% of eligible costs, except for the costs of obtaining and maintaining patents, rights of protection for a utility model, and rights conferred by the registration of an industrial design listed in the PIT Act and the CIT Act, where the amount of eligible costs cannot exceed 100% of costs. In the case of other taxpayers, the deduction limit is 100% of eligible costs, except for personnel-related costs, where 200% of eligible costs may be deducted.⁷⁷ The amount of the deduction for eligible costs cannot exceed the amount of income earned by the CIT taxpayer from revenues other than capital gains, and the amount of income earned by the PIT taxpayer from non-agricultural business activity in the tax year. The right to deduct eligible costs is available provided that these costs have not been refunded to the taxpayer in any form and have not been deducted from the income tax base.

The complexity of the R&D tax relief means that in order to benefit from this tax preference, the taxpayer not only needs to correctly classify the activity conducted as R&D activity, but also to exercise particular care when determining the costs of the R&D activity and the valuation of these costs.⁷⁸ The taxpayer must also correctly identify the documentation justifying the right to use the tax relief and fulfil formal obligations, including the separate recording of the costs of R&D activity in the accounting records.⁷⁹

Several interpretative problems arise in relation to the above. They concern, for example, amounts paid as wages and salaries of employees in the part related to R&D activity together with social insurance contributions in the part in which the time allocated to the performance of R&D activity remains within the employee's total working time in a given month.⁸⁰ Issues are also related to determining whether the time of justified absence from work, in particular in connection with the employee's annual leave or illness, can be recognised as an eligible cost. In accordance with the position of the Ministry of Finance and the Director of the National Tax Information taken until February 2024, 'the employee's total working time in a given month'⁸¹ was interpreted only as time actually worked, which excluded the possibility of

⁷⁵ In the revenue and expense ledger kept or in the accounting records kept – Article 24a(1b) of the PIT Act.

⁷⁶ In the accounting records – Article 9(1b) of the CIT Act.

⁷⁷ Article 26e(7) of the PIT Act and Article 18d(7) of the CIT Act.

⁷⁸ By identifying costs meeting the definition of 'eligible costs' referred to in Article 26e of the PIT Act and in Article 18d of the CIT Act.

⁷⁹ In accordance with Article 24a(1b) of the PIT Act and Article 9(1b) of the CIT Act.

⁸⁰ Eligible costs specified in Article 26e(2)(1) of the PIT Act and Article 18d(2)(1) of the CIT Act.

⁸¹ Referred to in Article 26e(2)(1) of the PIT Act and Article 18d(2)(1) of the CIT Act, respectively.

including costs related to the employee's justified absence (e.g. annual leave or illness)⁸² in the eligible costs for the purposes of the R&D tax relief. The case law issued so far also does not present a uniform position in this respect. For instance, the Voivodeship Administrative Court in Poznań stated that:

'If an employee devotes all of their working time to research and development activities, then the costs related to the time of the employee's justified absence from work should be included in full, or in a specified proportion when the employee devotes only part of their time to research, in relation to the total working time.'⁸³

A similar opinion was expressed by the Voivodeship Administrative Court in Gliwice:

'The decisive factor is the performance of R&D activity by the employee, and as these activities are performed on the basis of a contract of employment, all revenues of the taxpayer related to their employment relationship and financed by the payer of contributions related to these amounts due, specified in the Act on the social insurance system, constitute eligible costs under Article 18d(2)(1) of the CIT Act.'⁸⁴

Judgments of the Supreme Administrative Court also include the view that:

'The employee's justified absence is inherently related to the employment relationship, and consequently it cannot be excluded from the eligible costs for the purposes of the research and development tax relief.'⁸⁵

A different position, however, was taken by the Voivodeship Administrative Court in Gdańsk:

'Wages and salaries for the period of sick leave and annual leave and contributions related thereto are not subject to deduction under the research and development tax relief, pursuant to Article 18d(1) in conjunction with Article 18d(2)(1) of the CIT Act.'⁸⁶

It is hoped that the issue of uniform interpretation of this matter will be resolved by the general tax ruling of 13 February 2024 issued by the Ministry of Finance,⁸⁷

⁸² Cf. e.g. individual tax rulings of 27 July 2022, No. 0111-KDIB1-3.4010.296.2022.2.IM (ID of information in the Eureka system: 502083); of 4 March 2022, No. 0111-KDIB1-3.4010.709.2021.2.PC (ID of information in the Eureka system: 483095); of 9 October 2020, No. 0111-KDIB1-3.4010.357.2020.2.MBD (ID of information in the Eureka system: 427285); of 11 February 2020, No. 0111-KDIB1-3.4010.563.2019.1.BM (ID of information in the Eureka system: 427173).

⁸³ Judgment of the Voivodeship Administrative Court in Poznań of 13 May 2021, I SA/Po 163/21.

⁸⁴ Judgment of the Voivodeship Administrative Court in Gliwice of 22 October 2020, I SA/Gl 422/20.

⁸⁵ Cf. judgment of the Supreme Administrative Court of 14 December 2022, II FSK 1204/20; judgment of the Supreme Administrative Court of 11 October 2022, II FSK 364/20; judgment of the Supreme Administrative Court of 11 January 2022, II FSK 1247/21.

⁸⁶ Judgment of the Voivodeship Administrative Court in Gdańsk of 18 May 2021, I SA/Gd 232/21.

⁸⁷ General tax ruling No. DD8.8203.1.2021 of 13 February 2024 issued by the Minister of Finance, on the possibility of classifying amounts paid in a given month under the titles referred to in Article 12(1) of the Act on Personal Income Tax and contributions related to these amounts

stipulating that wages and salaries for the period of annual leave or sick leave constitute an eligible cost for the purposes of the R&D tax relief. As noted by the Minister of Finance, individual components of an employee's compensation, i.e. remuneration for the period of annual leave and sick leave, should be treated as components of remuneration constituting an eligible cost for the purposes of the research and development tax relief, in the part in which the employer is obliged to cover them on the basis of separate provisions and subject to compliance with all other requirements imposed on the taxpayer by Article 26e of the PIT Act and Article 18d of the CIT Act, respectively – including, in particular, determining whether the cost in question constitutes a tax-deductible cost for the relevant tax year and determining the employee's involvement in the performance of research and development activities.

CONCLUSIONS

The purpose of tax-law institutions aimed at supporting sustainable development assumptions is to emphasise the value of the concept of respect for the environment, while ensuring the proper involvement of human resources and the development of a competitive economy. Pro-ecological tax preferences ensure the performance of the non-fiscal functions of the tax system by softening the legal regime for entities that, through taking or avoiding certain activities, contribute to broadly understood environmental protection.⁸⁸ The functional essence of tax preferences is expressed in the use of taxes to produce certain economic or social effects by the tax creditor, including in the area of environmental protection.

The thermal modernisation tax relief was introduced into the Polish tax system in order to speed up the process of improving air quality, ensuring compliance with air quality standards set by national and EU regulations on air protection. This measure is aimed at implementing low-carbon economy standards by supporting the implementation of projects pursuing sustainable development objectives. Consequently, the thermal modernisation tax relief, through its stimulating impact, is intended to encourage taxpayers who are owners of single-family residential buildings to finance thermal modernisation projects without using public funds. However, if we examine the functioning of this tax relief aimed at supporting pro-environmental attitudes over the past few years, it is difficult to conclude that this goal has been fully achieved. The number of judgments, individual tax rulings and guidance issued by the Minister of Finance on the basis of Article 26h of the PIT Act indicates that some of the restrictions imposed by the legislator, and often

financed by the taxpayer, specified in the Act on the Social Insurance System, in relation to a justified absence of an employee, as eligible costs for the purposes of the research and development tax relief (Official Journal of the Ministry of Finance of 21 February 2024, item 16).

⁸⁸ A. Krajewska, *Podatki. Unia Europejska. Polska. Kraje nadbaltyckie*, Warszawa, 2004, pp. 53–54; F. Gradalski, 'Teoretyczne podstawy proekologicznego systemu podatkowego', *Gospodarka Narodowa*, 2002, No. 10, p. 25.

additional limitations introduced by the tax authorities themselves, significantly limit the effectiveness of this support instrument.

The introduction of the research and development (R&D) tax relief into the Polish tax system undoubtedly corresponds with sustainable development goals, contributing to building a knowledge-based economy, in which the share of spending on R&D is constantly increasing. However, it should be noted that the structure of the R&D tax relief, providing the possibility to deduct from the tax base only eligible costs previously recognised as tax-deductible costs, deprives a significant group of PIT taxpayers, i.e. taxpayers using simplified forms of taxation, of the possibility of benefiting from the tax relief. For this group of taxpayers, the benefits of the R&D tax relief are not a sufficient incentive to undertake R&D activity. A different trend can be observed – a transition to simplified forms of taxation, resulting from numerous changes to the rules governing simplified taxation of the income of individuals conducting non-agricultural business activity, e.g. reducing the list of activities excluded from the flat-rate taxation of recorded revenues while simultaneously reducing tax rates in comparison with taxation settled according to general rules and flat-rate taxation.⁸⁹ These measures, although perhaps not even intended by the legislator, are considered the main reason for the recent decrease in the number of PIT taxpayers using this relief. At the same time, the complexity of the R&D tax relief and the lack of precise definitions of concepts crucial for its application, i.e. R&D activity and eligible costs, may discourage taxpayers from undertaking activities in this area for fear of the risk of incorrect settlement of the tax relief and the related adverse consequences.

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⁸⁹ This is confirmed by data of the Ministry of Finance, according to which taxpayers paying lump-sum tax on recorded revenue submitted 1,493,199 tax returns for 2021 (i.e. 105,655 more than in 2020), while the number of tax returns submitted by them for 2022 was 1,719,658 (i.e. 226,459 more than in 2021) – see Ministry of Finance, Income Tax Department, *Information on personal income tax settlement for 2021*, <https://www.podatki.gov.pl/pit/abc-pit/statystyki> (accessed: 4 September 2023); for 2022, <https://www.podatki.gov.pl/media/9684/informacja-cit-za-2022-r.pdf> (accessed: 10 May 2024).

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PROCESSED ENVIRONMENTAL INFORMATION

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ABSTRACT

The legislator, under the Act on Access to Public Information, introduced a distinction between simple and processed information. Processed information is understood as information that, as at the date of submitting the request, does not exist in a form expected by the requester and, therefore, has to be specially generated for the requester's needs. Provision of processed information is conditional upon the requirement of particular importance for the public interest. A special category of public information, access to which is governed by a separate legislative act, is environmental information. Under the Act on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments, however, the legislator has not introduced any provisions on access to processed information. This gives rise to a practical problem as to how an entity obliged to provide information should react if it receives a request for environmental information whose nature indicates that, in fact, processed information has been requested. The purpose of this article is to resolve this practical issue through a dogmatic analysis of the provisions of both aforementioned Acts in the light of relevant axiological considerations. This is the case as the opinions presented in the literature so far seem to conflict with fundamental constitutional values.

Keywords: public information, environmental information, processed information, limitation of the right to information

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INTRODUCTION

The right to public information is a public subjective right, enshrined both in the Constitution and in provisions of international law.¹ Beyond any doubt, this right materially affects the formation of civil society. It is hard not to notice a correlation between the principle of transparency of public life and the principle of a democratic state ruled by law, since in the latter the citizen must be in a position to obtain information on activities carried out by public authorities. Most obviously, as with any other constitutional right or freedom, the right of access to public information is not absolute and, rather than that, is subject to a number of restrictions.

The basic legislative act of statutory rank governing transparency of public life is the Act on Access to Public Information.² Although, according to the legislator's intention, it was intended to be a 'mother' Act comprehensively regulating the subject matter of the title, already in Article 1(2) API Act, the legislator introduced a conflict-of-law rule under which provisions of the Act do not violate any other provisions of statutory acts that define differently the terms or procedures for providing access to public information. Under the current legislative framework, there are a number of legislative acts that constitute *leges speciales* in relation to the Act under discussion.

One of the statutory acts that regulate specifically issues concerning transparency of public life is the Act on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments.³ The question of mutual relations between the two legislative acts will be one of the leading issues discussed in this article.

As it turns out, interpretative problems in legal practice arise from the procedure to be applied by an entity obliged to provide information when it is faced, in fact, with a request for processed information. This is a specific category of public information, access to which has been conditioned by a requirement of particular importance for the public interest. Such a specific statutory regime, however, can only be found in the API Act. What happens, however, if the request relates to environmental information?

This research issue has, only to a minor extent, been of interest to academic authors (it has been chiefly discussed in commentaries). What is more, in decisions of administrative courts the subject matter has not been frequently commented upon. However, this issue gives rise to decision-making dilemmas for entities obliged to provide information on the environment and environmental protection. The task

¹ Cf. J. Taczowska-Olszewska, *Dostęp do informacji publicznej w polskim systemie prawnym*, Warszawa, 2014, p. 97; K. Karsznicki, 'Kryteria dostępu do informacji publicznej', *Prokuratura i Prawo*, 2015, No. 11, p. 112; A. Kwaśniak, 'Udział prokuratora w postępowaniu o udostępnienie informacji publicznej', *Prokuratura i Prawo*, 2021, No. 9, pp. 103–124.

² Act of 6 September 2001 on Access to Public Information, Journal of Laws of 2022, item 902; hereinafter referred to as 'the API Act'.

³ Act of 3 October 2008 on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments, Journal of Laws of 2024, item 1112, as amended; hereinafter referred to as 'the Environmental Act'.

is not made easier by a divergence of views expressed in literature. The intention behind this article is to fill the gap in academic literature by putting forward a proposal to solve the existing practical issue based on the current legislative framework (*de lege lata*).

In the article, the formal dogmatic method is used, as analysis made when interpreting the existing legal provisions can be a means towards the goal, that is, formulation of a solution to the issue. To the necessary extent, this will be supported by literature research and an analysis of case law of administrative courts in the area of access to public information and access to environmental information.

PUBLIC INFORMATION AND ENVIRONMENTAL INFORMATION

As signalled at the beginning, an interpretative problem arises already in the context of the mutual relationship between the concepts of 'public information' and 'environmental information'. Public information has been defined, in a generally criticised and rather unfortunate manner, as any piece of information on public matters (Article 1(1) API Act). Article 6 API Act contains a non-exhaustive list of information qualifying as public information. Yet, the legislator decided to define environmental information by means of a list in Article 9(1) of the Environmental Act. Before we move on to further considerations, it should be pointed out that the two rights have a different constitutional basis – the right of access to public information is enshrined in Article 61(1) of the Constitution of the RP,⁴ whereas the right to obtain information on the environment and environmental protection is enshrined in Article 74(3) of the Constitution. However, any closer discussion of differences between the two constitutional rights of the individual goes beyond the scope of this study.

At first glance, it could be assumed that the relation between the referents of the concepts 'public information' and 'environmental information' is that of inclusion, with the latter concept being narrower. The mutual relation between the legislative acts cited above should be approached along the same lines. However, some authors argue that the concepts are cross-related, which means that there are both pieces of information that are public but not environmental (which is obvious and requires no comment) and certain pieces of information that are environmental but not public (which will be discussed below in more detail). It seems, however, that the former approach should be followed. The Republic of Poland is the common good of all its citizens (Article 1 of the Constitution of the RP), and the Republic ensures protection of the natural environment pursuant to principles of sustainable development (Article 5 of the Constitution). Public authorities pursue policies ensuring ecological security of current and future generations, and protection of the environment is the duty of public authorities (Article 74(1) and (2) of the Constitution). The above gives rise to the

⁴ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78, item 483, as rectified and amended – hereinafter referred to as: 'Constitution', 'Constitution of the RP'.

conclusion that natural environment is a public good, and that it is an obligation of public authorities to protect the environment, but also an obligation of citizens. In the light of the above, even if a private entity owns certain elements of the environment, as a whole it is still a common good. Therefore, by way of example, information on the chemical composition of waste discharged by the owner of a private plot of land into a river, or on the morphology of waste generated by private-law bodies, which at first glance may give the impression of private information (though it is undoubtedly environmental information), should, in fact, be considered public, as concerning a public matter within the meaning of Article 1(1) API Act. In the light of the above, it should be concluded that information on the environment and on environmental protection is a certain type of public information, which means that the relation between the two concepts is one of inclusion.

With the above in mind, what is the relation between the two discussed statutory acts? In the case law of administrative courts, it has been pointed out that the Environmental Act is *lex specialis* in relation to the API Act, which means that requests for information about the environment are processed under the statutory regime of the former Act – both with regard to disclosure of such information and refusal of its disclosure. Provisions of the API Act do not apply insofar as terms and procedures governing access to the requested information are specified in the Environmental Act.⁵ Doubtlessly, the legislator introduced in Articles 8–28 of the Environmental Act a separate legislative regime – in many ways differing from the general one – governing access to environmental information, and put in place the above-mentioned conflict-of-law rule in Article 1(2) API Act with the intention that special provisions should apply to information on the environment and environmental protection. However, an important reservation must be made in this regard. Namely, taking into account the conflict-of-law rule in Article 1(2) API Act, it cannot be said that the entire Environmental Act is *lex specialis* in relation to the API Act, as it regulates a wide range of matters, not only access to environmental information. It contains 174 Articles divided into smaller sections, with only Articles 8–28 governing access to environmental information. The Act regulates such subject matters, separate from the issues discussed herein, as public participation in environmental protection, environmental impact assessments, administrative fines for non-compliance with legal provisions in the area of environmental protection or, finally, it provides the organisational basis for the operation of an administrative body – the Director General for Environmental Protection. Therefore, it must be concluded that it is not the Act as a whole but only its specific provisions that constitute *leges speciales* in relation to particular provisions of the API Act (e.g. Article 14 of the Environmental Act is *lex specialis* in relation to Article 13 API Act).

In this context, one can only agree with an argument expressed in literature that:

⁵ Cf. judgment of the Voivodeship Administrative Court in Wrocław of 18 May 2021, IV SA/Wr 147/21, LEX No. 3192515; judgment of the Supreme Administrative Court of 5 January 2023, III OSK 6352/21, LEX No. 3481155; judgment of the Supreme Administrative Court of 7 December 2016, I OSK 462/15, LEX No. 2174974.

'In case of concurrence, priority attaches to special provisions (including prior ones), however, this does not mean that the Act on Access to Public Information no longer applies to public information covered by such special provisions. The norms of the Act will apply in all matters in which the Act is not contrary to the special provisions.'⁶

This will have important implications for further considerations on disclosure of processed information on the environment and environmental protection.

PROCESSED PUBLIC INFORMATION

As mentioned at the beginning, processed information is a specific category of public information. Under Article 3(1)(1) API Act, the right of access to public information covers the right to obtain public information, including obtaining processed information insofar as this is particularly important for the public interest. This provision introduces an exception to the rule in Article 2(2) API Act, according to which a person exercising the right of access to public information may not be requested to demonstrate a legal or factual interest. Such an inquiry may be made by the entity obliged to provide information only if the request relates to processed public information. There is no doubt that the need to meet stringent requirements to access processed information is a limitation of the constitutional right to public information.⁷

In practice, access to processed information gives rise to multiple interpretative doubts, which is a consequence of the legislator's use of unclear expressions that have not been defined in statutory provisions at all. This task had to be taken on by academic authors and the judiciary. From the time of entry into force of the legislative regime, it has been indicated that processing of information should be treated as an intellectual process carried out in relation to data at the disposal of the obliged entity.⁸ This involves preparation of certain breakdowns, tables, charts or calculations that are not at the disposal of the obliged entity as at the date of the request; however, they can be generated specifically for the requestor on the basis of the information held. Over time, however, another, wider understanding of the term 'processed information' has developed, according to which the concept also covers

⁶ G. Wierczyński, 'Pojęcie informacji publicznej w świetle ustawy o dostępie do informacji publicznej. Glosa do wyroku NSA z dnia 19 grudnia 2002 r., II SA 3301/02', *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 2005, No. 1–2, pp. 55–64.

⁷ Cf. A. Kwaśniak, 'Faktyczne i prawne ograniczenia w dostępie do informacji publicznej na tle rodzimego ustawodawstwa', *Roczniki Administracji i Prawa*, 2019, No. 2, pp. 193–208; R. Stefanicki, 'Ustawa o dostępie do informacji publicznej (wybrane zagadnienia w świetle orzecznictwa sądowego)', *Państwo i Prawo*, 2004, No. 2, p. 97; E. Jarzęcka-Siwik, J. Wyporska-Frankiewicz, 'Ograniczenie prawa dostępu do informacji publicznej', in: Wyporska-Frankiewicz J. (ed.), *Dostęp do informacji publicznej na wniosek w praktyce jednostek samorządu terytorialnego*, Warszawa, 2019, p. 100.

⁸ Cf. M. Jabłoński, 'Dekodowanie zwrotów niedookreślonych na przykładzie przepisów nowelizujących ustawę o dostępie do informacji publicznej', *Wrocławsko-Lwowskie Zeszyty Prawnicze*, 2013, No. 4, p. 195; M. Jaśkowska, 'Pojęcie informacji publicznej i jej rodzaje', *Kwartalnik Prawa Publicznego*, 2012, Vol. 12, No. 3, pp. 71–72; B. Przywora, 'Regulacje prawne w zakresie dostępu obywateli do informacji przetworzonej – stan obecny i postulaty zmian', *Przegląd Prawa Publicznego*, 2013, No. 5, pp. 79–88.

a large amount of simple information requiring above-average commitment of the obliged entity in the process of gathering and disclosing the information.⁹ This is a consequence of a conclusion drawn in legal practice that processing a request having as its subject hundreds of documents often requires much more commitment from the obliged entity than preparing intellectually engaging breakdowns or charts. Added to this is the still existing and growing phenomenon of abuse of the right of access to public information, which assumes the form of vexatious requests that often even paralyse public administration. In this context, it has been expressly pointed out in literature that the purpose behind the legislator's introduction of a legal provision restricting access to processed public information was to protect the public good against abuses of the right of access to information.¹⁰

Even though such an extensive interpretation of Article 3(1)(1) API Act can be considered controversial – since, strictly speaking, the concept of processing cannot be understood as gathering a large amount of unprocessed data (in fact, one can speak of an extensive interpretation of a provision introducing an exception) – for nearly a quarter of a century of application of the discussed legal regime the legislator has not identified the issue of abuse of the right of access to public information and has not offered any effective antidote. It seems that – *lege lata* – the only remedy to the issue is to resort to an extensive interpretation of the term 'processed information'. In fact, if the obliged entity establishes that two premises are jointly fulfilled, i.e. that the information subject to the request constitutes processed information and that one cannot speak of particular importance of its disclosure for the public interest, the obliged entity is in a position to issue an administrative decision refusing to disclose the requested public information,¹¹ which will often require much less commitment from the administrative authorities than preparing hundreds of documents for disclosure. It must be remembered that the statutory deadline for handling a request for disclosure of public information does not change merely because the request relates to processed information. As a rule, in such situations, the obliged entity will be forced to take advantage of the possibility to prolong the deadline for settling the matter up to two months.¹²

⁹ Cf. D. Lebowa, A. Fermus-Bobowiec, 'Prawo do informacji publicznej a jego nadużycie – rozważania na gruncie orzecznictwa sądów administracyjnych', *Annales UMCS Sectio G*, 2022, Vol. LXIX, No. 2, p. 32; K. Pawlik, 'Szczególnie uzasadniony interes publiczny w udostępnieniu informacji publicznej', *Informacja w Administracji Publicznej*, 2020, No. 2, p. 45; P. Szustakiewicz, Ł. Nosarzewski, 'Wpływ orzecznictwa sądów administracyjnych na stosowanie ustawy o dostępie do informacji publicznej', in: Błachucki M., Sibiga G. (eds), *20 lat ustawy o dostępie do informacji publicznej – podsumowanie i perspektywy ustawowej regulacji prawa do informacji publicznej*, Warszawa, 2022, pp. 51–52.

¹⁰ Cf. A. Korzeniowska-Polak, 'Postępowanie z wniosku o udostępnienie informacji publicznej przetworzonej', *Kwartalnik Prawa Publicznego*, 2012, Vol. 12, No. 3, p. 111; A. Kręciś-Sarna, 'Ochrona przed nadużyciem prawa do informacji publicznej', *Informacja w Administracji Publicznej*, 2019, No. 1, p. 52; similarly, the Constitutional Tribunal in the judgment of 18 December 2018, SK 27/14, OTK-A 2019, item 5.

¹¹ Cf. B. Pietrzak, 'Decyzja o odmowie udostępnienia informacji publicznej przetworzonej', *Informacja w Administracji Publicznej*, 2015, No. 3, pp. 56 et seq.; P. Szustakiewicz, 'Zróżnicowanie informacji prostej i informacji przetworzonej', *Informacja w Administracji Publicznej*, 2017, No. 2, pp. 61 et seq.

¹² Cf. A. Kwaśniak, 'Bezczynność organu w przedmiocie udostępnienia informacji publicznej przetworzonej. Glosa do wyroku NSA z dnia 21 maja 2014 r., I OSK 2472/13', *Orzecznictwo w Sprawach Samorządowych*, 2021, No. 4, pp. 131–139.

CAN ENVIRONMENTAL INFORMATION BE PROCESSED INFORMATION?

A provision analogous to the regime described above is nowhere to be found in the Act on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments. Oddly enough, this statutory regime was put in place several years later, when the legislator had to be aware of the practical aspects of disclosing processed information and of the ensuing problems. The phenomenon of abusing the right of access to public information was already known at that time. However, for certain reasons – unfortunately not made clear in the explanatory memorandum to the draft bill – the legislator did not decide to include in the Environmental Act a provision following the pattern of Article 3(1)(1) API Act.

However, it is hard not to notice that the practice of requesting public information and the practice of requesting environmental information are very much the same. In fact, requestors often cite an incorrect legal basis, requesting environmental information while, at the same time, invoking the right of access to public information (which is more frequent), or *vice versa* (much less frequently). The procedure itself, i.e. submitting a request, which initiates the lapse of statutory deadlines, the need to prepare, often copy, scan, anonymise information, and to provide it to the requestor, is the same in both situations. Therefore, if we accept that a request for public information may also include information that is not held by the obliged entity in the requested form as at the date of the request but can be generated specifically for the requestor based on available data (processed information), there are no rational grounds to conclude that an identical situation will not arise in the context of environmental information. In practice – especially before administrative bodies whose main task is environmental protection¹³ – these are very common situations. Unfortunately, they have not been duly regulated under the statutory regime. In light of the above, it can be concluded that the phenomenon of processed environmental information is real and exists in practice; however, as opposed to processed public information, it has not been identified by the legislator and duly regulated.

PROCEDURE UPON SUBMISSION OF A REQUEST FOR PROCESSED ENVIRONMENTAL INFORMATION

THE CURRENT STATE OF RESEARCH AND CASE-LAW

The key problems, from the point of view of this study, have only to a limited extent been of interest to academic authors, and, if so, this refers mainly to commentaries. However, even within this limited scope, one can speak of two opposing views regarding the procedures to be followed, according to the applicable law, upon receipt of a request for disclosure of processed environmental information.

¹³ Such as bodies of the Environmental Protection Inspectorate, Directors for Environmental Protection, the Polish Waters, etc.

Nevertheless, it seems that neither of these extreme approaches takes into account certain essential axiological conditions and, above all, is compatible with provisions of the Constitution. Both opinions explained below are based on an observation that the Environmental Act does not contain any provisions in this regard, and assume that its provisions constitute *leges speciales* in relation to the API Act and – importantly – that, as a result, they cannot be applied jointly with that Act.

The first of the views, which seems to be the majority opinion, assumes – in great simplicity – that since the legislator did not regulate the matter in the Environmental Act, in the event of submission of a request for environmental information bearing the features of processed information, the obliged entity is exempt from the obligation to comply with such a request.

It has been emphasised in literature that:

‘It cannot be concluded that there is a legal dualism in the context of disclosing information on the environment and environmental protection. There are no grounds to apply, as appropriate, in such matters the provisions of the Act on Access to Public Information. Matters concerning provision of information on the environment and environmental protection should be resolved exclusively on the basis of the legal regime under the Environmental Act.’¹⁴

As pointed out in a judgment of the Voivodeship Administrative Court in Wrocław, ‘as opposed to the procedure under API Act, the Environmental Act does not mention disclosure of processed information. In addition, the administrative body is definitely under no obligation to search for materials in generally available media.’¹⁵ The Court in Wrocław also emphasised that

‘The Environmental Act, in the context of providing environmental information, does not use the terms “simple” and “processed” information (unlike the Act on Access to Public Information). The discussed Act points only to a possibility of converting information, however, only as to its form. Public authorities, when disclosing information on the environment or environmental protection, are required to take measures permitted by law (under legal provisions and within their scope), and when it comes to conversion of information, they only take technical substantive measures that do not interfere with the contents of the disclosed data. Provisions of the Environmental Act regarding disclosure of information on the environment or environmental protection do not permit a conclusion that entities obliged to provide information are also obliged to “generate” such information for the requestor. This follows, among other things, from the provision of Article 8(1) of the Environmental Act providing for a requirement to provide information held by the public authority and intended for public authorities. Such a position is also confirmed by the provision of Article 8(2) of the discussed Act, imposing on public authorities an obligation to provide necessary assistance and guidance in the search for information on the environment and its protection, which materialises when the authority is not in possession of the requested information. Obviously, the above does not exempt the authority from preparing simple breakdowns of the environmental information already held that allow the requested data to be obtained.’¹⁶

¹⁴ Judgment of the Supreme Administrative Court of 19 June 2024, III OSK 1859/22, LEX No. 3746429.

¹⁵ Judgment of the Voivodeship Administrative Court in Wrocław of 1 February 2024, II SA/Wr 591/23, LEX No. 3689204; similarly, judgment of the Voivodeship Administrative Court in Cracow of 13 September 2022, II SA/Kr 572/22, LEX No. 3416674.

¹⁶ *Ibidem*.

In line with the above, commentaries point out that 'there are no legal grounds to conclude that, under provisions of the discussed Act, processed information can be disclosed in the understanding developed in administrative court jurisprudence'.¹⁷

The above opinion deserves criticism on account of the serious limitation of the constitutional right of the individual to obtain information on the condition of the natural environment and its protection. Although the institution of processed information constitutes such a limitation, the restriction itself seems to be proportional and, first of all, does not compromise the essence of the limited right (cf. Article 31(3) of the Constitution), since the requestor can obtain processed information; however, the prerequisite of particular importance for the public interest must be fulfilled. The opinion presented above seems to go much further, effectively excluding the possibility of obtaining such information in the context of environmental information. This can be treated as a limitation compromising the essence of the constitutional right of the individual, and therefore contrary to Article 31(3) of the Constitution.

Referring to the arguments of the Voivodeship Administrative Court concerning consequences of the provision in Article 8(1) of the Environmental Act, it can only be mentioned in passing that Article 4(3) API Act also provides that only public information held by a given obliged entity is subject to disclosure; however, in the light of Article 3(1)(1) API Act, no one derives from that norm the conclusion that it is inadmissible to request processed information. From the semantic perspective, both provisions are equivalent. It seems that both Article 8(1) of the Environmental Act and Article 4(3) API Act are a logical consequence of the obvious fact noticed by the legislator that it is impossible to disclose information that is not in the entity's possession, assuming at the same time that one should not impose on entities obliged to provide information a requirement to search, on behalf of the requestor, for information that might potentially be held by other entities.

An opposing view posits that

'When it comes to environmental information, processed information should also be disclosed, that is information whose provision requires additional measures consisting, e.g. in reaching for reference documentation or performing appropriate analyses, calculations, statistical breakdowns involving engagement of particular personal and financial resources in the process of their preparation'.¹⁸

It can be assumed (as this was not expressly stated in the cited commentary) that, in the opinion of the authors, such information should be disclosed without a need to demonstrate that any premises have been fulfilled, that is without an option to issue a negative decision on account of the processed status of the information and, at the same time, non-compliance with the special prerequisite of particular

¹⁷ T. Filipowicz, A. Plucińska-Filipowicz, in: Wierzbowski M. (ed.), *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz*, 2nd ed., Warszawa, 2020, p. 97.

¹⁸ M. Bar, J. Jendrośka, *Komentarz do wybranych przepisów ustawy o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko*, 2nd ed., LEX/el., 2024, Article 8.

importance for the public interest. In consequence, this opinion is a polar opposite of the one previously discussed.

However, such a position cannot be accepted. As rightly pointed out in literature, exercise of the right of access to public information cannot lead to paralysis of the state's institutions.¹⁹ Efficiency, or even viability, of the state's structures seems to prevail, as a value, over transparency of such structures' operation, especially in a situation of abuse of the right of access to information on activities of public authorities. This is the case, as diligence and efficiency of public authorities are constitutional values enshrined in the Preamble to the Constitution. The institution of access to processed information is regarded as a protection measure for entities obliged to provide information against the phenomenon of abuse of the right of access to public information, understood as

'such actions of the entitled party that are made in exercise of their right of access to information under the established legal order, however, do not correspond to purposes of the law adopted by the legislator'.²⁰

However, it cannot be accepted that omission of that institution in the Environmental Act should lead to an entirely unlimited obligation to disclose any environmental information, no matter how extensive or how engaging for the obliged entity. This would lead by the most direct means to the state's paralysis. A situation can easily be imagined in which a party of interest to Environmental Protection Inspectorate bodies, pursuing its activities in violation of legal provisions, submits extensive requests for environmental information for the sole purpose of paralysing the body and, at the same time, precluding effective review of its own activities. This was definitely not the legislator's intention.

THE PROPOSAL TO SOLVE THE PROBLEM

The solution to the depicted problem lies in appropriate interpretation of provisions of both Acts and, in particular, the conflict-of-law rule discussed at the beginning. As pointed out in case law:

'Existence of separate terms or a procedure for disclosing public information precludes application of the Act on Access to Public Information, however, only insofar as a given matter is expressly regulated by such special provisions. As highlighted in legal litera-

¹⁹ Thus, e.g. in M. Badowski, 'Dostęp do informacji publicznej jednostek samorządu terytorialnego. Nadużycie prawa', *Prawo i Więź*, 2021, Vol. 38, No. 4, p. 434.

²⁰ A. Piskorz-Ryń, 'O nadużyciu prawa dostępu do informacji publicznej', in: Błachucki M., Sibiga G. (eds), *20 lat ustawy o dostępie do informacji publicznej – podsumowanie i perspektywy ustawowej regulacji prawa do informacji publicznej*, Warszawa, 2022, p. 91. For more on the same phenomenon, see M. Kowalski, 'Nadużycie prawa do informacji publicznej', *Zeszyty Naukowe Sądownictwa Administracyjnego*, 2016, No. 2, pp. 49–60; A. Knopkiewicz, 'O nadużyciu prawa do informacji publicznej', *Państwo i Prawo*, 2004, No. 10, pp. 69–81; A. Kwaśniak, 'Countering Abuse of Subjective Rights as Exemplified by the Right to Public Information', *Roczniki Administracji i Prawa*, 2024, No. 2, pp. 67–78.

ture – the provision of Article 1(2) of the Act on Access to Public Information requires that in each situation where specific matters concerning terms and procedure of access to public information are regulated differently in the Act on Access to Public Information and differently in a special statutory act on disclosure of information, and provisions of both acts cannot be reconciled with one another, priority must be afforded to provisions of the special act. However, if a given matter is only partially regulated or not regulated at all in the special act, appropriate provisions of the Act on Access to Public Information will apply; in the former case they apply on a supplementary basis, and in the latter case they are the only legal framework in that respect.²¹

Importantly, literal interpretation of Article 1(2) API Act leads to the conclusion that provisions of the Act on Access to Public Information do not violate provisions of other acts laying down different terms and procedures of accessing information. Therefore, first of all, it is provisions of other acts that can supersede provisions of the Act on Access to Public Information, and not entire acts. This issue has already been discussed above. Second, such provisions will be *leges speciales* only if they define differently the terms and procedure of access. *A contrario*, in situations where provisions of another statutory act do not specify different terms and procedure of access to information, they will not constitute special rules in relation to provisions of the API Act. In turn, if a particular question has not been regulated differently, the conflict-of-law rule in Article 1(2) API Act will not apply, and *leges generales* will.

Along the above lines, it must be concluded that Article 3(1)(1) API Act has no normative equivalent in the other statutory regime discussed. And since there is no special provision regarding access to processed information, the entity applying the law has no other choice but to reach for a general rule in this regard. The conflict-of-law rule in Article 1(2) API Act will not apply in such a case, since neither the terms nor the procedure of access to processed information have been regulated differently under the Act on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments.

In light of the above, if a request is submitted for disclosure of information and content of the request shows that it relates to environmental information referred to in Article 9(1) of the Environmental Act and, second, the requested information bears features of processed information (developed by academic authors and the judiciary but not defined in the Act), the obliged entity will classify the information as environmental information; however, it will then take further steps according to the procedure under the Act on Access to Public Information. The obliged entity will explain to the requestor why it considers the information processed and will call on the requestor to demonstrate particular importance of disclosure for the public interest (it should be borne in mind, however, that it is always for the obliged entity to determine whether this premise is met). If it is found that the premise has not been met, the right will materialise to issue an administrative decision refusing disclosure of the processed information. It seems that the appropriate legal basis

²¹ Resolution of the Supreme Administrative Court of 9 December 2013, I OPS 8/13, *ONSA i WSA*, 2014, No. 3, item 38, p. 67, and a study cited therein: J. Jendrońska, M. Bar, Z. Bukowski, *Dostęp do informacji o środowisku i jego ochronie*, Poznań–Wrocław, 2007, pp. 64–65.

for such a decision will be Article 16(1) in conjunction with Article 3(1)(1) API Act, since, in the absence of special provisions, the conflict-of-law rule referring the matter to the Environmental Act will not apply.

The proposed solution lies between the two extreme conceptions expressed so far. On the one hand, it takes into account the constitutional status of the right of the individual to obtain information on the condition of the environment and environmental protection. Even though the solution restricts the right, the restriction does not compromise its essence but, on the other hand, permits effective and efficient performance of public tasks by entities obliged to provide information. In the end, it must not be overlooked that no state authority has been appointed for the sole purpose of disclosing information to citizens. This is always a secondary activity in relation to the principal area of the authority's responsibility.

CONCLUSIONS

The issue of citizen access to information on public activities is invariably of high practical importance and, over time, its significance has continued to grow. This can be confirmed, for example, by the high number of decisions of administrative courts relating to this question, which is increasing every year. Since the legislator has used many vague expressions, the everyday practice of applying the legal provisions in question gives rise to an increasing number of new problems, which have so far not been examined in the academic literature or by administrative courts.

One such issue encountered in practice by entities obliged to provide information that – as it seems – has not been satisfactorily resolved to date is the handling of requests for environmental information having the status of processed information. Although this question has been regulated (though imperfectly) under the Act on Access to Public Information, analogous provisions are nowhere to be found in the Act on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments.

Research carried out demonstrated, on the one hand, that the phenomenon has so far met with limited interest from academic authors and the judiciary. The purpose of this article is to fill that gap. On the other hand, two extreme opinions can be found, one of which seems to compromise the constitutional rights of the individual, and the other neglects the need to ensure effective operation of the state. In contrast, interpretation made leads to the conclusion that it is possible – avoiding extremes and bearing in mind all imperfections of the currently applicable legislative framework – to apply jointly, to a certain degree, provisions of both discussed Acts.

From the point of view of entities applying the law, the most favourable solution would be intervention by the legislator. However, having regard to the need to respond to current problems, it seemed more pertinent to achieve a solution *de lege lata*, leaving proposals *de lege ferenda* for a separate publication.

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GLOSS ON THE JUDGMENT OF THE COURT OF APPEAL IN LUBLIN OF 22 NOVEMBER 2022 (REF. NO. II AKA 231/22)

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ABSTRACT

The commented ruling refers to the issue of the relationship between the provisions of Article 161 § 3 of the Penal Code and Article 165 § 1(1) of the Penal Code. The interpretative difficulties arose upon the introduction of Article 161 § 3 into the legal system as a consequence of the COVID-19 pandemic. The judicial authorities were faced with the choice of the correct legal classification of behaviours aimed at the spread of infectious diseases. The problem constituting the crux of the title judgment is therefore important both dogmatically and in the practice of applying the law. The significance of the subject matter is also visible in the special nature of the prohibited acts in question, the implementation of which is related to the occurrence of biological pathogens invisible to the human eye that cause infectious diseases and which did not disappear once the SARS-CoV-2 pandemic had been brought under control.

Keywords: infectious disease, exposure to infection, bringing danger, apparent coincidence, health of many people

JURISPRUDENCE THESIS

There is an apparent coincidence between the provisions of Article 161 § 3 of the Penal Code and Article 165 § 1(1) of the Penal Code, because Article 161 § 3 of the Penal Code penalises direct, i.e. close in time and highly probable, exposure to infection of many individualised persons, while Article 165 § 1(1) of the Penal Code penalises the

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introduction of a real (and therefore not necessarily direct, i.e. neither temporally close nor highly probable) danger to the life and health of unspecified persons, causing an epidemiological threat.

GLOSS

The SARS-CoV-2 pandemic, more widely known as COVID-19, has been one of the greatest challenges for all elements of the structure of the state's functioning in this century. The unpredictability of the development of epidemic outbreaks has reminded many of the need for a quick and determined response from national and supranational systems. These experiences have brought many new solutions, including legal ones, but regulations that have been in place for years have also been verified in practice. Such examples include Article 165 § 1(1) of the Penal Code (hereinafter referred to as 'the PC'), which has been in force since its introduction of the Penal Code of 1997,¹ and Article 161 § 3 PC, newly introduced as a result of the pandemic experience.

The choice of the correct legal classification of criminal conduct is one of the most important elements of a subsequent conviction, and thus of the legal basis for criminal liability and the amount of punishment. However, in the course of the analysis of a criminally relevant action that meets the characteristics of a type of prohibited act, certain disturbances may occur due to the concurrence of provisions of the Act. This situation takes place when the scopes of penalisation of at least two provisions coincide at some level of interpretation of specific elements. Such a case arises if we take into account the already mentioned Article 161 § 3 and Article 165 § 1(1) PC.² Interpretative ambiguities as to the choice of the most appropriate provision of criminal law became the basis for an appeal filed with the Court of Appeal in Lublin. It should be noted that the basis of the case is not at all obvious. Elements describing perpetrating acts ('direct exposure to infection of many people with the virus' and 'endangering the life or health of many people by causing an epidemiological threat or the spread of an infectious disease') belong to the category of evaluative elements, depending on the type of disease, as well as its virulence and aetiology.³ It is not possible to simply compare the initial stages of influenza with the plague and to state unequivocally that, in the same circumstances in both cases, the elements of a prohibited act will be met. Issues related to the development of infectious diseases in the human body and the possibilities of transmission, as well as the phases of the disease in which a biological pathogen invisible to the

¹ Act of 6 June 1997 – Penal Code (Journal of Laws of 2024, item 17, as amended). Hereinafter referred to as 'the Penal Code'.

² Similar remarks are made by J. Karnat, who emphasises that the scopes of these acts partially overlap (J. Karnat, in: Gadecki B. (ed.), *Kodeks karny. Art. 1–316. Komentarz*, Warszawa, 2023, pp. 483–484).

³ Similar positions can be found in the doctrine. This aspect is discussed extensively by B. Michalski on the example of Article 161 of the Penal Code (see B. Michalski, in: Warylewski J. (ed.), *Przestępstwa przeciwko dobrom indywidualnym. System Prawa Karnego. Tom 10*, 2nd ed., Warszawa, 2016, p. 321).

human eye is capable of causing infection in other people, mean that in some cases the boundaries between the above-mentioned elements relating to the perpetrator's conduct in the provisions of Article 161 § 3 and Article 165 § 1(1) PC may become blurred.

Therefore, three variants of criminal liability should be allowed:

1. under Article 161 § 3 PC, in the implementation of all elements described therein,
2. under Article 165 § 1(1) PC, in the implementation of one of the alternative elements: 'causing a danger to the life or health of many people causing an epidemiological threat',
3. under Article 165 § 1(1) PC, in the implementation of one of the alternative elements: 'causing a danger to the life or health of many people by causing the spread of an infectious disease'.

The evidence of the indicated doubts in practice is the judgment under commentary, which was issued in the following factual circumstances. The defendant, knowing that he was infected with the SARS-CoV-2 virus, while present in shops touched the counter and goods and paid for his purchases with banknotes. Importantly, he was in the initial phase of the illness,⁴ which justifies the claim that he could have infected other persons. The events occurred during the COVID-19 pandemic, that is, at a time when special epidemiological legal regimes were in force, including the isolation of persons suffering from this disease. The Regional Court found him guilty of committing the act described in Article 165 § 1(1) PC. As a result of the appeal lodged, the case was examined by the Court of Appeal in Lublin, which considered, among other things, the correctness of the legal classification adopted.

In the first place, the relationship between the perpetrator's conduct and the place where it was committed should be considered. This is important from the perspective of the proper attribution of criminal liability. Since he knew that he was infected with the SARS-CoV-2 virus and nevertheless went to a public place where at least one person (a shop assistant) was present, he exposed at least that person to the possibility of infection with the virus transmitted, *inter alia*, by droplets. However, more persons could have been present in the shop at that time. It must also be borne in mind that infectious diseases spread in a specific manner. Biological pathogens left in the environment under normal conditions are capable of surviving and replicating for some time and therefore may pose a threat to humans even after the perpetrator has left the shop. Therefore, the perpetrator's conduct should be assessed in a holistic manner, particularly when dealing with endangerment offences. Moreover, the defendant did not use any personal protective equipment (gloves, mask). Furthermore, he did not comply with the home isolation imposed on him. The Court of Appeal therefore correctly concluded that in the established factual circumstances 'it is irrelevant which of the shop assistants had direct contact with him and which did not, who served him, or whether there were other people

⁴ According to the established facts, on 25 March 2021, he developed symptoms, which were confirmed the following day by a COVID-19 test. This resulted in his being placed in home isolation from 27 March 2021 to 5 April 2021. However, the described conduct took place on 29 and 30 March 2021.

in the shop – because his conduct caused an epidemiological threat to many persons'. As a result, the Court of Appeal endorsed the second variant of the legal classification of the act described above. It thus approved the legal classification adopted by the Regional Court. The adoption of this variant was justified by the finding that the defendant, on three occasions, caused a danger to the life and health of many persons in the form of an epidemiological threat, including shop assistants and an unspecified group of customers.

The Court of Appeal in Lublin undertook to consider whether the appropriate legal classification of the act had been applied. For this purpose, it compared Article 161 § 3 and Article 165 § 1(1) PC. In conclusion, it indicated that:

'There appears to be an apparent concurrence of provisions between these regulations, as Article 161 § 3 Penal Code penalises direct exposure, i.e. exposure that is short-term and highly probable, to infection of many individualised persons, whereas Article 165 § 1(1) Penal Code penalises a real danger (which therefore does not have to be direct, i.e. neither immediate in time nor highly probable) to the life and health of unspecified persons by creating an epidemiological threat. The court of first instance found that the defendant's act exhausted the disposition Article 165 § 1(1). This classification appears to be correct.'

When assessing the conclusion of the Court of Appeal, it should be noted that there are differences in meaning between the elements 'epidemiological threat' and 'the spread of an infectious disease', which are alternatively included in Article 165 § 1(1) PC. An epidemiological threat may be caused by conduct whose effect is the possibility of the occurrence of a significant number of illnesses within a given area.⁵ It is therefore a phenomenon preceding the 'spread of an infectious disease', as it signals the possibility of the dissemination of biological pathogens which may, but do not necessarily have to, cause specific infections. It should therefore be agreed that, for the realisation of the third variant described earlier, consisting in the spread of an infectious disease, it is necessary for an infectious disease to arise that will actually spread, and thus for at least several cases of infection to occur.⁶ Consequently, it must be unequivocally assumed that the perpetrator's conduct fulfilled the element of an 'epidemiological threat'. Hence, the third variant proposed earlier should be excluded.

The first and second proposals therefore require further consideration. This configuration of the adopted variants necessitates determining whether the perpetrator caused a danger or direct exposure. It follows that the elimination of the element of directness makes it possible to determine the correctness of one of the two remaining variants. On the basis of Article 161 PC, it is rightly assumed that direct exposure is exposure from which, in the light of current medical knowledge, the possibility of infection follows directly.⁷ Directly, that is, once the perpetrator

⁵ Cf. W. Gutekunst, in: Świda W. (ed.), *Prawo karne. Część szczególna*, Wrocław–Warszawa, 1980, p. 81

⁶ See R.A. Stefański, in: Filar M. (ed.), *Kodeks karny. Komentarz*, 3rd ed., Warszawa, 2013, p. 770.

⁷ Cf. J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, 3rd ed., Warszawa, 2002, p. 303.

has created a dangerous situation, without any further activity on his part there is a high probability that a further effect (infection) will occur in the near future.⁸ With regard to threats associated with biological pathogens, it should be stated that this type of threat, due to its unpredictability and depending on the virulence of specific pathogens, constitutes an independent threat and does not require any additional intervention by the perpetrator in order to fulfil the element of 'directness' of exposure. In legal doctrine one may encounter the view that the mere presence of the perpetrator in a particular place cannot in itself determine that the danger is direct. It is necessary, among other things, to determine the distance at which the perpetrator was from other persons and whether he used measures intended to prevent infection.⁹ It is also rightly assumed that the fulfilment of the elements of an act under Article 161 § 3 PC may result from being present in a public place while simultaneously remaining in close proximity to other persons.¹⁰ From this perspective, two situations may be distinguished. The first would be one in which the defendant was present in a shop in which many people were located and which, for example, had a relatively small area, meaning that he could have exposed many persons to direct infection through droplets. The second situation is the one described in the case at hand, namely entering the shop and touching the counter and goods, thereby creating the possibility of leaving biological pathogens that may pose a real, but not necessarily direct, threat. In the absence of the possibility of additional verification of the directness of exposure, it cannot be assumed beyond reasonable doubt that the defendant's conduct constituted direct exposure. Biological pathogens are invisible to the human eye. It is therefore objectively impossible to establish their significant multiplication on a specific surface and to unequivocally demonstrate a causal link between the defendant's previous presence and an increase in pathogens in a particular shop capable of infecting many persons at a given time. Therefore, in the established factual circumstances, the first variant, referring to the fulfilment of the elements of Article 161 § 3 PC, had to be excluded.

The solution adopted by the Regional Court and subsequently approved by the Court of Appeal, consisting in attributing liability under Article 165 § 1(1) PC on the basis of the fulfilment of the element of an 'epidemiological threat', requires further consideration. In earlier case law of the Supreme Court it was rightly assumed that a common danger is one characterised by the extensive scope of the threat in relation to a larger, defined or undefined human community,¹¹ which undoubtedly reflects the factual circumstances described in the judgment under commentary. It should also be added that the acts typified in Article 165 § 1 of the Penal Code are characterised by the escalation of danger over time.¹² This is an inherent feature of

⁸ Cf. M. Królikowski, in: Królikowski M., Zawłocki R. (eds), *Kodeks karny. Komentarz. Tom II. Część szczególna. Art. 117–221*, Warszawa, 2023, p. 381; J. Karnat, in: Gadecki B. (ed.), *Kodeks karny...*, op. cit., p. 483.

⁹ Cf. A. Błachnio, in: Majewski J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2024, pp. 863–864.

¹⁰ Cf. K. Wiak, in: Grześkowiak A., Wiak K. (eds), *Kodeks karny. Komentarz*, 8th ed., Warszawa, 2024, p. 1199.

¹¹ See judgment of the Supreme Court of 20 May 1998, file no. II KKN 37/98, LEX no. 33542.

¹² Cf. A. Marek, *Prawo karne*, 2nd ed., Warszawa, 2000, p. 464.

the development of both infectious and non-infectious diseases. At the moment of the defendant's presence in the shop it could not be determined whether he was spreading an infectious disease, since from the moment other persons come into contact with a biological pathogen causing a given infectious disease to the moment when the first symptoms of infection appear, even several days or more may pass. Consequently, the perpetrator's conduct described above cannot fulfil the element of 'the spread of an infectious disease'. No infection was established. At least none that could be causally linked to the earlier conduct of the perpetrator.

Attention should also be drawn to the somewhat cautious approach adopted by the court, as it stated that:

'Even if it were theoretically assumed that the defendant's conduct resulted in direct exposure of many individualised persons to infection with the SARS-CoV-2 virus, thus fulfilling the elements of the offence under Article 161 § 3 of the Penal Code, the judgment could not be amended in that direction due to the principle of *reformatio in peius* contained in Article 434 § 1 of the Code of Criminal Procedure, since the judgment had been appealed only in favour of the defendant and Article 161 § 3 of the Penal Code provides for a more severe penalty than Article 165 § 1(1) of the Penal Code.'

The Court of Appeal therefore recognised the interpretative difficulties associated with the provisions under analysis, which may be regarded as further evidence of the significance of the identified problem. Naturally, the court was correct with regard to the prohibition of ruling to the detriment of the defendant. However, if the case were to be examined again by a court of first instance as a result of a decision ordering a retrial, that court could encounter interpretative doubts analogous to those identified above concerning the respective scopes of penalisation under Article 161 § 3 and Article 165 § 1(1) PC. Of course, the indirect prohibition resulting from the principle of *reformatio in peius* cannot become a procedural privilege amounting in practice to a clause of impunity in situations where the elements of an offence have been incorrectly attributed. Issues related to the application of this indirect prohibition remain debatable and constitute a broad field of interest in the doctrine of criminal procedure.¹³ It therefore appears that the situational context may significantly influence the interpretative approach adopted with respect to both provisions, particularly when account is taken of the two factual situations described earlier.

The Court of Appeal also stated that there is an apparent concurrence of provisions between Article 161 § 3 and Article 165 § 1(1) PC. The literature similarly indicates that there is an apparent concurrence between these provisions, since Article 161 § 3 PC protects the health of many individualised persons, whereas Article 165 § 1(1) PC protects many persons who are not specified individually. Moreover, in the latter case the

¹³ See, e.g. M.J. Szewczyk, *Zakaz reformationis in peius w polskim procesie karnym*, Warszawa, 2015; P. Pratkowiecki, 'O możliwości pociągnięcia sprawcy do odpowiedzialności karnej pomimo wadliwego opisanie czynu w wyroku skazującym', *Przegląd Sądowy*, 2020, No. 11–12, pp. 111–120; J. Duży, 'Pośredni zakaz *reformationis in peius* a prawo sądu do modyfikacji opisu znamion czynu przypisanego wyrokiem w postępowaniu ponownym – uwagi na tle wykładni art. 443 k.p.k.', *Prokuratura i Prawo*, 2021, No. 5, pp. 5–16.

directness of the threat is not required, but only its real nature.¹⁴ However, one may also encounter the view that a cumulative legal classification of the act is possible where the perpetrator's conduct fulfils the elements of both Article 161 § 3 PC and Article 165 § 1(1) PC.¹⁵ It seems, however, that in the judgment under commentary it would be unnecessary to invoke cumulative classification, as the factual circumstances are sufficiently clear to allow the scopes of the two provisions penalising, albeit closely related, types of prohibited acts to be separated, even if only by a thin line. For this reason, the position adopted by the Court of Appeal should be approved, although it required broader commentary, which has been provided in this gloss.

The above findings allow the conclusion that the judgment of the Court of Appeal, which was entirely consistent with the legal classification and the legal basis of criminal liability adopted in the judgment of the Regional Court, deserves approval. The Court of Appeal, however, justified its reasoning somewhat briefly, referring to the findings made by the Regional Court. It seems that when addressing such important issues as the relationship between Article 161 § 3 and Article 165 § 1(1) PC, as well as the specific nature and practical difficulties involved in establishing facts related to the spread of pathogenic agents, the court should have elaborated its observations in the reasoning of the judgment under review. It should also be mentioned once again that the court adopted a somewhat cautious approach with respect to the principle of *reformatio in peius*, which may be perceived by readers of the judgment – and rightly so – as a statement made ‘just in case’, in order to add an argument that is beyond doubt. The purely numerical comparison of the differences in the severity of the penalties remains undisputed, which cannot be stated with the same certainty when assessing *in abstracto* the relationship between the provisions under analysis (Article 161 § 3 and Article 165 § 1(1) PC).

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¹⁴ See V. Konarska-Wrzosek, in: Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, 4th ed., Warszawa, 2023, p. 928.

¹⁵ J. Karnat, in: Gadecki B. (ed.), *Kodeks karny...*, op. cit., p. 484.

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