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THE EU PROJECT OF THE 'AML PACKAGE' – REFORM OR REVOLUTION IN THE FIELD OF COUNTERACTING OF MONEY LAUNDERING

ANNA GOLONKA*

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Abstract

The study is an original scientific article devoted to the issues of proposed changes in the EU regulations on counteracting money laundering (the so-called 'AML package'). A significant part of the amended provisions of EU legal acts will be governed by EU Regulations and, as such, they will be directly applicable. This situation justifies the need for an in-depth analysis. On the other hand, those provisions which remain in the form of directives raise certain reservations. Therefore, the aim of this article is to analyse the nature and scope of the comprehensive amendment to the AML regulations using a formal-dogmatic method. Based on this analysis, conclusions were drawn regarding the assessment of the legitimacy and possible effectiveness of the proposed regulations in combating money laundering. The conclusion also highlights the inaccuracies and deficiencies they are burdened with, allowing for *de lege ferenda* postulates concerning the desired correction of the regulations.

Keywords: money laundering, counteracting money laundering, AML directive, AML package, AML set

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INTRODUCTION

Money laundering is one of the most serious economic crimes, given its effects on the economy and the global scale of the phenomenon.[1] In Polish criminal law, it is penalised under Article 299 of the Polish Criminal Code.[2] Additionally, the Anti-Money Laundering and Counter Financing of Terrorism Act of 1 March 2018[3] is devoted to aspects related to the prevention of this practice.[4] The shape of this act, as well as its predecessors,[5] has been significantly influenced by EU regulations, which often necessitated amendments. Currently, the fundamental legal act in the EU legal system is Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015,[6] known as the IV or V AML Directive,[7] partially amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018.[8] However, on 20 July 2021, the European Commission presented a set of legal acts

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[1] It is estimated that the global economy loses about 2 to 5% of the world's GDP annually due to money laundering, i.e., approx. EUR 1.87 trillion – cf. European Union Agency for Criminal Justice Cooperation 'Eurojust', *Money laundering cases registered at Agency doubled in the last 6 years according to Eurojust's new report* of 20 October 2022, at: https://www.eurojust.europa.eu/news/money-laundering-cases-registered-agency-doubled-last-6-years-according-eurojusts-new-report [accessed on 7 March 2023].

[2] The Criminal Code of 6 June 1997 (consolidated text, Journal of Laws of 2024, item 17, as amended).

[3] AML/CFT Act of 1 March 2018 (consolidated text, Journal of Laws of 2023, item 1124, as amended). This act, similarly to international regulations on counteracting money laundering, covers counteracting the financing of terrorism (AML/CFT). The present study will only address issues related to counteracting money laundering, omitting the possible specificity of regulations relating to the financing of terrorism.

[4] Cf. Article 2(2)(14) of the AML/CFT Act of 1 March 2018, according to which money laundering is understood as 'an act specified in Article 299 of the Act of 6 June 1997 – Criminal Code'.

[5] AML/CFT Act of 16 November 2000 on counteracting money laundering and financing of terrorism (consolidated text Journal of Laws of 2017, item 1049, as amended).

[6] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (OJ L 141, 5.6.2015, p. 73).

[7] Taking into account the directives issued within the EU institutional framework, it is referred to as the 4th AML Directive – cf. Koster, H., 'Towards better implementation of the European Union's anti-money laundering and countering the financing of terrorism framework', *Journal of Money Laundering Control*, 2020, Vol. 23, Issue 2, pp. 380–381. This author recognises as the subsequent AML directives (i.e., V and VI) the following acts: Directive 2018/843 of 30 May 2018 and Directive 2018/1673 of 23 October 2018 on combating money laundering by criminal law (OJ L 284, 12.11.2018, p. 22). Similarly, in the light of EU documents – cf. https://finance.ec.europa.eu/financial-crime/eu-context-anti-money-laundering-and-countering-financing-terrorism_en [accessed on 19 April 2024]. Taking into account the Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering – 5th AML Directive – cf. Soana, G., 'Regulating cryptocurrencies checkpoints: fighting a trench war with cavalry?', *Economic Notes*, 2022, Vol. 51, Issue 1 (e12195), pp. 3–4; Golonka, A., 'Zakres podmiotowy ustawy o przeciwdziałaniu praniu pieniędzy w świetle znowelizowanych przepisów', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2020, Vol. 82, No. 3, pp. 155–168; Petit, Ch.A., 'Anti-money laundering', in: Scholten, M. (ed.), *Research Handbook on the Enforcement of EU Law,* Glos, UK, 2023, pp. 248–249.

[8] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the

in the form of three regulations and two directives (the 'AML/CFT package').[9] The main purpose of their development was to provide a comprehensive approach to counteracting money laundering in the EU.

As emphasised many times in the literature,[10] Directive 2015/849, *inter alia*, due to the need to implement it into the national legal orders of EU Member States, does not provide coherent legal solutions enabling effective detection of cases of suspected introduction of illegal assets into financial circulation. This matter, involving issues related to criminal matters (justice),[11] in the field of cooperation between EU countries, is based mainly on Articles 82–86 of the Treaty on the Functioning of the European Union (TFEU).[12] These articles establish a foundation for cooperation between EU countries, primarily based on the principle of mutual recognition of judgments and judicial decisions.[13] Moreover, they include a policy of striving to harmonise the laws and regulations of the Member States (Article 82 TFEU). At the same time, the pursuit of the unification of legal solutions and the need to

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purpose of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (OJ L 156, 19.6.2018, p. 43).

[9] Document and change strategy available at: https://finance.ec.europa.eu/financial-crime/eu-context-anti-money-laundering-and-countering-financing-terrorism_en [accessed on 19 April 2024]. Regarding the assumptions – see: Petit, Ch.A., 'Anti-money laundering…', op. cit., p. 250.

[10] Cf. Subbagari, S., 'Counter Measures to Combat Money Laundering in the New Digital Age', *Digital Threats: Research and Practice*, 2023 (accepted on September 2023), p. 5; Çemberci, M., Başar, D., Yurtsever, Z., 'The effect of institutionalization level on the relationship of corporate governance with money laundering activity: An example of the BIST Corporate Governance Index Murat', *Borsa Istanbul Review*, 2022, Vol. 22, Issue 5, pp. 1020–1021; Tiemann, M., 'A commentary on the EU money laundering reform in light of the subsidiarity principle', *Journal of Financial Regulation and Compliance*, 2024, Vol. 32, pp. 1–3; Pavlidis, G., 'The dark side of anti-money laundering: Mitigating the unintended consequences of FATF standards', *Journal of Economic Criminology*, 2023, Vol. 2 (100040), p. 1; Petit, Ch.A., 'Anti-money laundering…', op. cit., pp. 252–259.

[11] Police and judicial cooperation in criminal matters until 2009, i.e., until the entry into force of the Lisbon Treaty, constituted the third pillar of cooperation between EU Member States (police and judicial union) – cf. Grzelak, A., *Trzeci filar Unii Europejskiej. Instrumenty prawne*, Warszawa, 2008, pp. 50–64; Gruszczak, A., 'III filar Unii Europejskiej po Tampere: wnioski i perspektywy', *Studia Europejskie*, 2000, Vol. 15, No. 3, pp. 87–106; Banach-Gutierrez, J., *Europejski wymiar sprawiedliwości w sprawach karnych. W kierunku ponadnarodowego systemu sui generis?*, Warszawa, 2011, pp. 156–208; Grzelak, A., Kolowca, I., *Przestrzeń Wolności, Bezpieczeństwa i Sprawiedliwości Unii Europejskiej. Współpraca policyjna i sądowa w sprawach karnych. Dokumenty. Tom 1*, 1st ed., Warszawa, 2009, pp. 17–20; Masło, K., 'Współpraca policyjna i sądowa w sprawach karnych w Unii Europejskiej z perspektywy członkostwa Polski w Unii Europejskiej', *Kwartalnik Prawa Publicznego*, 2011, No. 1–2, pp. 191–217.

[12] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (OJ C 202, 7.6.2016, p. 13). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2016:202:FULL&from=EN [accessed on 20 May 2024].

[13] Cf. Steinborn, S., 'Ewolucja zasad współpracy karnej na obszarze Europy', in: Grzelak, A., Królikowski, M., Sakowicz, A. (eds), *Europejskie prawo karne*, 1st ed. Warszawa, 2012, pp. 51–90; Krysztofiuk, G., 'Zasada wzajemnego uznawania orzeczeń w sprawach karnych w Traktacie Lizbońskim', *Prokuratura i Prawo*, 2011, Issue 7, p. 11; Szwarc, A.J., Długosz, J., 'Unijne instrumenty współdziałania państw w sprawach karnych', *Edukacja Prawnicza*, 2011, No. 3, pp. 31–34; Brodowski, L., 'Zasada podwójnej karalności czynu w kontekście ekstradycji', *Studia Prawnicze KUL*, 2015, No. 1, pp. 31–58.

ensure coordination of activities in the area of AML,[14] crucial in combating money laundering, is fully guaranteed through the direct application of EU regulations. This led to the decision to regulate many of the AML proposals in legal acts of the rank of regulation.[15] As provided for in Article 288 TFEU, a regulation is a legal act of general application because 'it shall be binding in its entirety and directly applicable in all Member States,' while a directive is binding only as to the result to be achieved, leaving to the national authorities the choice of forms and methods of implementing its provisions. This determined both the form taken by the legal acts that make up the 'AML package' and the inclusion of many existing legal acts in the scope of the amendments.

This state of affairs makes the issue of proposed changes to EU AML regulations important, especially considering the prospect of their direct application by Polish institutions and offices. It is therefore worth analysing their scope and attempting to assess the justification for their introduction and the expected effectiveness in combating money laundering.

'AML PACKAGE' – THE ESSENCE OF THE REGULATION AND THE REASONS FOR ITS DEVELOPMENT

The proposed 'AML package', presented on 20 July 2021 by the European Commission, is intended to replace or supplement the applicable regulations. It consists of the following regulations of the European Parliament and of the Council (EU):

– on the establishment of the European Union Anti-Money Laundering and Terrorist Financing Authority, amending Regulations (EU) No 1093/2010, (EU) No 1094/2010, and (EU) No. 1095,
– on information accompanying transfers of funds and certain crypto assets and amending Directive (EU) 2015/849, i.e., Regulation 2023/1113 of 31 May 2023,[16]
– on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, concerning high-risk third countries.

Due to the scope of the regulated matter, including criminal matters,[17] the Commission proposals – in addition to the above – also include the adoption of

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[14] Krzysztofiuk, G., 'Perspektywy współpracy sądowej w sprawach karnych w Unii Europejskiej', *Prokuratura i Prawo*, 2015, No. 7–8, pp. 186–205; Hofmański, P., 'Przyszłość ścigania karnego w Europie', *Europejski Przegląd Sądowy*, 2006, No. 12, pp. 4–11.

[15] See preamble to the Regulation on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, included in the Commission proposal (2021/0239 (COD)); recitals: 2, 3, 28, 32, Brussels, 5.12.2022, taking into account the position of the Council (EU). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0420 [accessed on 20 May 2024].

[16] Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849 (OJ L 150, 9.6.2023, p. 1).

[17] On this subject see Grzelak, A., *Trzeci filar Unii Europejskiej*…, op. cit., pp. 50–64; Grzelak, A., Kolowca, I., *Przestrzeń Wolności, Bezpieczeństwa i Sprawiedliwości*…, op. cit., pp. 17–20;

two directives, i.e., Directive of the European Parliament and the Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (and repealing Directive (EU) 2015/849 currently in force) and the Directive of the European Parliament and the Council amending Directive 2019/1153 of the European Parliament and of the Council as regards access of competent authorities to centralised bank account registries through the single access point.[18]

It is worth noting that the 'AML package' was the subject of disputes and discussions both within the EU and its Member States.[19] On 7 December 2022, the Council of the EU presented its agreed position on the Commission proposal, and on 28 March 2023,[20] the proposals were approved by MEPs from the Committee on Economic and Monetary Affairs and the Committee on Civil Liberties, Justice and Home Affairs,[21] while raising some reservations about the proposals put forward. However, it was only on 12 and 13 February 2024 that the Council (EU) presented documents confirming that a compromise had been reached regarding two of the five legal acts making up the 'AML package'. This includes the Directive of the European Parliament and of the Council (EU) on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing,[22] as well as the Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ('the AML Regulation').[23] Their entry into force is scheduled for the twentieth day after their publication in the Official Journal, with two years for the transposition of the provisions of the 'new' AML Directive into the legal orders of EU Member States (Articles 52, 59 of this Directive) and three years for the application of the regulations (Article 65 of the AML Regulation).

Maroń, H., 'Współpraca policyjna i sądowa w sprawach karnych wg projektu Konstytucji Europejskiej', *Państwo i Prawo*, 2007, No. 4, pp. 100–110.

[18] On the role and importance of the ECSB in the context of the three-system of European Supervisory Authorities (ESAs) – cf. Botopoulos, K., 'The European Supervisory Authorities: role-models or in need of re-modelling?', *ERA Forum*, 2020, Vol. 21, pp. 178–180.

[19] *Sprawozdanie Generalnego Inspektora Informacji Finansowej z realizacji ustawy z dnia 1 marca 2018 r. o przeciwdziałaniu praniu pieniędzy oraz finansowaniu terroryzmu w 2021 roku*, Warszawa, March 2022. The document can be downloaded at: https://www.gov.pl/web/finanse/sprawozdania-roczne-z-dzialalnosci-generalnego-inspektora-informacji-finansowej [accessed on 23 April 2024].

[20] Cf. https://www.consilium.europa.eu/en/press/press-releases/2022/12/07/anti-money-laundering-council-agrees-its-position-on-a-strengthened-rulebook/ [accessed on 23 April 2024].

[21] Cf. https://www.europarl.europa.eu/news/en/press-room/20230327IPR78511/new-eu-measures-against-money-laundering-and-terrorist-financing [accessed on 23 April 2024].

[22] This directive is also intended to replace the currently applicable Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015, called 'the 5th AML Directive' (OJ L 141, 5.6.2015, p. 73). Document containing 'confirmation of the final compromise text with a view to agreement' on the draft new AML directive available at: https://data.consilium.europa.eu/doc/document/ST-6223-2024-INIT/en/pdf [accessed on 18 April 2024].

[23] Document confirming the final compromise text with a view of agreement on the Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AML Regulation) available at: https://data.consilium.europa.eu/doc/document/ST-6220-2024-REV-1/en/pdf [accessed on 18 April 2024].

They are to replace or supplement the applicable EU AML regulations, constituting the main weapon in the fight against money laundering. In turn the regulation on information accompanying transfers of funds and certain crypto assets (constituting a recast of and replacing Regulation 2015/847)[24] has entered into force, and will apply from 30 December 2024 (Article 40 of Regulation 2023/1113).[25] However, the date of entry into force of the Regulation establishing a supranational anti-money laundering authority, the Anti-Money Laundering Authority (hereinafter 'AMLA'), is not specified. Originally scheduled for 1 January 2024 (Articles 92, 93 of the AMLA Regulation), it is now indicated that this will probably take place in 2026.[26] There is still no compromise as to the competencies of this body. Under the agreement concluded on 22 February 2024 between the European Parliament and the Council, it was only specified that the headquarters of AMLA would be in Frankfurt.[27]

Nevertheless, the legal acts that make up the 'AML package' allow us to determine the direction chosen by the EU institutions, which, in light of the referred legal acts, is intended to ensure effective cooperation among EU Member States in counteracting money laundering. Therefore, the priority objectives of the common policy of EU Member States in this area are:

– ensuring the direct application of AML regulations adopted at the EU level;
– improving the exchange of information and coordinating activities in counteracting the phenomenon;
– establishing an EU body responsible for supervising the activities of financial intelligence units of the Member States in counteracting money laundering: the Authority for Counteracting Money Laundering of the European Union;
– establishing a mechanism to support and improve cooperation for Financial Intelligence Units (FIUs);[28]
– ensuring that cases of money laundering are effectively combated, including by enforcing criminal laws in the Member States.

To achieve these goals, specific solutions are to be developed, with particular attention and analysis given to those that will introduce significant changes to the legal order in force in our country, especially since the regulated matter falls within the scope of EU Regulation).

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[24] Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds (OJ L 141, 5.6.2015, p. 1, and OJ L 334, 27.12.2019, p. 1).

[25] The text of Regulation 2015/847 as amended by the proposals presented by the European Commission on 20 July 2021, in a consolidated version, available at: https://www.consilium.europa.eu/en/press/press-releases/2023/05/16/anti-money-laundering-council-adopts-rules-which-will-make-crypto-asset-transfers-traceable/ [accessed on 20 April 2024].

[26] Pavlidis, G., 'The birth of the new anti-money laundering authority: harnessing the power of EU-wide supervision', *Journal of Financial Crime*, 2023, Vol. 31(2), p. 323.

[27] See: *Commission welcomes the selection of Frankfurt as the seat for the Authority for Anti-Money Laundering and Countering the Financing of Terrorism*, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_972 [accessed on 20 April 2024].

[28] In Poland, such a unit is the General Inspector of Financial Information (Generalny Inspektor Informacji Finansowej – GIIF).

ANALYSIS OF CHANGES AND BASIC SOLUTIONS PROVIDED IN THE 'AML PACKAGE'

The analysis of the proposed changes should begin with a discussion of issues related to the Anti-Money Laundering Authority (AMLA), particularly its duties and powers. According to the regulation establishing the AMLA, its basic tasks include the preparation of draft 'regulatory standards' and draft 'technical standards'. The former defines the minimum requirements for AML procedures based on established situations and detected cases of money laundering (Article 38 of the AMLA Regulation). The technical standards include indications of additional measures to be taken against third countries if their legal systems do not meet basic AML requirements, e.g., due to restrictions on the ability to access, process, or exchange information due to insufficient data protection or banking secrecy, (Article 16 of the AMLA Regulation). This Authority will also be empowered to issue guidelines for Financial Intelligence Units (FIUs) of EU Member States regarding the assessment of the level of risk related to politically exposed persons and their family members, which is important given the lack of a uniform approach to these issues in EU Member States (Article 7(5) of the AMLA Regulation). The development of a uniform template to report suspicious transactions will also be centralised (Article 50(5) of the AMLA Regulation). This will be based on the powers granted to AMLA to identify risk areas based on information from the monitoring of transactions and economic relations (taking into account the need to ensure that the intensity of monitoring business relations and transactions is adequate and proportionate to the level of risk) (Article 21, Article 55(5) of the AMLA Regulation). However, this Authority was established to improve the exchange of information and cooperation between FIUs.[29] As a result, it was granted powers related to supporting and coordinating the activities of these units,[30] including those related to the development of joint analyses based on suspicious transaction reports and suspicious activity reports with a significant cross-border footprint by obliged entities in EU Member States. AMLA also provides stable hosting of the FIU.net platform as a secure information exchange system in the field of AML (Articles 33–37 of the AMLA Regulation). This Authority will also supervise, to some extent, the activities of the FIUs (Articles 31–32 of the AMLA Regulation).[31] More importantly, however, it will also obtain the status of an authority exercising direct supervision over certain obliged entities, including the possibility of imposing pecuniary sanctions on them (Articles 20–25 of the AMLA Regulation).[32]

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[29] Siena, F.A., 'The European anti-money laundering framework – At a turning point? The role of financial intelligence units', *New Journal of European Criminal Law*, 2022, Vol. 13, Issue 2, pp. 216–221, and about cooperation options – Allegrezza, S., *The proposed Anti-Money Laundering Authority, FIU cooperation, powers and exchanges of information- a critical assessment,* IPOL-Study, Luxembourg, 2022, pp. 35–40.

[30] Pavlidis, G., 'The birth of the new…', op. cit., pp. 323–326.

[31] Critically on this topic – see Allegrezza, S., *The proposed Anti-Money*..., op. cit., pp. 21–34; negatively about limiting the role of national FIUs – cf. Siena, F.A., 'The European anti-money…', op. cit., pp. 220–245.

[32] Allegrezza, S., *The proposed Anti-Money*…, op. cit., pp. 21–29.

In turn, the new regulation on the transfer of funds and certain crypto-assets[33] does not introduce any significant changes to the existing EU legal order.[34] A certain novelty is the changes regarding entities subject to AML obligations, as well as the update resulting mainly from the standards set by the FATF in the field of services and tools used in trading crypto assets.[35] In accordance with the above-mentioned Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023, entities referred to as VASPs (Virtual Asset Service Providers), are required to obtain, store, and transfer information about the transaction initiator and its recipient, the so-called real beneficiary (Articles 14(2), 16–18). Such transactions typically involve the exchange of cryptocurrencies or other virtual assets for fiat currencies or the exchange of virtual assets for other virtual assets (which is most commonly used for money laundering and will be properly described). Additionally, VASPs also conduct activities related to the transfer of virtual assets, provide financial services related to the issue and sale of virtual assets (tokens), and deal with the storage and administration of virtual assets (VAs) or instruments enabling control over them.[36] In this area, the EU regulation *expressis verbis* refers to the standards developed by the Financial Action Task Force (FATF). Their implementation in EU law was ensured by specifying and extending the scope of information obligations imposed on VASPs. For example, 'third party funding intermediaries' that operate a digital platform to match or facilitate the matching of funders with project owners, such as associations or applicants for funding, as well as unlicensed social finance platforms under Regulation (EU) 2020/1503, are covered. Legal solutions are also provided to facilitate remote customer due diligence, regulated in Regulation (EU)

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[33] Regarding the definition of 'crypto-asset'– cf. Article 3(5) of Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-asset markets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (OJ L 150, 9.6.2023, p. 40), where it is indicated that: 'crypto-asset means a digital representation of a value or right that is able to be transferred and stored electronically using distributed ledger technology or similar technology.' The current Directive 2015/849 defines virtual currencies as: 'digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically.' In turn, a 'custodian wallet provider' means 'an entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies' (Article 3(18)). The AML/CFT Act of 1 March 2018 provides a similar definition of virtual currency in Article 2(2)(26). On the criticism of the definition – Opitek, P., 'Przeciwdziałanie praniu pieniędzy z wykorzystaniem walut wirtualnych w świetle krajowych i międzynarodowych regulacji AML', *Prokuratura i Prawo*, 2020, No. 12, p. 49.

[34] On the VA regulations in the 5th AML Directive (i.e., Directive 2015/849): Behan, A., *Waluty wirtualne jako przedmiot przestępstwa,* Kraków, 2022, pp. 392–421.

[35] Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds and certain crypto-assets (recast), COM(2021) 422 final. Document 52021PC0422.

[36] IEWG, *FIU-FinTech Cooperation and Associated Cybercrime Typologies and Risks*, Ottawa, July 2022, p. 4.

No 910/2014 of the European Parliament and of the Council and covered by the proposal to amend it with the European digital identity framework.[37]

From the perspective of preventing money laundering, the actions of EU institutions against countries classified as high-risk are also of particular importance. The list of such countries is periodically updated,[38] and the Commission recently presented another list.[39] Conducting transactions or establishing economic relations with such countries requires the obliged entities of an EU Member State (in Poland, referred to as the 'Obligated Institutions'[40]) to take enhanced due diligence measures (Article 9 of Directive 2015/849). The currently applied enhanced due diligence measures include the obligation to obtain additional information on the client and the beneficial owner, the intended nature of business relationships, the source of the assets being the subject of these business relationships or transactions, as well as information on the reasons and circumstances of the transaction.[41] These measures also require the establishment of business relationships with senior management. They are also subject to increased monitoring by increasing the number and frequency of related activities, as stipulated in Articles 43 and 44 of the AML Act.[42]

However, under the assumptions of the new EU AML policy, the approach to transactions with such countries will change.[43] First of all, in accordance with

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[37] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73) and Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing framework for a European Digital Identity, COM(2021) 281 final.

[38] In 2019, the Council unanimously decided to reject the list of *the 23 High-Risk Third Countries* proposed by the Commission, stating in the justification for its decision that '(...) it cannot support the current proposal that was not established in a transparent and resilient process that actively incentivises affected countries to take decisive action while also respecting their right to be heard.' Cf. Communication: Money laundering and terrorist financing: Council returns draft list of high risk countries to the Commission (press release of 7 March 2019), available at: https://www.consilium.europa.eu/en/press/press-releases/2019/03/07/money-laundering-and-terrorist-financing-council-returns-draft-list-of-high-risk-countries-to-the-commission/ as well as: the amended methodology for identifying high-risk third countries (European Commission): https://ec.europa.eu/info/files/200507-anti-money-laundering-terrorism-financing-action-plan-methodology_en; and the list of countries presenting strategic deficiencies in their regimes on anti-money laundering and countering terrorist financing (Official Journal): https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32020R0855 [accessed on 18 February 2023].

[39] Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Anti-money laundering: the Commission updates its list of high-risk third-country jurisdictions to strengthen the international fight against the financial crime*, of 20 December 2022, available at: https://finance.ec.europa.eu/news/anti-money-laundering-commission-updates-its-list-high-risk-third-country-jurisdictions-strengthen-2022-12-20_en [accessed on 18 February 2023].

[40] Cf. Article 2(1) of the AML/CFT Act of 1 March 2018.

[41] In Poland, under Article 43(2)(12) and Article 44 of the Act on Counteracting Money Laundering and Terrorist Financing.

[42] Article 44 of the AML/CFT Act. For more details – cf. Obczyński, R., in: Kapica, W. (ed.), *Przeciwdziałanie praniu pieniędzy oraz finansowaniu terroryzmu. Komentarz*, Warszawa, 2020, pp. 151–159. The introduction of these provisions is an expression of the implementation of Article 18a and 19 of the Directive (EU) 2015/849.

[43] Section 2, Articles 23–26 of the AML/CFT Regulation (*Third-country policy and ML/TF threats from outside the Union*).

Articles 23–25 of the draft Regulation on counteracting the use of the financial system for the purpose of money laundering or terrorist financing ('the AML Regulation'), high-risk third countries, third countries showing compliance deficiencies, and countries that pose a specific and serious risk to the EU financial system will be subject to intensified monitoring. It should be recalled (since it is stated *expressis verbis* by the binding EU act) that countries not included in the Commission list as high-risk countries: 'should not be automatically considered to have effective AML/CFT systems'.[44] Nevertheless, in light of the AML Regulation, apart from its direct application, the very idea of approaching third countries will change. Classifications will be introduced, forming the basis for the application of differentiated due diligence measures proportionate to the risk these countries pose to the EU financial system. At this point, it seems indispensable to refer to the lists of countries developed by the FATF,[45] since the Commission also did so when preparing the draft regulation.[46] The draft AML Regulation also clearly indicates that the EU will rely on these lists in its work when introducing rules for conducting transactions with third countries (recitals 50 and 51 of the AML Regulation). Therefore, referring to the division adopted by the FATF it is necessary to distinguish countries whose jurisdictions pose a high risk of money laundering from those that show a higher risk in this respect.[47] In addition, a third category is included in the form of countries posing a specific and serious threat to the EU financial system (recital 52 of the Regulation). Consequently the due diligence measures applied to them will also be differentiated. Those third countries that are 'blacklisted' by the FATF will, in principle, be subject to all enhanced due diligence measures and additional due diligence measures (countermeasures, Article 29) that are appropriate for the country (Article 23(3) and (4)). On the other hand, those that the FATF has placed on the 'grey list' will be subject to enhanced measures appropriate to the risk of 'laundering' posed by a given third country (Article 24). In cases where the obliged entity (its branch or subsidiary) is in a third country where the basic AML requirements are less stringent than those set out in EU regulations (e.g., due to banking/professional secrecy; data protection and the level of this protection), requirements are introduced in this entity by EU AML regulations. If this is not possible (due to the restrictive provisions of a third country), it develops additional security measures for this entity (its branch or subsidiary). The draft technical standards will be developed by AMLA (Article 26). There is also a ban on using the services of outsourcing companies based in high-risk countries (Article 40(1)). It is also worth noting that this rigour in risk assessment applies to other countries which, in the opinion of the FATF, do not deserve to be included in the relevant list; however, in the opinion of the Commission, transactions and economic relations with them should be treated

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[44] Recital 29 of the Directive 2015/849; similarly, recitals 52 and 53 of the AML Regulation.

[45] The organisation publishes two lists three times a year: a 'black list' covering high-risk jurisdictions, the so-called countries called upon to introduce legal changes, and the 'grey' list, which includes countries that are 'under increased monitoring'.

[46] Explanatory memorandum to the AML Regulation (COM(2021) 420 final).

[47] Current lists available at: https://www.fatf-gafi.org/en/countries/black-and-grey-lists.html [accessed on 24 February 2023].

with the application of enhanced due diligence measures equal to those for high-risk countries (Article 25). Including these regulations under the principle of direct application will avoid difficulties arising from the transposition of provisions into the national legal orders of the Member States, but it will not eliminate them. There is a specific exception in the form of abandoning the 'maximum harmonisation approach' because, as clearly stated in the Regulation: 'it is incompatible with the basic risk-based approach'.[48] A further consequence is that Member States are free to introduce provisions that go beyond those set out in the AML Regulation in areas that relate to the specific nature of national risk. It may be questioned whether such an approach will actually contribute to the development of harmonious solutions and will not affect the implementation of AML regulations in practice.

On this occasion, it is also appropriate to point out that, given the status quo, the transposition of the applicable provisions (i.e., Directive 2015/849) into Polish law is not sufficient. As pointed out by the Commission, national law does not regulate issues related to the risks arising from the use of anonymous prepaid cards issued in high-risk third countries.[49] The current regulations impose only an obligation on card organisations to enable confirmation of whether an anonymous prepaid payment card issued in a third country meets the conditions justifying a waiver of the basic due diligence measures.[50]

It also seems important to note that the AML Regulation departs from the 'ineffective' (according to the Commission) obligation to register transactions of people who trade goods and make or accept cash payments of at least EUR 10,000. The reason for the change, as indicated in the justification for the Regulation, was the non-application of this provision in practice, resulting from... 'its poor understanding'.[51] Instead, a ban on cash transactions over EUR 10,000 was introduced for persons trading in goods or providing services (Article 59(1)). The obligation imposed on obliged entities to register transactions worth at least EUR 10,000 or the equivalent of this amount in the national currency has also been maintained. Cash transactions above EUR 10,000 are still allowed if they are payments between natural persons who 'are not acting in a professional function' or payments or deposits made on the

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[48] See explanatory memorandum to the AML Regulation (COM(2021) 420 final): 'However, the present proposal does not adopt a maximum harmonization approach, as being incompatible with the fundamental risk-based nature of the EU's AML regime. In areas where specific national risks justify it, Member States remain free to introduce rules going beyond those laid out in the present proposal.' Surveys showing difficulties with assessment under the RBA (Risk-based approach) – cf. Ogbeide, H., Thomson, M.E. et al., 'The anti-money laundering risk assessment: A probabilistic approach', *Journal of Business Research*, 2023, Vol. 162 (113820), pp. 4–14.

[49] Cf. Bujalski, R., *Komisja wytyka Polsce naruszenia prawa UE. 12 razy*, 17 June 2021, article available at: https://www.lex.pl/prawo-ue-a-prawo-krajowe-sprawy-komisji-przeciwko-polsce,16535.html [accessed on 21 April 2024].

[50] Under Article 2(19b) of the Act of 19 August 2011 on Payment Services, a card organisation is an entity (including an authority or organisation and an entity referred to in Article 2(16) of Regulation (EU) 2015/751), defining the rules for the functioning of a payment card system and responsible for making decisions regarding the functioning of the payment card system (consolidated text, Journal of Laws of 2022, item 2360, as amended).

[51] Ibidem ('Such an approach has shown to be ineffective in light of the poor understanding and application of AML requirements, lack of supervision, and the limited number of suspicious transactions reported to the FIU').

premises of credit institutions (although in this case, the institution reports this fact to the FIU and the amount exceeding the indicated limit) (Article 59(4)).

It is also worth pointing out that in March 2023, Members of the European Parliament presented an even more restrictive proposal. In line with that proposal, the cash transaction limit would be EUR 7,000 in cases when it would be impossible to identify the customer.[52] In addition, the European Parliament wants to ban citizenship under the investment programme – the so-called 'golden passport', that is, EU citizenship obtained in exchange for investments in an EU country, and introduce restrictive rules to control stay in an EU country under the investment programme – the so-called 'golden visa'.[53] This issue was also the subject of the debate[54] that took place while preparing the final (i.e., compromise) version of the AML documents.

The version of the AML Regulation of 13 February 2024 takes into account additional threats related to money laundering, including those posed by financial mixed activity holding companies (Article 3(la) of the AML Regulation), defined in Article 2(6a), similarly in relation to agents and football clubs referred to in Article 3(lb) and (lc) (except as provided for in Article 4a of the AML Regulation). In addition, definitions were introduced, including non-financial holding companies with mixed activities (Article 2(8a)), crypto-assets service providers (Article 2(6a)), crowdfunding service providers (Article 2(14b)), virtual IBAN (Article 2(20c)), basic information on legal persons (Article 2(23a)(a) and (b)), and the definition of persons in exposed positions was extended (Article 2(26)(ca)), also including persons performing 'eminent public functions, heads of regional and local authorities, including groupings of municipalities and metropolitan regions with at least 50,000 inhabitants' (Article 2(25)(iii) and (via)). The purchase of luxury vehicles (motorcycles, boats; – Article 48(1)(ba); Article 54(1)(a)) was also considered particularly susceptible to 'laundering'. Exceptions have been allowed for obligations related to the identification of persons or registration of transactions for, among others, professionals who act in the exercise of the right to defend themselves or determine the client's legal situation, except existing representatives of legal professions (Article 16a(4)) or certain transactions, e.g. electronic (Article 15(3b)). The regulation *expressis verbis* requires taking into account those criminal solutions in force in EU Member States that, having regard to the provisions of Directives 2015/849 and 2018/1673, 'have adopted a broader approach to the definition of criminal activities constituting predicate offences in relation to money laundering' (recital 5a).

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[52] Cf. https://www.europarl.europa.eu/news/en/press-room/20230327IPR78511/new-eu-measures-against-money-laundering-and-terrorist-financing [accessed on 25 April 2024].

[53] Ibidem.

[54] Directive of the European Parliament and of the Council on prevention of the use of the financial system for the purposes of money laundering or terrorist financing – cf. Proposal for a Directive of the European Parliament and of the Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849, C(2021) 423 final. Document 52021PC0423.

The regulation also stipulates that when the regulation refers to investigative bodies, it includes the European Public Prosecutor's Office (EPPO), and clearly states the need to comply with the provisions of the GDPR (Regulation 2016/679).[55]

In turn, the AML Directive, which is to replace Directive 2015/849, covers only regulations regarding: the application of national measures in sectors exposed to money laundering and terrorist financing by Member States (including maintaining the obligation to prepare a national risk assessment once every four years – Article 8(1)). National measures applied in sectors particularly 'vulnerable' to money laundering involve the imposition of AML obligations on institutions or persons other than the obliged entities, according to the results of the national risk assessment carried out by a given Member State and after submitting information on this matter to the Commission (Article 3). Member States may, but are not required to, take advantage of such a possibility, which would in fact mean a broader authorisation to apply the AML Regulation in a wider (subjective) scope.

The 'new' directive, in its originally drafted version, also established public access to information contained in the registers of beneficial owners to all persons who demonstrate a relevant legal interest (Article 12). Refusal to provide information contained in the register was to be possible only if its disclosure would jeopardise the actual beneficiary 'to a disproportionate risk of fraud, abduction, blackmail, extortion, harassment, violence, or intimidation' or when the beneficial owner is a minor or a person deprived of full capacity to legal actions. In exceptional cases, preceded by a thorough analysis of a given case, it will be possible to refuse to provide information on part or all data collected in the register of beneficiaries also in other 'individual cases' (Article 13).

In the compromise text of the 6th AML Directive, the need to ensure access to the Central Register of Beneficiaries is still strongly emphasised. These issues received a lot of attention during discussions on developing the final version of the new AML directive. The reason for this is, on the one hand, the need to effectively detect money laundering cases, made possible by the relevant authorities obtaining information about both parties to a suspicious financial transaction,[56] and, on the other hand, the right to data protection and respect of the parties to the transaction, guaranteed in particular by the provisions contained in the Charter of the Fundamental Rights of the EU and the provisions of the Regulation on the protection of natural persons with regard to the processing of personal data (GDPR).[57] As indicated in the literature, an open register and open access to data, in particular regarding entrepreneurs, constitutes a violation of the rights arising

[55] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

[56] Masciadaro D., 'Financial supervisory unification and financial intelligence units', *Journal of Money Laundering Control*, 2005, Vol. 8, No. 4, pp. 354–370; Al-Rashdan, M., 'An analytical study of the financial intelligence units' enforcement mechanisms', *Journal of Money Laundering Control*, 2012, Vol. 15, No. 4, pp. 483–495.

[57] Goździaszek, Ł., 'Dostęp do danych z Krajowego Rejestru Sądowego na potrzeby analiz branżowych', *Przegląd Prawa Handlowego*, 2024, No. 2, p. 40.

from EU regulations, in particular the EU Charter of Fundamental Rights and the GDPR. The judgment of the Court of Justice of the EU of 22 November 2022 is also important in this respect.[58] In this judgment, the Court of Justice of the EU declared invalid the provisions of Directive 2015/849 AML allowing public access to data contained in the Central Registers of Information on Beneficial Owners (hereafter 'CRB'). As a result of the entry into force of the above-mentioned judgment of the Court of Justice, the previously applicable rules of access to the CRB were restored (Article 30(5)(1)(c)), which is also important in the context of national regulations in force in the EU Member States.[59] However, as a result of the consensus reached, the wording of the AML Directive of 12 February 2024 decided, among other things, on the need to demonstrate a legal interest by entities requesting access to information contained in the CRB (Article 12(1)) and the rules for making it available are specified (Articles 12a and 12b). This applies to ensuring the possibility of obtaining data from the CRB, in particular for non-governmental organisations, institutions operating in third countries, and journalists (Article 12(2)). In the above-mentioned judgment, the Court of Justice of the European Union emphasised that information containing data collected in the CRB should be 'limited to what is strictly necessary'.[60] Therefore, during the work on the compromise text of the 'new' AML directive, the need to harmonise EU regulations regarding the 'legal interest' on which access to data in the CRB depends (recital 30) was emphasised.

The right of access to the data collected in this register will, of course, be provided to state and EU authorities (including AMLA and EPPO) responsible for counteracting money laundering or prosecuting crimes and obliged entities operating in EU Member States (Article 11(2)).

The proposed AML Directive, therefore, establishes for the FIU and 'other competent authorities' the right to access to information enabling the timely identification of any natural or legal person owning real estate (Registry of Real Estate, Article 16). Significant changes included in the 'new' AML Directive also refer to the principles of cooperation between EU institutions, entities, and organisations in the field of counteracting money laundering (Articles 45–52). With regard to international cooperation, the obligations and powers related to the provision of information by national supervisory authorities, including those concerning beneficial owners, have been clarified (Article 45(2) of the Directive). An assurance has also been introduced that AML requests between EU Member

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[58] Judgment of the Court (Grand Chamber) of 22 November 2022, C-37/20 and C-601/20, *WM and Sovim SA v. Luxembourg Business Registers*, ECLI:EU:C:2022:912. In its justification, the Court of Justice noted that Article 30(5), first subparagraph, point (c) of Directive 2015/849: 'constitutes an interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, whatever the subsequent use of the information communicated.'

[59] With regard to Article 67 of the AML Act of 1 March 2018, providing for the transparency of the CRB and the effect of the judgment of the Court of Justice of the European Union of 22 November 2022 – see Sawczuk M., 'Komentarz do ustawy o przeciwdziałaniu praniu pieniędzy oraz finansowaniu terroryzmu', in: Mikos-Sitek, A., Nowak-Far, A., Zapadka, P. (eds), *Prawo obrotu pieniężnego. Komentarz*, Warszawa, 2023, LEX document, Article 67.

[60] Justification of the judgment of the CJEU of 22 November 2022, in joined cases C-37/20 and C-601/20.

States will not be refused solely on the basis that the proposal also addresses tax issues; the information is covered by professional secrecy (excluding cases where the requested information is protected by attorneys' or legal advisors' secrecy to the appropriate extent); an investigation or proceeding is being conducted in the requested member state, unless assistance would jeopardise its conduct; the nature or status of the requesting competent authority is different from the nature or status of the requested counterpart competent authority (Article 45(3) of the Directive). Naturally, the new regulations also provide for the addition of references to the AMLA and the obligation for other authorities to cooperate with this Authority (including informing the AMLA of all administrative penalties and measures imposed, Article 44; providing it with information on the authorities responsible for supervising compliance with AML regulations, Article 46; and providing it with any information that the FIU needs, Article 47 of the Directive). It also provides for the need to ensure security in the exchange of information, which will be based on the use of the information exchange system, the so-called 'FIU.net'. This system will be managed by AMLA, providing its hosting. Protected communication channels will be used to exchange information between the FIUs of EU Member States and their counterparts in third countries, as well as with other EU bodies and agencies (Article 23 of the Directive). At the same time, emphasis was placed on ensuring mutual cooperation between the FIUs of the EU Member States (on their own initiative or upon request), including, providing any information that may be relevant to the processing or analysis of information by the FIU in relation to suspected money laundering (Article 24 of the Directive). In addition, provisions have been introduced relating to cooperation with authorities responsible for the supervision of credit institutions to ensure compliance with the Payment Accounts Directive and the Payment Services Directive (Article 48). The changes also cover implementing regulations, including the format for submitting information on beneficial owners to registers. Provisions are also provided for cases in which there are doubts about the information on beneficial owners or it is impossible to identify them at all. A kind of complement to the aforementioned directive is the second directive, which makes up the AML/CFT 'package' the scope of which includes access by competent authorities to centralised bank account registers through a single access point (amending Directive 2019/1153 of the European Parliament and of the Council).

In addition to the aforementioned changes, it is also worth noting the unification and tightening of the rules for imposing penalties (more precisely: pecuniary sanctions) and administrative measures. Principles and conditions for imposing penalties were defined, as well as the maximum amount of the fine. It will be 'at least twice the amount of the benefit derived from the breach where that benefit can be determined, or at least EUR 1 000 000' (Article 40(2)).[61] Finally, the novelty

[61] The version of 12 February 2024 also includes a provision stating that: 'Member States shall ensure that, when determining the amount of the pecuniary sanction, the ability of the entity to pay the sanction is taken into account and that, where the pecuniary sanction may affect compliance with prudential regulation, supervisors consult the authorities competent to supervise compliance by the obliged entities with relevant Union acts' (Article 40(5) of that version).

provided for in the aforementioned AML Directive is the introduction of the so-called College of Anti-Money Laundering Supervisors, meaning a 'permanent structure for cooperation and exchange of information for the supervision of a group or entity with cross-border activities' (defined in Article 2(6)). On the other hand, under Article 2(7) an entity that conducts cross-border activity will be 'an entity with at least one establishment in another member state or in a third country'. It is worth noting that the version of this document presented on 12 February 2024 provides for solutions regarding control over non-financial sector institutions and introduces a definition of the entity exercising such control (Article 2(1a) and (1b); Article 36a). Furthermore, the information provided includes data from virtual bank accounts (virtual IBANs, Article 14 of the AML Directive), and the FIU is obliged to appoint a Fundamental Rights Officer, who may be a member of the existing staff operating in the organisational structures of a national unit established to counteract money laundering (Article 17a).

CONCLUSION

To recapitulate, by ensuring comprehensive normalisation, the set of established AML regulations is intended to create pillars of cooperation between EU Member States in the field of counteracting money laundering. The actions taken by EU institutions to harmonise AML regulations across EU Member States should be positively assessed. Therefore, the Commission legislative initiative covering a set of AML/CFT regulations should be considered worthy of support. Similarly, acceptance, in principle, should refer to the change in the nature of regulations and the inclusion of the matter related to the discussed phenomenon in adequate regulations. However, some reservations can be raised in this regard.

First of all, the EU AML 'package' is in a way 'incomplete', as it lacks a separate regulation (directive) on the rules, procedures, and scope of applying penal measures (i.e., equivalent to Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law). Although this directive will not lose its force with the entry into force of the legal acts that make up the EU AML set (in the case of directives – their transposition into national legal systems), this directive (and even more precisely, its scope of matter) ought to be included in the mentioned 'package'.

The analysis of the changes proposed by the European Commission encourages reflection on both the very scope of individual regulations that make up this set and certain provisions contained therein.

In the first respect, it would be justified to consider a kind of remodelling in relation to the 'package' of AML. After including some issues currently regulated in Directive 2015/849 within the scope of the AML Regulation, and others in the 'new' AML Directive, a kind of normative chaos will arise. As a result, the provisions laying down the obligations for obliged entities, specifying the rules of cooperation of these entities with the FIUs and AMLA, and other regulations of an administrative nature were laid down in various legal acts, although many of these standards could

successfully become the subject of one or a maximum of two EU regulations. Thus, the provisions regarding, for example, the mode of appointment, scope of activity, etc., of the central unit (according to the draft AMLA), its cooperation with the FIUs of the EU Member States, the rules for collecting, sharing or widely-exchanging information at the international level should be regulated in a separate legal act having the status of a regulation. However, the scope of the AML Directive should *de facto* cover issues that fall within the competence of EU Member States, such as regarding penalties, forfeiture of property or proceeds from the crime of money laundering, confiscation; provisions related to jurisdiction (with the need to take due account of the jurisdiction in cases of this crime of 'laundering' committed in cyberspace); rules and procedures in cases of suspected money laundering – in terms of cooperation between EU Member States, etc. In other words, the 'new' AML Directive should cover the regulatory scope in the current legal status which is the subject of the provisions of Directive 2018/1673.

Moreover, referring to the regulation establishing the EU Authority for Anti-Money Laundering, the very idea of coordinating activities at the EU level should be considered worthy of support.[62] The need to establish such a supranational unit at the EU level that would coordinate the activities of FIUs of Member States has already been noted in the literature.[63] However, the analysis of the tasks entrusted to AMLA raises some objections and justifies the *de lege ferenda* postulate. It should be noted that the powers granted to AMLA largely consist of developing regulatory and technical standards (based on data provided by the FIUs of the Member States) and the coordination of FIU activities. This raises doubts related to the legitimacy (necessity) of creating a 'central unit' in the form of a separate AML Authority. Taking into account modern technological possibilities, in my opinion, it would be better to strive to develop algorithms that would improve cooperation between the FIUs of the EU Member States, instead of creating a separate institution. More precisely, a solution can be proposed that would use an information exchange system based on artificial intelligence. Properly developed, it would allow for both ongoing monitoring of money laundering threats to the EU financial system and enable coordination of the activities of national Financial Intelligence Units, supporting them, and setting directions for their activities tailored to current needs. At the same time, the solution in which AMLA was granted competencies to exercise direct supervision over the obliged entities of the EU Member States should be considered

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[62] The literature has often emphasised the negative effects of the lack of unified norms and standards in the area of AML regarding the activities of national FIUs. It was most often reported that difficulties with early detection of suspicious transactions or implementation of actions at the transnational level result from, among others, from: lack of possibility or knowledge allowing to distinguish the origin of property values from legal or illegal sources in the era of modern technologies – cf. Ogbeide, H., Thomson, M.E. et al., 'The anti-money laundering risk…', op. cit., pp. 1–3; Tiwaria, M., Ferrill, J. et al., 'Factors influencing the choice of technique to launder funds: The APPT framework', *Journal of Economic Criminology*, 2023, Vol. 1 (el100006), p. 6; underfinancing of FIUs and the AML system – cf. Bolgoriana, M., Mayelib, A., Ronizic, N.G., 'CEO compensation and money laundering risk', *Journal of Economic Criminology*, 2023, Vol. 1 (el100007), pp. 1–6, or language difficulties (translations of documents, i.e., audit reports) – cf. Koster, H., 'Towards better implementation…', op. cit., pp. 382–383.

[63] Pavlidis, G., 'The birth of the new…', op. cit., pp. 323–324.

too far-reaching. Despite full support for the coordination and improvement and acceleration of FIUs cooperation at the EU level, the change consisting of granting AMLA the power to impose sanctions on obliged entities of EU Member States should be regarded with great reserve.

In addition to the above, the analysis of the legal solutions contained in the 'package' of AML raises objections related to a certain inconsistency. An example of this can be, on the one hand, a relatively rigorous approach to the rules of applying enhanced financial security measures to third countries and, on the other hand, the establishment of exceptions, in the form of 'gaps' in the system of prevention against the dealings in question. The AML Regulation may apply to countries that even the FATF has not included in its lists (i.e., on the 'black' or 'grey list'). However, the Commission foresees a break from the adopted comprehensive approach and harmonisation of AML regulations, pointing out that striving to ensure them to the full extent would be... inconsistent with the approach based on risk analysis (i.e., *de facto* with the very idea of AML activities). As a result, it allows the freedom of EU Member States to introduce different regulations (in theory, 'going beyond EU standards') in those areas that are related to the specificity of national risk. However, concerns may be expressed as to whether such an approach will not result in the adoption by EU Member States of such regulations that will hinder effective cooperation and at the same time distort the cardinal assumption of the EU anti-money laundering policy, i.e., unification of AML regulations within the EU Member States.

It is also impossible to omit the reference to the abandonment of the 'unworkable' obligation for entrepreneurs to register cash transactions with a value of at least EUR 10,000. As practice proves, 'fragmented' cash transactions (smurfing, structuring) are still most often used by money laundering perpetrators. A clear example of this is inherently cross-border migrant smuggling and its benefits, which are laundered most often through cash-related methods.[64] Cash payments often appear in the layering stage and are then converted into other assets.[65] This state of affairs raises the question of what and whom the proposed solution is intended to serve. It is doubtful that it serves anti-money laundering purposes since it does not address the heart of the problem. It neither excludes cash transactions in this amount in an absolute manner (although exceptions to the prohibition of such transactions have been established), nor does it meet the expectation related to the lack of supervision over entrepreneurs conducting such transactions.

The conclusions presented lead to the conclusion that the draft EU AML regulations, although accurate in principle, are not free from defects. This will not

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[64] According to research on money laundering methods in relation to human trafficking and smuggling of migrants, cash transactions are the most frequently chosen form of payment (52%), followed by the transport of (literally) cash between jurisdictions. Cf. https://dxcompliance.com/money-laundering-risks-arising-from-migrant-smuggling/ [accessed on 27 May 2023].

[65] The use of informal value transfer systems (IVTS) is also popular when chipping deposits, such as hawala and repeated off-site prepaid card transactions – cf. FATF, *Money Laundering and Terrorist Financing Risks Arising from Migrant Smuggling*, Paris, 2022, pp. 20–24. Document available at: https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Methodsandtrends/Migrant-smuggling.html [accessed on 25 May 2023].

be without significance for the prevention of the practice discussed. In addition, bearing in mind the Polish AML regulations, one should expect their amendment, although – as should be assumed – rather limited to the necessary minimum, i.e., dictated by the requirements related to the need to adapt national legal solutions to EU directives, without using the possibility of a more rigorous approach to the principles of applying financial security measures.

Thus, when trying to answer the question indicated in the title of this study, it should be assumed that the 'AML package' is rather a major reform of the AML policy and the approach to the procedures for counteracting these dealings, than a legislative revolution. However, they do not provide extraordinary solutions or measures, because the establishment of AMLA cannot be included among them, and they do not provide, for example, the use of cutting-edge technologies in the field of AML.

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OBJECT OF THE CRIME OF A CREDITOR'S BRIBERY

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Abstract
The article is of a scientific and research nature, and its subject matter covers the object of the crime of a creditor's bribery (Article 302 § 2 of the Criminal Code). The article aims to resolve the doubts it raises. The author presents its development in Polish criminal law and analyses the features specified in the provision: a creditor, financial benefits, means of granting them, a promise to grant such benefits, acting to the detriment of other creditors, a relationship between a creditor's action and an insolvency proceeding or a proceeding aimed at preventing bankruptcy, an insolvency proceeding, and other proceedings aimed at preventing bankruptcy. The interpretation of all these notions is proposed in the article based on doctrine and case law.

Keywords: bankruptcy, bribery, creditor, debtor, financial benefit

INTRODUCTION

The importance of economic and civil transactions for economic and social development requires their special protection, ensured by the norms of various branches of law, in particular civil and administrative law. Equally important, although as an *ultima ratio*, are the norms of criminal law. Particularly significant is the criminalisation of granting a financial benefit or promising it to a creditor for acting to the detriment of other creditors in connection with bankruptcy proceedings or proceedings aimed at preventing bankruptcy, as stipulated by Article 302 § 2 of

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the Criminal Code (CC). This provision aims to protect the economy.[1] Its purpose is to ensure the proper functioning of economic transactions, undisturbed by unfair and dishonest activities during ongoing bankruptcy proceedings or proceedings aimed at preventing bankruptcy.[2] It safeguards the proper functioning of economic transactions and the related individual interests of the parties involved, as well as the supra-individual economic interests of society and the principles of satisfying creditors from the debtor's assets as evenly as possible and sharing losses proportionally.[3]

Combating pathologies in a free market economy requires comprehensive and holistic legal protection.[4] It is rightly stated in the literature that: 'Corruption in the private sector is an attack on the social and economic foundations of trade, i.e., reliability, honesty and equal opportunities for entities operating in the market economy. Bribery in the private sector is equally, or perhaps even more harmful to the national economy than the corruption of public officials.'[5]

DEVELOPMENT OF THE OBJECT OF THE CRIME OF A CREDITOR'S BRIBERY

The crime of a creditor's bribery was specified in Article 69 § 2 of the Regulation of the President of the Republic of Poland on preventing bankruptcy of 23 December 1927.[6] This applied to granting special subsidies or benefits by a debtor or a person acting on his behalf, personally or through third parties, to any of the creditors, in addition to the terms of the preventive agreement, to induce that creditor to vote in favour of the adoption of the preventive agreement. The perpetrator did not have to act to the detriment of creditors; his action was an attack on the sincerity of voting.[7]

Article 279 § 1 CC of 1932 provided for criminal liability for granting or promising to grant a financial benefit for acting to the detriment of other creditors during a bankruptcy proceeding or a proceeding aimed at preventing bankruptcy. The crime specified in Article 302 § 2 of the Criminal Code of 1997 differs from the one specified in Article 279 § 1 CC of 1932; currently, the modal feature is the connection of benefits granted with a bankruptcy proceeding or a proceeding aimed at preventing bankruptcy, while Article 279 § 1 required that the perpetrator's action took place during such proceedings.

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1 Bill, J., 'Korupcja w biznesie jako zagrożenie bezpieczeństwa ekonomicznego państwa', *Kultura Bezpieczeństwa. Nauka – praktyka – refleksje*, 2014, No. 15, pp. 33–34; Patora, K., 'Analiza korupcji', *Studia Iuridica Toruniensia*, 2018, Vol. XXII, p. 261.

2 Nowakowski, K., 'Teoretyczne i prawne aspekty korupcji w sektorze prywatnym', *Ekonomia i Prawo – Economics and Law*, 2010, No. 1, p. 356.

3 Gałązka, M., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny. Komentarz*, Warszawa, 2019, pp. 1452–1452; Zawłocki, R., in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny. Część szczególna, Komentarz. Art. 222–316*, Vol. II, Warszawa, 2017, p. 955.

4 Płońska, A., 'Istota prawnokarnej ochrony obrotu gospodarczego', *Acta Universitatis Wratislaviensis – Przegląd Prawa i Administracji*, 2015, No. 2, p. 583.

5 Nowakowski, K., *Teoretyczne i prawne aspekty…*, op. cit., p. 345.

6 Journal of Laws of 1928, No. 3, item 20.

7 Makarewicz, J., *Kodeks karny. Komentarz*, Lwów, 1938, p. 636.

The Criminal Code of 1969 did not provide for this type of crime. Economic changes and the need to restore, *inter alia*, the system of business law resulted in an urgent need for legal protection of business activities, which was reflected in the Act of 12 October 1994 on the protection of economic transactions and amendments to some provisions of criminal law,[8] which criminalised bribery in Article 8 § 2 as well as Article 302 § 2 CC.

Prima vista, it might seem that Article 8 § 2 of the Act of 12 October 1994 on the protection of business transactions and amendments to some provisions of criminal law was a model for the current regulation, as its content was the same as that of Article 302 § 2 CC. However, the similarity in wording results from the literal transfer of the content of Article 302 § 2 of the Bill (edited in 1994) to the Bill of the current Criminal Code.

Criminal conduct specified in Article 302 § 2 CC consists in granting or promising to grant financial benefits to a creditor for actions detrimental to other creditors in connection with bankruptcy proceedings or proceedings aimed at preventing bankruptcy.

GRANTING A FINANCIAL BENEFIT

The word 'granting' [in Polish: *udzielenie*] means 'providing somebody with something, lending something for use, giving something to somebody',[9] and the verb 'grant' [in Polish: *udzielić*] means '(a) give, provide, lend for use; (b) make it possible to obtain something, ensure something; (c) give consent, award something.'[10] From the linguistic point of view, the constituent element includes the transfer of a financial benefit. The form of this transfer is not specified, which indicates that it may take any form. It is rightly assumed in the doctrine that granting a benefit includes all forms of direct or indirect transfer of financial benefits, regardless of the form; it is adjusted to the needs of the person bribed.[11]

PROMISE TO GRANT A FINANCIAL BENEFIT

The word 'promise' means: 'what has been promised; assurance that something will be done, sorted out.'[12] A promise to grant a financial benefit is an assurance that the benefit will be transferred, e.g., money will be handed over, a specific

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[8] Journal of Laws of 1994, No. 126, item 615.

[9] Zgółkowa, H. (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 41, Poznań, 2003, p. 34.

[10] Dubisz, S. (ed.), *Uniwersalny Słownik Języka Polskiego PWN*, Vol. 4, Warszawa, 2003, p. 209; Szymczak, M. (ed.), *Słownik Języka Polskiego PWN*, Vol. 3, Warszawa, 1998, p. 540.

[11] Górniok, O., in: Góral, R., Górniok, O., *Przestępstwa przeciwko instytucjom państwowym i wymiarowi sprawiedliwości. Rozdział XXIX i XXX Kodeksu karnego. Komentarz*, Warszawa, 2000, pp. 91–92.

[12] Zgółkowa, H. (ed.), *Praktyczny słownik…*, op. cit., Vol. 24, p. 464.

amount will be transferred to an account, or a donation will be made.[13] It does not have to contain a precisely defined financial benefit and a precisely determined deadline. It is important that the perpetrator externalises his intention to grant it.[14] For the occurrence of this crime, it is not necessary to precisely define and specify the promise to grant a financial benefit; it is important that a perpetrator externalises his intention to grant it.[15] Article 302 § 2 CC does not limit the verbal feature by specifying the manner or form of externalising the intention to make a promise. It may be expressed in any way, expressly or implicitly, e.g., by making a gesture. The movement of fingers can be helpful in expressing thoughts.[16] It is rightly pointed out in the literature that it does not concern the common reception of a given gesture; a promise to grant a benefit may be expressed with a gesture understandable to a specific group of people, even though it would not be clear to others. The crime of bribery involves discretion and embarrassment on the part of the perpetrator, who does not know how the person to whom he wants to promise a benefit will react.[17]

The court shall assess *in concreto* whether a gesture expressed such an intention of the perpetrator and whether its addressee could understand the information transferred this way as a promise to grant benefits.[18] As the Supreme Court rightly notes:

– 'Not only a precisely defined, but also a vague promise is punishable, provided that, due to the accompanying circumstances, it may be considered to be a promise of financial or personal benefits.'[19]
– 'A promise to grant benefits, as the Supreme Court rightly notices, may be expressed in any way, including a gesture, because the provisions of Article 241 CC [current Article 229 – note by R.A.S.] do not limit the verbal feature in terms of the manner or form of externalising the intention to make a promise. The adjudicating court shall assess *in concreto* whether the gesture expressed such an intention of the perpetrator and whether the addressee could understand the information passed this way as a promise to grant benefits.'[20]

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[13] Stefański, R.A., 'Przestępstwo czynnej płatnej protekcji (art. 230a k.k.)', *Prokuratura i Prawo*, 2004, No. 5, p. 9; Opala, A., *Ochrona obrotu gospodarczego*, Warszawa, 1995, pp. 56–57.

[14] The Supreme Court judgment of 20 November 1972, III KR 209/72, OSNKW 1973, No. 4, item 48.

[15] The Supreme Court judgment of 20 November 1972, III KR 209/72, OSNKW 1979, No. 4, item 48.

[16] Kopaliński, W., *Słownik symboli*, Warszawa, 1990, p. 296.

[17] Satko, J., 'Glosa do wyroku SN z dnia 5 listopada 1997 r., V KKN 105/97', *Orzecznictwo Sądów Polskich*, 1998, No. 6, item 117.

[18] The Supreme Court judgment of 5 November 1997, V KKN 105/97, OSNKW 1998 No. 1–2, item 7.

[19] The Supreme Court judgment of 12 April 1934, 3 K 293/34, *Zbiór Orzeczeń SN*, 1934, No. X, item 228.

[20] The Supreme Court judgment of 5 November 1997, V KKN 105/97, OSNKW 1998, No. 1–2, item 7 with an approving gloss by Satko, J., *Orzecznictwo Sądów Polskich*, 1998, No. 6, item 117 and similar comments by Zabłocki, S., 'Przegląd orzecznictwa Sądu Najwyższego – Izba Karna', *Palestra*, 1998, No. 1–2, p. 170.

FINANCIAL BENEFIT

A financial benefit is a means of corruption, unlike a personal benefit, which cannot be used in this context, as seen in other types of bribery (Article 229 § 1, Article 230a, Article 296a § 2 CC). The omission of personal benefits in Article 302 § 2 CC is clearly inconsistent with the scope of liability for the venality of a creditor who, in accordance with Article 302 § 3 CC, is liable for accepting a benefit, including a personal benefit. Due to the lack of specification of the nature of the benefit referred to in the latter provision, the correct conclusion is drawn in the doctrine that it may be any benefit, i.e., both financial and personal.[21]
The argument for this distinction, based on the fact that Article 302 § 3 CC protects the solidarity of creditors, who should support each other and not act against each other, is not convincing.[22] The statement that 'directives of functional interpretation, including, first of all, the criminally the criminally and politically justified need to maintain a specific symmetry between the systems of features specified in Article 302 § 2 and § 3, also in terms of the object of bribery, strongly support the narrowing of the meaning of the word 'benefit' used in Article 302 § 3 only to financial benefits'[23] is not convincing either. It does not explain why the briber should not be liable for granting or promising to grant a personal benefit. Respect for the clear wording of Article 302 § 2 CC dictates that the opinion should be approved although, due to the consistency of statutory solutions, *de lege ferenda*, it is necessary to amend the provision by extending the scope of benefits to include personal ones.

Financial benefits have a measurable economic value and constitute an addition to property or avoidance of losses or burdens on that property, i.e., an increase in assets or a decrease in liabilities.[24] The ability to satisfy material needs is an important feature of each financial benefit.[25] The Supreme Court is correct in stating that:

> 'Since the achievement of a financial benefit is connected with both an increase in assets or a reduction in liabilities on the property and the avoidance of its reduction, obtaining this benefit may occur not only by means of theft (increment consisting in the inclusion of someone else's property in the perpetrator's property with the provision of the ability to use it as one's own), but also in a variety of forms, e.g., accepting unfair payment,

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[21] Górniok, O., *Prawo karne gospodarcze. Komentarz*, Toruń, 1997, p. 73; Buczkowski, K., *Przestępstwa gospodarcze*, Warszawa, 2000, pp. 82–83; Zawłocki, R., in: Zawłocki, R. (ed.), *System Prawa Karnego. Przestępstwa przeciwko mieniu i gospodarcze*, Vol. 9, Warszawa, 2015, p. 682.

[22] Skorupka, J., 'Typy przestępstw korupcyjnych po noweli kodeksu karnego z 13.06.2003 r.', in: Bogunia, L. (ed.), *Nowa Kodyfikacja Prawa Karnego*, Vol. XV, Wrocław, 2004, p. 152.

[23] Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część szczególna. Komentarz do art. 278-363 k.k.*, Vol. III, Warszawa, 2022, p. 837; Oczkowski, T., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 1404; Łabuda, G., in: Giezek, J. (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa, 2021, p. 1477; Gałązka, M., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny…*, op. cit., p. 1461; Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2019, p. 995.

[24] The Supreme Court ruling of 30 May 2017, II KK 156/17, LEX No. 2298294.

[25] Judgment of the Appellate Court in Lublin of 17 April 2007, II AKa 81/07, LEX No. 314605.

obtaining property rights, being released from debt, waiving claims, obtaining an interest-free or low-interest loan.'[26]

The form it takes does not matter; it may take the form of money, a legal act, or a benefit in kind. Granting it may take the form of handing over cash or transferring an amount to a creditor's bank account, donation, unjustified advantageous exchange, purchase of movable property or real estate at a low price, release from debt, waiver of the statute of limitations, assignment of receivables, interest-free or low-interest loan,[27] transfer of rights from a bill of exchange, concluding a more favourable contract with conditions better than typically found in business transactions,[28] or concluding and implementing a contract commissioning the performance of specific activities provided that the terms of the contract significantly and clearly differ from the standard values of services that are commonly adopted.[29]

A financial benefit is to be undue, unlawful and not based on a legal title.[30]

A perpetrator may grant a financial benefit personally or through a third party.

It may be a benefit for both a bribed creditor and somebody else (arg. ex. Article 115 § 4 CC). A bribed creditor does not have to be the beneficiary of the financial benefit.[31] Since the financial benefit may be granted to anybody, it does not matter whether and what benefit the bribed person gained and what benefit other persons obtained.[32]

Granting or promising to grant a financial benefit may occur before or after a creditor takes action. In the former case, it is aimed at inducing the creditor to take action to the detriment of other creditors; in the latter case, it is a form of remuneration for taking this action.[33] It is not required that the perpetrator persuade

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[26] The Supreme Court judgment of 16 January 2009, IV KK 269/08, OSNwSK 2009, No. 1, item 173.

[27] The Supreme Court judgment of 24 April 1975, II KR 364/74, OSNKW 1975, No. 8, item 111.

[28] Adamus, R., Lubelski, M.J., *Karnoprawna ochrona wierzycieli w postępowaniu naprawczym*, *Prokuratura i Prawo*, 2009, No. 4, pp. 46–47.

[29] Judgment of the Appellate Court in Wrocław of 24 May 2012, II AKa 87/12, LEX No. 1238690.

[30] The Supreme Court judgment of 17 May 1972, III KR 67/72, OSNKW 1972, No. 10, item 157; resolution of 7 judges of the Supreme Court of 15 February 1977, VII KZP 16/76, OSNKW 1977, No. 4–5, item 34; resolution of the whole Criminal Chamber of 30 January 1980, VII KZP 41/78, OSNKW 1980, No. 3, item 24; Górniok, O., *Prawo karne*…, op. cit., p. 71; idem, in: Górniok, O., Hoc, S., Kalitowski, M., Przyjemski, S.M., Sienkiewicz, Z., Szumski, J., Tyszkiewicz, L., Wąsek, A., *Kodeks karny Komentarz*, Vol. II, Gdańsk, 2005, p. 470; Zawłocki, R., in: idem, *System Prawa Karnego*…, op. cit., p. 679; idem, in: Królikowski M., Zawłocki R. (eds), *Kodeks karny*…, op. cit., p. 693; Potulski, J., in: Stefański, R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, pp. 1888–1889.

[31] The Supreme Court judgment of 17 April 2014, WA 11/14, LEX No. 1482488; judgment of the Appellate Court in Warsaw of 21 December 2018, II AKa 397/18, LEX No. 2609039.

[32] Judgment of the Appellate Court in Wrocław of 13 June 2018, II AKa 397/18, LEX No. 2718727; Judgment of the Appellate Court in Kraków of 24 May 2017, II AKa 51/17, LEX No. 2660429; judgment of the Appellate Court in Łódź of 24 July 2013, II AKa 105/13, LEX No. 1356552.

[33] Ratajczak, A., *Ochrona obrotu gospodarczego. Praktyczny komentarz*, Warszawa, 1994, pp. 81–82.

the creditor to take predetermined and specific action. It may concern ensuring the creditor's goodwill, which will be expressed in taking actions to the detriment of other creditors, suitable for the situation developed, e.g., in the way adjusted to the course of the creditors' meeting.[34]

A creditor's actions taken in order to obtain the largest possible refund of debts from the debtor do not exhaust the features of the crime, provided that they do not involve obtaining a financial benefit or a promise to receive one, even if they are taken to the detriment of other creditors. A creditor is allowed to take any possible action to have his claims settled, even if they are to the detriment of other creditors.[35]

CREDITOR

Undoubtedly, a creditor is a natural person, a legal entity, or a so-called defective legal entity entitled to demand settlement of claims by the debtor (arg. ex. Article 353 § 1 of the Civil Code), i.e., a creditor within the strict civil law meaning. A financial liability is a legal relationship in which one person (a creditor) is entitled to demand that the other person (a debtor) settle this liability.[36] Due to the fact that the act of granting a financial benefit or promising to grant it to a creditor should be connected with a bankruptcy proceeding or a proceeding aimed at preventing bankruptcy, the concept should be understood within the meaning given to it in Article 189 of the Act of 28 February 2003: Bankruptcy Law,[37] in accordance with which a creditor is anybody entitled to seek settlement of liabilities from the debtor's assets even if the liability does not have to be reported. A creditor is a person who holds receivables, even if they do not have to be reported, and is repaid from the debtor's assets regardless of whether the receivables arose before reporting the insolvency of the debtor or after reporting the insolvency of the bankrupt.[38] It is rightly pointed out in the literature that it does not only concern a creditor claiming liabilities that arose before the announcement of insolvency, regardless of whether the liabilities are subject to reporting in accordance with the mode laid down in Article 236 of the Bankruptcy Law or are listed as liabilities *ex officio*, but also a creditor claiming liabilities that arose after the announcement of insolvency in connection with the actions taken by the official receiver. It is a person who has a claim against the debtor or the bankrupt. It is a personal creditor of the bankrupt, a creditor of the debtor's assets, a person entitled to hand over an item of the property that does not belong to the bankrupt, a person who is entitled to and has personal rights and claims to

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[34] The Supreme Court judgment of 15 November 1971, IV KR 35/71, OSNKW 1972, No. 3, item 53.

[35] Peiper, L., *Komentarz do kodeksu karnego*, Kraków, 1936, p. 600.

[36] Wiśniewski, T., in: Gudowski, J. (ed.), *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna*, Vol. III, Warszawa, 2018, p. 31.

[37] Journal of Laws of 202, item 1520, as amended.

[38] Jakubecki, A., in: Jakubecki, A., Zedler, F., *Prawo upadłościowe i naprawcze. Komentarz*, Warszawa, 2010, p. 610.

real property of the bankrupt, and the entitled person for whom the bankrupt is only a debtor in possession.[39]

The status of a creditor may be granted to a specific person in the course of an insolvency proceeding even though there is no financial liability relationship between him/her and the debtor, e.g., the debtor mistakenly regarded him/her as one. In the doctrine, it is assumed that in such a situation the feature is matched, because formally exercising the rights of the creditor, he/she can influence the course of the insolvency proceeding, *inter alia*, by participating in the creditors' meeting with the right to vote (Article 195(1) of the Bankruptcy Law), being a member of the creditors' council (Article 201(1) and (2) of the Bankruptcy Law), whose consent is required for some activities of the receiver (Article 206(1) of the Bankruptcy Law).[40] This view is difficult to agree with because the requirement for criminality of the act in question consists in the fact that the person accepting a financial benefit or its promise has the features of a creditor in the material sense and not only the formal sense. Its adoption would lead to the infringement of the principle of the crime determination. Therefore, the opinion that the bribed person must be a real creditor, not a fictitious one, deserves approval.[41]

In accordance with this provision, a person cannot be recognised as a creditor if, based on a legal provision, a decision of a competent authority, a contract or actual performance, he/she is involved in the property affairs of a natural person, a legal person, a group of people or an entity without legal personality being a creditor. Although in Article 308 CC these persons are added to the list of entities that are creditors liable for crimes specified in Chapter XXXVI of the Criminal Code, it applies to a creditor who is a perpetrator of a crime, and he is an object of crime under Article 302 § 2 CC. In this context, it is assumed in the literature that there is a criminalisation loophole because, in the event of granting a financial benefit or promising to grant it to an entity on whose behalf someone else acts, e.g., to a limited company, the features of the crime are matched, and when this is a proxy for a company, the act goes unpunished.[42] In addition, it is pointed out that the interpretation excluding penalisation of bribery of a person dealing with the creditor's property matters leads to a lack of symmetry between liability for bribery and venality because in the case of venality the person involved is liable.[43]

Such interpretation of Article 302 § 2 CC is a manifestation of extended interpretation and infringes the principle: *nullum crimen sine lege*. Nevertheless, it is

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[39] Janda, P., 'Pojęcie wierzyciela w postępowaniu upadłościowym', *Przegląd Sądowy*, 2006, No. 6, p. 43 et seq.

[40] Peiper, L., *Komentarz…*, op. cit., p. 600; Wiśniewski, M., *Prawnokarna ochrona wierzytelności majątkowych uczestników obrotu gospodarczego,* Kraków, 2000, pp. 97–98.

[41] Makarewicz, J., *Kodeks...*, op. cit., p. 635; Zawłocki, R., in: idem, *System Prawa Karnego…*, op. cit., p. 679; idem, in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny…*, op. cit., p. 962.

[42] Łabuda, G., in: Giezek, J. (ed.), *Kodeks karny...*, op. cit., p. 1254; Zawłocki, R., *Przestępstwa przeciwko wierzycielom. Rozdział XXXVI Kodeksu karnego. Artykuły 300–302. Komentarz,* Warszawa, 2001, p. 136.

[43] Iwański, M., *Odpowiedzialność karna za przestępstwa korupcyjne*, Kraków, 2015, (doctoral dissertation), p. 468–469; https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/41726/Iwanski_Odpowiedzialnosc_karna_za_przestepswa_korupcyjne_2015.pdf?isAllowed=y&sequence=1 [accessed on 11 December 2023].

an irrational solution and, therefore, a *de lege ferenda* proposal is that Article 302 § 2 CC should also cover corruptive conduct targeting persons who, based on a legal provision, decision of a competent authority, contract or actual performance, deal with the property affairs of another legal person, a natural person, a group of people or an entity without legal personality.[44]

ACTING TO THE DETRIMENT OF CREDITORS

A financial benefit or a promise to grant it is to be offered to a creditor for acting to the detriment of other creditors. It is not a requirement because, as rightly pointed out in the literature, this is not directly articulated in Article 303 § 2 CC,[45] but this is what the conduct in fact aims at. It does not matter whether a creditor has actually taken action to the detriment of other creditors[46] or caused a loss,[47] as well as whether the claim was satisfied in whole or in part.[48]

Such action may manifest itself in the threat of losing the possibility of satisfying claims in whole or in part by other creditors, or in delaying settlement, or failing to obtain security for their receivables.[49] A relationship between a financial benefit or a promise to grant it and an action to the detriment of creditors is required. It concerns the risk of loss in creditors' receivables and not just in any property.

The feature 'acts to the detriment' does not exactly mean to cause a loss.[50] It is sufficient that the perpetrator's conduct can cause a loss; it concerns the possibility of its occurrence. Thus, the conduct is aimed at causing a loss. It aims to expose a party to a financial loss, which is demonstrated in the loss of the possibility to satisfy claims in whole or in part by other creditors or to obtain by some of them proportionally less than others.[51]

Acting to the detriment of creditors consists in the perpetrator's conduct creating a possibility of causing a loss to them. It is inadmissible to assume that every action of a creditor who accepted a financial benefit or a promise to get it means acting to the detriment of other creditors. Such a creditor may in fact take

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[44] Ibidem, p. 469.

[45] Ibidem, p. 470.

[46] Sitek, P., Łapownictwo urzędnicze, polityczne oraz gospodarcze w świetle prawa karnego. Skrypt. Analiza kazusów bankowych, Józefów, 2013, pp. 91–92;

[47] Ratajczak, A., *Ochrona*…, op. cit., p. 82; Opala, A., *Ochrona obrotu*…, op. cit., p. 57; Wiśniewski, M., *Prawnokarna ochrona*…, op. cit., p. 95; Wojciechowski, J., *Kodeks karny. Komentarz. Orzecznictwo,* Warszawa, 1997, p. 536; Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny*…, op. cit., p. 845; Łabuda, G., in: Giezek, J. (ed.), *Kodeks karny*..., op. cit., p. 1477; Potulski, J., in: Stefański, R.A. (ed.), *Kodeks karny*…, op. cit., p. 1923.

[48] Wiśniewski, M., *Prawnokarna ochrona*…, op. cit., p. 83; Majewski, J., in: Buchała, K., Kardas, P., Majewski, J., Wróbel, W., *Komentarz do ustawy o ochronie obrotu gospodarczego*, Warszawa, 1995, p. 181; Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny*…, op. cit., p. 995.

[49] Górniok, O., *Prawo karne gospodarcze*…, op. cit., p. 7.

[50] Wojciechowski, J., *Ustawa o ochronie obrotu gospodarczego z komentarzem*, Warszawa, 1994, p. 49.

[51] Peiper, L., *Komentarz*…, op. cit., p. 601; Górniok, O., *Ustawa o ochronie obrotu gospodarczego z komentarzem,* Warszawa, 1995, p. 37; Górniok, O., *Prawo karne*…, op. cit., p. 71.

actions that are advantageous to other creditors, even against the briber's assertion that the conduct was advantageous to him and to the detriment of other creditors.

The emphasis that it concerns 'other creditors' in Article 302 § 2 CC proves that these are creditors of the same debtor.[52] The specification of creditors in the plural form means that the action should be to the detriment of at least two other creditors,[53] and thus there must be at least three creditors (including the bribed one) in a given case. Therefore, acting to the detriment of one creditor does not match the feature of the crime. The phrase 'other creditors' also indicates that it is not required that the bribed creditor's actions affect all creditors; this would be the case if the legislator had used the word 'all'.[54]

The crime is committed the moment a financial benefit is granted or promised to the creditor.[55] It is the moment when the benefit reaches the person for whom it was intended.[56] The view that it is not sufficient to accept a promise of a benefit is unfounded[57] because it is contrary to the literal wording of the provision. It is not possible to share the view that it is committed the moment a benefit is received because the crime of bribery has a multi-personal configuration and its commission requires the cooperation of two parties: one granting a financial benefit and the other receiving it.[58] This view is rightly criticised because, in accordance with the Polish conception, liability for the crime of venality is not accessory in relation to bribery, and its commission does not in any way depend on the activeness of the person being bribed.[59] It is also erroneous to state that the commission of this crime occurs also when a creditor refuses to accept a financial benefit or a promise to grant it.[60]

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[52] Wojciechowski, J., *Ustawa o ochronie…*, op. cit., p. 51; Wojciechowski, J., *Kodeks karny…*, op. cit., p. 536; Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny…*, op. cit., p. 844.

[53] Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny…*, op. cit., p. 838.

[54] Adamus, R., Lubelski, M.J., *Karnoprawna ochrona…*, op. cit., p. 47; Piaczyńska, A., 'Glosa do wyroku SN z dnia 27 listopada 2015 r., II KK 216/15', *Prokuratura i Prawo*, 2017, No. 5, p. 135.

[55] Adamus, R., Lubelski, M.J., *Karnoprawna ochrona…*, op. cit., p. 47; Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny…*, op. cit., p. 995.

[56] Siewierski, M., in: Bafia, J., Mioduski, K., Siewierski, M., *Kodeks karny. Komentarz*, Vol. II, Warszawa, 1987, p. 397; Surkont, M., 'Glosa do wyroku SN z dnia 12 września 1986 r., Rw 655/86', *Nowe Prawo*, 1988, No. 10–12, pp. 261–263; Surkont, M., Łapownictwo, Sopot, 1999, p. 85; Wojciechowski, J., *Kodeks karny…*, op. cit., p. 407; Skorupka, J., *Ochrona interesów majątkowych Skarbu Państwa w kodeksie karnym*, Wrocław, 2004, pp. 84–85; Palka, P., *Sprzedajne nadużycie funkcji publicznej. Studium z prawa karnego*, Olsztyn, 2011, pp. 455–456; Górniok, O., in: Góral, R., Górniok, O., *Przestępstwa przeciwko instytucjom…*, op. cit., p. 93; Wiatrowski, P., 'Łapownictwo czynne i warunki niekaralności jego sprawcy w prawie karnym', *Prokuratura i Prawo*, 2008, No. 7–8, p. 58; the Supreme Court judgment of 7 November 1994, WR 186/94, OSNKW 1995, No. 3–4, item 20; the Supreme Court ruling of 14 March 2007, III KK 248/06, *Prokuratura i Prawo*, supplement, 2007, No. 10, item 4.

[57] Siewierski, M., in: Bafia, J., Mioduski, K., Siewierski, M., *Kodeks karny...*, op. cit., p. 428.

[58] The Supreme Court judgment of 12 September 1986, Rw 655/86, OSNKW 1987, No. 5–6, item 47, Marek, A., *Kodeks karny. Komentarz,* Warszawa, 2010, p. 508.

[59] Surkont, M., 'Glosa…', op. cit., pp. 261–263.

[60] Ratajczak, A., *Ochrona...*, op. cit., p. 82; Wojciechowski, J., *Ustawa o ochronie...*, op. cit., p. 50; Wojciechowski, J., *Kodeks karny…*, op. cit., p. 536; Michalska-Warias, A., in: Bojarski T. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2006, p. 630.

It is a formal crime, because causing a loss is not required and its commission occurs the moment a prohibited act is performed.[61] It might seem that the phrase 'acts to the detriment' indicates a consequential nature of the act,[62] and the consequence consists in the occurrence of a specific risk of loss; thus the crime is characterised by its result. It does not have this character, because the act to the detriment does not apply to the perpetrator but to the creditor as an object of the crime.

RELATIONSHIP BETWEEN A CREDITOR'S ACTION AND AN INSOLVENCY PROCEEDING OR A PROCEEDING AIMED AT PREVENTING BANKRUPTCY

The requirement for liability under Article 302 § 2 CC is a relationship between a creditor's venal conduct and an insolvency proceeding or a proceeding aimed at preventing bankruptcy (administration). Granting creditor a financial benefit or promising to grant it should be connected with any of those proceedings. The occurrence of such a link indicates that the bribery of a creditor is an action to the detriment of other creditors, which is within the limits of a creditor's rights in an insolvency proceeding or one aimed at preventing bankruptcy.[63] This means that a creditor should be able, within his powers, to influence the course of an insolvency proceeding or one aimed at preventing bankruptcy.[64] His action does not have to influence the course of those proceedings directly but can have an indirect impact.[65]

There is no normative justification for the opinion that the relationship with an insolvency proceeding or a proceeding aimed at preventing bankruptcy applies mainly to the conduct of a perpetrator and not a bribed creditor, supported by the statement that a different interpretation would render the considered circumstance useless for the recognition of the crime considered.[66] The wording of Article 302 § 2 CC clearly stipulates that the relationship applies to a creditor, and moreover, a creditor may have influence on the decisions regarding receivables in an insolvency proceeding while the perpetrator of the crime, who is a debtor or another person, does not have such possibilities.

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[61] Wojciechowski, J., *Ustawa o ochronie*…, op. cit., p. 50; Majewski, J., in: Buchała, K., Kardas, P., Majewski, J., Wróbel, W., *Komentarz do ustawy*…, op. cit., p. 188; Wiśniewski, M., *Prawnokarna ochrona*…, op. cit., p. 92; Zakrzewski, R., 'Przestępstwa na szkodę wierzycieli', *Prokuratura i Prawo*, 1999, No. 7–8, p. 34; Adamus, R., Lubelski, M.J., *Karnoprawna ochrona*…, op. cit., p. 47; Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny*…, op. cit., p. 845; Bojarski, M., in: Filar, M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, p. 1623; Zawłocki, R., in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny*…, op. cit., p. 963; Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny*…, op. cit., p. 995; Potulski, J., in: Stefański, R.A. (ed.), *Kodeks karny*…, op. cit., p. 1223.

[62] Sarkowicz, R., *Wyrażanie przyczynowości w tekście prawnym (na przykładzie Kodeksu karnego z 1969 r.)*, Kraków, 1989, p. 76.

[63] Makowski, W., *Kodeks karny. Część szczególna*, Warszawa, 1933, p. 644; Opala, A., *Ochrona obrotu*…, op. cit., pp. 57–58.

[64] Wiśniewski, M., *Prawnokarna ochrona*…, op. cit., p. 96.

[65] Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny*…, op. cit., pp. 854–845.

[66] Zawłocki, R., in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny*…, op. cit., p. 964.

It is not required that the proceedings should be underway. This observation is reinforced by historical interpretation, because Article 279 § 1 CC of 1932 referred to the action 'in the course of an insolvency proceeding or a proceeding aimed at preventing bankruptcy'. The comparison of these features means that, by using a different definition of the feature in Article 302 § 2 CC, the legislator gave it a broader sense. The concept of the relationship with a proceeding is rightly interpreted more broadly in the doctrine, where it is assumed that it also concerns a situation in which no proceeding is taking place but it is probable that it can be instigated at any time and that is why a perpetrator undertakes a criminal action,[67] e.g., a debtor anticipates the announcement of his bankruptcy soon or intends to apply for opening a debt restructuring proceeding.[68] It is obvious that granting a financial benefit or promising to grant it may also concern actions undertaken in the course of a proceeding. An insolvency proceeding includes a proceeding aimed at declaring insolvency, starting with an effective submission of an insolvency petition, and the proper insolvency proceeding instigated by the issuance of a decision declaring insolvency. The insolvency proceeding ends in the event of effective insolvency, which primarily occurs when the creditors are paid off. The court declares the termination of an insolvency proceeding after the division schedule has been implemented and all creditors have been satisfied. A prohibited act must be committed during the proceeding, because if the proceeding is terminated, a creditor cannot act to the detriment of other creditors and his action cannot be related to such proceedings.[69]

BANKRUPTCY PROCEEDING

Bankruptcy proceedings are special proceedings that are in the nature of universal enforcement targeting all the assets of a debtor who has become insolvent as a result of his debts.[70] In accordance with insolvency law, it includes a phase concerning the matter of insolvency, a discovery phase following the declaration of insolvency, in which a list of receivables is established, and an execution phase, in which claims against the bankrupt are settled. It concerns not only the bankruptcy of insolvent debtors who are entrepreneurs, but also the bankruptcy of natural persons not

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[67] Górniok, O., *Ustawa o ochronie*…, op. cit., p. 37; idem, *Prawo karne*…, op. cit., pp. 71–72; Majewski, J., in: Buchała, K., Kardas, P., Majewski, J., Wróbel, W., *Komentarz do ustawy*…, op. cit., p. 188; Wiśniewski, M., *Prawnokarna ochrona*…, op. cit., p. 96; Michalska-Warias, A., in: Bojarski, T. (ed.), *Kodeks karny*…, op. cit., p. 630; Marek, A., *Kodeks*…, op. cit., p. 652; Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny*…, op. cit., p. 749; Zawłocki, R., in: idem, *System Prawa Karnego*…, p. 680; idem, in: Królikowski, M., Zawłocki, R. (eds), *Kodeks karny*…, op. cit., p. 964; Bojarski, M., in: Filar, M. (ed.), *Kodeks karny*…, op. cit., p. 1622; Gałązka, M., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny*…, op. cit., p. 1461; Oczkowski, T., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny*…, op. cit., p. 1486.

[68] Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny*…, op. cit., p. 845.

[69] Ratajczak, A., *Ochrona*…, op. cit., p. 82; Wiśniewski, M., *Prawnokarna ochrona*…, op. cit., p. 97.

[70] Siedlecki, W., in: Siedlecki, W., Świeboda, Z., *Postępowanie cywilne – zarys wykładu*, Warszawa, 1998, p. 29.

engaged in business activities, the so-called consumer bankruptcy that enables insolvent customers to benefit from debt relief (Article 491[1] Bankruptcy Law). What supports the idea of including this proceeding within the scope of Article 302 § 2 CC is the generic object of protection under Chapter XXXVI of the Criminal Code, which is complex and covers both economic transactions and property interests in civil law transactions.

OTHER PROCEEDINGS AIMED AT PREVENTING BANKRUPTCY

Other proceedings aimed at preventing bankruptcy include any proceedings provided for by law that are intended to prevent a debtor's declaration of bankruptcy.[71] A debt restructuring proceeding is an example of such a proceeding. Its aim, articulated in Article 3 of the Act of 15 May 2015: Restructuring Law,[72] is to prevent a declaration of a debtor's bankruptcy by enabling him to restructure debts by concluding an agreement with creditors, and in the case of administration, also by carrying out restructuring activities while securing the legitimate rights of creditors. The scheme of arrangement can be concluded after a list of receivables is prepared and approved (Article 3(4)(1) RL). A restructuring proceeding enables a debtor to undertake remedial activities and to conclude the scheme of arrangement after a list of receivables is prepared and approved, and it covers legal and actual actions aimed at improving the debtor's economic situation and restoring his ability to fulfil his obligations while he is protected against debt execution (Article 3(5) and (6) RL).

CONCLUSIONS

1. The crime of a creditor's bribery specified in Article 302 § 2 CC, consisting of granting a financial benefit or promising to grant it to a creditor for acting to the detriment of other creditors in connection with an insolvency proceeding or another proceeding aimed at preventing bankruptcy, plays, as an *ultima ratio*, an important role in the protection of economic and civil law transactions and economic and social development.
2. The means of this crime commitment is a financial benefit (Article 302 § 3 CC), and the means of a creditor's venality is an economic or personal benefit (Article 302 § 3 CC). Such a distinction of those benefits regarding the same object and in the same editorial unit has no criminal or political grounds, because it leads to a clear dysfunction in the construction of those offences; it is necessary to supplement the scope of Article 302 § 2 CC with personal benefit.
3. For the determination of a creditor within the meaning of Article 302 § 2 CC, its definition laid down in Article 189 of the Bankruptcy Law is important. In

[71] Majewski, J., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny…*, op. cit., p. 844.
[72] Journal of Laws of 2022, item 2309, as amended, hereinafter 'RL'.

accordance with this, it is every person entitled to satisfaction from the debtor's assets even if the liability does not require reporting, which is supported by the relationship between granting a financial benefit or promising to grant it and an insolvency proceeding or a proceeding aimed at preventing bankruptcy.

4. Article 302 § 2 CC applies not only to the bankruptcy of insolvent debtors who are entrepreneurs but also to the bankruptcy of natural persons not involved in business activities, the so-called consumer bankruptcy that enables insolvent customers to benefit from debt relief (Article 4911 of the Bankruptcy Law).

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STATUTORY ELEMENTS OF THE CRIME OF MOTOR VEHICLE REGISTRATION PLATES FORGERY

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Abstract
This article is of a scientific and research nature and covers the subject of offences defined in Article 306c of the Criminal Code, which has been in force since 1 October 2023. It addresses, *inter alia*, the counterfeiting or altering of a motor vehicle registration plate to use it as an authentic one (§ 1) and using it as an authentic one (§ 2). The primary research goal is to assess the reasonableness of introducing this provision into the Criminal Code and the correctness of determining the conditions for its application and its objective scope. The assumption is that the criminalisation of such behaviour could be an effective weapon in combating the phenomenon of fuel theft from petrol stations, as the perpetrators of these thefts usually attach counterfeit plates to their vehicles. The analysis covers the object of protection of this provision, the types of this crime, their elements such as counterfeiting and alteration, the concept of a registration plate, the legalisation of the plate, the purpose of the causative behaviour, and the concept of a motor vehicle. It is sufficient to use the normative and dogmatic method to analyse the issues.

Keywords: alteration, counterfeiting, legalisation, motor vehicle, object of protection, registration plate, types of crime

INTRODUCTION

Article 306c of the Act of 7 July 2022 amending the Act: Criminal Code and Some Other Acts[1] defines the following offences: (1) stealing a motor vehicle registration plate allowing the use of this motor vehicle on roads in the territory of the Republic of Poland (§ 1); (2) using a motor vehicle registration plate on a vehicle different from

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[1] Journal of Laws of 2022, item 2600, as amended.

the one to which it has been assigned (§ 2); (3) counterfeiting and altering a motor vehicle registration plate to use it as an authentic one (§ 1); (4) using a counterfeit or altered motor vehicle registration plate as an authentic one (§ 2).

The analysis covers the offences of counterfeiting or altering a motor vehicle registration plate to use it as an authentic one and of using it as such. The amendment results in the specification of another distinct type of crime of counterfeiting objects. Traditionally, the basic crime of forgery consists of counterfeiting or altering a document (Article 270 § 1 CC). In addition, the Criminal Code lists the following offences: (1) altering or forging records or other electoral or referendum documents (Article 248 § 3 CC); (2) counterfeiting or altering invoices for the purpose of confirming factual circumstances that may be important for determining the amount of public law receivables or their refund or a refund of other receivables that are tax-related (Article 270a § 1 CC); (3) counterfeiting or altering identification marks, a production or expiry date of a product or facility (Article 306 CC); (4) counterfeiting or altering Polish or foreign money, and Polish or foreign monetary signs, established as legal tender but not yet put into circulation, other means of payment or documents entitling to receive a sum of money or containing an obligation to pay capital, interest, share in profits or confirmation of participation in a company (Article 310 § 1 CC); (5) counterfeiting or altering an official mark intended to confirm authorisation of the result of an examination (Article 314 CC); and (6) counterfeiting or altering legalised measuring or testing tools (Article 315 § 1 CC). The basic forms of these offences differ concerning the target of particular forbidden acts.

JUSTIFICATION FOR CRIMINALISATION

It was argued in the justification for the Bill[2] that the criminalisation of counterfeiting or altering a motor vehicle registration plate to use it as an authentic one and of using one was necessary to employ criminal law instruments to combat the phenomenon of counterfeiting registration plates committed mainly for the purpose of stealing fuel from petrol stations, because there was a legal loophole: if a motor vehicle registration plate is not a document but only a mark, then counterfeiting or altering it is not penalised at all. Reference was made to two judgements of the Supreme Court in which the body recognised that a registration plate is not a document, because on its own it does not prove any right to the vehicle[3] and therefore cannot be an object of crime under Article 270 CC, but may be an object of crime under Article 306 CC.[4]

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[2] Justification for the Bill amending Act: Criminal Code and Some Other Acts. The Sejm print No. 2024, pp. 96 and 97, https://orka.sejm.gov.pl/Druki9ka.nsf/0/2851BC6F8739C593C12587F10042EF6E/%24File/2024.pdf [accessed on 2 January 2024].

[3] The Supreme Court judgment of 23 May 2002, V KKN 404/99, OSNKW 2002, No. 9–10, item 72.

[4] The Supreme Court ruling of 19 March 2003, III KKN 207/01 LEX No. 78408.

In assessing the justification for the criminalisation of these activities in a separate Article 306c CC, it is not possible to refrain from referring to the legal nature of registration plates as specified in case law and jurisprudence. Undoubtedly, it is a controversial issue, and there are four views on it stating that a registration plate:
(1) is not a document within the meaning of Article 115 § 14 CC,[5] and therefore cannot be an object of crime under Article 270 § 1 CC or Article 276 CC; counterfeiting or altering it is irrelevant from the point of view of criminal law;
(2) is a document, because a registration plate constitutes a significant element of the permission to use a vehicle on roads; a vehicle cannot take part in road traffic without it;[6]
(3) may constitute an object of crime under Article 306 CC, because it is an identification mark within the meaning of this provision;[7]

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[5] The Supreme Court judgment of 30 August 2000, V KKN 263/2000, unpublished judgment of the Supreme Court of 23 May 2002, V KKN 404/99, OSNKW 2002, No. 9–10, item 72 with critical glosses by Błaszczyk, J., 'Glosa do wyroku SN z dnia 23 maja 2002 r., V KKN 404/99', *Prokuratura i Prawo*, 2003, No. 6, pp. 116–125, and Siwek, M., 'Glosa do wyroku SN z dnia 23 maja 2002 r., V KKN 404/99', *Prokuratura i Prawo*, 2003, No. 6, pp. 109–115; the Supreme Court judgment of 10 April 2003, III KKN 203/01, LEX No. 77461; the Supreme Court ruling of 12 December 2003, II KK 211/03, OSNwSK 2003, No. 1, item 2687; the Supreme Court ruling of 4 May 2005, III KK 130/04, OSNwSK 2005, No. 1, item 895; the Supreme Court ruling of 14 November 2006, II KK 129/06, OSNwSK 2006, No. 1, item 2145; the Supreme Court ruling of 16 November 2005, III KK 51/05, OSNwSK 2005, No. 1, item 2088; the Supreme Court resolution (7) of 27 October 2005, I KZP 33/04, OSNKW 2005, No. 11, item 1.6 with critical comments by Stefański, R.A, 'Przegląd uchwał Izby Karnej Sądu Najwyższego z zakresu prawa karnego materialnego, prawa karnego skarbowego i prawa wykroczeń za 2005 r.', *Wojskowy Przegląd Prawniczy*, 2006, No. 1, pp. 134–135; the Supreme Court ruling of 25 February 2005, I KZP 33/04, KZS 2005, No. 7–8, item 39; the Supreme Court judgment of 23 November 2010, IV KK 293/10, LEX No. 667517 with a partly critical gloss by Skowron, A., 'Glosa do wyroku SN z dnia 23 listopada 2010 r., IV KK 293/10', LEX/el. 2012; the Supreme Court judgment of 19 September 2016, V KK 189/16, LEX No. 2122065: Barczak, A., in: Gadecki, B. (ed.), *Kodeks karny. Art. 1–316. Komentarz*, Warszawa, 2023, p. 361; Daniluk, P., in: Stefański, R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 826; Oczkowski, T., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 706; Piórkowska-Flieger, J., *Fałsz dokumentu w polskim prawie karnym*, Kraków, 2004, p. 197: Piórkowska-Flieger J., 'Ewolucja pojęcia dokumentu w polskich kodeksach karnych', in: Leszczyński, L., Skrętowicz, E., Hołda, Z. (eds), *W kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci prof. A. Wąska*, Lublin, 2005, p. 518; Wróbel, W., Sroka, T., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część szczególna. Komentarz do art. 212–277d*, Vol. II, Part II, Warszawa, 2017, p. 762; Gałązka, M., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny. Komentarz*, Warszawa, 2019, p. 787; Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2019, p. 404.

[6] Błaszczyk, J., 'Glosa do wyroku SN…', op. cit., pp. 116–125; Siwek, M., 'Glosa do wyroku SN…', op. cit., pp. 109–115; Stefański, R.A., 'Przegląd uchwał (…) za 2005 r.', op. cit., pp. 102–104; Stefański, R.A., *Prawo karne materialne. Część szczególna*, Warszawa, 2009, pp. 499–500; Herzog, A., 'Tablice rejestracyjne pojazdu jako dokument w rozumieniu prawa karnego', *Prokuratura i Prawo*, 2002, No. 10, p. 154; Herzog, A., 'Problemy wokół prawnej ochrony tablic rejestracyjnych', *Paragraf na Drodze*, 2006, No. 3, pp. 16–28; Herzog, A., 'Charakter prawny tablic rejestracyjnych w rozumieniu prawa karnego', *Prokuratura i Prawo*, 2006, No. 4., pp. 30–44; Zawłocki, R., in: Wąsek, A., Zawłocki, R. (eds), *Kodeks karny. Komentarz do artykułów 222–316*, Vol. II, Warszawa, 2010, p. 756; Błachut, J., *Dokument jako przedmiot ochrony prawnokarnej*, Warszawa, 2011, pp. 214–224; Majewski, J., in: Zoll, A. (ed.), *Kodeks karny. Część ogólna. Komentarz do art. 1–116 k.k.*, Vol. I, Warszawa, 2016, p. 1025.

[7] The Supreme Court ruling of 19 March 2003, III KKN 207/01, LEX No. 78408.

(4) cannot be an object of crime under Article 306 CC, because it should not be equated with an identification mark within the meaning of this provision, as only the engine and chassis numbers are.[8]

The Supreme Court is right to adopt the stance that the change of genuine registration plates with unaltered content and their use as authentic ones when driving does not exhaust the constituent elements of crime under Article 270 § 1 CC[9] and those laid down in Article 306 CC.[10]

The above-presented different stances on liability for counterfeiting and altering registration plates, supported by more or less convincing arguments, leave no doubts that the legislator's intervention was necessary to standardise the legal basis and the scope of criminal liability for such conduct. The criminalisation of this conduct will make it possible to combat the increasingly common phenomenon of stealing fuel from petrol stations by drivers using false registration plates.

TYPES OF CRIME

The content of Article 306c CC makes it possible to assume that it defines two types of crime regarding the falsification of registration plates, as indicated in the Introduction, namely: (1) counterfeiting or altering a motor vehicle registration plate to use it as an authentic one (§ 1); and (2) using a counterfeit or altered motor vehicle registration plate as an authentic one (§ 2).

Doubts concerning this interpretation of the provision may be raised due to the fact that their constituent elements are laid down in one editorial unit, i.e., in one article of the Act. This may suggest that it concerns a single offence that occurs in many types. However, considering that it consists of stealing a plate and counterfeiting or altering it, i.e., entirely different criminal conduct, it is reasonable to assume that Article 306c § 1 CC defines two different, separate types of crime.[11] The identity of the object of the prohibited act is an unconvincing argument for treating this provision as one defining a single offence. An error was made during the construction of Article 306c § 1 CC, because it contains two independent thoughts, and in accordance with the principles of legislation, two different types of conduct should be laid down in two separate articles. In accordance with § 55 (1) of the Appendix 'Principles of Legislative Technique' to the Regulation of the President of the Council of Ministers of 20 June 2002 concerning 'Principles of Legislative Technique',[12] each independent thought shall be edited in a separate article.

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[8] The Supreme Court judgment of 17 May 2000, V KKN 143/00, *Prokuratura i Prawo*, supplement, 2001, No. 1, item 5; the Supreme Court judgment of 18 May 2000, V KKN 80/00, LEX No. 5099; the Supreme Court judgment of 13 July 2000, V KKN 491/98, LEX No. 50962; the Supreme Court judgment of 6 May 2003, III KK 118/03, OSNwSK 2003, No. 1, item 907; Błachut, J., *Dokument*…, op. cit., p. 226.

[9] The Supreme Court judgment of 30 August 2000, V KKN 263/2000, LEX No. 50949.

[10] The Supreme Court judgment of 6 May 2003, III KK 118/03, *Prokuratura i Prawo*, supplement, 2003, No. 11, item 15.

[11] Oczkowski, T., in: Konarska-Wrzosek, V. (ed.), *Kodeks*…, op. cit., 2023, p. 1506.

[12] Journal of Laws of 2016, item 283.

The definition laid down in Article 306c § 2 CC is unclear regarding the characterisation of conduct involving the use of a motor vehicle registration plate that is not assigned to the vehicle on which it is placed, as well as the use of a counterfeit or altered motor vehicle registration plate as an authentic one. The question is whether they constitute the elements of separate types of crime or the form of, respectively, stealing a motor vehicle registration plate to permit this vehicle's participation in traffic within the territory of the Republic of Poland, or falsifying a registration plate. The doubt arises from the regulation of the conduct in a separate paragraph. Nevertheless, the first solution should be approved of, and the argument for this opinion is the fact that, in accordance with the principles of legislative technique, an article is divided into smaller editorial units, i.e., paragraphs in this case, when there are content-related links between sentences expressing independent thoughts, and the content of none of them is sufficiently important to express them in a separate article. Additionally, a thought expressed in a set of sentences shall be placed in paragraphs (Article 55 §§ 3 and 4 of the above-mentioned legislative technique).[13] There is no doubt that the conduct specified in Article 306c § 2 CC is not strictly related to that described in § 1. Taking the above into consideration, it is necessary to assume that there are two types of crime of falsifying a registration plate: (1) counterfeiting or altering a motor vehicle registration plate to use it as an authentic one (Article 306c § 1 CC); and (2) using a counterfeit or altered motor vehicle registration plate as an authentic one (Article 306c § 2 CC). The dual nature of the crime is determined by fact that the conduct involving use of a counterfeit or altered motor vehicle registration plate as an authentic one is placed in a separate paragraph. In this context, the opinion that the conduct specified in § 1 and § 2 of Article 306c CC constitutes separate offences cannot be approved of.[14]

OBJECT OF PROTECTION

Article 306c is placed in Chapter XXXVI, entitled 'Offences against Economic Transactions and Property Interests in Civil Law Transactions', which indicates that the object of protection consists of the security of economic transactions and property interests in civil law transactions. This is the main individual object of protection under Article 306c CC. Additionally, it includes the reliability of registration plates, as well as the safety and order in public road traffic, in residential areas, and in traffic zones. It concerns trusting registration plates as a formal expression of a vehicle's admission to traffic. The argument for the safety of road traffic is the fact that only vehicles meeting specific technical requirements are registered and assigned legalised registration plates (Article 72(2) of the Act of 20 June 1997: Law on Road Traffic).[15] The registration of a vehicle confirms that it meets technical requirements. Providing

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[13] Przetok, M., *Struktura tekstu prawnego na przykładzie kodeksu karnego*, Gdańsk, 2015, p. 185.

[14] Oczkowski, T., in: Konarska-Wrzosek, V. (ed.), *Kodeks*…, op. cit., 2023, p. 1506; Kulik, M., in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz aktualizowany*, LEX/el. 2023, theses 2 and 6 to Article 306c.

[15] Journal of Laws of 2023, item 1047, as amended, hereinafter 'LRT'.

a vehicle with falsified registration plates does not allow the assumption that the vehicle is constructed, equipped, and maintained in a manner that guarantees its use does not pose a threat to traffic safety. The protection of traffic order arises from the fact that a registration plate allows for the identification of vehicles participating in traffic. The limitation of this traffic to public roads, residential areas, and traffic zones is related to the scope of the road traffic law, which is in force on such roads; and in a wider scope, only when it is necessary to avoid threats to the safety of persons resulting from road signs and signals (argued based on Article 1 para. 1 (1) and Article 1 para. 32 LRT). The importance of registration plates is demonstrated by the introduction of their production control. Under Article 72a para. 1 LRT, the production of registration plates, including professional ones, and their duplicates, is a regulated activity and requires that each involved business be entered into the register of manufacturers of registration plates.

There is no justification for the views expressed in the literature indicating that the individual object of protection consists of 'the obligation to mark motor vehicles officially admitted to road traffic with the use of legal registration plates, i.e., the plates issued by a competent authority and assigned to a particular motor vehicle'[16] or 'the property interests of a potential purchaser of a vehicle and the security of economic transactions involving motor vehicles.'[17] It is also inaccurate to assume that the object of protection includes the authenticity and truthfulness of the registration plate content, and that the security of property interests in civil transactions is an indirect object of protection.[18] On the contrary, the title of the Chapter, which is unambiguous, indicates the object of protection. It is not understandable why economic transactions, in which entities using counterfeit or altered registration plates may participate, are omitted as an object of protection.

CAUSATIVE ACTIVITY

The causative activity consists of counterfeiting or altering a motor vehicle registration plate to use it as an authentic one. The essence of this conduct is to create a pretence that a plate comes from a particular manufacturer.

COUNTERFEITING

From a linguistic point of view, 'counterfeit' means 'to make a copy of something to use it illegally instead of the original'.[19] It involves making this copy in the form and content of a registration plate corresponding to one produced by an authorised

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16 Oczkowski, T., in: Konarska-Wrzosek, V. (ed.), *Kodeks*…, op. cit., 2023, p. 1506.

17 Kulik, M., in: Mozgawa, M. (ed.), *Kodeks*…, op. cit., LEX/el. 2023, thesis 1 to Article 306c.

18 Bogucki, P., Olężałek, M., *Kodeks karny. Komentarz do nowelizacji z 7.7.2022 r.*, Warszawa, 2023, p. 646.

19 Zgółkowa, H. (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 29, Poznań, 2000, p. 409.

manufacturer. The essence of counterfeiting is embossing the registration number on the same or similar carrier, creating the pretence of authenticity. However, a counterfeit registration plate does not originate from the manufacturer who was supposed to produce it. The idea is to make a plate that appears to come from an authorised manufacturer, i.e., a fake or imitation of an authentic plate.

The method of its production does not matter. The method of counterfeiting, including the use of very simple or even primitive means that produce a very poor effect, is irrelevant to liability under Article 306c § 1 CC. It is not necessary for the perpetrator to achieve a striking resemblance that could mislead even an experienced person. It is not necessary for the counterfeit plate to be illusively similar to the original, and its identification to require specialised knowledge and tools. It is enough to show such similarity that an inexperienced person, seeing it under common circumstances, cannot immediately recognise it as a fake. What is important in the perpetrator's activity is that his intention is to make a registration plate that is to fulfil its functions.

The use of a copier does not eliminate the elements of counterfeiting a plate. A plate may be made using a 3D printer as a copy of an authentic registration plate. A copy of any motor vehicle registration plate may be made this way, for example, by taking photographs of registration plates of selected models of vehicles parked in front of shops or in any other public place. There are companies that produce 'collector's' registration plates. They are manufactured using original materials; as a rule, they do not have legalisation signs. Some people buy a custom-designed plate as a third one for the trunk, even though such plates are available officially.[20]

It may be helpful to identify a counterfeit registration plate if plate producers place a laser-made marking of the certificate number confirming that the registration plates or materials used for their production comply with the technical requirements laid down in the certificate held by the producer of plates without embossed numbers, if applicable, or a marking of the manufacturer's name and the number of the certificate held by the manufacturer of registration plates with embossed registration numbers or one embossing registration numbers (§ 28 subsection 4 (3) and (4) of the Regulation of the Minister of Infrastructure of 31 August 2022 concerning the registration and marking of vehicles, requirements for registration plates and templates of other documents related to vehicle registration).[21]

It is not possible to treat the placement of a plate with the inscription 'Wedding Couple' or 'Just Married' in the place of a registration plate on a vehicle driving a bride and groom as an offence of counterfeiting a registration plate, because such a plate is not counterfeit: its content differs significantly from that of authentic registration plates. As suggested in the literature, there is no need to refer to the custom-related countertype.[22]

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[20] Brzeziński, M., 'Do więzienia za "lewe" tablice rejestracyjne – jest projekt ustawy', *Auto Świat*, 2022, https://www.auto-swiat.pl/wiadomosci/aktualnosci/kara-wiezienia-za-niewlasciwe-tablice-rejestracyjne-jest-projekt-ustawy/8plvg00 [accessed on 3 January 2024].

[21] Journal of Laws of 2022, item 1847, hereinafter 'RRMV'.

[22] Behan, A., 'Prawnokarna ochrona tablic rejestracyjnych pojazdów mechanicznych na gruncie nowego art. 306c Kodeksu karnego', *Palestra*, 2023, No. 10.

ALTERING

An altered registration plate is an authentic plate manufactured by an authorised producer, the content of which has been changed by an unauthorised person. These changes create the pretence that it comes from an authorised producer. Any element of the registration plate may be changed, e.g., the voivodeship distinguishing mark, the county distinguishing mark, the vehicle distinguishing mark, the historic vehicle symbol, the 'PL' sign, or a number. Altering may consist in the introduction of changes to the original plate by an unauthorised person, giving it content different from the original, e.g., by changing the digit 3 into 8. It is rightly indicated in the literature that altering may involve changing the legalised registration plate background colour from white to green, which is used for electric or hydrogen-fuelled vehicles[23] admitted to traffic in the so-called clean transport zones (low emission zones). These zones may be established to limit the negative effects of exhaust emissions on human health and the environment of a county, including roads administered by the authorities of a county, to which the entry of vehicles other than electric or hydrogen-fuelled ones is banned (Article 39(1)(1) and (2) of the Act of 11 January 2018 on Electromobility and Alternative Fuels).[24] The aim of the above-mentioned plate counterfeiting is to allow driving in the zone, as only vehicles with such plates are allowed to enter such zones, and they are exempt from parking fees in the paid parking zones or in the city centre paid parking zones (Article 13(3)(e) of the Act of 21 March 1985 on Public Roads).[25]

The alteration does not have to be permanent or irremovable. The durability or indelibility of changes depends solely on the method or technique used to alter a plate. The Supreme Court, *mutatis mutandis*, rightly noted that if altering registration plates in a non-permanent and easily removable way had been sufficient to mislead another person or to prevent the identification of a vehicle, the perpetrators understandably would have used just that method, and there was no reason why their activity should not be classified as alteration and therefore not subject to penalisation.[26]

THE OBJECTIVE OF CAUSATIVE CONDUCT

To determine the occurrence of this crime, it is not sufficient to establish that a perpetrator has counterfeited or altered registration plates; it is also necessary to establish that it was done with the intention of using it as an authentic one (Article 306c § 1 CC) and, as far as its use is concerned, that a perpetrator has used it as an authentic one (Article 306c § 2 CC).

The element 'for the purpose of using it as an authentic one' is met only when the perpetrator's objective is to counterfeit or alter a registration plate to provide it for

[23] Ibidem, p. 72.
[24] Journal of Laws of 2023, item 875, as amended.
[25] Journal of Laws of 2023, item 645, as amended.
[26] The Supreme Court ruling of 19 March 2003, III KKN 207/01, LEX No. 78408.

a vehicle that should have it. This can be done for oneself or another person. From the point of view of meeting the element 'for the purpose of using it as an authentic one', it is not important whether the perpetrator counterfeited it on his own and then used it. The perpetrator also achieves the aim when he uses a registration plate counterfeited by another person.[27] The perpetrator's conduct does not meet the elements of the crime if he counterfeits or alters a registration plate for a purpose different from the one indicated in Article 306c § 1 CC.

It is not the objective of a perpetrator who uses a set consisting of a 'leaf', an electromagnet, and a remote control, and installs the electromagnet behind the plate to hold the 'leaf' equipped with a magnet. The 'leaf' is used to hide the sign or signs of the vehicle registration number to prevent its identification if a speed camera takes a photograph of it. At the same time, if the police stop the vehicle, the remote control is used to turn off the electromagnet, which makes the 'leaf' fall off.[28]

The 'use', within the meaning of Article 306c § 2 CC, means supplying a vehicle with such a plate. The statute does not require the perpetrator to be also a counterfeiter. A perpetrator who uses a counterfeit plate after having counterfeited it commits an offence under Article 306c § 1 CC, because the offence of using it is a co-punished act as a consecutive one taking place after the former act. Another person using such a plate shall be liable for the offence under Article 306c § 2 CC.

REGISTRATION PLATE

The object of the prohibited act is a motor vehicle registration plate that admits the vehicle to road traffic in the territory of the Republic of Poland. There is no legal act providing a definition of a registration plate. The requirements for registration plates are regulated in the Law on Road Traffic and in the provisions issued based on it, mainly in the Regulation concerning Registration and the Marking of Vehicles, Requirements for Registration Plates and Templates of Other Documents Related to Vehicle Registration (RRMV).

A registration plate, besides the registration certificate, is an element confirming the admission of a vehicle to road traffic, indicating that the vehicle has been built, equipped, and maintained to meet safety requirements.

Each vehicle shall be assigned one registration number (§ 27(1) RRMV).

This concerns every registration plate required to register a motor vehicle, regardless of its template and type. The legalised registration plates, depending on the template, include:

(1) standard ones used to mark all vehicles except the ones that follow;
(2) individual ones used to mark passenger cars;
(3) historic ones used to mark historic vehicles;
(4) temporary ones used to mark vehicles registered temporarily;

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[27] The Supreme Court judgment of 20 April 2005, III KK 190/04, *Prokuratura i Prawo*, supplement, 2005, No. 11, item 5.

[28] Behan, A., 'Prawnokarna ochrona tablic…', op. cit., pp. 72–73.

(5) diplomatic ones used to mark vehicles possessed by diplomatic missions, consular corps, special missions of foreign countries, international organisations, and their personnel (§ 24 RRMV).

As far as their size is concerned, there are:

(1) car plates:
   (a) single-row and double-row ones to mark all types of vehicles except motorcycles, agricultural tractors, motor bicycles, and vehicles classified as 'other car-like' ones (categories: L6e and L7e);
   (b) reduced size single-row ones to mark motor vehicles with a smaller construction element designed to fit a registration plate, except motorcycles, agricultural tractors, low-speed vehicles being part of tourist trains, and vehicles classified as 'other car-like' ones;
(2) motorcycle plates: to mark motorcycles, tractors, agricultural tractors, and vehicles classified as 'other car-like' ones (categories: L6e and L7e);
(3) motor bicycle (double-row) plates - to mark motor bicycles (§ 26(1) RRMV).

There are also:

(1) additional registration plates for the purpose of marking a trunk covering the rear plate of a vehicle (Article 73 para. 1c (2) LRT and § 8 RRMV);
(2) professional registration plates (trade licence plates) for vehicles used for test driving within the activities conducted by an entrepreneur based in the territory of the Republic of Poland. In the case of an entrepreneur based abroad, a branch involved in the production, distribution (selling within the trade of vehicles), or testing vehicles that have not been registered in the territory of the Republic of Poland or abroad before, or used by technical services involved in type-approval of vehicles and their equipment, or a research unit of the producer of a vehicle, a piece of equipment, or parts (Article 80s para. 1 and 2 LRT). Depending on their size, these plates are divided into the same categories as indicated above (§ 11 of the Regulation of the Minister of Infrastructure of 12 March 2019 concerning Professional Registration of Vehicles and the Markings Used, and Fees for Professional Registration of Vehicles);[29]
(3) registration plates for vehicles of the Armed Forces of the Republic of Poland;
(4) registration plates for vehicles of foreign armed forces staying in the territory of the Republic of Poland (§ 1 of the Regulation of the Minister of National Defence of 30 August 2023 concerning Registration of Vehicles of the Armed Forces of the Republic of Poland and Vehicles of Foreign Armed Forces Staying in the Territory of the Republic of Poland Based on International Agreements);[30]
(5) registration plates for vehicles of the Military Counterintelligence Service and the Military Intelligence Service (§ 1 of the Regulation of the Minister of National Defence of 31 August 2023 concerning Registration of Vehicles of the Military Counterintelligence Service and the Military Intelligence Service);[31]

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[29] Journal of Laws of 2023, item 2616, hereinafter 'RPRV'.
[30] Journal of Laws of 2023, item1776, hereinafter 'RRAFV'.
[31] Journal of Laws of 2023, item 1777, hereinafter 'RRMCSV'.

(6) registration plates for vehicles of the State Protection Service, the Police, the Internal Security Agency, the Intelligence Agency, the Central Anti-Corruption Bureau, the Border Guard, and the National Fiscal Administration used by the Customs-Fiscal Service (§ 1 of the Regulation of the Minister of the Interior and Administration of 1 September 2023 concerning Registration of Vehicles of the State Protection Service, the Police, the Internal Security Agency, the Intelligence Agency, the Central Anti-Corruption Bureau, the Border Guard, and the National Fiscal Administration Used by the Customs-Fiscal Service).[32]

Detailed technical requirements for registration plates, the scope and method of testing them, as well as registration plates templates, signs, symbols placed on them, and their descriptions are specified in Annex 12 to RRMV. For example, the plate should be made of 1-mm-thick aluminium tape resistant to weather conditions and those occurring during standard vehicle use. The front surface of the plate should be covered in white, yellow, green, or blue reflective material permanently bound with the base surface, resistant to impacts and bending, and having flexible, as well as the required reflective and colour properties (para. 2 (1) of the above-quoted Annex). Car plates are made in sets, while motorcycle, motor bicycle, and trailer plates are made as singles. An additional registration plate with the same registration number as the registration of a motor vehicle is made to mark a trunk covering the rear plate of that vehicle. Registration plates for agricultural tractors can be made as singles. Motorcycle and motor bicycle plates may be made in sets to mark: (1) three-wheel motorcycles of the L5e category and three-wheel motor bicycles of the L2e category; (2) four-wheel vehicles of the L7e category and four-wheel light vehicles of the L6e category (para. 2 (4) of the above-quoted Annex). Electric and hydrogen-fuelled vehicles shall have registration plates indicating the fuel used (Article 71 para. 2a LRT).

A registration plate has an embossed registration number, which is black on a white background, or black on a green background in the case of an electric or hydrogen-fuelled vehicle, consisting of the voivodeship distinguishing mark, the county distinguishing mark, and the vehicle distinguishing mark. The number on the registration plate consists of letters and digits: the voivodeship, the county, and the vehicle distinguishing marks (a vehicle registration plate or a motorcycle registration plate); the voivodeship and vehicle distinguishing marks (standard registration plate that is a single-row vehicle registration one); the voivodeship and the individual vehicle distinguishing marks (an individual registration plate); the voivodeship, the county, and the vehicle distinguishing marks and the symbol of a historic vehicle (a historic registration plate); the voivodeship and the vehicle distinguishing marks (a temporary plate); the voivodeship and the vehicle distinguishing marks (a diplomatic registration plate) (§ 27(1)–(4), (9), and (10) RRMV). In addition, the symbol of the European Union composed of twelve yellow five-pointed stars arranged in a circle on a blue background and white PL letters are placed on the left. This requirement is not applicable to diplomatic registration plates. There is a legalisation sign in the place designated for this purpose (§ 28(1)

[32] Journal of Laws of 2023, item 1778, hereinafter 'RRPSV'.

and (2) RRMV). With the exception of motor bicycle and temporary plates, registration plates also have the following laser-applied components: (1) a graphic of the eagle contour, which is Poland's emblem; (2) the number of the certificate held by the producer of registration plates without the embossed registration number, if applicable; (3) the designation of the producer's name and the number of the certificate held by the producer of registration plates with an embossed registration number or the one embossing registration numbers; (4) a graphic of a car symbol on a historic registration plate in the case of reduced-size historic single-row registration plates; (5) a graphic of the symbol of a motorcycle on the historic motorcycle and motor bicycle registration plates (§ 28(4) and (6) RRMV). Registration numbers are composed of the following 25 letters: A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, R, S, T, U, V, W, X, Y and Z, and digits 0–9. For example, individual letters and digits of the registration number on standard car registration plates mean: the first letter – a voivodeship distinguishing mark; the second letter or the second and third letters – a county distinguishing mark; the following digits or digits and a letter or letters – a vehicle distinguishing mark created successively in a specific arrangement (§ 30(1) and (2) RRMV).

A professional registration plate has a registration number composed of letters and digits or a digit. The green professional registration number is embossed on a white background and contains a voivodeship distinguishing mark, a county distinguishing mark, and a distinguishing mark assigned for vehicles in a decision on the professional registration of vehicles. This includes a letter P as the third successive permanent sign, constituting a distinguishing mark of a plate to be used for the professional registration of vehicles. Additionally, the symbol of the European Union, composed of twelve yellow five-pointed stars arranged in a circle on a blue background, and white PL letters are placed on the left side of a professional registration plate. A *starosta* (mayor) places a legalisation sign (legalisation sticker) in the designated place. Professional registration numbers are composed of letters selected from the following 25: A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, R, S, T, U, V, W, X, Y, and Z, and digits 0–9. Particular letters and digits of a professional registration number have the following functions: the first letter is a voivodeship distinguishing mark, two digits from 0 to 9 constitute a county distinguishing mark, and the next five signs constitute a distinguishing mark assigned to a vehicle in a decision on professional registration of vehicles. The templates of these registration plates are specified in Annex 9 to the Regulation (§ 12, § 13(1) and (2), § 14(1) and (2), and § 15 RRMV).

Registration plates for vehicles of the Armed Forces contain a letter U as a distinguishing mark of the Armed Forces and is placed first; one of the letters: A, B, C, D, E, F, G, H, I, J, K, L, M, N, P, R, S, T, V, W, X, Y, Z and a sequence of digits from 00001 to 99999 (§ 6(1) and (3) RRMV). The template of these registration plates, and the way of placing symbols and a legalisation sign on them, are the same as in the case of civilian vehicles (§ 1(1) and (6) RRMV).

Registration plates for vehicles of the Military Counterintelligence Service and the Military Intelligence Service are composed of the letters HM, constituting a distinguishing mark of the services, and one letter from the following 25-letter

set: A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, R, S, T, U, V, W, X, Y, Z, and a distinguishing mark of a vehicle or a distinguishing mark of a voivodeship, a county, and a vehicle (§ 6(1) and (2) RRMV).

Registration plates for vehicles of the State Security Service, Police, Internal Security Agency, Intelligence Agency, Central Anti-Corruption Bureau, Border Guard, and National Fiscal Administration used by the Customs-Fiscal Service contain a number composed of a distinguishing mark of the service and one letter from the 25-letter set: A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, R, S, T, U, V, W, X, Y, Z, and a distinguishing mark of a vehicle or distinguishing marks of a voivodeship, a county, and a vehicle. The service distinguishing marks are: (1) HB for the State Security Service; (2) HP for the Police; (3) HK for the Internal Security Agency and the Intelligence Agency; and (4) HC for the Customs-Fiscal Service. Registration plates with voivodeship and county distinguishing marks are not used to mark vehicles of the state services (§ 5(1)–(3) and § 6 RRMV).

VEHICLES ASSIGNED REGISTRATION PLATES

Both § 1 and § 2 of Article 306c CC concern registration plates of a motor vehicle. In accordance with Article 71 para. 1 and 2 LRT, a motor vehicle, an agricultural tractor, a low-speed vehicle in a tourist train, a motor bicycle, and a trailer shall be subject to registration, and therefore should be supplied with legalised registration plate(s).

LEGALISED REGISTRATION PLATE

In accordance with Article 71 para. 1 LRT, the admission of a vehicle to road traffic requires that it should have legalised registration plate(s). According to § 18(3) RRMV, a legalisation sign placed in the designated spot confirms the plate legalisation (§ 2 Regulation of the Minister of Transport, Construction and Maritime Economy of 13 April 2012 concerning the mode of Legalising Registration Plates, Technical Requirements, and Templates of Legalisation Signs).[33] The designated place for the legalisation sign on the registration plate, except for a temporary plate, is indicated using laser technique (§ 28(3) and (5) RRMV). Legalisation signs differ depending on the type of plate. These are stickers used to legalise: (1) standard, individual, historic, and diplomatic registration plates; (2) registration plates of electric vehicles, motor bicycles with an electric engine, or hydrogen-fuelled vehicles; (3) temporary registration plates (§ 3(1) RLRP). Templates of legalisation signs and their specifications are provided in the Annex 'Templates of Verification Signs' to RLRP. A sticker is made of special self-adhesive multi-layer foil, which deforms and the background is destroyed when someone tries to remove it. The same happens if there is an attempt to remove it at an increased or decreased temperature. The dashed line in the drawing indicates the area of the top protective layer of the sticker, which

[33] Journal of Laws of 2021, item 100, as amended, hereinafter 'RLRP'.

is made of transparent acrylic foil (para. 1.1 of the Annex). The specifications of legalisation templates differ, and the types are as follows: a template of a legalisation sticker used to legalise registration plates of electric vehicles and motor bicycles with an electric engine (Fig. 1a), a template of a legalisation sticker used to legalise registration plates of hydrogen-fuelled vehicles (Fig. 1b), and a template of a sticker used on temporary plates (Fig. 1c). Legalisation of registration plates is accomplished when an authorised body places a legalisation sticker on them (Article 75b LRT).

The conditions of production and the detailed method of distribution of registration plates and legalisation signs, as well as the method of keeping records and materials of particular importance for the production of registration plates, are determined in the Regulation of the Minister of Transport, Construction and Maritime Economy of 2 May 2012 concerning the Conditions of Production and Methods of Distribution of Registration Plates and Legalisation Signs.[34] In the case of professional registration plates, these are regulated by the Regulation of the Minister of Infrastructure of 12 March 2019 concerning the Conditions of Production and the Method of Distribution of Professional Registration Plates and Legalisation Signs, and the Mode of Legalising Professional Registration Plates.[35]

Since Article 306c §§ 1 and 2 CC applies to legalised plates, counterfeiting and altering registration plates without legalisation signs and historic ones that do not identify a vehicle and do not admit it to road traffic (i.e., are collector's items or mementos) do not match the constituent elements of this crime. Moreover, such plates are not ones that 'allow for admission to traffic'.[36]

Registration plates shall be placed at the front and rear of a vehicle in the designated spots, except for trailers, agricultural tractors, motorcycles, and motor bicycles, on which a plate is placed only at the rear (§ 33(1) RRMV).

MOTOR VEHICLE

Article 306c §§ 1 and 2 CC applies to a registration plate of a motor vehicle. Since the provision concerns registration plates, which are required for road traffic vehicles, it also applies to motor vehicles in this traffic zone.

The Supreme Court rightly stated: 'Motor vehicles should mean vehicles with an engine that moves them (cars, agricultural machines, motorcycles, railway engines, airplanes, helicopters, water vessels, and others), as well as electric traction powered rail vehicles (trams and trolleybuses).'[37] A motor vehicle is a vehicle set in motion by

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[34] Journal of Laws of 2022, item 1885, as amended.

[35] Journal of Laws of 2019, item 547.

[36] Behan, A., 'Prawnokarna ochrona tablic…', op. cit., p. 69.

[37] The Supreme Court judgment of 25 October 2007, III KK 270/07, *Państwo i Prawo*, 2008, No. 5, item 2, with glosses of approval by W. Kotowski, see: Kotowski, W., 'Glosa do wyroku SN z dnia 25 października 2007 r., III KK 270/07', *Paragraf na Drodze*, 2008, No. 3, pp. 5–10, and R.A. Stefański, see Stefański, R.A., 'Glosa do wyroku SN z dnia 25 października 2007 r., III KK 270/07', *Prokuratura i Prawo*, 2008, No. 5, pp. 165–172; Łucarz, K., Muszyńska, A., 'Glosa do wyroku SN z dnia 25 października 2007 r., III KK 270/07', *Przegląd Sądowy*, 2009, No. 6, pp. 147–157; the Supreme Court judgment of 4 February 1993, III KRN 254/92, OSP 1993, No. 10, item 198,

an engine mounted on it. The Court also rightly stated: 'A motor bicycle intended to move in road traffic solely powered by an engine is a motor vehicle within the meaning of the provisions of the Criminal Code and Misdemeanour Code, regardless of its technical parameters.'[38]

As a result of the definition of a motor vehicle, Article 306c CC does not apply to trailers, which are not vehicles that should have registration plates (Article 71 para. 1 and 2 LRT). A trailer is a vehicle without an engine and is to be connected to another vehicle (Article 2 para. 50 LRT).

An electric scooter is also a motor vehicle, i.e., it is an electrically powered, two-axle vehicle with a steering wheel, without a seat or pedals, designed to be driven solely by a user who stands on it (Article 2 para. 47b LRT); and so is a personal mobility device (except an electric scooter) – an electrically powered vehicle without a seat and pedals designed solely for a user standing on it (Article 2 para. 47c LRT). The Supreme Court was wrong to state that: 'An electric scooter with an engine having the power similar to an engine of an electrically assisted bicycle, which retains all the standard characteristic features of the construction making its use as an ordinary scooter possible, i.e., enabling a user to move by pushing his foot against the ground, is not a motor vehicle within the meaning of the provisions of the Criminal Code.'[39] It is not appropriate for the Court to refer by analogy to a bicycle with an auxiliary engine with a cylinder capacity not exceeding 50 cm^3, which retains all the standard constructional characteristic features that make it possible to use it as an ordinary bicycle and which is not regarded as a motor vehicle.[40]

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with a gloss of approval by R.A. Stefański, see: Stefański, R.A., 'Glosa do wyroku SN z dnia 4 lutego 1993 r., III KRN 254/92', *Orzecznictwo Sądów Polskich*, 1993, No. 10, pp. 462–465.

[38] The Supreme Court resolution (7) of 12 May 1993, I KZP 9/93, OSNKW 1993, No. 5–6, item 27 with approving comments by R. A. Stefański, see: Stefański, R.A., 'Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego materialnego za lata 1991–1993', *Wojskowy Przegląd Prawniczy*, 1994, No. 3–4, pp. 91–92; the Supreme Court resolution of 20 July l976, VII KZP 10/76, OSNKW 1976, No. 9, item 109; the Supreme Court resolution of 29 December l976, VII KZP 27/76, OSNKW 1977, No. 1, item 4; the Supreme Court resolution of 14 November 1981, VI KZP 16/81, OSNKW 1981, No. 12, item 72; the Supreme Court judgment of 22 July 1993, II KRN 18/93, LEX No. 1671633; the Supreme Court judgment of 4 February 1993, III KRN 254/92, OSP 1993, No. 10, item 198 with an approving gloss by R.A. Stefański, see: Stefański, R.A., 'Glosa do wyroku SN z dnia 4 lutego 1993 r….', op. cit., pp. 462–465; the Supreme Court judgment of 26 June 2007, II KK 97/07, OSNwSK 2007, No. 1, item 1423; the Supreme Court judgment of 26 June 2007, II KK 98/07, LEX No. 280737; the Supreme Court judgment of 25 October 2007, III KK 270/07, OSNwSK 2007, No. 1, item 2320; the Supreme Court judgment of 12 January 2011, IV KK 341/10, LEX No. 688704; the Supreme Court ruling of 18 June 2014, III KK 28/14, LEX No. 1483958; the Supreme Court judgment of 4 November 2016, VKK 259/16, LEX No. 2147289; the Supreme Court ruling of 26 May 2020, V KK 54/20, LEX No. 3275603.

[39] The Supreme Court judgment of 22 February 2023, III KK 13/22, OSNK 2023, No. 11–12, item 49.

[40] The Supreme Court judgment of 4 February 1993, III KRN 254/92, OSP 1993, No. 10, item 198; the Supreme Court judgment of 26 June 2007, II KK 97/07, LEX No. 450351; the Supreme Court judgment of 26 June 2007, II KK 98/07, OSNwSK 2007, No. 1, item 1423; the Supreme Court judgment of 25 October 2007, III KK 270/07, OSNwSK 2007, No. 1, item 2320.

OTHER ISSUES

Anyone who counterfeits or alters registration plates in order to use them as authentic motor vehicle registration plates (§ 1) or uses such plates as authentic ones (§ 2) is committing the crime of counterfeiting registration plates under Article 306c CC.

Counterfeiting or altering a motor vehicle registration plate must be committed with the purpose of using it as an authentic one, which means that the offence under Article 306c § 1 CC may only be committed with direct intent (*cum dolo directo colorato*). There is no such requirement in the case of using a counterfeit or altered motor vehicle registration plate as an authentic one (Article 306c § 2 CC). It is an intentional crime that can be committed with direct or oblique intent. In the latter case, the person using such a plate must be aware that the plate is not authentic and must accept this fact.

CONCLUSIONS

1. The conduct specified in Article 306c CC, consisting of counterfeiting a registration plate, is classified as two offences: first, counterfeiting or altering a motor vehicle registration plate in order to use it as an authentic one (§ 1); and second, using a counterfeit or altered motor vehicle registration plate as an authentic one (§ 2). The argument for distinguishing the two types is the fact that they are subject to regulation in separate paragraphs.
2. The criminalisation of the conduct fills a legal gap because there was no agreement in the existing legislation regarding the recognition of a plate as a document within the meaning of Article 270 § 1 CC or as an identification sign; therefore, there was no constituent element of crime under Article 306 CC, which resulted in impunity. This will allow for more effective combating of the increasingly common phenomenon of stealing fuel from petrol stations by drivers of vehicles with fake registration plates.
3. The security of economic transactions and property interests in civil law transactions constitutes the main object of protection under Article 306c CC; the reliability of registration plates and the safety and order on public roads, in residential areas, and in traffic zones are additional ones.
4. The causative conduct consists of counterfeiting or altering a motor vehicle registration plate in order to use it as an authentic one. Making a pretence that a plate is authentic and comes from a particular producer is the essence of the conduct.
5. Every plate of a motor vehicle may be an object of the offence. A registration plate, besides a registration certificate, is an element confirming the admission of a vehicle to traffic and that a vehicle is constructed, equipped, and maintained in a way that meets safety requirements.

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REMARKS ON THE INCREASING OF LIABILITY OF FOR CERTAIN TRAFFIC OFFENCES

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Abstract
The author discusses the nature and scope of changes introduced to the Code of Petty Offences and the Code of Procedure in Petty Offences Cases by the Act of 2 December 2021. The amendment represents a drastic intervention by the legislator in the current legal framework regarding offences against safety and order in transportation. It foresees significant modifications in the legal and criminal response to these offences, transformations in the characteristics of selected types of prohibited acts, and proposes entirely new types of prohibited acts. The analysis suggests that the guiding principle behind these changes is to increase the degree of punitiveness of petty offences law towards perpetrators of traffic violations. This legislative approach raises concerns about the instrumental use of petty offences law with respect to the perpetrators of these offences. The adopted direction of changes raises suspicions that the legislator has not thoroughly familiarised themselves with the matter covered by their intervention. In any case, it is not grounded in the current state of traffic criminality, or in the analysis of judicial practice. An increase in repressiveness has never directly translated into a reduction in traffic criminality. The latter is a much more complex problem, involving the necessity of multi-faceted references.

Keywords: traffic offence, traffic violation, criminal punishment, prohibited act, fine

The solutions provided by the Act of 2 December 2021 amending the Road Traffic Act and Certain Other Laws,[1] constitute drastic interference by the legislator in the current legal framework regarding traffic offences. The legislator enters the domain of the general part of the Code of Petty Offences (CPO) by modifying the terms of

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[1] Journal of Laws of 2021, item 2328.

pecuniary penalties and the institution of reoffending, without omitting its special part, implementing changes in Chapter XI regarding the severity of pecuniary penalties, the construction of individual types of mala prohibita, and introducing completely new mala prohibita. Appropriate transformations are also continued within the framework of the Code of Procedure in Petty Offences (CPPO),[2] and, in principle, they amount to facilitating the practical implementation of the substantive legal assumptions of the amendment. A superficial insight into the content of transformations briefly outlined here reveals that they fit into the general trend of increasing the punitiveness of legal regulations. The essence of the mentioned amendment is best illustrated by the legislator's statement in the justification about the need to strengthen legal protection against acts infringing on such fundamental legal goods as the life and health of road users.[3] According to the legislative concept, the current legal state does not provide sufficient tools to limit traffic crime and safeguard such important social values. In particular, in the legislator's view, too low pecuniary penalties for certain traffic violations hinder achieving the desired results. Hence, in his estimation, calming traffic and creating conditions for safe participation in it, especially for unprotected participants must be accompanied by the introduction of strong sanctioning solutions guaranteeing compliance with legal restrictions and principles arising from the essence of road safety.[4] While fully sharing the legislative pursuit to guarantee optimal safety protection, doubts arise about the method of its implementation. It seems that in order to reverse the adverse trend in traffic crime the legislator intends mainly to employ criminal law solutions of a deterrent nature, aimed at discouraging perpetrators from committing the most dangerous traffic violations. This raises the question of whether the proposed direction of changes in misdemeanour law is grounded in rational reasoning. It should also be noted that the statistical depiction of traffic crime presented by the legislator in quantitative terms does not necessarily provide reliable grounds for increasing the repressiveness of misdemeanour law in the form presented by them. If so, it is believed that somewhat different intentions, of a rather populist nature, are hidden behind these normative efforts. Increasing the level of protection for the life and health of road users is just a proverbial 'smoke-screen' for the schematic tightening of criminal measures in this area of legal regulation.

The picture emerging from the new decisions of the amendment necessitates an initial examination of the changes in the imposition of pecuniary penalties. The amending Act allows for the imposition of a fine of up to PLN 30,000 for the offences enumerated in Article 24 § 1a CPO. It should be emphasised that such an escalation of sanctions is not entirely new to misdemeanour law. In principle, it does not contradict de lege lata neither Article 1 § 1 CPO nor Article 24 § 1 CPO. The literature on the subject generally agrees that the cited provisions, particularly the clause in Article 24 § 1 CPO 'unless the Act provides otherwise,'

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[2] Official Journal of Laws of 2022, item 1124.

[3] Sejm document No. 1504, 9th term of the Sejm, https://orka.sejm.gov.pl/Druki9ka.nsf/0/9C68E8FF143EDFFAC125872E0047444E/%24File/1504.pdf, (regulation impact assessment, p. 6) [accessed on 15 July 2024].

[4] Ibidem.

warrant the modification of the standard term of pecuniary penalties, including the upper limit of the threat.[5] In this context, there is nothing preventing the CPO or any other act from stipulating, for example, a pecuniary penalty of up to PLN 10,000. The position opposing raising the upper limit of the pecuniary penalty above PLN 5,000 is considered unconvincing and even unjustified.[6] At the same time, it is emphasised that the possibility of such threats occurring does not mean that there is a conflict between this latter regulation and the provision typifying an offence punishable by a fine exceeding PLN 5,000, requiring the application of collision rules.[7] The latter is conceivable only in the case of a collision of legal norms. Here, however, we are not dealing with a conflict requiring the application of such rules, since, on the one hand, there are provisions typifying offences punishable by a fine exceeding PLN 5,000, and, on the other hand, Article 1 § 1 CPO in conjunction with Article 24 § 1 CPO provides for the possibility of exceeding the standard fine threshold. However, it should be added that not all authors allow for the establishment of the maximum threat of a pecuniary penalty exceeding PLN 5,000 in the special part of the CPO itself.[8] In their opinion, this manoeuvre seriously collides with Article 1 § 1 CPO. When explaining the content of Article 24 § 1 CPO, they refer to Article 1 § 1 CPO in conjunction with Article 7 § 3 of the Criminal Code (CC) (in its current wording), indicating that it can also be interpreted to mean that the CPO allows for an increase in the minimum fine or a decrease in the maximum fine but does not allow for an increase in the maximum fine, because then the act would become a crime instead of an offence. Therefore, in the special part of this Code, the legislator can only reduce the upper limit of this penalty, which is often done, but cannot increase it under any circumstances. The validity of this observation is further reinforced by the wording of Article IX § 3 of the Provisions introducing the CPO,[9] according to which whenever the Act provided for a collegial adjudication penalty of imprisonment exceeding 3 months or a fine exceeding PLN 5,000, the upper limit was reduced to 3 months of detention or a PLN 5,000 fine. However, these authors reserve the possibility of exceeding the statutory maximum fine penalty for extra-codified misdemeanour legislation. They argue that when seeking

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[5] Jakubowska-Hara, J., in: Daniluk, P. (ed.), *Reforma prawa wykroczeń*, Vol. I, Warszawa, 2019, pp. 252–253; Daniluk, P., in: Daniluk, P. (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa, 2016, pp. 16–17.

[6] According to P. Daniluk, this is still indicated by the current justification of the draft CPO, which clearly shows that Article 24 § 1 CPO may set the fine limits differently (Law on Offenses, draft, Warszawa, 1970, pp. 87–88). The use of the pronoun 'them' (plural) in the fragment concerning the fine ('The provision [Article 24 § 1 CPO], setting the fine limit, reserves that the law may determine them differently') indicates that the legislator's intention with this provision is to modify both the lower and upper limits of the fine. Moreover, it is not reserved anywhere that change in the upper limit of this penalty can only consist in its reduction and not in its increase. This seems to predetermine – according to the quoted author – the legislator's allowance for modifying the upper limit of the fine above PLN 5,000 (Daniluk, P., in: Daniluk, P. (ed.), *Kodeks…*, op. cit., pp. 16–17).

[7] Ibidem, p. 17.

[8] Radecki, W., 'Co dalej z polskim prawem wykroczeń? (część 1)', *Prokuratura i Prawo*, 2023, No. 5., p. 16.

[9] Journal of Laws of 1971, No. 12, item 115, as amended.

a legal basis for increasing the upper limit of the fine above PLN 5,000 in extra-codified misdemeanour law, they should rather refer to Article 48 CPO, and not to Article 24 § 1 CPO, emphasising that the argumentation referring to the formula 'unless these Acts contain different provisions' seems legally clearer.[10]

Without prejudging the merit of any position here, one thing remains certain, that the legislator quite eagerly uses this solution and 'through the back door' introduces in the non-codified legislation the maximum penalty of a fine exceeding many times its basic term. For example, the increase of the upper limit to PLN 10,000 is provided by the Metrology Act of 11 May 2001;[11] to PLN 30,000 – Act of 26 June 1974 – Labour Code;[12] to PLN 100,000 – Act of 19 August 2011 on the Transport of Dangerous Goods;[13] and also the Act of 10 January 2018 on Limiting Trade on Sundays and Holidays and on Some Other Days;[14] to PLN 70,000 – Act of 4 November 2022 on the Central Animal Asylum;[15] and even up to PLN 200,000 – Act of 28 May 2020 amending the Act on Chemical Substances and Mixtures and Some Other Acts.[16] What astonishes here is the ease with which the legislator reaches for the 'second maximum of the misdemeanour fine'. Such actions unnecessarily deepen the difference between the 'code misdemeanour law' and the 'non-code misdemeanour law', especially since the reasons for adopting such a substantial scale of maximum terms of the pecuniary penalties in non-code misdemeanour law are not fully clear and established (from PLN 10,000, through PLN 30,000, PLN 50,000, PLN 70,000, PLN 100,000 up to PLN 200,000).[17] Moreover, by going beyond the code maximum of the pecuniary penalties, it disintegrates the criminal law at the crime-misdemeanour junction.[18] Ignoring the law contained in Article 1 § 1 CPO blurs the criteria for classifying behaviours as misdemeanours, thereby complicating the identification of their true nature. Misdemeanours are usually identified with violations characterised by generally lower social harmfulness, hence threatened with lower and less severe punishment. High social harmfulness in abstracto, reflected in the severe criminal threat, is reserved for crimes.[19] Sanctioning misdemeanours with severe fines thus seems to completely overlook the original sense that stands on the foundation of creating the law on misdemeanours.[20] Although such a solution is formally considered

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[10] Radecki, W., in: Daniluk, P. (ed.), *Reforma prawa wykroczeń*, Vol. I, Warszawa, 2019, pp. 26–27.

[11] Journal of Laws of 2021, item 2068.

[12] Journal of Laws of 2020, item 1320, as amended.

[13] Journal of Laws of 2022, item 2147.

[14] Journal of Laws of 2021, item 936, as amended.

[15] Journal of Laws of 2022, item 2375.

[16] Journal of Laws of 2020, item 1337.

[17] Radecki, W., 'Co dalej…', op. cit., p. 20.

[18] Radecki, W., 'Dezintegracja polskiego prawa penalnego', *Prokuratura i Prawo*, 2014, No. 9, pp. 13–15.

[19] Daniluk, P., in: Daniluk, P. (ed.), Kodeks…, op. cit., pp. 17–18.

[20] This issue was most clearly addressed by the authors of the first commentary on the CPO, who only annotated the regulation of Article 24 § 1 determining the fine limits with one remark: other fine limits were determined by the CPPO provisions in payment order proceedings from PLN 100 to 1,500 and in administrative penalty proceedings from PLN 50 to 1,000 (Bafia, J., in: Bafia, J., Egierska, D., Śmietanka, I., *Kodeks wykroczeń. Komentarz*, Warszawa, 1980, p. 69).

acceptable, it does not find any rational justification from a systematic point of view. A misdemeanour burdened with a disproportionately severe pecuniary penalty is simply a methodologically false concept. Concerns about the correct recognition of the content and scope of this concept are probably not unfamiliar to the legislator since adjudication in cases involving offences at risk of a fine exceeding PLN 5,000 is subjected to the procedure of the CPPO each time.[21]This way, albeit indirectly, it ensures their accurate classification as misdemeanours. The rationality of the new solution is further undermined by the fact that this time the breach concerns the 'code misdemeanour law'. Until now, liberation from the too-tight framework of the general part of the misdemeanour law took place only on the grounds of non-code acts. It is not excluded at all that too much freedom in this respect finally 'emboldened' the legislator to create a 'second maximum of the fine' in the CPO itself.[22] Moreover, the weakness of the analysed change is further emphasised by its selectivity. Article 24 § 1a of the CPO allows for the imposition of a fine of up to PLN 30,000 for the misdemeanour under Article 86 § 1, 1a and 2, Article 86b § 1, Article 87 § 1, Article 92 § 1 and 2, Article 92a § 2, Article 92b, Article 93 § 1, Article 94 § 1, Article 96 § 3 and Article 97a CPO.[23] Such an approach results in a disproportionate and inconsistent raising of the thresholds of statutory risk within the same legal act. Apart from traffic offences, we can easily point out examples of code typification deserving of a harsher criminal reaction due to similar objects of protection (e.g., offences against the safety of persons and property). However, the amending act did not stop at tightening the upper statutory threats, a similar intention also accompanies the lower limits of the pecuniary penalty. As a result of the changes made, its minimum punishment is now at the level of PLN 500, PLN 800, PLN 1,000, PLN 1,500, and even PLN 2,500.[24] The exception here is only Article 86b § 2 CPO, in which case the lower limit of the statutory risk still amounts to PLN 20. Raising the lower statutory threat limits seems particularly alarming, as it generates consequences in the form of limiting the judicial shaping of the punishment. This, in turn, contradicts any sensible shaping of case-law practice, which is reduced to the mechanical reproduction of artificial statutory frameworks. The general tendency of the legislator to increase the penal severity in this respect is not explained, in any case, by the statement about the supposedly low effectiveness of the pecuniary penalties according to the previously applicable limits. It does not find support in axiological or empirical arguments.

All that has been said thus far does not mean to undermine the necessity of increasing the limits of pecuniary penalties in the CPO. The current term of this penalty not only incites the aforementioned issues but also does not conform

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[21] Supreme Court decision of 24 February 2006, I KZP 52/05, OSNKW 2006, No. 3, item 23.

[22] In W. Radecki's opinion, by violating the principles of proper legislation, the 2021 amendment led to internal inconsistency within the same code-ranked law (see more in Radecki, W., 'Co dalej…', op. cit., p. 23).

[23] The amending act provides for exceptions from the rule expressed in Article 24 § 1a CPO in the form of limits up to PLN 500 for Article 90 § 1 or up to PLN 1,500 for Article 94 § 1a CPO.

[24] Following the amendments, the lower threshold of statutory threat in the case of the offence under Article 86 § 1a CPO amounts to PLN 1,500, under Article 86 § 2 CPO – PLN 2,500, under Article 94 § 1a CPO – PLN 1,500, and under Article 140 § 3 CPO – PLN 1,500.

to contemporary penal requirements.[25] It does not assure a sufficient level of repressiveness in petty offence law. The upper limit of the fine penalty (PLN 5,000) was established in 1995,[26] a period when the average remuneration (PLN 691) was nearly eight times lower than the upper limit of the pecuniary penalties in petty offence law. As the years have progressed, the statutory intensity of this penalty has significantly diminished, as indicated by the relationship between the statutory threat of this penalty and the national average wage. At present, the average remuneration in Poland slightly exceeds the upper limit of the fine penalty in the CPO (in 2022 it amounted to PLN 6,346.15).[27] Consequently, it is rightly asserted that the only remedy to rectify the legal condition in this scope is an increase of the upper limit of the fine penalty for petty offences.[28] An urgent need for changes in the statutory terms of the pecuniary penalties also concerns the lower limit, which in its current term of PLN 20 is easy to negate for the same reasons. However, updating the fundamental limits of the fine penalty should be coupled with an amendment of Article 1 § 1, Article 24 § 1 CPO (without the necessity to add a separate § 1a), and Article 7 § 3 CC. In the context of Article 24 § 1 CPO, it is worth considering removing the final phrase 'unless the statute provides otherwise.' This phrase can inadvertently lead to behaviours being categorised as petty offences despite their significant social harm. Since different fine limits appear in mandate proceedings, these limits should also be defined in Article 24 CPO (e.g., in § 2).[29] for the alignment of systemic inconsistencies in the application of this penal reaction measure. When addressing the alignment of the basic term for pecuniary penalties, one must not overlook the potential irregularities that may arise from its application in practice. An inherent flaw of the fine penalty is the risk that it may be paid by someone other than the perpetrator, which contradicts the personal nature of the penalty itself. Similarly, the inability of the sanctioned individual to pay the fine due to a lack of assets or its imposition in an amount exceeding their payment capabilities often results in the imposition of a substitute penalty, thereby highlighting the inefficiency of this criminal law instrument.[30] Particularly, this last possibility, combined with

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[25] Similarly, Radecki, W., in: Daniluk, P. (ed.), *Reforma prawa…*, op. cit., p. 30. The author indicates that attempts to break free from the restrictive framework of the general part of misdemeanour law are twofold: by raising the maximum fine for (so far) non-codified offenses and by replacing liability for offenses with liability for administrative offenses.

[26] Act of 12 July 1995, amending the Criminal Code, the Criminal Enforcement Code, and on Raising the Lower and Upper Limits of Fines and Contributions in Criminal Law (Journal of Laws from 1995, No. 95, item 457).

[27] Compensation according to GUS data, www.stat.gov.pl [accessed on 15 July 2024].

[28] Recently on this topic, *inter alia*, P. Daniluk, in: Daniluk, P. (ed.), *Reform of Misdemeanor Law*, p. 110, and Jakubowska-Hara, J., in: Daniluk, P. (ed.), *Reforma…*, op. cit., p. 255, and the literature cited therein.

[29] **J**akubowska-Hara, J., in: Daniluk, P. (ed.), *Reforma…*, op. cit.

[30] The National Bar Council in its opinion (https://orka.sejm.gov.pl/Druki9ka.nsf/0/8AD4775C38BB9A66C125876C0053D637/$File/1504-006.pdf) and the National Council of the Judiciary (https://krs.pl/pl/dzialalnosc/opinie-stanowiska-uchwaly/1160-opinia-krajowej-rady-sadownictwa-z-dnia-10-wrzesnia-2021-r-wo-420-88-2021.html) [accessed on 15 July 2024], and recently Kluza, J., 'Nowelizacja Kodeksu wykroczeń w zakresie wykroczeń przeciwko bezpieczeństwu i porządkowi w komunikacji', *Ius Novum*, 2022, No. 4, pp. 65–66; letter of the Ombudsman, II.561.1.2021.MH, https://orka.sejm.gov.pl/Druki9ka.nsf/0/1A0310008295FFD7C125875E003EC

the tightening of the rigours of applying substitute forms of pecuniary penalties execution, calls for a distance from any attempts to create its standard term too rigorously in the CPO framework. From the perspective of such expectations, a reasonable compromise seems to be the proposal to shape the codified term of the pecuniary penalty within the range of PLN 200 to PLN 15,000.[31] The possibility of adjudicating this penalty within such clearly delineated limits respects the objectives and considerations outlined in Article 33 § 1 and Article 24 § 3 CPO. Therefore, it fully meets the requirements for individualisation of the penalty term.

The introduction of a mechanism for significantly increasing punishment for selected traffic offences committed under conditions of specifically defined recidivism has sparked considerable controversy. The amendments resulted in the transfer of the institution of intensified criminal repression, hitherto solely encompassed within Article 38 CPO, to § 1, distinguishing within its scope a new § 2, which stipulates the obligation to impose a fine of not less than twice the minimum statutory penalty for specifically delineated prohibited acts. Examining the amendment in this regard, a pronounced trend towards enhancing the repressiveness of petty offence law should be noted. It seems to stem more from the legislator's adopted ideology of punishing perpetrators of traffic violations rather than authentic needs based on an analysis of the prevailing type of criminality in Poland. The rationale for the act does not facilitate finding an appropriate reference in this regard. Another issue is that the mechanism for automatically doubling the lower limit of statutory threats has already been sufficiently scrutinised under the 1969 criminal codification and has yielded many negative experiences, rightly criticised in the subject literature. Transposing solutions burdened with such significant flaws to the realm of petty offence law thus signifies a disregard for conclusions from obsolete, dysfunctional legal regulations. Moreover, by resorting to this, the legislator jeopardises the principle of equal treatment of perpetrators committing prohibited acts as recidivistic offences. In Article 38 § 1 CPO, the clause for extraordinary aggravation of punishment was not, after all, subjected to the requirement of obligatory application. From the content of this provision, it is inferred that the imposition of arrest as a penalty upon the perpetrator, despite fulfilling the conditions specified in this provision, has been left to the court's discretionary judgment, which must be agreed upon. The situation is different in the case of 'traffic recidivism' under Article 38 § 2 CPO. Although consideration of the symmetry of legal solutions would mandate resignation from the obligatory application of the institution of extraordinary aggravation of fine punishment here as well.

Separate reservations are also aroused by the editorial formulation of the provision of Article 38 § 2 CPO. The way its personal scope has been formed does not entirely harmonise with the personal scope of the offences listed therein. The typifications of prohibited acts referred to therein utilise the concepts of 'driver',

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CC4/$File/1504-004.pdf [accessed on 15 July 2024], pp. 8–9, have pointed out the risk of the fine not being adapted to the directives of the sentence determined in Article 33 CC or the financial capabilities of the accused, difficulties with its enforcement and thus an increase in the number of substitute arrests.

[31] Jakubowska-Hara, J., in: Daniluk, P. (ed.), *Reforma…*, op. cit., p. 255.

'traffic participant or another person present on the public road, in the residential area or traffic zone,' and even the impersonal formula 'who'. Meanwhile, Article 38 § 2 CPO exclusively refers to 'the person at the wheel'. Some of the terms mentioned have received legal definitions (i.e. 'traffic participant' – Article 2(17), 'person at the wheel' – Article 2(20) of the Road Traffic Act[32]), while others have been extensively and competently explained by criminal law doctrine ('driving').[33] Realising the semantic differences between them does not allow for equating the concept of 'the person at the wheel' with 'the person driving'. The latter undoubtedly exceeds the boundaries delineated by the definition of 'the person at the wheel'. Therefore, if it was not the legislator's intention to limit the aggravation of the fine punishment only to 'persons at the wheel', it is necessary to verify of his position in this respect. Depending on the legislative assumption adopted, the term 'person at the wheel' used in Article 38 § 2 CPO should be replaced with 'person driving' or 'the penalised individual'. Another example of clumsy editing is the phrase 'commits the same offence', which should likewise be subject to correction. In the case of recidivism, the issue is not the same, but a similar (identical) offence. It is also inappropriate to include in the catalogue of offences subject to the mechanism of obligatory aggravation the typification from Article 92 § 2 CPO, for which the lower limit of the threat of a fine amounts to PLN 20.

Considering these remarks, it is worth noting that even before the amendment, accusations of redundancy were levied against the provisions of Article 38 CPO.[34] It was deemed that the lack of a central registry of those fined for offences makes the application of this institution random in nature.[35] Although we still do not have a satisfactory solution in this regard, it seems that this is not a sufficient reason to abandon the institution of recurrence for offences altogether. Instead, efforts should be made to improve courts' access to a central registry of individuals who have been legally fined for offences.[36] In the current legal state, this registry contains the data of individuals sentenced to arrest, including for offences against traffic safety and order as envisaged in Chapter XI CPO. Therefore, the registration of punishments for offences is selective and incomplete. It does not include data on individuals who have been legally fined with a non-custodial sentence or fined as a result of mandatory proceedings. In the case of offences related to traffic violations, the situation is somewhat mitigated by the records kept by the Police based on Article 130(1) of the Road Traffic Act (including final court judgments and penal orders) and by the Minister responsible for informatisation based on Article 100a(4) of the Road Traffic Act regarding data mentioned in Article 100aa(4)(12)–(13) of the same Act, which is also accessible by the courts. However, to ensure proper

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[32] Act of 20 June 1997 – Traffic Law (consolidated text, Journal of Laws from 2021, item 450, as amended).

[33] Stefański, R.A., *Wykroczenia drogowe. Komentarz*, Zakamycze, 2005, pp. 237–251.

[34] Marek, A., *Prawo wykroczeń (materialne i procesowe)*, Warszawa, 2012, p. 112.

[35] Ibidem.

[36] See Article 2 of the Act of 4 October 2018 amending the Act – Code of Petty Offences, and Some Other Acts (Journal of Laws from 2018, item 2077). However, this solution is limited, as it concerns specific offenses against property.

application of Article 38 § 2 CPO, it would be desirable to expand the range of data on offences collected in the National Criminal Register to include information on all convicted offenders, regardless of the type of sentence imposed or the procedure applied. Only such an action will guarantee judicial authorities full and independent access to knowledge about the previous criminality of the perpetrator of each offence. Additionally, it would be recommended to introduce into the CPPO a provision corresponding in content to the standard contained in Article 213 § 1b of the Code of Criminal Procedure (CCP), which in proceedings on land traffic crimes specified in Chapter XXI CC imposes on the court the obligation to obtain information from the central drivers' registry and from the Police's record of drivers violating traffic regulations concerning the accused. The suggested proposal could significantly assist in organising matters related to determining by the court the previous criminality of the perpetrator of a traffic offence.

Further changes proposed by the legislator go far beyond the criticised and schematic regulation of fine boundaries or the so-called traffic recidivism and confront us with the addition or significant modification of selected provisions from Chapter XI CPO.

Changes associated with the introduction of new prohibited acts concern Article 86b CPO (failing to yield the right of way to a pedestrian and other behaviour variants violating their right of way), Article 92b CPO (violation of overtaking ban), and Article 97a(2) CPO (unauthorised bypassing of barriers at railway crossings and entering a railway crossing if there is no space to continue driving on the other side). In other aspects, an increase in liability can be observed for acts previously penalised based on pre-existing legal regulations. Among this group of provisions, it is necessary to mention Article 86 § 1a (road collision in case of a health disorder qualified against Article 86 § 1 CPO), Article 92a § 2 (exceeding the speed limit by 30 km/h qualified against the act from Article 92a § 1 CPO), Article 92b CPO (disregard of the overtaking ban qualified against the act from Article 92 § 2 CPO), and Article 97a(1) CPO (bypassing barriers at a railway crossing).

Legal solutions in the area of traffic offences have drawn significant criticism. It does not seem justified to multiply further legal entities within this category. The introduction of a provision on 'light road accidents' (Article 86 § 1a CPO) alongside the existing regulation from Article 86 CPO, of a represents a revival of the previously abandoned concept of such accidents. A similar proposal was contained in the 1991 draft of the CPO,[37] stating that: 'Whoever violates, even unintentionally, the principles of safety in land, water or air traffic and causes an accident in which another person suffers injuries impairing the functions of an organ of the body lasting no longer than 14 days (consistent with the draft of the Criminal Code – note by K.Ł.), or unintentionally causes damage to someone else's property, is subject to a fine.' With the established interpretation of Article 86 CPO and its practical use, it is necessary to consider adopting such a distinction of liability for an accident

[37] Draft of the Code of Petty Offences (edition from February 1991), prepared by the Commission for the Reform of Criminal Law – Team for the Unification of Solutions of Criminal Law and Misdemeanor Law.

that is a crime and a 'light road accident' that is an offence as an unnecessary procedure. If one rightly weighs, Article 86 CPO previously applied, among others, to the perpetrator of a road accident in which participants suffered bodily injuries impairing the proper functioning of the body for a period not exceeding 7 days, regardless of the value of the damaged property.[38] Therefore, it does not require additional stratification. For slightly different reasons, the expansion of existing types of acts also does not gain approval. The issue of the legitimacy of distinguishing new structures of offences from Article 90 § 2, Article 92a § 2 and Article 94 § 1a CPO remains debatable due to the manner of the perpetrator's actions (exceeding the speed limit by over 30 km/h), the nature of participation in traffic (driving a vehicle or another participant in traffic/road user), or the type of vehicle used (mechanical or non-mechanical). Such a division seems artificial. A more rational solution is to leave to the justice authorities the assessment of these circumstances and to adapt the dimension of the penalty defined within the limits of the appropriately modified statutory threat to them. Finally, a cautious approach should be taken to distinguishing new offences provided for in Article 86b, Article 92b or Article 97a CPO. It should be noted that the legislator, in building new types of offences in the amending act, cultivates unnecessary casuistry, replacing the solution of the general problem of comprehensive regulation of 'traffic' matters. So far, the punishment of behaviours mentioned in these provisions has often been ensured by Article 97 CPO. This provision, as complementary to the regulations provided for in Articles 94–96d CPO, allows consideration of the whole range of different violations of the Road Traffic Law or regulations issued on its basis. Regarding offences against other provisions in the field of road law, Article 97 CPO is applied. With such a blanket legislative technique, duplicating identical regulations in the substantive layer should be considered unnecessary and categorically erroneous.

Separate remarks are needed here concerning the drastic modifications in the scale of the pecuniary penalties for traffic offences covered by the amendment. As mentioned earlier, the changes in penalties indicate an increase in both the lower and upper limits of statutory threats of pecuniary penalties. Usually, these limits are disproportionately high, both in relation to the threats of this penalty provided for similar types of offences, and due to the standards regulating this scope. Such 'messy' lawmaking conflicts with the requirement of rational punishment. A lack of respect for the principles of proper legislative technique is especially highlighted by the regulation contained in Article 87 § 1a CPO, which, in terms of the scale of punishment, refers to Article 87 § 1 CPO threatened after the amendment with the penalty of arrest or a fine not less than PLN 2,500.[39] It seems unnecessary to

[38] Cf., *inter alia*, resolution of the Supreme Court of 18 November 1998, I KZP 16/98, Lex No. 34208, judgment of the Supreme Court of 20 February 2008, V KK 313/07, Lex No. 406889; decision of the Supreme Court of 27 March 2014, I KZP 1/14, OSNKW 2014, No. 7, item 54.

[39] We have the opposite situation in Article 94 § 2 CPO, in which a reference was left ('the same penalty applies (...)') to the penalty specified for the offense under Article 94 § 1a of the CPO. It is difficult to understand and explain the mitigation of the penalty for an act consisting in driving a vehicle despite the lack of its approval for traffic. In terms of weight, this is similar to driving a mechanical vehicle without licence (i.e. an offense under Article 94 § 1 CPO).

elaborate further that setting the lower limit of the fine for driving a non-mechanical vehicle while intoxicated at the level of PLN 2,500 (before the change – from PLN 50) grossly violates the 'internal justice' when resolving the issue of responsibility for a prohibited act committed while intoxicated.[40] It can be read as nullifying the existing assumptions of criminal policy, for which the effectiveness of combating this type of crime is not dependent, as the legislator declared at the time, on the severity of criminal repression.[41] The consequences of changing the threats of fine penalties for individual traffic offences are, therefore, multidimensional and have not been properly considered. Thus, when considering the postulate of making the quantitatively indicated limits of pecuniary penalties more realistic, care should be taken to ensure that the proposals formulated in this regard remain in appropriate correlation to the national average wage. Instead of significantly expanding the hierarchy of threats with this penalty in Chapter XI CPO, it is sufficient to leave the generally defined 'quota-free' fine penalty, modifying its upper limit according to the scheme adopted for the entire CPO. Of course, these changes require synchronisation with Article 24 CPO. It would also be desirable to abandon the designation of the lower limit of the pecuniary penalties. In this regard, the general term 'pecuniary penalties' can be used as a substitute. When submitting further comments on the scope of penalisation of traffic offences, the introduction of the penalty of restriction of liberty as an alternative to the penalty of arrest and the penalty of a fine to the provisions typifying traffic offences should also be considered. Where the justification for imposing pecuniary penalties falls away in concrete terms and there is a threat of imposing a substitute penalty, such an alternative definition of the sanction appropriately expands the judge's scope for individualising the scale of the penalty. When analysing the sanctions occurring in Chapter XI CPO, it is also worth considering the possibility of removing the penalty of reprimand. The symbolic character of this sanction, which resembles more a measure of educational influence in connection with the rank of traffic offences, argues in favour of the proposed postulate. After all, in cases deserving special consideration, the court has at its disposal the institution of extraordinary mitigation of the penalty or abstaining from its imposition. Finally, the use of the driving ban should be left to the court's discretion. Contrary to appearances, moving away from the obligatory nature of the driving ban does not have to mean retreating from its application on a large scale. It is rightly pointed out that every case of punishing a person driving a vehicle for a traffic offence is a 'starting point' for considering the purpose of imposing this criminal measure. The overall set of conditions that justify imposing a driving ban indicates that resorting to this measure is warranted, especially when the circumstances of the committed offence demonstrate that the individual's driving poses a threat to traffic safety.

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[40] For more on this topic, see Kluza, J., 'Nowelizacja Kodeksu wykroczeń…', op. cit., pp. 66–69.

[41] Justification for the parliamentary draft act amending the act – Criminal Code, print No. 378, Sejm of the 7th term, https://orka.sejm.gov.pl/Druki7ka.nsf/0/E737B26FC8784129C12579F9003263A4/%24File/378.pdf [accessed on 15 July 2024].

The amendments introduced in the CPO have led to concurrent amendments in the CPPO. Moreover, there has been an escalation in the scale of liability for traffic offences. Until recently, fines of up to PLN 500 could be imposed in the ticket procedure, and in the case where provisions coincided as per Article 9 § 1 CPO, fines could reach up to PLN 1,000 (Article 96 § 1 CPPO). Meanwhile, the new provision Article 96 § 1ad CPPO introduces a departure from this general rule, allowing for fines to be imposed in the ticket procedure for offences specified in Chapter XI CPO, up to PLN 5,000. In cases where multiple offences are committed with a single act, the fine can be increased to up to PLN 6,000. Additionally, for the offence under Article 96 § 3 CPO, which involves failure to indicate, at the request of an authorised body, the person entrusted by the perpetrator with the vehicle for driving or use at a specified time, fines in such proceedings can reach up to PLN 8,000 (Article 96 § 1d CPPO). Setting the upper limit of the fine at such a high level in a procedure that is inherently simplified and subsidiary in relation to court proceedings provokes opposition for several reasons. First and foremost, in the ticket procedure, the fine is not adjudicated but 'imposed' on the perpetrator by the police or officers (inspectors) of other bodies through a criminal ticket. In this way, the legislator emphasises that the non-judicial body authorised to impose a fine does not perform adjudicatory functions and does not enter the realm of justice administration, which is the exclusive competence of the judiciary. This body is usually represented by an officer without in-depth legal knowledge, which would allow for a thorough consideration of all relevant legal and factual circumstances of the committed act. Handling the case almost 'on the spot', they usually lack the ability to take into account factors that could affect the fine amount, such as the perpetrator's income, personal and family conditions, financial relations, and earning opportunities. This limitation appears to be recognised by the legislators themselves, who introduced in Article 95 § 6 CPPO a so-called tariff specifying a priori, i.e., disregarding the individualising features of the perpetrator and their act, the amount of the fine imposed in the ticket procedure for particular offences.[42] With such an approach, the fine imposed in the ticket procedure resembles an administrative monetary penalty, which, combined with its designation in the new tariff at a significantly higher level than before, invites deserved criticism of the changes made in this regard.

The extremity of the analysed regulation is not even mitigated by the fact that the legislator had previously bypassed the general principle expressed in Article 96 § 1 CPPO and raised the upper limit of fines for certain offences under some special acts. For example, in all cases where the public prosecutor is the competent authority of the National Labour Inspectorate and in four other cases specified in Article 96 § 1a, 1aa, and § 1c CPPO,[43] the maximum fine in the ticket procedure was raised

[42] The legal act currently in force is the Regulation of the Prime Minister of 30 December 2021, amending the Regulation on the Amount of Fines Imposed by Way of Criminal Tickets for Selected Types of Offenses (Journal of Laws of 2021, item 2484).

[43] Offenses under the Act of 6 September 2001 on Road Transport, when the prosecutor is the competent authority of the Road Transport Inspection or Police (consolidated text, Journal of Laws from 2021, item 919, as amended); offenses under the Act of 20 April 2004 on Promoting Employment and on Labour Market Institutions, in which the public prosecutor is the competent

to PLN 2,000, and under the conditions described in Article 96 § 1ab, the fine can even go up to PLN 7,500.[44] A fine of up to PLN 5,000 can generally be imposed for the offences committed within the framework of recidivism. This applies to offences against workers' rights specified in the Labour Code, offences specified in the Act of 9 July 2003 on the Employment of Temporary Workers, offences specified in the Act of 10 October 2002 on the Minimum Wage for Work, and offences specified in the Act of 10 January 2018 on Restricting Trade on Sundays and Holidays and on Certain Other Days (Article 96 § 1b, 1ba, 1bb and 1bc CPPO). In one instance, the legislator also raised the upper limit of fines imposed through a criminal ticket to PLN 5,000 (Article 96 § 1ab CPPO). The legislator's increase in the maximum amount of fines imposed by way of a criminal ticket does indeed prove that, with regard to certain offences or the offences committed under conditions of recidivism, a fine of PLN 500 is inadequate due to their gravity. Nevertheless, until recently, this solution was limited in its statutory scope. All these exceptions applied to individual, enumerated, and prohibited acts under specific acts. The new regulation, however, is comprehensive; it covers every offence contained in Chapter XI CPO, regardless of its gravity and its relation to traffic safety. It is worth emphasising at this point that Chapter XI CPO primarily safeguards two key interests: traffic safety, and secondly, traffic order. The lack of clear and unambiguous criteria for distinguishing between these concepts often leads to their conflation into a single term and means that, as a result, they are recognised jointly. However, it is indisputable that violations of traffic safety can carry significantly graver consequences for human life, health, and property than violations of traffic order, which, while troublesome, do not jeopardise to the same extent the values or arrangements protected by law. The identified valuation plane of acts typified within the framework of Chapter XI CPO, while undoubtedly one of the most important, does not exhaust the entirety of the issue. Another possible division is one that distinguishes offences closely related to the provisions of the road traffic law (Articles 84–98 CPO) and refers to the Act on public roads (Articles 99–103 CPO). Without elaborating further, it is evident that the discrepancy in the perception of traffic offences indicated above should be addressed through tailored procedural solutions. Any generalisations in this regard, when coupled with improper practice, may inadvertently reduce the perpetrator of a traffic offence to a mere subject of criminal policy.

Examining the changes in the scale of fines imposed through criminal tickets for traffic offences, it is crucial to acknowledge a significant advantage of such non-mandatory proceedings: they relieve courts from handling a large volume of minor cases. The social costs associated with the judicial process and the interests of the accused themselves are also pivotal considerations. Especially given the latter issue, one should refrain from extending the boundaries of criminal tickets imposed

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Border Guard authority (consolidated text, Journal of Laws of 2021, item 1100, as amended); offenses under the Act of 20 March 2009 on the Safety of Mass Events (consolidated text, Journal of Laws of 2019, item 2171); offense under the Act of 7 July 1994 – Construction Law (consolidated text, Journal of Laws of 2020, item 1333, as amended).

[44] Act of 9 March 2017 on the System of Monitoring Road and Rail Transport of Goods and the Turnover of Solid Fuels (consolidated text, Journal of Laws of 2021, item 1857).

for traffic offences too far. It is worth noting that, the accused must consent to this method of resolving their case for the ticket procedure to be maintained. The excessively inflated limits of fines that can be imposed under this procedure, coupled with a rigorous enforcement model (Article 25 § 2(1) CPO), could potentially hinder its effective application. This could result in a significant increase in cases being brought before the courts in the long term.

Concluding considerations on the changes introduced in the CPO amendment, it becomes apparent that the legislator has taken a rather simplified approach towards the task of ensuring proper traffic safety. Their main idea is to increase the degree of punitiveness of petty offence law with regard to offenders of road violations. This assumption is primarily implemented by intensifying the severity of fines and expanding the scope of penalties by adding new types of prohibited acts, as well as casuistically delineating already existing types of acts. Particularly alarming is the restriction on the discretion of judicial sentencing, brought about by rigidly defined penalty boundaries and mandatory mechanisms for their application. Such legislative methods lacks substantive justification in the current state of traffic crime or in the analysis of judicial practice. Changes altering the statutory term of pecuniary penalties and adjusting the types of prohibited acts, combined with constraints on the freedom of court action, essentially reduce the role of the court to a 'mouth of the law' with a clearly repressive message. Combating traffic violations in this way seems to be a simple misunderstanding. It likely stems from an unsupported belief in the omnipotence of the means proper to petty offence law in preventing this kind of crime. However, petty offence law typically intervenes with its means to combat traffic crime after the fact, often too late. Moreover, the instruments at its disposal generally address symptoms rather than underlying causes, making them inadequate substitutes for or competitors to measures that are applicable in the sphere of broadly understood pre-crime prevention. Recognising this aspect of the issue requires examining the root causes of traffic crime and subsequently developing a system of solutions ensuring that the severity of penalties under petty offence law and their scope remain rational and functional. The focus should particularly be on optimising the formulation sanctions, which occurs when statutory frameworks empower courts to levy fair penalties. The realisation of this assumption in cases of traffic offences necessitates a comprehensive review of all sanctions outlined in Chapter XI CPO. Additionally, there would also be an expectation to revise the structure of certain traffic offences. Reflecting misleadingly similar classification, terminological disorder, and the resulting uncertainty in the interpretation of attributes, are examples of the most contentious issues. As part of the proposed intervention, it is crucial to address the issue of systemic inconsistency or even the complete lack of foundation for imposing penalties for certain behaviours classified as traffic offences. In light of the afore-mentioned oversights by the legislator, it is difficult to view the solutions implemented by the amending act as satisfactory and deserving approval. The shortcomings of the amendment, demonstrated so far in many ways, instead suggest that the provisions of the petty offence law discussed in this study were designed without a precise understanding of the subject matter they are intended to regulate.

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ACTIVE REGRET IN THE LIGHT OF THE LATEST AMENDMENTS TO FISCAL PENAL CODE

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Abstract
The study presents both planned and introduced amendments concerning the traditional measure of fiscal penal law: active regret. The publication consists of four thematic parts. The first part presents general characteristics of active regret and provides an overview of the functions this measure performs. The second and third parts contain a presentation of the proposed and eventually withdrawn amendments in terms of the positive and negative premises of active regret, respectively. The fourth part of the article discusses the amendments introduced to the Fiscal Penal Code, allowing for the submission of the notification to the financial preparatory proceeding body also via an account at the e-Tax Office. The publication ends with conclusions, in which the author assesses the current legal regulations in the analysed field.

Keywords: active regret; e-active regret, fiscal offences, fiscal misdemeanours

INTRODUCTION

Active regret is a traditional measure of fiscal penal law that is subject to the regulations of not only Chapter 2 'Non-institution of punishment for perpetrators' of the Fiscal Penal Code of 1999 currently in force[1] but also former fiscal penal codes. All the successive legal acts regulating fiscal penal law, i.e., the Fiscal Penal Code of 2 August 1926,[2]

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[1] Act of 10 September 1999: Fiscal Penal Code, consolidated text, Journal of Laws of 2023, items 654 and 818, hereinafter 'FPC'.

[2] Journal of Laws of 1926, No. 105, item 609, as amended.

the Fiscal Penal Code of 18 March 1932,[3] the Decree of the President of the Republic of Poland: the Fiscal Penal Law of 3 November 1936,[4] the Decree of 11 April 1947: Fiscal Penal Law,[5] the Fiscal Penal Act of 13 April 1960,[6] and the Fiscal Penal Act of 26 October 1971,[7] provided for it.

It is emphasised in the doctrine that active regret is a universal measure as it is applicable to all fiscal offences and misdemeanours. It consists in the fact that a perpetrator of a fiscal offence or a fiscal misdemeanour discloses the commission of a prohibited act and its circumstances and settles the financial loss. Therefore, the legislator ensures complete impunity, although it is neither a circumstance excluding the unlawfulness of an act (countertype) nor a circumstance excluding guilt.[8]

Active regret is also a measure of criminal policy that performs the functions established by the legislator in combating fiscal crime. To a large extent, the functions are an expression of the general role of fiscal penal law. It is indicated in the literature that the current regulation of fiscal penal law provides the basis for distinguishing the following functions of active regret: it discloses fiscal offences and misdemeanours, it provides justice, it acts in a preventive way, it plays an enforcement-related role, it provides guarantees, it ensures procedural economics, and it is fiscal in nature.[9]

The function of disclosing fiscal offences and misdemeanours consists in self-denunciation, i.e., revealing one's own act and its significant circumstances, as well as the denunciation of persons cooperating in its commission. In other words, the function comes down to the fact that if a financial preparatory proceeding body, having completed its inspection activities, reveals the commission of a prohibited act or receives clearly documented information about the commission of a fiscal offence or misdemeanour, the perpetrator cannot take advantage of the benefit of active regret, which means that he cannot avoid fiscal criminal liability.

The justice-related function is connected with the idea of restorative justice. Its most important element does not consist in redressing the damage but in resolving the conflict between the perpetrator and the aggrieved. Compensating for the damage is only a way of resolving this conflict. The Fiscal Penal Code uses the concept of depletion of public law liabilities instead of the concept of damage and provides its legal definition in Article 53 § 27 FPC.[10] As a result, the non-institution of punishment by using various means of punishment reduction,

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[3] Journal of Laws of 1932, No. 34, item 355, as amended.

[4] Journal of Laws of 1936, No. 84, item 581, as amended.

[5] Journal of Laws of 1947, No. 32, item 140, as amended.

[6] Journal of Laws of 1960, No. 21, item 123, as amended.

[7] Journal of Laws of 1971, No. 28, item 260, as amended.

[8] Sawicki, J., Skowronek, G., *Prawo karne skarbowe. Zagadnienia materialnoprawne, procesowe i wykonawcze*, Warszawa, 2021, p. 91; Sawicki, J., 'Znaczenie czynnego żalu w prawie karnym skarbowym', *Prokuratura i Prawo*, 2013, No. 6, pp. 34–35; Legutko-Kasica, A., *Czynny żal jako instrument polityki kryminalnej wobec sprawców przestępstw i wykroczeń skarbowych*, Brzezia Łąka, 2021, p. 185; Legutko-Kasica, A., 'Czynny żal w kodeksie karnym skarbowym', *Prokuratura i Prawo*, 2012, No. 4, pp. 130–131.

[9] For more see: Legutko-Kasica, A., *Czynny żal jako instrument...*, op. cit., p. 187 et seq.

[10] Ibidem, pp. 187–189. Article 53 § 27 FPC stipulates: 'Public law liability depleted by the commission of a prohibited act shall be expressed as the amount of money that a person obliged

inter alia through the measure of active regret, in exchange for the perpetrator's voluntary compensation for the damage, fits into the concept of restorative justice in fiscal criminal law.[11]

The above function, which is also referred to as repressive justice, is sometimes associated with retaliation. The use of penal repression is aimed at satisfying the sense of justice both individually (of the aggrieved) and socially. This function of criminal law plays a much more important role in traditional common crimes such as murder or theft, where the aggrieved party is a particular individual, than in fiscal offences, which inflict harm on the general interest. In fiscal criminal law, the justice-related function results from the statutory directive to adapt the severity of fiscal penal repression to the degree of social harmfulness of the act and the degree of the perpetrator's guilt.[12]

However, the basic task of the individual preventive function of active regret is to shape the legal awareness of society, which means that in the event of a fiscal offence or fiscal misdemeanour commission, the perpetrator will be held criminally liable for it. That is why it consists mainly in deterring potential perpetrators by prohibiting certain acts and by imposing penalties for committing them. It should be noted that if the perpetrator reveals the commission of a prohibited act within the prescribed period, he may express active regret and will avoid punishment.[13]

The execution-related function is a characteristic feature of fiscal penal law because its role is to ensure obedience to financial obligations and prohibitions by means of punitive measures. Failure to perform or, on the contrary, fulfilment of financial obligations by the perpetrator of a prohibited act has an impact on the repression, mitigation, or even exclusion of criminal liability.[14] The fundamental function of fiscal penal law is not to enforce repression but public law liabilities and to compensate for the financial loss to the State Treasury or another entitled entity. The assumption of the priority of the enforcement purpose over repression is the *signum temporis* of contemporary penal policy in fiscal criminal law, which involves treating criminal sanctions as *ultima ratio*, in accordance with the intended purpose that the main aim of criminal law norms is not to punish a perpetrator, but to protect a legal interest and to resolve a social conflict resulting from the commission of a prohibited act.[15] It is manifested in a number of fiscal penal regulations, which entirely express a thesis that the sooner the financial loss is compensated and public law liabilities are fulfilled, the greater is the relief and mitigation of fiscal penal liability the perpetrator of a fiscal offence or misdemeanour may

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to pay or to declare to pay as a whole or in part evaded, and this financial depletion actually occurred.'

[11] Sawicki, J., *Zaniechanie ukarania jako element polityki karnej w prawie karnym skarbowym*, Wrocław, 2011, pp. 61–62.

[12] Wilk, L., Zagrodnik, J., *Prawo i proces karny skarbowy*, Warszawa, 2015, p. 14.

[13] Legutko-Kasica, A., *Czynny żal jako instrument...* op. cit., pp. 193–194.

[14] Zoll, A., 'Założenia polityki karnej w projekcie kodeksu karnego', *Państwo i Prawo*, 1995, No. 5; Siwik, Z., *Systematyczny komentarz do ustawy karnej skarbowej. Część ogólna*, Wrocław, 1993, pp. 9–10.

[15] Siwik, Z., 'Kodeks karny skarbowy. Ogólne zasady odpowiedzialności i karania', *Przegląd Podatkowy*, 1999, No. 12, p. 31.

count on.[16] Therefore, it is more about enforcing public law liabilities and compensating financial loss to an entitled entity than about repression. Thus, it is necessary to make a clear distinction between an execution-related purpose and a compensatory one of the fiscal response,[17] because the former consists in inducing the perpetrator to fulfil a public law obligation towards the State Treasury, and the latter constitutes the infliction of pain upon the perpetrator, which may also constitute compensation for the damage caused.[18]

The main role of the guarantee-related function of active regret is to ensure that the perpetrator avoids criminal liability, of course after he meets certain requirements, which include notifying a prosecuting body of the commission of a certain act, and disclosing significant circumstances of the act, in particular, persons cooperating in its commission. The provision of Article 16 § 1 FPC is applicable only when the due public law liability depleted by the commission of a prohibited act is settled in full within the deadline set by the authorised preparatory proceeding body. However, if even one requirement is not met, active regret does not occur and, therefore, the authority is not bound by it.[19]

Active regret in fiscal penal law also performs the function of procedural economics. According to Z. Siwik, this is manifested in the fact that active regret is a legal measure serving to protect the financial interests of public law entities. These entities are not so much interested in punishing the perpetrator, but in recouping due financial amounts by virtue of public levies as quickly and inexpensively as possible. The state refrains from punishing the perpetrator when it is certain that the depleted financial obligation will be compensated. If the State Treasury does not suffer any financial loss, there is no actual need to enforce penal repression. The complete impunity promised in advance by the legislator is aimed at encouraging the perpetrator to abandon the criminal path and facilitate the prosecution of his acts. The abolition of penalisation is determined by the fact that the perpetrator withdraws from the criminal path after having committed a prohibited act. This general impunity clause is a kind of 'reward' for the perpetrator's active regret.[20]

The fiscal function of active regret is related to the collection and retention of funds by the state to perform its mandated tasks. A derivative of the fiscal function, its partial element, consists in the necessity of protecting and developing the sources of budget revenues. This is expressed in the principle of tax source protection, which means that tax collection cannot lead to the abandonment of taxable activities and thus a reduction in the volume of tax revenues. Strict taxes and their strict enforcement may only bring temporary benefits and lead to the destruction of the source of income. The principle of tax source protection involves shaping the tax system, the structure of taxes, and the enforcement methods in a way that encourages

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16 Wilk, L., Zagrodnik, J., *Prawo i proces...*, op. cit., p. 110.

17 Radzikowska, Z., *Założenia systemu wymiaru kary w polskim prawie karnym skarbowym*, Kraków, 1986, p. 38.

18 Legutko-Kasica, A., *Czynny żal jako instrument...*, op. cit., pp. 195–196.

19 Ibidem, p. 213.

20 Siwik, Z., *Systematyczny komentarz...*, op. cit., p. 125.

taxpayers to develop their business activities. This, in turn, will increase budget revenues from taxes in the long run, rather than causing taxpayers to abandon their taxable business activities.[21]

POSITIVE PREMISES OF THE AMENDMENTS

The requirement of denunciation is the first positive premise of active regret. It concerns both self-denunciation, i.e., notifying a prosecution body of the commission of a fiscal offence or misdemeanour on one's own, and the denunciation of persons cooperating in the commission of those offences (Article 16 § 1 FPC). Therefore, it involves providing prosecution bodies with significant information concerning prohibited acts previously unknown to them. The information must be significant, and this is decided by the relevant body. The information must also be complete, thus applying to all persons cooperating in the commission of the reported act. The omission of even one cooperating person excludes the application of Article 16 FPC.[22]

The requirement to settle the due amount of the public law liability depleted by the commission of a prohibited act within the deadline set by the preparatory proceeding body constitutes the second positive premise of active regret (Article 16 § 2 sentence 1 FPC). This requirement materialises only when, as a result of a fiscal offence or misdemeanour, there is actual depletion of public law liabilities. At the same time, it unambiguously indicates the legislator's priorities. From the perspective of the necessity of settling the due amount, it does not matter whether the depletion directly matches the elements of a given prohibited act.[23]

However, if the prohibited act does not involve depletion of the due amount and the forfeiture of items is obligatory, the perpetrator should submit those items, and if this is not possible, pay their monetary equivalent. There is no obligation to pay their monetary equivalent if the forfeiture concerns items specified in Article 29 § 4, i.e., objects whose production, possession, trade, storage, transportation, transfer, or transmission is prohibited (Article 16 § 2 second sentence FPC). However, if the submitted items subject to forfeiture might be quickly damaged or spoiled, if their storage involves disproportionate costs or excessive difficulties, or causes a considerable reduction in their value, the preparatory proceeding body should impose on the perpetrator an obligation to pay their monetary equivalent, unless the forfeiture concerns items specified in Article 29 § 4 FPC (Article 16 § 3 FPC).[24]

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[21] Legutko-Kasica, A., *Czynny żal jako instrument*..., op. cit., pp. 219–220.

[22] Skowronek, G., *Kodeks karny skarbowy. Komentarz*, Legalis, 2020, thesis 2 to Article 16; Legutko-Kasica, A., 'Czynny żal w kodeksie...', op. cit., p. 132.; Tużnik, M.R., 'Wpływ pandemii Covid-19 na instytucję czynnego żalu w prawie karnym skarbowym', in: Stefański, R.A. (ed.), *Srebrna księga jubileuszowa upamiętniająca XXV-lecie Wydziału Prawa i Administracji*, Warszawa, 2022, p. 337.

[23] Zgoliński, I. (ed.), *Kodeks karny skarbowy. Komentarz*, Lex, 2021, thesis 2 to Article 16.

[24] Skowronek, G., *Kodeks karny skarbowy*..., op. cit., thesis 3 to Article 16; Kardas, P., Łabuda, G., Razowski, T., *Kodeks karny skarbowy. Komentarz*, Lex, 2017, thesis 4 to Article 16; Legutko-Kasica, A., *Czynny żal jako instrument*..., op. cit., p. 257; Tużnik, M.R., 'Wpływ pandemii…', op. cit., p. 338.

Submitting the Bill amending the Act: Fiscal Penal Code and some other acts of 3 March 2022,[25] the Ministry of Justice proposed a new wording of Article 16 § 2 first sentence FPC: 'The provisions of § 1 shall apply only if the due public law liability depleted by the commission of a prohibited act is settled in full within the deadline set by the competent preparatory proceeding body.'

Therefore, the change consisted in waiving the requirement that the public law liability depleted by the commission of a prohibited act should be 'due'. In the drafter's opinion, the requirement that the liability should be due, introduced by the amendment of 28 July 2005 to the Fiscal Penal Code and some other acts,[26] resulted not only in the blurring of the borderline between criminal and tax liability, but also in the significant limitation of the possibility of applying measures based on the compensation for financial losses in the revenues of the State Treasury and other entitled bodies. Above all, however, it led to a successive slowdown in the proceedings over time. Moreover, the Ministry of Justice argued that the change would enable the perpetrator to reach an agreement with the prosecutor on the amount he should return to the State Treasury (or other creditors) so that he could count on more lenient treatment.[27]

Thus, the settlement of a public law liability depleted by the commission of a prohibited act would be a premise of effective active regret regardless of whether the liability is due. To take advantage of the benefit of active regret, it would be necessary to pay even such a tax that is not yet due. According to tax law experts, it is a controversial solution because it is not possible to demand payment of tax that is not due, i.e., when the tax obligation has not yet transformed into a tax liability.[28]

The Ombudsman was also critical of the above-mentioned solution and stated that, in practice, waiving the requirement that the liability should be due in the case of measures allowing for evading fiscal penal sanctions might lead to a situation in which an obligation to pay a tax remitted or barred by the statute of limitations would arise. Such consequences, according to the Ombudsman, would be unacceptable from the point of view of the standard of taxpayers' rights protection.[29]

As a result of the negative assessment reported by many groups, including experts, the project was withdrawn. The Ministry of Justice explained that the reason for abandoning work on the project was the purposelessness of continuing work on the project currently due to the fact that the scope of fiscal criminal liability is closely related to the regulations concerning both natural persons' and legal persons' tax obligations, which have been subject to frequent and significant

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[25] No. UD 357 in the list of the legislative and programme works of the Council of Ministers, the Sejm of the 9th term.

[26] Journal of Laws of 200, No. 178, item 1479.

[27] Justification for the Bill amending Fiscal Penal Code and some other acts of 3 March 2022, UD 357, the Sejm of the 9th term, pp. 30–31.

[28] Keler, R., 'Czynny żal po ostatnich zmianach (i przed kolejnymi)', *SPGC Blog*, 8 September 2022, https://spcgblog.pl/tax-law/czynny-zal-po-ostatnich-zmianach-i-przed-kolejnymi/ [accessed on 23 October 2022].

[29] Stance of the Ombudsman reported within the opinion on the Bill amending Fiscal Penal Code and some other acts of 3 March 2022, UD 357, the Sejm of the 9th term, https://legislacja.rcl.gov.pl/projekt/12357450/katalog/12860114, [accessed on 23 October 2022].

amendments recently; on the other hand, fiscal criminal liability should be shaped based on the main principle of the *ultima ratio* of criminal law, i.e., only after the areas requiring an adequate criminal law response have been ultimately identified.[30]

NEGATIVE PREMISES OF THE AMENDMENTS

Negative premises of active regret may be divided into three groups:
(1) pursuant to Article 16 § 5 FPC;
(2) pursuant to Article 16 § 6 (1), (2) and (4) FPC;
(3) pursuant to Article 16 § 6 (3) FPC.

When negative premises have occurred pursuant to Article 16 § 5 FPC, the perpetrator's notification is ineffective if it was submitted:
(1) at the time when the law enforcement body had already obtained clearly documented information about the commission of a fiscal offence or misdemeanour (Article 16 § 5 (1) FPC);
(2) after the law enforcement body commenced official activities, in particular a search, verification, or inspection aimed at revealing a fiscal offence or misdemeanour, except in situations where the activity did not provide grounds for initiating proceedings concerning this prohibited act (Article 16 § 5 (2) FPC).

As indicated above, active regret under Article 16 FPC is not limited in any way in terms of its object-related matter, i.e., it applies to all fiscal offences and misdemeanours.[31] However, there are subject-related limitations excluding the possibility of applying the measure of active regret in relation to:
(1) the managerial perpetrator, i.e., the person in charge of the commission of the prohibited act revealed;
(2) the recommending perpetrator who, taking advantage of another person's dependence, ordered him to commit a prohibited act revealed;
(3) the agent provocateur, i.e., a person inducing another person to commit a fiscal offence or misdemeanour to instigate proceedings concerning the commission of this prohibited act against him (Article 16 § 6 (1), (2), and (4) FPC).

The last group of negative premises consists of the circumstances resulting in the fact that the perpetrator who organised a group or association with the aim of committing a fiscal offence or managed such a group or association cannot benefit from active regret unless he submitted a notification together with all members of the group or association (Article 16 § 6 (3) FPC).[32]

The above-discussed, eventually withdrawn project of the Ministry of Justice also introduced changes in the scope of negative premises of active regret; namely, it concerned the condition under Article 16 § 5 (2) FPC, modifying the provision in

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[30] Kancelaria Prezesa Rady Ministrów, *Projekt ustawy o zmianie ustawy – Kodeks karny skarbowy oraz niektórych innych ustaw*, https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy--kodeks-karny-skarbowy-oraz-niektorych-innych-ustaw [accessed on 23 October 2022].

[31] Legutko-Kasica, A., *Czynny żal jako instrument...*, op. cit., p. 271.

[32] See Wilk, L., Zagrodnik, J., *Kodeks karny skarbowy. Komentarz*, Legalis, 2021, thesis 10 to Article 16.

such a way that the perpetrator's notification would become ineffective if it were submitted 'after the law enforcement body started an official activity, in particular a search or inspection aimed at revealing a fiscal offence or misdemeanour, except in situations where the activity did not provide grounds for initiating proceedings concerning this prohibited act.'

Purely hypothetically, it can be assumed that if the above-mentioned change were introduced to the Fiscal Penal Code, its consequence would be that the effectiveness of active regret would depend on the commencement of official activities by any unspecified body (and not a law enforcement body as up to now).[33] Moreover, according to experts and the Ombudsman, the object-related change in the provisions would be particularly severe and unfavourable for taxpayers because it would limit the possibility of making use of active regret. For example, it would prevent them from declaring active regret in situations where the course of inspection activities revealed irregularities of which a taxpayer is not always aware.[34]

Also, according to the Lewiatan Confederation,[35] such a change would be very unfavourable for taxpayers. In the opinion submitted during the consultations, experts indicated that due to the complexity of tax regulations, their extensiveness, and frequent changes, it is unfair to taxpayers to deprive them of the only opportunity to protect themselves against fiscal criminal liability for an unintentional mistake. As a result, as one can read in Lewiatan's opinion, active regret may become a measure that taxpayers may be able to use relatively rarely. Meanwhile, the measure is extremely valuable for securing the citizens' situation, and in trivial cases, waiving fiscal criminal liability brings positive effects more often than imposing even the smallest penalties. Moreover, its experts feared that the introduction of the proposed provision would lead to the infringement of the currently accepted principle of priority of the enforcement function over the repressive function in fiscal penal law.[36]

On the other hand, the Ministry of Justice emphasised in its justification of the proposed amendment to Article 16 § 5 (2) FPC that it is currently not possible to prosecute perpetrators of fiscal offences and misdemeanours revealed during an

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[33] Banaszak, E., 'Już niedługo mogą czekać nas poważne zmiany w Kodeksie karnym skarbowym', *Blog TPA*, 22 June 2022, https://blog-tpa.pl/2022/06/28/juz-niedlugo-moga-czekac-nas-powazne-zmiany-w-kodeksie-karnym-skarbowym/ [accessed on 24 October 2022].

[34] Stance of the Ombudsman reported within the opinion on the Bill amending Fiscal Penal Code and some other acts of 3 March 2022, UD 357, the Sejm of the 9th term, https://legislacja.rcl.gov.pl/projekt/12357450/katalog/12860114 [accessed on 5 November 2022]; Banaszak, E., 'Już niedługo…', op. cit.

[35] Lewiatan Confederation is a Polish business organisation thanks to which companies influence the shape of law, seek a dialogue with administration and obtain tools to develop business. It represents its members in Poland and the European Union. It has a standing representative office in Brussels and is the only Polish organisation that is a member of BusinessEurope, the biggest European business organisation, cf. Konfederacja Lewiatan, *Lewiatan – kim jesteśmy*, https://lewiatan.org/lewiatan-kim-jestesmy/ [accessed on 22 September 2023].

[36] Rada Podatkowa Lewiatan, *Uwagi Konfederacji Lewiatan do projektu ustawy o zmianie ustawy – Kodeks karny skarbowy oraz niektórych innych ustaw*, https://lewiatan.org/wp-content/uploads/2022/04/KL-118-53-PP-2022.pdf [accessed on 5 November 2022]; Rochowicz, P., 'Skrucha już nie pomoże. Resort Ziobry odsyła czynny żal do lamusa', *Rzeczpospolita*, 10 May 2022, https://www.rp.pl/podatki/art36265131-skrucha-juz-nie-pomoze-resort-ziobry-odsyla-czynny-zal-do-lamusa [accessed on 5 November 2022].

inspection carried out by a competent body that is not a law enforcement one. Perpetrators may effectively avoid liability by declaring the so-called active regret even during an inspection, which is not possible when a law enforcement body starts an official proceeding. According to the Ministry of Justice, the purpose of the measure of active regret regulated in Article 16 FPC was to grant exemption from liability (punishment) only to those perpetrators of prohibited acts who, on their own initiative and of their own will, disclose irregularities before a competent body does so, regardless of whether this body is a law enforcement one or another competent one authorised to do so. For these reasons, in the Ministry's opinion, the above-mentioned restriction should have been removed. Moreover, according to the drafter, it is also difficult to ignore that, from a pragmatic point of view, explanatory activities still do not constitute a stage of the proceeding principally aimed at revealing a fiscal offence or misdemeanour, which should exclude the possibility of self-denunciation. Therefore, the drafter decided to clearly emphasise that only activities such as inspections result in the 'expiry' of the right to effective active regret within the meaning of Article 16 FPC.[37]

CHANGES IN THE FORM OF NOTIFICATION

In the light of the currently applicable wording of Article 16 § 4 CCP, the rule is that the notification shall be submitted in writing or orally for the record. In practice, the first form is more convenient and more often used. After the outbreak of the Covid-19 pandemic, the possibility for submitting active regret in writing recorded on paper or in an electronic form, or orally for the record, was introduced. E-pleadings were signed with a qualified electronic signature, a trusted signature, or a personal handwritten signature and sent via electronic communication means, including the e-tax platform referred to in the Act of 29 August 1997: Tax Law.[38]

The above change was introduced to the Fiscal Penal Code by virtue of Article 26 of the so-called Covid Act, i.e., the Act of 31 March 2020 amending the Act on Special Solutions Preventing, Counteracting, and Combating Covid-19, Other Contagious Diseases, and Crisis Situations Caused by Them, and Some Other Acts,[39] constituting the legislator's quick response to the breakout of the Covid-19 pandemic.

The above-mentioned amendment was very well assessed in the legal community. There were opinions that it was long-awaited and that the Ministry of Justice transferred the responsibility for the archaic regulations that were then in force onto the Ministry of Digitisation. Taking into account the constantly growing number of activities performed only electronically (Standard Audit File-Tax, financial

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[37] Justification for the Bill..., op. cit., pp. 29–30.

[38] Consolidated text, Journal of Laws of 2021, item 1540, as amended; Keler, R., *Czynny żal po ostatnich zmianach (i przed kolejnymi)*, https://spcgblog.pl/tax-law/czynny-zal-po-ostatnich-zmianach-i-przed-kolejnymi/ [accessed on 6 November 2022].

[39] Journal of Laws of 2020, item 568.

statements, MDR, WHT, Transfer Pricing Reports), it would seem irrational that the so-called active regret could only be submitted in the traditional ways.[40]

However, on 5 October 2021, by virtue of Article 89(1) of the Act of 18 November 2020 on Electronic Delivery,[41] the wording of Article 16 § 4 FPC regulating the issue was amended, and the only forms of notification left were the written and oral ones. What was pointed out was the successful synchronisation of the above provision of the Fiscal Penal Code with the amended Article 116 § 1 of the Code of Criminal Procedure,[42] applicable to fiscal penal cases pursuant to Article 113 § 1 FPC and stipulating that: 'Unless the statute provides otherwise, the parties and other entities entitled to take part in the procedural activity may submit declarations, including motions, in writing or orally for the record. A declaration submitted electronically shall also be considered one submitted in writing' and that active regret submitted electronically should be interpreted as active regret submitted 'in writing'. However, the problem consisted in the fact that the amended Article 116 § 1 CCP was scheduled to enter into force no sooner than on 1 October 2029.

In the meantime, there was a situation where, pursuant to the literal wording of the provisions of Article 16 § 4 FPC (the version applicable from 5 October 2021) and Article 116 CCP (the version applicable until 30 September 2029, i.e., 'Unless the statute provides otherwise, parties and other entities entitled to take part in a procedural activity may submit motions and other declarations in writing or orally for the record'), it was not possible to submit active regret in electronic form.[43]

This state of affairs caused numerous doubts about submitting active regret electronically. In response, the Ministry of Finance expressed its stance that changes to Article 16 § 4 FPC introduced by the Act on Electronic Delivery do not modify the substantive content of the regulations provided therein, as they are only of an adjusting nature. Thus, the submission of active regret electronically (e.g., via e-PUAP or the e-Tax Office) remains effective from 5 October 2021. According to the Ministry, the legislator's intention was that the term 'in writing' should mean both on paper and in electronic form. Moreover, it was emphasised that the justification for the Bill on electronic delivery clearly indicates that the change in terminology used in legal provisions, consisting of changing the words *pisemnie* into *na piśmie*, was aimed at balancing the paper form with the electronic form, with the proviso that paper documents should be signed with a handwritten signature, while electronic documents should be signed with a qualified electronic signature, trusted signature, or personal handwritten signature.[44]

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[40] Cf. Pogroszewska, M., 'E-czynny żal budzi wątpliwości', *Rzeczpospolita*, 12 October 2021, Legalis 2021; Koślicki, K., *Elektroniczny czynny żal zablokowany na osiem lat*, https://www.prawo.pl/podatki/elektroniczny-czynny-zal-po-nowelizacji-kks-i-kpk-zablokowany-na,509700.html [accessed on 15 March 2022]; Tużnik, M.R., 'Wpływ pandemii…', op. cit., p. 341.

[41] Journal of Laws of 2020, item 2320, as amended.

[42] Act of 6 June 1997: Code of Criminal Procedure, consolidated text, Journal of Laws of 2022, item 1375, as amended, hereinafter 'CCP'.

[43] See Pogroszewska, M., 'E-czynny żal…', op. cit.

[44] Ministerstwo Finansów, *e-Czynny żal w sprawach karno-skarbowych wciąż możliwy i skuteczny*, Lex, 2021; Tużnik, M.R., 'Wpływ pandemii…', op. cit., pp. 342–343.

On 7 July 2022, a number of changes were introduced to the Fiscal Penal Code. They were connected with the new IT solution implemented by the Ministry of Finance, i.e., the e-Tax Office, which is ultimately intended to replace the tax portal. The changes included, *inter alia*, enabling entities to notify a financial preparatory proceeding body of active regret via an account in the e-Tax Office. This was done by virtue of Article 9(1) of the Act of 8 June 2022 amending Some Acts to Automate the Handling of Some Matters by the National Fiscal Administration,[45] by means of adding § 4a to Article 16 FPC, stipulating that: 'Notification of the financial preparatory proceeding body may also be made via the account in the e-Tax Office.'[46]

In the justification for the governmental bill, it was noted that the addition of Article 16 § 4a FPC indicates an additional, in relation to the provision of § 4, possibility for sending a notification of the so-called active regret via the e-Tax Office. The provision will constitute a supplement to Article 114c FPC, regulating the possibility of delivering pleadings in the course of a preparatory proceeding also via the e-Tax Office, as Article 16 § 4a FPC concerns the stage before the preparatory proceeding is instigated.

The drafter also emphasised that the addition of § 4a was aimed at clarifying Article 16 § 4 FPC, stating that such a notification shall be submitted 'in writing,' i.e., also electronically, to a financial preparatory proceeding body via the e-Tax Office. The phrase 'in writing' shall apply to both a paper form and an electronic one. The pleading recorded on paper must have a handwritten signature. Pleadings in electronic form must have a qualified electronic signature, a trusted signature, or a personal handwritten signature. However, the possibility of submitting active regret in the previous traditional form remains unchanged.

The justification also indicated that the provision of Article 16 § 4 FPC applies to all law enforcement agencies to which active regret may be submitted, as Article 16 FPC does not limit the submission of active regret to financial preparatory proceeding bodies. The phrase '(...) who notified a body authorised to prosecute of the fact (...)' is used. The provision of Article 16 § 4a FPC will constitute a special provision supplementing Article 16 § 4 FPC, applying only to financial preparatory proceeding bodies that will act within the e-Tax Office. The introduction of Article 16 § 4a is aimed at avoiding potential interpretational doubts concerning the possibility of submitting active regret via the e-Tax Office.[47]

CONCLUSIONS

When assessing the measure of active regret in fiscal penal law in its current form, it is necessary to point out that the introduction of the above-presented changes within the scope of positive premises would lead to a situation where a taxpayer would

[45] Journal of Laws of 2022, item 1301.

[46] Krywan, T., *Zmiany w Kodeksie karnym skarbowym w 2022 r.*, Lex, 2022.

[47] Justification for the Bill of 8 June 2022 amending Some Acts to Automate Some Proceedings of the National Fiscal Administration, the Sejm print No. 2138, the Sejm of the 9th term, p. 23.

be obliged to pay the remitted or expired tax, which would constitute a serious limitation of his rights.

On the other hand, if the proposed changes regarding negative premises were introduced, they would significantly narrow the possibilities for taxpayers to use active regret and infringe upon the currently accepted principle that prioritises the execution function over the repressive one in fiscal penal law.

The change that resulted in the restoration of the possibility of submitting active regret in electronic form, albeit a bit limited, deserves approval. The change was undoubtedly long awaited due to the doubts raised about the possibility of submitting active regret in electronic form and constituted the legislator's response to this state of affairs. Therefore, the amendment corrected the legislative error and provided an appropriate guarantee of the rights of taxpayers, who could not rely on the non-binding stance of the Ministry of Finance, because it could result in the imposition of penalties on them in accordance with the provisions of the Fiscal Penal Code.[48]

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[48] See Pogroszewska, M., 'E-czynny żal…', op. cit.; Tużnik, M.R., 'Wpływ pandemii…', op. cit., p. 344.

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THE ROLE OF THE POLISH AGENCY FOR AUDIT OVERSIGHT AND COMMON COURTS IN DISCIPLINARY PROCEEDINGS AGAINST STATUTORY AUDITORS: *DE LEGE LATA* AND *DE LEGE FERENDA* REMARKS

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Abstract

This article is of a scientific and research nature, covering the role of the Polish Agency for Audit Oversight (Polska Agencja Nadzoru Audytowego – PANA) and common courts in disciplinary proceedings against statutory auditors. The research aims to determine whether the provisions of Directive 2006/43/EC and Regulation (EU) 537/2014 justify assigning the aforementioned Agency the status of an authority for proceedings concerning disciplinary offences committed while performing assurance or related services in compliance with national professional standards. The provisions of European Union law regarding the role of public supervision bodies of auditors and audit firms are analysed, and the results are compared with the constitutional and systemic conditions for shaping the norms of disciplinary proceedings. Some *de lege ferenda* proposals regarding the regulation of disciplinary proceedings bodies in matters concerning statutory auditors are put forward.

Keywords: disciplinary proceedings, auditors, Polish Agency for Audit Oversight

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INTRODUCTION

The rules governing the profession of a statutory auditor, which is regarded as a profession of public trust,[1] are laid down in numerous legal acts issued by various law-making bodies within the multi-centric legal order.[2] This includes the Act of 11 May 2017 on Statutory Auditors, Audit Firms, and Public Oversight,[3] internal acts issued by the authorities of the Polish Chamber of Statutory Auditors (Polska Izba Biegłych Rewidentów), which is a professional self-governing body of representatives of this profession,[4] as well as by the EU secondary law. Recently, the latter has directly regulated the requirements for statutory oversight of financial reports of public-interest entities (Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC,[5] hereinafter referred to as 'Regulation (EU) 537/2014'). On the other hand, within the remaining scope, it directs that standards resulting from the provisions of Directive 2006/43/EC of the European Parliament and of the Council of 16 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC[6] should be implemented and national legal frameworks should be created to apply Regulation (EU) 537/2014.[7] Both of these legal acts require that a public system of supervision of statutory auditors and audit firms performing those tasks should be created. *De lege lata*, in accordance with the provisions of Article 88 ASA, the authority responsible for this supervision in Poland is the Polish Agency for Audit Oversight (Polska Agencja Nadzoru Audytowego),[8] which is a state legal person (Article 94a ASA).

One of PANA's tasks is to carry out explanatory proceedings, disciplinary proceedings and to act as a prosecuting body before courts in cases concerning disciplinary offences committed while carrying out statutory audits and providing other assurance and related services (Article 90(1)(6) ASA). At the same time, the

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1 Szydło, M., 'Komentarz do art. 17', in: Safjan, M., Bosek, L. (eds), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa, 2016, p. 425 et seq.; Świerc, Z., Baran, W., 'Certyfikacja zawodowa a specjalności biegłych sądowych', in: Łazarska, A., Miczek, Z. (eds), *Dowód z opinii biegłego z zakresu ekonomii w sprawach cywilnych i gospodarczych*, Warszawa, 2024, p. 119; Jastrzębski, J., 'Odpowiedzialność cywilna biegłego rewidenta. Glosa do wyroku SN z dnia 1 grudnia 2006 r., I CSK 315/06', *Glosa*, 2007, No. 2, p. 45.

2 For a more detailed comparison of multi-centricity of the legal system see: Łętowska, E., 'Multicentryczność współczesnego systemu prawa i jej konsekwencje', *Państwo i Prawo*, 2005, No. 4, pp. 3–10; Łętowska, E., '"Multicentryczność" systemu prawa i wykładnia jej przyjazna', in: Ogiełło, L., Popiołek, W., Szpunar, M. (ed.), *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, Kraków, 2005, pp. 1127–1146; Kustra, A., 'Wokół problemu multicentryczności systemu prawa', *Państwo i Prawo*, 2006, No. 6, pp. 85–99; Lang, W., 'Wokół "multicentryczności systemu prawa"', *Państwo i Prawo*, 2005, No. 7, pp. 95–99.

3 Journal of Laws of 2023, item 1015, as amended, hereinafter 'ASA'.

4 See Article 23(1) ASA.

5 OJ L 158, 27.5.2014, p. 77.

6 OJ L 157, 9.6.2006, p. 87, as amended, hereinafter 'Directive 2006/43/EC'.

7 OJ L 158, 27.5.2014, p. 77.

8 Hereinafter 'PANA'.

statute stipulates that the first-instance disciplinary proceeding shall be carried out before a district court that has jurisdiction over the place of residence of the accused (Article 176 ASA). Although the competence of those bodies is limited to 'cases concerning disciplinary offences committed while providing assurance and related services in compliance with the national professional standards', in practice they conduct most of the disciplinary proceedings against statutory auditors. The definition of assurance services (Article 2(5) ASA)[9] and related services (Article 2(6) ASA)[10] means that, in fact, failure to fulfil the obligation to improve professional skills[11] and failure to pay membership contributions[12] are the only offences not within the scope in question and are subject to proceedings carried out by the National Disciplinary Prosecutor (within the scope of explanatory proceedings and disciplinary investigations – Article 34(2) ASA) and the National Disciplinary Court (within the scope of the first-instance disciplinary proceeding – Article 154(2) ASA). However, from the point of view of the aforementioned purpose of disciplinary liability, their importance is marginal. In such cases, PANA has the right to join a disciplinary proceeding as a party at any stage of the proceeding (Article 144(2) ASA), the right to inspect the files at any stage of the disciplinary proceeding, to request information on the results of the proceeding, as well as the right to request delivery of final judgments or resolutions together with the case files (Article 145 ASA). PANA may also file a complaint against the decision terminating the disciplinary proceeding issued by the National Disciplinary Prosecutor, even if it did not join the proceeding as a party (Article 152a ASA), and to appeal against a judgment or a decision terminating the disciplinary proceeding issued by the National Disciplinary Court, even if it did not join the proceeding as a party (Article 164(2) ASA).

The above-mentioned PANA's role in cases of disciplinary offences committed while providing assurance or related services in compliance with national professional standards, as well as the reservation of the jurisdiction of common courts (district courts) in the first instance, raises doubts at first glance. Disciplinary liability is a special type of legal responsibility of persons practicing a profession

[9] In accordance with this provision, these are services aimed at providing high or moderate credibility to issues concerning in particular financial and non-financial information, systems, processes, as well as aspects of behaviour or attitudes of specific entities, based on evidence obtained during appropriate procedures constituting the basis for the assessment of the issues covered by these services, in accordance with the adopted criteria, included in the report on the service provided.

[10] These are services consisting in carrying out agreed procedures that are performed based on an agreed goal, scope of work and method of their implementation, the description and result of which are presented in the report on the service or a service of compilation of financial information, the aim of which is to use accounting knowledge to collect, classify and summarise financial information.

[11] See reports on activities of the National Disciplinary Prosecutor based on Article 34(3) ASA for 2021 (https://pana.gov.pl/wp-content/uploads/2022/05/Sprawozdanie_KRD_za_2021.pdf [accessed on 27 February 2024]), and for 2022 (https://pana.gov.pl/wp-content/uploads/2023/04/Sprawozdanie-KRD-za-2022.pdf [accessed on 27 February 2024]).

[12] In practice, it is only a matter of failure to fulfil the training obligation because failure to pay membership fees for a period longer than one year constitutes grounds for removal from the register of statutory auditors (Article 18(1)(4) ASA).

of trust for their behaviour that, generally speaking, may result in the loss of trust necessary for its proper practice.[13] Its aim is to ensure compliance with the rules of practising a free profession and to create the possibility of eliminating people who do not have the qualities necessary for its proper practice.[14] For this reason, in general, professional self-government bodies exercise this responsibility.[15]

The legislative motives show that granting PANA the status of the body of disciplinary proceedings against statutory auditors in the vast majority of cases resulted from the alleged lengthiness of disciplinary proceedings conducted by the Polish Chamber of Statutory Auditors,[16] on the one hand, and from the

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[13] Cf. Giętkowski, R., *Odpowiedzialność dyscyplinarna w prawie polskim*, Gdańsk, 2013, p. 25 et seq.; Łętowski, J., 'O problemach odpowiedzialności służbowej i dyscyplinarnej w administracji', *Państwo i Prawo*, 1971, No. 8–9, pp. 384–385; Kubiak, J.R., Kubiak, J., 'Odpowiedzialność dyscyplinarna sędziów', *Przegląd Sądowy*, 1994, No. 4, p. 3; Rejman, G., 'Pojęcie odpowiedzialności', in: Turska, A. (ed.), *Refleksje o prawie, państwie i społeczeństwie*, Warszawa, 2005, pp. 61–77; Wincenciak, M., *Sankcje w prawie administracyjnym i procedura ich wymierzania*, Warszawa, 2008, p. 73; Czarnecki, P., *Postępowanie dyscyplinarne wobec osób wykonujących prawnicze zawody zaufania publicznego*, Warszawa, 2013, pp. 64–70.

[14] Giętkowski, R., *Odpowiedzialność…*, op. cit., p. 25; in relation to statutory auditors: Zieliński, M.J., 'Komentarz do art. 139', in: Ślebzak, K., Ślebzak, M. (eds), *Ustawa o biegłych rewidentach, firmach audytorskich oraz nadzorze publicznym. Komentarz*, Warszawa, 2018, p. 557.

[15] See Article 86a(1) and Article 91(1) of the Act of 26 May 1982: Law on Barristers (consolidated text, Journal of Laws of 2022, item 1184, as amended); Article 54^1(1) and Article 70^2(1) of the Act of 6 July 1982 on Solicitors (consolidated text, Journal of Laws of 2022, item 1166); Article 65(1) and (2) and Article 30(2) of the Act of 2 December 2009 on Medical Chambers (consolidated text, Journal of Laws of 2021, item 1342); Article 47(1)–(4) and Article 55(1) of the Act of 1 July 2011 on Self-government of Nurses and Midwives (consolidated text, Journal of Laws of 2021, item 628); Article 47(1) and (2) and Article 25(1) of the Act of 15 December 2000 on Self-government of Architects and Construction Engineers (consolidated text, Journal of Laws of 2023, item 551); Article 65(1) and Article 68 of the Act of 5 July 1996 on Tax Consultancies (consolidated text, Journal of Laws of 2021, item 2117); Article 90(1) and Article 100(2) of the Act of 15 September 2022 on Laboratory Medicine (consolidated text, Journal of Laws of 2023, item 2125); Article 33 and Article 46(1) and Article 46a of the Act of 19 April 1991 on Pharmacy Chambers (consolidated text, Journal of Laws of 2021, item 1850); Article 79 and Article 81 of the Act of 25 September 2015 on the Profession of a Physiotherapist (consolidated text, Journal of Laws of 2023, item 1213); Article 33 and Article 43 of the Act of 21 December 1990 on the Profession of a Veterinarian and Veterinary Chambers (consolidated text, Journal of Laws 2023, item 154); Article 55 § 1 and Article 55 of the Act of 14 February 1991 Law on Notaries Public (consolidated text, Journal of Laws of 2022, item 1799, as amended); Articles 58, 59 and 60 of the Act of 8 June 2001 on the Profession of a Psychologist and Professional Self-government of Psychologists (consolidated text, Journal of Laws of 2019, item 1026); Article 132(1) and Article 171(1)–(3) of the Act of 1 December 2022 on the Profession of a Paramedic and Self-government of Paramedics (consolidated text, Journal of Laws of 2023, item 2187); Article 53(1) and (3) of the Act of 11 April 2001 on Patent Attorneys (consolidated text, Journal of Laws of 2023, item 303).

[16] See the justification for the Bill amending Act on statutory auditors, audit firms and public oversight, and some other acts (the Sejm print No. 3481, the Sejm of the 8th term), where it is indicated that '[out of] 473 cases conducted by the National Disciplinary Prosecutor in 2017, 273 cases were completed, but 194 of them without a motion to impose a penalty (decisions on refusal to instigate a disciplinary investigation and decisions on discontinuation of a disciplinary proceeding), which constitutes 70% of cases concluded in 2017. It should be borne in mind that the National Disciplinary Court imposed disciplinary penalties banning the performance of financial audit only six times in 2017. In most cases (circa 80% of judgments), the National Disciplinary Court imposed the least severe disciplinary penalties of warnings, reprimands, and pecuniary penalties (up to twice the amount of the minimum salary, i.e., circa PLN 4,000).'

need to implement the provisions of Directive 2006/43/EC into the Polish legal system and to create a national legal framework necessary to apply Regulation (EU) 537/2014, on the other hand.[17] However, a question arises as to whether these legal acts require such action. The answer is of particular importance in the context of the ordinary legislator's discretion to shape the model of functioning of self-governments in accordance with Article 17(1) of the Constitution of the Republic of Poland and to deprive them of tasks that may be considered to be the oversight of practicing the profession. The aim of the present paper is primarily to resolve this issue. At the same time, the following research hypothesis may be formulated: neither Directive 2006/43/EC nor Regulation (EU) 537/2014 justifies granting PANA the status of an authority for proceedings in cases of disciplinary offences committed while providing assurance or related services in compliance with national professional standards; however, this is opposed by the political system conditions resulting from the provisions of the Constitution of the Republic of Poland.

STATUS OF AN AUTHORITY OF PUBLIC OVERSIGHT IN DISCIPLINARY PROCEEDINGS AGAINST STATUTORY AUDITORS IN THE LIGHT OF DIRECTIVE 2006/43/EC AND REGULATION (EU) 537/2014

With regard to statutory audits of financial reports of entities that are not public-interest ones, public oversight of statutory auditors and the role that Member States should assign to the authorities responsible for this oversight are laid down in Chapter VIII of Directive 2006/43/EC. Article 32(1) of this legal act obliges Member States to organise an effective system of public oversight. In particular, the provision obliges Member States to 'designate a competent authority responsible for this oversight'. The competent authority shall be governed by non-practitioners who are knowledgeable in the areas relevant to statutory audit and shall be selected in accordance with an independent and transparent nomination procedure (Article 32(2) of Directive 2006/43/EC).

The tasks of the audit authorities are laid down in Article 32(4) of Directive 2006/43/EC. In accordance with this provision, an authority of public oversight shall have the ultimate responsibility for the oversight of: (a) the approval and registration of statutory auditors and audit firms; (b) the adoption of standards on professional ethics, internal quality control of audit firms, auditing, and assurance of sustainability reporting, except where those standards are adopted or approved by other Member State authorities; (c) continuing education; (d) quality assurance systems; and (e) investigative and administrative disciplinary proceeding systems. The phrase 'ultimate responsibility' referred to therein does not provide grounds for

[17] Ibidem. Also see the justification for the governmental Bill amending Act on statutory auditors, audit firms and public oversight, and some other acts (the Sejm print No. 3481, the Sejm of the 8th term).

the assumption that an authority of oversight should perform all tasks independently because, by virtue of paragraph 4a,[18] Member States may delegate any of the tasks of a competent authority to other authorities and bodies designated or otherwise authorised by law to carry out such tasks.

The Regulation is particularly important for the legislations of Member States where constitutional or statutory provisions provide for a special role for a professional self-government. It is important to note that although the Directive indicates that oversight bodies should be authorised to impose penalties for the infringement of its provisions and of Regulation (EU) 537/2014, where applicable, the analysis of Article 30a unambiguously indicates that it concerns administrative and not disciplinary penalties. The provision includes: (1) a notice requiring the person responsible for the breach to cease the conduct and abstain from any repetition of that conduct in the future; (2) a public statement which indicates the person responsible and the nature of the breach, published on the website of competent authorities; (3) a temporary prohibition, of up to three years' duration, banning the statutory auditor, the audit firm or the key audit partner from carrying out statutory audits and/or signing audit reports; (4) a temporary prohibition, of up to three years' duration, banning the statutory auditor, the audit firm or the key sustainability partner from carrying out sustainability reporting and/or signing assurance reports or sustainability reports; (5) a declaration that the audit report does not meet the requirements of Article 28 of this Directive or, where applicable, Article 10 of the Regulation (EU) 537/2014; (6) a declaration that the assurance report on sustainability reporting does not meet the requirements of Article 28a of this Directive; (7) the imposition of a temporary prohibition, of up to three years' duration, banning a member of an audit firm or a member of an administrative or management body of a public-interest entity from exercising functions in audit firms or public-interest entities; (8) the imposition of administrative pecuniary sanctions on natural and legal persons.

This means that achieving the aims determined by the provisions of Directive 2006/43/EC does not require that the bodies of statutory auditors' self-government be deprived of the competence to enforce the disciplinary liability of statutory auditors. Quite the opposite, it is necessary to shape the system of supervision of the representatives of this profession and audit firms in such a way that the supervisory authority is only 'ultimately responsible' in matters of 'the systems of administrative disciplinary proceedings'. The national legislator has a wide margin of discretion in this area; nevertheless, it should take into account national conditions.

As regards Regulation (EU) 537/2014, it requires that competent authorities be independent of statutory auditors and audit firms (Article 21(1)) and have all supervisory and investigatory powers necessary for the exercise of their functions

[18] In accordance with the provision, Member States shall designate one or more competent authorities to carry out the tasks provided for in this Directive. Member States shall designate only one competent authority bearing the ultimate responsibility for the tasks referred to in this Article except for the purpose of the statutory audit of cooperatives, saving banks or similar entities, as referred to in Article 45 Directive 86/635/EEC, or a subsidiary or legal successor of a cooperative, saving bank or similar entity as referred to in Article 45 of Directive 86/635/EEC.

under this Regulation in accordance with the provisions of Chapter VII of Directive 2006/43/EC (Article 23(2)). The powers shall include at least the power to: (a) access data related to the statutory audit or other documents held by statutory auditors or audit firms in any form relevant to the carrying out of their tasks and to receive or take a copy thereof; (b) obtain information related to the statutory audit from any person; (c) carry out on-site inspections of statutory auditors or audit firms; (d) refer matters for criminal prosecution; (e) request experts to carry out verifications or investigations; (f) take the administrative measures, and impose the sanctions referred to in Article 30a of Directive 2006/43/EC (Article 23(3)). Regulation (EU) 537/2014 requires at the same time that Member States ensure that the competent authorities may exercise their supervisory and investigatory powers in any of the following ways: (a) directly; (b) in collaboration with other authorities; (c) by application to the competent judicial authorities (Article 23(4)). Regulation (EU) 537/2014 allows the Member States to delegate their tasks to other authorities or bodies designated or otherwise authorised by law to carry out such tasks, except for tasks related to the above-mentioned investigations. In fact, it is not clear whether this concerns disciplinary investigations; however, the systematisation of the Regulation analysed indicates that it pertains to proceedings related to the application of administrative measures and the imposition of sanctions referred to in Article 30a of Directive 2006/43/EC. Even if a different stance were adopted, it would only apply to statutory auditors carrying out statutory audits of public-interest entities.

In this context, it should be recognised that the requirements concerning organisation of public oversight of statutory auditors resulting from Directive 2006/43/EC do not demand that a public oversight body in matters of disciplinary offences committed by statutory auditors be assigned the role that the legislator assigned to PANA. Regarding the oversight referred to in Regulation 537/2014, such a solution could be justified at most in relation to offences committed while carrying out statutory audits of reports of public-interest entities, which does not seem, however, to be an indisputable statement. Each time, however, the national legislator must take into account national conditions.

The analysis of legal solutions adopted in other Member States of the European Union confirms the above conclusions. Regarding Directive 2006/43/EC, pursuant to Article 288 third paragraph of the TFEU,[19] they were obliged to achieve the same objective that Poland pursued by determining the role of PANA in disciplinary proceedings against statutory auditors. The report by Accountancy Europe on the organisation of public oversight in 30 European states after the implementation of the 2014 European reform of oversight[20] shows that, as of 2021, the competences of

[19] On the objective of the Directive binding Member States, see e.g. Szwarc, M., 'Warunki poprawnej implementacji dyrektyw w porządkach prawnych państw członkowskich w świetle prawa wspólnotowego', *Przegląd Prawa Egzekucyjnego*, 2001, No. 9, p. 12; Simon, D., *La Directive Européenne*, Paris, 1997, p. 3 et seq.; Kurcz, B., *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego*, Kraków, 2004, p. 46 et seq.; Kunkiel-Kryńska, A., 'Granice swobody implementacyjnej – komentarz do wyroku ETS z 25.04.2002 r. w sprawie C-183/00 González Sánchez przeciwko Medicina Asturiana SA.', *Europejski Przegląd Sądowy*, 2008, No. 10, p. 51.

[20] https://accountancyeurope.eu/wp-content/uploads/2022/12/210519-Organisation-of-the-Public-Oversight-of-the-Audit-Profession-2021-survey-update.pdf [accessed on 27 February 2024].

the supervisory authorities in the field of disciplinary proceedings varied depending on whether the offence was committed while carrying out the statutory audit of a public-interest entity in the Czech Republic, Hungary, Ireland, Italy, Latvia, Slovakia and the United Kingdom. Comprehensive disciplinary proceedings were entrusted to public supervisory bodies in Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Greece, Lithuania, Malta, and Slovenia. However, it is difficult to draw unambiguous conclusions from those circumstances. It is necessary to consider the entire legal system, which is illustrated by the following examples.

For instance, in Spain, the conduct of disciplinary proceedings against statutory auditors, also in relation to offences committed while carrying out statutory audits of entities that are not public-interest ones, was entrusted to a supervisory authority. The system of disciplinary proceedings against statutory auditors in that country is reserved to the jurisdiction of the Institute of Accounting and Auditing (Instituto de Contabilidad y Auditoría de Cuentas).[21] It should be emphasised, however, that there is no professional self-government of statutory auditors in Spain, and the tasks assigned to such self-governments, such as maintaining the register of statutory auditors and making entries in the register, are entrusted to the above-mentioned Institute (Article 46 para. 2 LAC).

The discussed issue is resolved in German law in an entirely different way. There is a professional self-government of statutory auditors, called the Chamber of Statutory Auditors (Wirtschaftsprüferkammer). Pursuant to the German Act on statutory auditors,[22] the application of disciplinary sanctions is reserved for the bodies of the Chamber of Statutory Auditors.[23] In turn, a public body of oversight (Abschlussprüferaufsichtsstelle) supervises the Chamber of Statutory Auditors, being able to participate in the meetings of its bodies and having the right to information and inspection. The auditor's supervisory body may commission the Chamber of Statutory Auditors to conduct a disciplinary proceeding. It may also participate in investigations carried out by the Chamber of Statutory Auditors (Article 66a § 3 WPO).

STATUS OF A BODY OF PUBLIC OVERSIGHT IN DISCIPLINARY PROCEEDINGS AGAINST STATUTORY AUDITORS IN THE LIGHT OF THE POLITICAL SYSTEM CONDITIONS

As indicated above, while defining the specific tasks of a body of public oversight, the national legislator has quite a wide margin of discretion. However, in making use of it, he should take into account national conditions of working in a given profession. In the Polish reality, this primarily concerns the requirements resulting

[21] See Article 46 para. 2 (f) of the Act No. 22/2015 of 20 July 2015 on audit (Spanish: ley 22/2015, de 20 de julio, de Auditoría de Cuentas), BOE-A-2015-8147, hereinafter 'LAC'.

[22] German: Wirtschaftsprüferordnung in der Fassung der Bekanntmachung vom 5. November 1975 (BGBl. I S. 2803), das zuletzt durch Artikel 4 des Gesetzes vom 17. Januar 2024 (BGBl. 2024 I Nr. 12) geändert worden ist, hereinafter 'WPO'.

[23] See Article 68(1) WPO.

from Article 17(1) of the Constitution of the Republic of Poland, in accordance with which, by means of a statute, self-governments may be created within a profession in which the public repose confidence, and such self-governments shall concern themselves with the proper practice of such professions in accordance with and for the purpose of protecting the public interest. The aim of this concern is to achieve a state in which the activities constituting the practice of a profession of public trust are performed while maintaining appropriate quality and in accordance with legal requirements.[24] Although the detailed definition of specific tasks and competence of professional self-governments rests with the legislator, his discretion to cross the borders of the concept of 'concern' is not unlimited. It is necessary that, while defining the model of a self-government functioning, the legislator retains the essence of this concept and fulfils the condition for this oversight 'in accordance with and for the purpose of protecting the public interest'.[25] The term 'concerning oneself with the proper practice of a profession' should be understood broadly.[26] It does not only mean providing support (assistance) to the self-government's members in the performance of their duties but also enforcing their liability for improper exercise of the profession.[27]

Among the tasks of professional self-governments that constitute the concept or the function of 'concern' about the proper practice of the professions in which the public repose confidence, the case law of the Constitutional Tribunal explicitly mentions the exercise of disciplinary judgements in matters of liability of persons practicing professions of public trust for conduct that infringes the law, principles of ethics, or dignity.[28] This statement seems even more justified if we take into account that the practice of public trust professions is regulated on many planes. The rules of practising the profession and particular activities that constitute it may be regulated by provisions of commonly binding law, as well as internal regulations and acts containing deontological norms established by a professional self-government. This is why the basic form of liability within the scope of compliance with professional standards established by a professional self-government is disciplinary liability, which, in accordance with Article 17(1) of the Constitution of the Republic of Poland, should be exercised by the appropriate self-government.

The above means that professional self-governments should be primarily competent to enforce disciplinary liability in matters related to standards of practising

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[24] Judgment of the Constitutional Tribunal of 18 February 2004, P 21/02, OTK-A 2004, No. 2, item 9.

[25] See the above-mentioned judgment of the Constitutional Tribunal of 14 December 2010, K 20/08, subsection III.5.1

[26] Izdebski, H., 'Sprawowanie pieczy nad należytym wykonywaniem zawodu przez samorządy zawodowe', in: *Zawody zaufania publicznego a interes publiczny – korporacyjna reglamentacja versus wolność wykonywania zawodu. Materiały z konferencji zorganizowanej przez Komisję Polityki Społecznej i Zdrowia Senatu RP przy współudziale Ministerstwa Pracy i Polityki Społecznej pod patronatem Marszałka Senatu RP Longina Pastusiaka 8 kwietnia 2002 r.*, Warszawa, 2002, p. 35.

[27] Judgment of the Constitutional Tribunal of 14 December 2010, K 20/08, OTK-A 2010, No. 10, item 129, subsection III.5.1).

[28] Cf. judgments of the Constitutional Tribunal: of 6 March 2012, K 15/08, OTK-A 2012 No. 3, item 24; of 30 November 2011, K 1/10, OTK-A 2011 No. 9, item 99; of 14 December 2010, K 20/08 (referred to above), and of 19 April 2006, K 6/06, OTK-A 2006 No. 4, item 45.

a profession. Therefore, in principle, depriving a professional self-government of the function to enforce disciplinary liability conflicts with Article 17(1) of the Constitution of the Republic of Poland. Although completely depriving a professional self-government of the possibility of enforcing liability in some disciplinary matters cannot be ruled out, it would have to be justified in constitutional terms, in particular to implement other constitutional values, which should be given priority in a given case, for example, in relation to compliance with international law binding the Republic of Poland or the law of organisations of which Poland is a member.

Assigning PANA the powers to carry out explanatory proceedings and disciplinary investigations, as well as the role of a prosecutor before a district court in cases of disciplinary offences committed while providing assurance or related services in compliance with national professional standards, as well as reserving the jurisdiction of the common courts in first-instance cases, does not seem to meet the above criteria, at least to the extent in which the services are provided to entities that are not public-interest ones. This is not determined by European Union law or other constitutional values, which should be given priority over professional self-government oversight of the proper practice of a profession of public trust.

DISCIPLINARY LIABILITY OF STATUTORY AUDITORS: A SYSTEMIC APPROACH

As mentioned above, the disciplinary liability of statutory auditors as representatives of a profession of public trust, in principle, does not constitute an exception to this type of liability of other professional groups. However, the detailed issues are completely different, in particular the role of PANA in a disciplinary proceeding in matters concerning disciplinary offences committed by a statutory auditor while providing assurance or related services in compliance with the national professional standards, and the issue of transferring such cases to a district court for adjudication.

As far as this first aspect is concerned, the solution of entrusting a specialised state authority with the powers to conduct all proceedings concerning professional liability in the majority of disciplinary cases is specific and rather unusual in other proceedings of this type. Usually, specific powers of state authorities are provided for at most. They include mainly the minister responsible for performing particular activities in the course of a proceeding (e.g., requesting that a proceeding be instigated, designating a prosecutor, gaining access to the files and requesting information), which is hosted and administered by a professional self-government body.[29]

The transfer of powers to adjudicate in the first instance in disciplinary cases to a district court shows even more distinctiveness. It is difficult to find justification for

[29] See e.g. Article 69(4) of the Act of 5 July 1996 on Tax Consultancies (consolidated text, Journal of Laws of 2021, item 2117, as amended), Article 57a and Article 58 of the Act of 14 February 1991: Law on Notaries Public (consolidated text, Journal of Laws of 2022, item 1799, as amended), Article 74(1), Article 75i(3) of the Act of 29 August 1997 on Bailiffs and Execution (consolidated text, Journal of Laws of 2018, item 1309, as amended).

such a solution. It certainly should not consist of the gravity of the examined torts. They do not seem more reprehensible or complicated than, for example, professional misconduct of physicians, prosecutors or barristers. It should be noted at the same time that one of the basic professional offences is a violation of the principles of professional ethics or national standards for practising a profession, which only partially have the status of commonly applicable legal norms (Article 139(1)(1) ASA). The former do not have the character of legal norms but are deontological ones. The latter are, to a large extent, intra-self-government standards adopted by the National Council of Statutory Auditors and approved by PANA (Article 2(23) in conjunction with Article 2(24)(b) ASA). It should be a self-government body rather than a common court that determines the content of those norms. Considerations of prevention, whether general or specific, remain irrelevant. It seems that, like in the theory of criminalisation, transferring disciplinary cases for adjudication to criminal courts should be ultima ratio if, for some specific reasons, liability before corporate authorities is recognised as insufficient.

However, even if, for some reasons, it were assumed that a court should decide cases of the disciplinary liability of statutory auditors in the first instance, it would be difficult to find convincing arguments for it to be a district court. Its subject matter jurisdiction is reserved for crimes and the most serious misdemeanours. Nonetheless, the adopted solution means that the same judicial authority responsible for resolving cases of genocide, murder, or waging an aggressive war will be adjudicating the most trivial disciplinary offences of statutory auditors referred to in Article 172 ASA.

Involving a court in disciplinary proceedings is not unprecedented or undesirable in legal systems. However, it is always justified in situations where there is interference in the sphere of particularly protected human rights and freedoms. This is noticeable, for example, in the case of imposing penalties for breach of order, detention, and bringing a witness as part of a disciplinary proceeding or an activity conducted by a court.[30] The legislator rightly assumes that the level of interference, especially in the right to personal freedom, requires the participation of an independent court and an impartial judge. There are guarantee-related reasons for this. A common solution is to entrust courts with the supervision of decisions made by bodies adjudicating in disciplinary cases,[31] as well as to exercise judicial

[30] See e.g. Article 60 of the Act of 2 December 2009 on Medical Chambers (consolidated text, Journal of Laws of 2021, item 1342, as amended); Article 53 of the Act of 19 April 1991 on Pharmacy Chambers (consolidated text, Journal of Laws of 2021, item 1850, as amended), Article 54 of the Act of 21 December 1990 on the Profession of a Veterinarian and Veterinary Chambers (consolidated text, Journal of Laws of 2023, item 154, as amended), Article 78(3) of the Act of 29ź August 1997 on Bailiffs and Execution (consolidated text, Journal of Laws 2018, item 1309, as amended).

[31] See e.g. Article 75 of the Act of 5 July 1996 on Tax Consultancies (consolidated text, Journal of Laws of 2021, item 2117, as amended), Article 124j of the Act of 24 August 1991 on the State Fire Brigade (consolidated text, Journal of laws of 2024, item 127, as amended), Article 63(2) of the Act of 27 July 2001 on Probation Officers (consolidated text, Journal of Laws of 2023, item 1095, as amended), Article 75ma of the Act of 29 August 1997 on Bailiffs and Execution (consolidated text, Journal of Laws of 2018, item 1309, as amended).

supervision of certain disciplinary cases by the Supreme Court.[32] The situation in which the entire disciplinary proceeding, from the instigation of an explanatory proceeding through the submission of a motion to impose a penalty to a final judgement on disciplinary liability, is conducted only by specialised state authorities without the representatives of a given corporation is certainly not a typical solution and conflicts with the constitutional distinctiveness of professional self-governments (Article 17 of the Constitution). In this aspect, there is little difference between the disciplinary liability of statutory auditors and criminal liability where state authorities perform the prosecuting, indicting, and adjudicating functions.

Considering the above, it is necessary to state that the hybrid structure of holding statutory auditors liable for disciplinary offences, which basically provides for two separate procedural regimes (Article 139 et seq. and Article 172 et seq.) and deprives professional self-government bodies of the ability to conduct some disciplinary proceedings, clearly differs from commonly applied normative solutions. The standard in this respect is only to limit, in justified cases, the autonomy of corporate bodies or to make their decisions subject to judicial supervision. This not only matches the idea of professional self-government but also allows for maintaining an appropriate degree of specialisation of the bodies of explanatory proceedings and ensuring the necessary distance from state authorities in this case. In turn, these authorities are not deprived of the possibility of reacting to pathological phenomena occurring within the functioning of a given professional group but on a different plane, mainly the administrative or criminal one.

De lege lata solutions concerning the disciplinary liability of statutory auditors are not only without systemic precedent but are also difficult to justify at the axiological level by referring to some kind of deontological specificity or superior values that distinguish this professional group and its activities from other professions of public trust.

At this point, it is necessary to address another systemic problem related to the need to standardise professional liability. The legislator is not fully consistent in the way disciplinary proceedings are regulated. They show fundamental differences, for example, with regard to the scope of reference to the Code of Criminal Procedure.[33] In some cases, it is full, and in others, it is limited to selected sections or provisions. This leads to some type of systemic inconsistency and fundamental differentiation of the scope of procedural guarantees in cases of the same type. Therefore, it is not groundless to call for the standardisation of the procedure of disciplinary liability. One of the ideas is to introduce a code of disciplinary procedure or a separate mode in the Code of Criminal Procedure.[34]

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[32] See Article 27a of the Act of 8 December 2017 on the Supreme Court (consolidated text, Journal of Laws of 2023, item 1093, as amended).

[33] See Kosonoga, J., in: Stefański, R.A., Zabłocki, S. (eds), *Komentarz do kodeksu postępowania karnego, t. I*, Warszawa, 2017, pp. 44–45.

[34] Czarnecki, P., 'Koncepcja kodeksu odpowiedzialności dyscyplinarnej zawodów prawniczych – założenia modelowe', in: Hofmański, P. (ed.), *Węzłowe problemy procesu karnego. Materiały konferencyjne*, Warszawa, 2010, pp. 390–394.

DE LEGE FERENDA DESIDERATA

The above considerations lead to a few fundamental conclusions. Firstly, the performance of tasks set in the provisions of Directive 2006/43/EC does not require that the bodies of the professional self-government of statutory auditors be deprived of the competence to enforce disciplinary liability for acts committed while providing assurance and related services. On the contrary, it is necessary to shape the system of supervision of the representatives of this profession and audit firms in such a way that the supervisory authority has 'ultimate responsibility' in matters of the systems of administrative disciplinary proceedings. The national legislator has quite a wide margin of discretion in this area but should take into account national conditions. With regard to supervision provided for in Regulation (EU) 537/2014, the above-mentioned exclusion of the bodies of professional self-governments could be justified at most in relation to offences committed while carrying out statutory audits of reports of public-interest entities; however, this does not seem to be an undisputed statement. Secondly, in the Polish political system, when assessing the implementation of the above-mentioned legal acts into the Polish legal order, it is necessary to take into account the fact that, based on the Constitution of the Republic of Poland, professional self-government bodies should be responsible in the first place for enforcing disciplinary liability in matters concerning the norms of professional practice. Therefore, in principle, depriving professional self-government bodies of the ability to conduct disciplinary proceedings is in conflict with Article 17(1) of the Constitution of the Republic of Poland. Although fully depriving professional self-governments of the ability to enforce liability in some disciplinary cases cannot be ruled out, it must have appropriate constitutional justification each time, and in particular implement other values that should be prioritised in a given case, for example, in relation to compliance with international law binding on the Republic of Poland or the law of an organisation of which Poland is a member. Thirdly, assigning PANA the competence to conduct explanatory proceedings and disciplinary investigations, as well as the role of a prosecutor before a district court in cases of disciplinary offences committed while providing assurance and related services in compliance with the national standards of professional practice, and reserving the jurisdiction of district courts in those cases in the first instance, does not seem to meet the above-mentioned criteria, at least to the extent that the services are provided to entities other than public-interest ones. As mentioned above, neither European Union law nor other constitutional values that should be given priority over the professional self-government's concern about the proper practice of the professions of public trust Fourthly, *de lege lata*, both the role of PANA and the adjudication of the first instance common courts in disciplinary proceedings against statutory auditors not only lack a systemic precedent but also are difficult to justify on the axiological plane by means of reference to some deontological specificity or superior values distinguishing this type of professional group and its activities compared with other professions of public trust.

Taking the above into account, it is necessary to request that explanatory proceedings and disciplinary investigations in all disciplinary cases against

auditors, or at least those that do not concern services provided to entities that are not public-interest ones, be conducted by the National Disciplinary Prosecutor and be adjudicated in the first instance by the National Disciplinary Court. The role of PANA should be limited to exercising the powers that it currently has in proceedings conducted by professional self-governments, which relate to: (1) the possibility of joining a disciplinary proceeding as a party at any stage of the proceeding; (2) the possibility of obtaining access to the files at any stage of the disciplinary proceeding, requesting the preparation and delivery of copies of the files and requesting information about the results of the proceeding, as well as requesting the provision of final judgements or decisions together with the case files; (3) the possibility of filing a complaint against a decision to terminate a disciplinary proceeding by the National Disciplinary Prosecutor, also in the event he did not join the proceeding as a party; (4) the possibility of filing an appeal against a judgement or decision to terminate a disciplinary proceeding issued by the National Disciplinary Court, also in the event it did not join the proceeding as a party. These powers should be considered fully sufficient to achieve the state required by Directive 2006/43/EC, in which a supervisory body is ultimately responsible for the disciplinary system.

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BILL ON HIGH RISK SUPPLIERS

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Abstract

The subject of this article is the introduction of cybersecurity-related regulations on the providers of infrastructure for the provision of 5G technology services into the Polish legal system. In particular, the implementation of the recommendations of the report prepared by the Network and Information System Cooperation Group entitled *Cybersecurity of 5G networks EU Toolbox of risk mitigating measures* (referred to as the 5G Toolbox). Following the recommendations of the European Commission, Poland has undertaken work on introducing regulations that would implement the provisions of the 5G Toolbox regarding high-risk suppliers. An amendment to the Act on the National Cybersecurity System of 3 July 2023 ('the Bill') has been prepared, which includes recommendations of the 5G Toolbox. The article carries out an analysis to answer the question of whether the provisions of the Bill regarding proceedings in the case of the so-called high-risk suppliers are consistent with the Constitution and basic procedural principles, and in particular whether legal guarantees have been provided for participants in the proceedings regarding high-risk suppliers. The research hypothesis is that not all proposed regulations in this area meet the previously indicated requirements. The analysis takes into account the proposed regulations regarding: proceedings concerning recognition of a supplier as a high-risk supplier; application of the provisions of the Code of Administrative Procedure in these proceedings and the content of issued decisions and remedies. Mainly the dogmatic-legal method, as well as the theoretical-legal method, is used.

Keywords: infrastructure, high-risk suppliers, cybersecurity, exclusion from deliveries

INTRODUCTION

There is a series of regulations concerning the security of telecommunications services and infrastructure in the European Union (EU). In particular, it is necessary to indicate Directive (EU) 2018/1972 of the European Parliament and of the Council

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of 11 December 2018 establishing the European Electronic Communications Code[1] (EECC) and Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act)[2] (hereinafter 'Regulation 2019/881'). The European Union also adopted documents that directly relate to the security of infrastructure and services provided in 5G networks.[3] On 26 March 2019, the European Commission (EC) adopted Commission Recommendation (EU) 2019/534 of 26 March 2019 – Cybersecurity of 5G networks (hereinafter 'Recommendation 2019/534').[4] On 9 October 2019 the Network and Information System Cooperation Group (NISCG) published a report: *EU coordinated risk assessment of the cybersecurity of 5G networks*,[5] which contains an analysis of threats to 5G networks. In November 2019, ENISA presented a catalogue of possible threats to 5G networks in its report: *ENISA Threat Landscape for 5G Networks*.[6]

On 29 January 2020, the NISCG published a report prepared in cooperation with the EC and ENISA: *Cybersecurity of 5G networks. EU Toolbox of risk mitigating measures* ('5G Toolbox').[7] The document specifies potential areas of risk in the field of cybersecurity, including the risks related to 5G infrastructure suppliers. In particular, it is necessary to indicate the provisions provided in sections: 2. *Supplier-specific vulnerabilities* and 3. *Vulnerabilities stemming from dependency to individual suppliers* (p. 42 of 5G Toolbox). In the table of risks presented on p. 35 of the 5G Toolbox, these are risks marked with symbols SM03 and SM04. They are the risks related to the provision of equipment for the construction of 5G infrastructure originating from suppliers from non-EU or NATO countries, where, for example, undemocratic influence of the government (authorities) on the manufacturers of this equipment may take place to obtain information that may be transferred in the course of providing telecommunications services with the use of this equipment in other countries, particularly in the EU. The 5G Toolbox also describes remedies that may be taken to limit identified risks. With regard to the suppliers of equipment, these remedies consist in their verification based on specified criteria, and in the event it is recognised that they pose threats, taking appropriate decisions, including the possibility of limiting the use of equipment from such suppliers that the operators already possess and limiting the purchase of equipment from such suppliers in the future. In December 2020, the EC made an impact assessment of Recommendation

1 OJ L 321, 12.12.2019, p. 36.

2 OJ L 151, 7.6.2019, p. 15.

3 5th generation of mobile phone technology – standard of cellular network that is a follower of 4G standard.

4 OJ L 88, 29.3.2019, p. 42.

5 https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6049 [accessed on 25 July 2023].

6 https://www.enisa.europa.eu/publications/enisa-threat-landscape-for-5g-networks [accessed on 30 August 2023].

7 https://digital-strategy.ec.europa.eu/en/library/cybersecurity-5g-networks-eu-toolbox-risk-mitigating-measures [accessed on 25 February 2023].

2019/534, focusing in particular on the completed stages of its implementation.[8] As a result, it was indicated in particular that there is a need to ensure convergent national approaches in the field of cybersecurity to effectively mitigate risks across the EU.[9] Similar recommendations were also prepared by the European Court of Auditors (ECA) in its report of January 2022, where it was indicated that Member States in practice adopted divergent approaches regarding the use of equipment from high-risk vendors.[10] On 15 June 2023, the NISCG published the *Second report on Member States' Progress in implementing the EU Toolbox on 5G Cybersecurity*, in which it was indicated that in case of lack of action by Member States in the field of 5G Toolbox implementation, the EC will look at further actions to enhance the resilience of the internal market, including exploring possible legislative avenues.[11]

Implementing the recommendations of the EC, ENISA and NISCG, Poland has undertaken work on implementing the provisions that are in compliance with the 5G Toolbox decisions concerning high-risk suppliers into the Polish legal system. Implementing the 5G Toolbox necessitates the introduction of entirely new regulations, previously non-existent in the Polish legal system. In legal terms, the 5G Toolbox document constitutes guidelines, similar to those issued by ENISA. Legislative work on the 5G Toolbox implementation commenced in 2020, and it was assumed that the 5G Toolbox requirements would be met by means of an amendment to the Act of 5 July 2018 on the National Cybersecurity System (hereinafter 'ANCS').[12] Altogether, 11 versions of the Bill amending the ANCS were prepared, and the last one, dated 3 July 2023, was sent to the Sejm (hereinafter 'the Bill'),[13] but the government withdrew it from further parliamentary work on 11 September 2023.

The subject matter of the article is the issue of introducing the 5G Toolbox regulations regarding high-risk suppliers into the Polish legal order, taking into account the Bill of 3 July 2023 amending the ANCS. The analysis aims to answer the question of whether the provisions in the Bill regarding proceedings in the case of the so-called high-risk suppliers are consistent with the Constitution and basic procedural principles, and in particular, whether the participants in proceedings concerning high-risk suppliers have been provided with legal guarantees. The consequences of issuing decisions in relation to those suppliers will be significant, as they will lead to the limitation of the freedom of business activities of entrepreneurs who are both suppliers and operators purchasing their equipment. The research

[8] Commission Report on the impacts of the Commission Recommendation 2019/534 of 26 March 2019 on the Cybersecurity of 5G networks, SWD(2020) 357 final, https://data.consilium.europa.eu/doc/document/ST-14354-2020-INIT/en/pdf [accessed on 14 March 2023].

[9] Joint Communication to the European Parliament and the Council, The EU's Cybersecurity Strategy for the Digital Decade, JOIN (2020)18, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52020JC0018 [accessed on 14 January 2023].

[10] *Special Report. 5G roll-out in the EU: delays in deployment of networks with security issues remaining unresolved*, https://www.eca.europa.eu/lists/ecadocuments/sr22_03/sr_security-5g-networks_en.pdf [accessed on 13 July 2023].

[11] https://digital-strategy.ec.europa.eu/en/library/second-report-member-states-progress-implementing-eu-toolbox-5g-cybersecurity, pp. 6, 22 and 24 [accessed on: 26 August 2023].

[12] Consolidated text, Journal of Laws of 2023, item 913.

[13] The Sejm print No. 3457.

hypothesis is that not all proposed regulations meet the above-mentioned requirements. The analysis takes into account the drafted regulations concerning: proceedings regarding the recognition of a supplier as a high-risk one; the application of the provisions of the Code of Administrative Procedure in such proceedings, and the content of decisions issued and means of appeal. The main methods used are the dogmatic-legal method and the theoretical-legal method.

PROCEEDINGS CONCERNING THE RECOGNITION OF A SUPPLIER AS A HIGH-RISK ONE

The key element of implementing the 5G Toolbox decisions will consist of the preparation of proceedings to be conducted in the event a supplier of equipment and software for the purpose of building telecommunications infrastructure necessary to provide telecommunications services based on 5G technology is recognised as the so-called high-risk one. The already drafted Bill amending the ANCS (Article 1(60) of the Bill) laid down a proceeding concerning a high-risk supplier in Article 66a. In accordance with Article 66a(1) of the Bill, a minister responsible for computerisation matters, in order to protect the security of the State or public safety and order, could instigate, *ex officio* or at the request of the Chair of the Committee,[14] a proceeding concerning the recognition of a supplier[15] of ICT[16] products, ICT services or ICT processes,[17] hereinafter referred to as 'a supplier of equipment or software' used by the entities indicated in the provision as 'a high-risk supplier'.

In the form proposed in the Bill, the provisions of Article 66a(1) would lead to restrictions on the freedom to conduct business activities, guaranteed not only in Article 2 of the Act of 6 March 2018: Law on Entrepreneurs,[18] but also in Article 20 of the Constitution of the Republic of Poland.[19] The application of those provisions would mean in practice that an entity being a supplier of equipment, who had been able to supply this equipment without restrictions in the past, would no longer be able to sell it after being recognised as high-risk. Under Article 66b(1) of the Bill, entities referred to in Article 66a(1) of the Bill, i.e., for example, electronic communications entrepreneurs, firstly, would not be able to put into use ICT products, services and specified processes supplied by a high-risk supplier within the scope determined in the decision, and secondly, they would have to withdraw from use the indicated ICT products, services and processes provided by a high-risk supplier within the scope

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[14] Committee within the meaning of Article 4(20) ACCA, i.e., the Committee for Cybersecurity Affairs.

[15] The term 'supplier of equipment or software' is defined in Article 2 of the Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, OJ L 218, 13.8.2008, p. 30.

[16] Information and Communications Technology.

[17] ICT within the meaning of EECC.

[18] Consolidated text, Journal of Laws of 2021, item 162, as amended.

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

covered in the decision no later than seven years from the date of the announcement of the information about the decision (Article 66a(12) of the Bill).

The justification for the Bill makes reference to Article 22 of the Constitution of the Republic of Poland, which allows for limitations on the freedom of economic activity by statute for important public reasons (p. 65 of the justification for the Bill[20] and the judgements of the Constitutional Tribunal (hereinafter 'the CT') based on Article 22 of the Constitution of the Republic of Poland, indicating that the freedom of economic activity is not absolute.[21] However, it is indicated in the doctrine and the CT judgements that in order to be justified (and thus constitutionally legal), the limitations of the freedom of economic activity established by public authorities must not only be aimed at the implementation of an important public interest but also be proportional to this interest.[22] Proportionality of established restrictions is a (mandatory) substantive condition justifying those restrictions, and public authority bodies (creating the restrictions of economic activity) have the obligation to meet this condition. This arises from Article 31(3) of the Constitution of the Republic of Poland, which states that the imposition of limitations must be 'necessary'.[23] The means to achieve a particular aim cannot be more extensive than what is necessary to achieve this aim.[24] The CT explained that the principle of proportionality must be primarily taken into account when the legislator interferes in the sphere of fundamental rights.[25] The verification of compliance with the principle of proportionality is carried out with the use of appropriate tests.[26] The general assessment of the proportionality of intervention should consider whether: (1) the measure used by the legislator can achieve the intended aims; (2) they are necessary to protect the interest to which they are related; (3) their effects are proportional to the burdens imposed on citizens;[27] (4) other alternative and less invasive means are

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[20] Justification for the Bill, p. 65.

[21] Judgment of the Constitutional Tribunal of 8 April 1998, K 10/97, Orzecznictwo Trybunału Konstytucyjnego (OTK) 1998, No. 3, item 29; judgment of the Constitutional Tribunal of 10 October 2001, K 28/01, OTK 2001, No. 7, item 212.

[22] See judgment of the CT of 25 May 2009, SK 54/08, OTK 2009, No. 5, item 69.

[23] Safjan, M., Bosek, L., *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa, 2016, Nb 102–105 to Article 22.

[24] Wronkowska, S., 'Zarys koncepcji państwa prawnego w polskiej literaturze politycznej i prawnej', in: Wronkowska, S., *Polskie dyskusje o państwie prawa*, Warszawa, 1995, p. 74. Also see judgment of the Appellate Court in Warsaw of 24 January 2017, VI ACa 1587/15, https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/vi-aca-1587-15-podstawa-kontroli-wysokosci-stawek-za-522365773 [accessed 28 August 2022].

[25] See judgment of the Constitutional Tribunal of 27 April 1999, P 7/98, Orzecznictwo Trybunału Konstytucyjnego, 1999, No. 4, item 72.

[26] Judgment of the Court of Justice of the European Union (CJEU) of 20 August 2007 in the case of *Commission v Netherlands*, C-279/05, para. 76. In judgment of 5 June 2007 in the case of *Rosengren*, C-170/04, para. 50, the CJEU indicated that: 'it is for the national authorities to demonstrate that those [national] rules are […] necessary in order to achieve the declared objective, and that that objective could not be achieved by less extensive prohibitions or restrictions.' Also see judgment of the CJEU of 11 September 2008 in the case of *Commission v Germany*, C-141/07, para. 50, and judgment of 26 June 1997 in the case of *Familiapress*, C-368/95, para. 27.

[27] See judgments of the CT of: 9 June 1998, K 28/97, OTK 1998, No. 4, item 50; 26 April 1999, K 33/98, OTK 1999, No. 4, item 71; 2 June 1999, K 34/98, OTK 1999, No. 5, item 94; 21 April 2004, K 33/03, OTK-A 2004, No. 4, item 31; 27 April 1999, P 7/98, OTK 1999, No. 4, item 72.

available; and (5) a given entity will receive compensation for the costs and losses arising as a result of the intervention.[28]

The provision of Article 66a of the Bill in the proposed form did not meet the requirement of proportionality and led to the infringement of the obligation of equal treatment of business entities.[29] It provided for the most far-reaching measure in the form of exclusion of some entities from the market without seeking any other possible solutions in accordance with the principle of proportionality. The measure cannot be recognised as necessary because there are less restrictive solutions that would achieve the intended result. A request to remove infringements or the limitation of exclusion to the supply of specified types of products or exclusion from a specific geographical area may be examples of such measures.

The regulations drafted in the future should also provide for other measures and solutions making it possible to achieve the intended goal, i.e., ensuring cybersecurity, in a different, less radical way than the exclusion of a particular entrepreneur from the market of telecommunications equipment supplies. The exclusion of a supplier should be a measure of last resort. Draftsmen should also explain in the Bill justification why and to what extent some interests, such as the freedom of economic activity, must give way to other interests, such as ensuring security. It is not sufficient to make a general reference to some threats; it is necessary to at least indicate what type of threats there are and why it is necessary to apply such far-reaching countermeasures.

APPLICATION OF THE PROVISIONS OF THE CODE OF ADMINISTRATIVE PROCEDURE IN PROCEEDINGS

Proceedings to recognise an ICT products or services supplier as a high-risk one should be conducted in accordance with the provisions of the Act of 14 June 1960: Code of Administrative Procedure[30] (CAP). The Bill stipulated in Article 66a(2) that the provisions of CAP shall be applied but with the exception of Articles 28, 31, 51, 66a, and 79 of this Act. The exclusion of these provisions raises objections. The arguments in the justification for the Bill indicating, with regard to the exclusion of Article 28 CAP, the necessity to improve the course of proceedings (p. 84 of the justification for the Bill), and with regard to the exclusion of Article 31 CAP, the issues of national security (p. 84 of the justification for the Bill) are not convincing. Participation of social organisations in the proceedings may be justified by the necessity to protect specific values, e.g., fair competition in a given market.[31] The exclusion of the

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[28] See judgment of the European Court of Human Rights (ECtHR) of 21 February 1986 in the case of *James and others v United Kingdom*, complaint No. 8793/79; judgment of the ECtHR of 22 February 2005 in the case of *Hutten-Czapska v Poland*, complaint No. 35014/97.

[29] Ciapała, J., *Konstytucyjna wolność działalności gospodarczej w Rzeczypospolitej Polskiej*, Szczecin, 2009, p. 268.

[30] Consolidated text, Journal of Laws of 2023 item 775.

[31] Cf. Adamiak, B., Borkowski, J., *Kodeks postępowania administracyjnego. Komentarz,* Warszawa, 2022, Nb 2 to Article 31.

application of Article 28 and Article 31 CAP violates the right to exercise the party's rights, as well as the right to actively participate in a proceeding concerning entities that are addressees of decisions regarding a high-risk supplier. The exclusion of the application of these provisions limits the right to fair administrative proceedings (Article 8 § 1 CAP), in particular the right to participate in a proceeding and to protect one's rights, which are guaranteed in the Constitution of the Republic of Poland.[32]

It is also necessary to draw attention to the fact that Article 66a(3) of the Bill defines a separate concept for the purpose of these proceedings. According to this provision, anyone is a party to a proceeding if a proceeding concerning the recognition of them as a high-risk supplier has been instigated. The term 'a party' defined in this way, with the exclusion of the application of Article 28 CAP, effectively means not only a limitation but an exclusion of the possibility of protecting their rights by entities that do not meet the criteria for being recognised as parties within the meaning of Article 66a(1)(1)–(3) of the Bill. A supplier against whom a proceeding has been instigated will be a party. Entities referred to in Article 66a(1)(1)–(3) of the Bill will be bound by the decision issued in the proceeding concerning the recognition of a given supplier as high-risk, but will not be parties to this proceeding. Therefore, these entities will lose the status of a party, which they would have if the provisions of CAP were applied. This conflicts with the way the legal situation of parties in an administrative proceeding is shaped.[33] Although different definitions of a party are used in the legal regulations related to particular economic sectors, it should be noted that according to the definition in Article 66a(3) of the Bill, the concept of a party is equated with the entity that becomes the subject of an instigated proceeding. Thus, in practice, only the entity that an authority conducting a proceeding has formally indicated as a party is one, i.e., it exclusively depends on the proceeding authority's decision whether an entity is going to be a party. This way, entities interested in participating in a proceeding will be deprived of the possibility of protecting their rights if a proceeding authority recognises that they are not entitled to the status of a party.

The lack of the status of a party will also influence the assessment of the legal interest of those entities according to Article 50 of the Act of 30 August 2002: Law on the proceedings before administrative courts (hereinafter 'LPAC').[34] This assessment may result in recognising lack of grounds to file a complaint to an administrative court, i.e., in depriving those entities of the right to have a matter adjudicated by a court. The right to a fair trial is recognised as an entitlement within civil law relationships[35] laid down in Article 45(1) of the Constitution of the Republic of

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[32] See judgment of the Voivodeship Administrative Court (hereinafter 'VAC') of 29 August 2019, IV SAB/Po 147/19, Centralna Baza Orzeczeń Sądów Administracyjnych (CBOSA). Also see Karpiuk, M., Krzykowski, P., Skóra, A., *Kodeks postępowania administracyjnego. Komentarz do art. 1–60*, Vol. I, Olsztyn, 2020, p. 56; Majer, T., 'Zasada ogólna współdziałania organów', in: Krzykowski, P. (ed.), *Zasady ogólne Kodeksu postępowania administracyjnego*, Olsztyn, 2017, p. 49.

[33] See judgment of the Supreme Administrative Court (hereinafter 'SAC') in Warsaw of 15 April 1993, I SA 1719/92, Orzecznictwo Sądów Polskich (OSP), 1994, issue 10, item 199.

[34] Journal of Laws 2002, No. 153, item 1270, as amended.

[35] Tuleja, P., 'Art. 45', in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2021, 2nd ed.

Poland.[36] Article 77(2) of the Constitution provides for a ban on barring the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.[37] Although access to a court proceeding may be limited,[38] it cannot be completely excluded.[39] The European Court of Human Rights explained that Article 6(1) of the European Convention on Human Rights, providing for the right to a fair trial, shall also be applied to administrative cases when they concern civil law entitlements or obligations (mostly the content or the consequences of the administration's activities concerning the property-related or economic spheres).[40] The above-mentioned provision is also applicable when a decision is not directly addressed to given entities but only influences them.[41] Such a situation occurs in the case of entities indicated in Article 66a(1)(1)–(3) of the Bill, as the decision is not addressed to them but the obligations resulting from it will apply to them.

The exclusion of the application of Article 79 CAP also raises objections, as it guarantees a party's presence during the taking of evidence.[42] In the justification for the Bill (p. 84), it is explained that the exclusion of the participation of a party in the taking of evidence is necessary due to the sensitive nature of the information used within this proceeding. Taking into account the remaining exclusions of the provisions of CAP, a party participating in the proceeding will be practically deprived of any real influence on the course of this proceeding. Even state security reasons cannot justify depriving a party of the right to defence laid down in the Constitution. Of course, in practice, there may be circumstances justifying the exclusion of disclosure of some information or activities. However, the exclusion of a party's participation in evidence-taking activities should be limited to such information or activities and should not be a general exclusion from participation in all evidence-taking activities conducted in this proceeding.

The draftsmen also provided for a regulation that at least partially aimed to solve the problem of excluding Article 28 CAP from application. Therefore, in accordance with Article 66a(4) of the Bill, proceedings may be joined, at the request, and as a party, by a telecommunications entrepreneur who, in the previous financial year, obtained revenue from telecommunications activity amounting to at least twenty-thousand-fold the average remuneration in the national economy indicated in the

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[36] Garlicki, L., Wojtyczek, K., 'Art. 77', in: Garlicki, L., Zubik, M. (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II*, Warszawa, 2016.

[37] For more see Florczak-Wątor, M., 'Art. 77', in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2021, 2nd ed.

[38] Cf. judgment of the CT of 14 November 2006, SK 41/04, OTK 2006, No. 10/A, item 150.

[39] Cf. Garlicki, L., Wojtyczek, K., 'Art. 77...', op. cit., and the CT judgments referred to therein of: 16 March 1999, SK 19/98; 14 June 1999, K 11/98; 10 May 2000, K 21/00; 15 June 2004, SK 43/03; 12 October 2004, P 22/03; 14 March 2005, K 35/04.

[40] Cf. Hofmański, P., Wróbel, A., 'Artykuł 6', in: Garlicki, L. (ed.), *Konwencja o ochronie praw człowieka i podstawowych wolności. Tom I. Komentarz do artykułów 1–18*, Warszawa, 2010, SIP Legalis, subsections 36–37 and judgments of the ECtHR referred to therein.

[41] Cf. judgment of the ECtHR of 6 April 2000 in the case of *Athanassoglou and others v. Switzerland*, complaint No. 27644/95, para. 45.

[42] See Hauser, R., Wierzbowski, M., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2023, Nb 1 to Article 79.

latest announcement of the President of the Central Statistical Office.[43] However, instead of solving the problem of the exclusion of the application of Articles 28 and 31 CAP, this proposal causes additional problems. The provision of Article 66a(4) of the Bill differentiates the legal situation of telecommunications entrepreneurs. Only the biggest players, i.e., the entrepreneurs whose revenue exceeded PLN 102 million, will be able to participate in a proceeding. The justification for the Bill indicates that only 69 telecommunications entrepreneurs exceeded the revenue of PLN 10 million, which is the limit for the need to develop a contingency plan for special threats[44] (p. 88 of the justification for the Bill). On the other hand, the report of the Office of Electronic Communications (Urząd Komunikacji Elektronicznej – UKE)[45] indicates that there were 3,900 telecommunications entrepreneurs in 2022. Thus, the vast majority of telecommunications entrepreneurs will be excluded from proceedings concerning high-risk suppliers. However, the outcome of such proceedings will affect all entrepreneurs regardless of their revenue generated from telecommunications activities, because every entrepreneur may be covered by the obligation to withdraw equipment from use regardless of the revenue obtained. Therefore, the regulations may be considered to violate the principle of equality before the law expressed in Article 32(1) of the Constitution of the Republic of Poland.[46] In the event of differentiating legal situations of entities in accordance with a specific criterion, it must fulfil a catalogue of specified conditions set out in the judgement of the CT of 28 March 2007, K 40/04.[47] Article 66a(4) of the Bill does not take into account any of the three criteria indicated in this judgement. Thus, the provisions proposed should not exclude entrepreneurs from proceedings solely based on the fact that they generate lower revenues but should enable each of them to participate in a proceeding if they are interested, because the outcome of such a proceeding will affect their rights and obligations.

CONTENT OF THE DECISIONS ISSUED AND MEANS OF APPEAL

In accordance with Article 66a(12) of the Bill, the content of the decision issued by the minister responsible for computerisation would consist of the recognition of the supplier of equipment or software as a high-risk one if this supplier posed a serious threat to defence, state security, public safety and order, or people's life and health.

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[43] Announcement of the President of the Central Statistical Office referred to in Article 20(1)(a) of the Act of 17 December 1998 on retirement and disability pensions financed from the Social Insurance Fund (Journal of Laws of 2022, items 504, 1504 and 2461).

[44] See § 2 subsection 1(1) of Regulation of the Council of Ministers of 19 August 2020 concerning a telecommunications entrepreneur's action plan in the situations of special threats (Journal of Laws 2020, item 1464).

[45] Urząd Komunikacji Elektronicznej, *Raport o stanie rynku telekomunikacyjnego za 2022 rok*, June 2023, https://bip.uke.gov.pl/download/gfx/bip/pl/defaultaktualnosci/23/78/2/uke_raport_tele_2022_2.pdf [accessed on 20 June 2024].

[46] Tuleja, P., Wróbel, W., 'Zasada równości w stanowieniu prawa', in: Rot, H. (ed.), *Demokratyczne państwo prawne (aksjologia, struktura, funkcje). Studia i szkice*, Wrocław, 1992, p. 139.

[47] OTK-A 2007, No. 3, item 33, Nb 40.

Pursuant to Article 66a(15) of the Bill, the decision was to be immediately enforceable. The enforceability of the decision could be suspended based on Article 61 § 3 LPAC, regulating the so-called interim protection in judicial-administrative proceedings,[48] which is aimed at protecting an appellant from the consequences of the decision appealed against, which may be difficult to reverse after its possible annulment by a court.[49]

In accordance with Article 66a(16) of the Bill, this decision would not be subject to a motion to re-examine the case. Therefore, it would not be possible to appeal against the decision on the recognition of a high-risk supplier in an administrative proceeding. On the other hand, under Article 78 of the Constitution of the Republic of Poland, each party shall have the right to appeal against an administrative decision issued at the first instance. It also applies to a motion to re-examine a case.[50] Although the provision of Article 78 of the Constitution of the Republic of Poland provides for exceptions, this does not mean that the legislator has unrestricted discretion to determine such exceptions, and departure from this principle must be justified by extraordinary circumstances and be in conformity with, *inter alia*, the above-mentioned principle of proportionality (Article 31(3) of the Constitution).[51]

However, the decision could be appealed to an administrative court. In accordance with Article 66d(1) of the Bill, the complaint would be heard in a closed session by a bench of three judges. The justification for the Bill explained that the provisions of Article 66d concerning the proceeding before an administrative court were *lex specialis* to LPAC, and that the provision was modelled on Article 38 of the Act of 5 August 2010 on the protection of confidential information.[52] Yet, the right to a fair trial may only be limited in accordance with Article 31(3) of the Constitution. The test of compliance with these requirements cannot be replaced by making reference to other provisions by analogy. Article 66d(1) of the Bill violated the provisions of Article 45(1) of the Constitution of the Republic of Poland, which provides for internal transparency, requiring that a party to the proceeding be provided with the right to fully participate in this proceeding.[53] It also violated Article 47 of the Charter of Fundamental Rights of the EU[54] (the Charter) and Article 6 of the European Convention on Human Rights[55] (ECHR), which guarantees that each person is entitled to a fair and public hearing by a court.

In turn, in accordance with Article 66d(2) of the Bill, a copy of the judgement with its justification was to be delivered only to the minister responsible for

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[48] Daniel, P., 'Ochrona tymczasowa w przepisach p.p.s.a. w świetle prawa unijnego', *Zeszyty Naukowe Sądownictwa Administracyjnego*, 2011, No. 5, p. 36 et seq.

[49] See ruling of the SAC of 29 May 2015, II GZ 251/15, Legalis No. 1386368; ruling of the VAC in Poznań of 25 June 2019, IV SA/Po 425/19, Legalis No. 1948826.

[50] Cf. judgment of the CT of 25 July 2013, SK 61/12, OTK-A 2013, No. 6, item 85, Nb 115.

[51] Judgment of the CT of 12 June 2002, P 13/01, OTK ZU 2002, No. 4/A, item 42.

[52] Consolidated text, Journal of Laws of 2019, item 742, as amended.

[53] See judgment of the CT of 6 December 2004, SK 29/04, OTK – A 2004, No. 11, item 114, Nb 51.

[54] OJ C 202, 7.6.2016, p. 389.

[55] Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284, as amended).

computerisation. The appellant would be delivered a copy of the judgement with only that part of its justification that did not contain confidential information within the meaning of the provisions on the protection of confidential information. Article 66a(2) second sentence of the Bill also violated the provisions of Article 45 of the Constitution and Article 6(1) of the ECHR, which guarantee everyone the right to a fair trial, because it provided for the delivery of only a part of the judgement's justification.[56] The Legislative Council was right to point out in its opinion that, in light of the constitutional right to a fair trial, a judgement of an administrative court should contain a full justification delivered to a party, because based on this justification, a party may effectively exercise its right to appeal against this judgement to a court. The Council did not deny that, in the event of a proceeding concerning the recognition of a supplier of equipment or software as a high-risk one, considerations of defence and state security (Article 31(3) of the Constitution of the Republic of Poland) are applicable. However, it expressed doubts as to whether the legal solutions used in this respect, consisting of the limitation of the party's possibility of knowing the justification for an administrative decision and an administrative court's judgement, are proportional.[57]

The principle of proportionality means shaping the content of a legal regulation in such a way that appropriate proportions are maintained between constitutional values justifying interference, on the one hand, and the degree of interference in a given constitutional right or freedom and the related burden, on the other hand.[58] There are criteria developed in the doctrine that help to assess how burdensome the means of interference are. They include the scope of the interference object and subject, spatial scope of interference, and the temporal scope of interference.[59] The CT judgements emphasise that if the scope of restrictions on a given constitutional right or freedom reaches such an extent that the basic components of that constitutional right are 'destroyed', they are 'hollowed out of their real content' and 'transformed into a pretence' of this right, the real content ('essence') of a given constitutional right is violated, which is constitutionally unacceptable.[60] This type of situation will occur in the case of a supplier who is recognised as high-risk. This entity will be deprived of legal tools enabling it to instigate second-instance supervision

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[56] See judgment of the ECtHR of 18 December 1984 in the case of *Sporrong and Lönnroth v. Sweden*, complaint No. 7151/75; judgment of the CJEU of 1 July 2008 in the case of *Chronopost SA and La Poste v. Union Française de L'express (UFEX) and others*, C 341/06 P and C-342/06 P, ECLI:EU:C:2008:375, para. 44 and 45.

[57] See paragraph 7 of the opinion of the Legislative Committee of 23 February 2021 on the amendment to Act on the National Cybersecurity System, https://www.gov.pl/web/radaleg-islacyjna/opinia-z-23-lutego-2021-r-o-projekcie-ustawy-o-zmianie-ustawy-o-krajowym-systemie-cyberbezpieczenstwa-oraz-ustawy--prawo-telekomunikacyjne [accessed on 20 October 2022].

[58] Safjan, M., Bosek, L. (eds), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa, 2016, Nb 122 to Article 31.

[59] Szydło, M., *Wolność działalności gospodarczej jako prawo podstawowe*, Bydgoszcz–Wrocław, 2011, pp. 212–216; Kijowski, D., 'Zasada adekwatności w prawie administracyjnym', *Państwo i Prawo*, 1990, No. 4, p. 62; Kijowski, D., *Pozwolenia w administracji publicznej. Studium z teorii prawa administracyjnego*, Białystok, 2000, pp. 251–252; Wojtyczek, K., *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków, 1999, p. 159.

[60] Judgment of the CT of 12 January 2000, P 11/98, OTK 2000, No. 1, item 3.

at the stage of an administrative proceeding. The Bill has limited the possibility of participating in a proceeding before an administrative court that assesses the appropriateness of the proceeding conducted. This entity has also been deprived of the possibility of knowing the full justification for an administrative court's judgement. Moreover, the Bill provided for the immediate enforceability of the decision by virtue of law. All these restrictions applied together mean that they cannot be considered consistent with the Constitution and *sensu stricto* proportional, as serving the security of the state.

CONCLUSIONS

The Bill amending the ANCS of 3 July 2023 contained provisions that could be recognised as inconsistent with the Constitution of the Republic of Poland and the basic principles of procedural law, particularly within the scope of ensuring legal guarantees for the participants in a proceeding concerning high-risk suppliers. The provisions of Article 66a(1) of the Bill provided for restrictions on the freedom to conduct economic activities, which is permitted by Article 22 of the Constitution of the Republic of Poland, provided that these restrictions are aimed at achieving an important public interest and, at the same time, are proportional to that public interest (Article 31(3) of the Constitution of the Republic of Poland). The measures used to achieve a particular objective cannot be more extensive than what is necessary to achieve this objective. However, the Bill did not provide for other alternative, less restrictive measures than, in practice, the introduction of a ban on conducting economic activities for a given entity. These measures could consist of the limitation of the requirements to specific types of products or the introduction of geographically defined restrictions. In the form proposed in the Bill, the provision of Article 66a does not meet the requirement of proportionality.

Serious objections are also raised in relation to the exclusion of Article 28, 31 and 79 CAP in proceedings concerning high-risk suppliers. The exclusion of the application of Articles 28 and 31 CAP violates the right to exercise a party's entitlements and the right to actively participate in a proceeding by parties that are addressees of a decision concerning high-risk suppliers. In turn, the exclusion of a party from evidence taking activities (Article 79 CAP) should be limited only to defined activities and should not be a general exclusion from participation in all evidence-taking activities conducted in this proceeding. As regards other exclusions of the provisions of CAP, a party participating in this proceeding will be practically deprived of real influence on the course of this proceeding.

The concept of a party defined in Article 66a(3) of the Bill, while the application of Article 28 CAP is excluded, means in practice a limitation of the protection of the rights of the parties that do not meet the requirements for being recognised as parties within the meaning of this provision, but will be bound by the decision issued in this proceeding. The entities indicated in Article 66a(1)(1)–(3) of the Bill will lose the status of a party, which they would have if the provisions of CAP were applied. Therefore, only an entity formally indicated by a body conducting

a proceeding will be a party to it, i.e., a decision on who is a party will depend solely on this body. This is in conflict with the method of shaping the legal situation of parties in an administrative proceeding.

Article 66a(2) second sentence of the Bill violates provisions of Article 45 of the Constitution of the Republic of Poland and Article 6 ECHR, which guarantee everyone the right to a fair trial, because it provides for the delivery of only a part of the judgement justification to a party. A judgement of an administrative court must contain a full justification delivered to a party, because based on this justification, a party will be able to effectively exercise the entitlement to appeal against this judgement to a court. The legal solutions used in this respect, consisting of the limitation of a possibility of knowing the actual justification of an administrative decision and an administrative court's judgement, are disproportionate.

A newly prepared version of amendments to the Act on the National Cybersecurity System, providing for regulations concerning high-risk suppliers, should eliminate the above-presented shortcomings of the Bill to ensure its compliance with the provisions of the Constitution and the basic procedural principles.

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FREEDOM OF EXPRESSION AND HATE SPEECH REGARDING THE ACTIVITIES OF PUBLIC OFFICIALS IN POLITICAL DEBATE

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Abstract

Freedom of expression has accompanied humanity for centuries. As societies have developed over the decades, it has evolved and changed. In parallel, the brutalisation of language has also progressed, leading to the emergence of hate speech. Today, hate speech is a global phenomenon, significantly impacting the speech of public figures. This is due to the fact that such statements reach a wide audience, which includes both supporters and opponents of such a person. Consequently, this leads to a wide-ranging debate where individual arguments lose relevance, overshadowed by the repetition of negative slogans and comments with hateful overtones. This article aims to delineate the boundary between freedom of expression and hate speech, highlighting the consequences associated with the use of hate speech by public figures. It seeks to prove the main thesis that hate speech in the activity of public figures is an unquestionably negative phenomenon and thus cannot benefit from the protection guaranteed under freedom of speech. Additionally, it posits that hate speech undermines the dignity of individuals and society, leads to a decline in the culture of speech, and diminishes both political and social culture. Consequently, it erodes the authority of public figures and harms the offices they hold by undermining trust in them.

Keywords: freedom of expression, hate speech, public figures

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INTRODUCTORY REMARKS

Freedom of expression, otherwise known as freedom of speech[1] in the sphere of private life, belongs to personal freedoms.[2] As Jacek Sobczak wrote, it is established for the whole society[3] but is particularly significant in the sphere of political life. Therefore, in a narrow sense, it can be described as political freedom.[4] It is a right granted to individuals, limiting the power of those who exercise authority over them, and constitutes a fundamental element of civil society.[5] As J.S. Mill wrote, '(...) protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them.'[6] For democracy, according to Mill, is not about the majority dominating but about everyone participating in the discussion, which guarantees the best decisions.[7]

Public debate is, therefore, a special arena for the exchange of views, requiring the maintenance of a culture of expression, as well as openness to accept, understand, and engage in good polemic with differing positions.[8] This paper attempts to answer whether there is a place for hate speech in the activities of public officials. Should public officials care about the authority of the institutions they represent and thus limit their form of expression to avoid hate speech due to their functions?

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[1] Florczak-Wątor, M., 'Komentarz do art. 54 Konstytucji RP', in: Tuleja, P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2019, p. 186; Sokolewicz W., *Prasa i Konstytucja*, Warszawa, 2011, pp. 66–67. Such an interpretation results from the interpretation of Article 54 of the Constitution of the Republic of Poland adopted in the doctrine, however, at the same time, the norm of this provision is the basis for the formulation of various types of allegations, including, *inter alia*, that the legislator did not use the internationally used expression – 'freedom of speech' – in the indicated provision. More on this subject, Lis, W., Husak, Z., 'Konstytucyjne podstawy wolności wypowiedzi', in: Lis, W., Husak Z. (eds), *Praktyczne aspekty wolności wypowiedzi*, Toruń, 2011, p. 114.

[2] Sadomski, J., 'Komentarz do art. 54 Konstytucji RP', in: Safjan, M., Bosek, L. (eds), *Konstytucja RP. Tom I*, Warszawa, 2016, pp. 1280–1281.

[3] Sobczak, J., 'Czy wolność słowa i wolność prasy są rzeczywiście potrzebne społeczeństwu i państwu?', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2018, Year LXXX, Issue 1, p. 133.

[4] Sarnecki, P., 'Komentarz do art. 54 Konstytucji RP', in: Garlicki, L., Zubik, M. (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2016., p. 292. It is therefore formulated in the doctrine as a mixed freedom. Thus, e.g., Sadomski, J., 'Komentarz do art. 54…', op. cit., pp. 1280–1281.

[5] Zięba-Załucka, H., 'Prawo do swobody wypowiedzi w prawie międzynarodowym i prawie polskim (na tle sporów o interes publiczny/demokratyzację polityki)', in: Skotnicki, K., Skłodowski, K., Michalak A. (eds), *Zagadnienia prawa konstytucyjnego. Polskie i zagraniczne rozwiązania ustrojowe, Księga jubileuszowa dedykowana Profesorowi Dariuszowi Góreckiemu w Siedemdziesiątą rocznicę urodzin*, Łódź, 2016, pp. 507–527.

[6] Mill, J.P., *The Essential Works of John Stuart Mill*, Lerner, M. (ed.), New York, 1961, p. 258.

[7] See, Zmierczak, M., 'John Stuart Mill o prawie wyborczym w demokracji – refleksje z perspektywy XXI wieku', *Gdańskie Studia Prawnicze*, 2012, Vol. XXVII, No. 1, p. 437 et. seq. Already at this point it must be emphasised that the formal qualification of a certain freedom as personal or political is irrelevant for the determination of its content or the differentiation of the protection afforded to it. Sarnecki, P., 'Komentarz do art. 54…', op. cit., p. 292.

[8] Sokolewicz, W., *Prasa*…, op. cit., pp. 132–133.

This article aims to delineate the boundary between freedom of expression and hate speech, as well as the consequences associated with the occurrence of hate speech in the statements of public officials. The article seeks to prove the central thesis that hate speech in the activities of public officials is an indisputably negative phenomenon and, therefore, cannot benefit from the protection guaranteed under freedom of speech. Accordingly, among the additional theses selected as part of the deliberations, it is posited that hate speech damages the dignity not only of individuals but also of society as a whole, leading to a decline in the culture of speech, political culture, and social culture. Consequently, it violates the authority of public officials and harms the dignity of the offices they hold, undermining confidence in them.

The research theses outlined thus necessitated the use of research methods, among which the dogmatic-legal method, used to present the norms of regulation in the field of freedom of expression and hate speech, and the theoretical-legal method, used to approximate the positions of science regarding the studied phenomenon, are essential.

THE ORIGINS OF FREEDOM OF EXPRESSION

Freedom of expression, or speech, as one of the fundamental human rights with a solid foundation in the values and dignity of the human person, has gained protection in various declarations and acts, including normative ones, of national and international rank. That is why it is worth going back to its origins.[9]

It should be recalled that it was not until the modern era, the Age of Enlightenment, and especially after the French Revolution in 1789, that these terms gained significant prominence. It was at this time that many 'freedom' terms were born, such as individual freedom, the justification for which can be found in the French Declaration of the Rights of Man and of the Citizen (Article 4): 'Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of society the enjoyment of the same rights. These limits can only be determined by law.'[10] This principle was also accepted in the 20th century, starting with the 1948 Universal Declaration of Human Rights, where Article 29(2) provides: 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic

[9] Drożdż, M., 'Nie ma wolności słowa bez… spojrzenie etyczne na wolność mediów i wolność słowa', in: Hofman, I., Kępa-Figura, D. (eds), *Współczesne media – wolne media?*, Vol. 1, Lublin, 2011, p. 15.

[10] Per: Smoktunowicz, E., 'Wolność jednostki', in: *Wielka Encyklopedia Prawa*, Białystok–Warszawa, 2000, p. 1152.

society.'[11] The International Covenant on Civil and Political Rights (ICCPR)[12] also enshrines this principle in its Article 19, which constitutes a comprehensive norm, defining the principle of freedom of expression and further indicating the scope of its limitations. The article reads as follows:

> '1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.'[13]

In contrast, Article 10 of the European Convention on Human Rights states that:

> '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'[14]

The norms of the provisions cited above indicate the scope of freedom of expression, while taking into account the circumstances that may limit it. The subjective scope of freedom of expression, as defined by these provisions, is enjoyed by everyone – whether natural persons, legal entities or organisational units without legal personality. The most elaborate in this respect is the norm of the ECHR provision, which identifies the circumstances that allow for the restriction of freedom of expression. I.C. Kaminski considers that, such a restriction fulfils two basic purposes. Firstly, it enables the signatory states to legitimise the interference

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[11] *Universal Declaration of Human Rights*, adopted and proclaimed by the General Assembly resolution 217 A (III) of 10 December 1948, https://www.refworld.org/legal/resolution/unga/1948/en/11563 [accessed on 3 July 2024].

[12] Comment on the pact more broadly, Taylor, P.M., *A Commentary on the International Covenant on Civil and Political Rights*. The UN Human Rights Committee's Monitoring of ICCPR Rights, Cambridge, 2020, https://www.cambridge.org/core/books/commentary-on-the-international-covenant-on-civil-and-political-rights/CC17EC9E29D73687CBE691386113C706 [accessed 3 July 2024].

[13] More broadly on this aspect of the freedom to hold and express opinions, Wieruszewski, R. (ed.), *Międzynarodowy pakt praw obywatelskich (osobistych) i politycznych. Komentarz*, Warszawa, 2012, p. 461.

[14] More broadly on Article 10 in the context of the freedom of assessment of judges, Addo, M.K., 'Are Judges Beyond Criticism Under Article 10 of the European Convention on Human Rights?', *International and Comparative Law Quarterly*, 2008, Vol. 47, No. 2, p. 425 et seq.

they carry out and, secondly, it prevents abuse of the power to restrict freedom of expression.[15]

One should also not forget the regulation of freedom of expression in the EU Charter of Fundamental Rights adopted in Nice on 7 December 2000, which states in Article 11 that: '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected.' The Charter confirms in Article 52(3) that if it contains rights corresponding to those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope are the same and there is even the possibility in the EU of more extensive protection. As A. Biłgorajski notes, 'the limit of freedom of expression and freedom of the media is human dignity recognised not only as a fundamental right but also as the actual source of all freedoms and rights enshrined in the Charter.'[16]

The regulation of freedom of expression included in the norms of documents of international and European rank allows for their clear and comprehensive interpretation. At the same time, the clarity of the acts prior to the Constitution of the Republic of Poland has become an assumption for drawing models for the constitutionalisation of freedom of expression today in Poland.

FREEDOM OF EXPRESSION IN THE DOMESTIC SYSTEM

Freedom of expression in the Constitution of the Republic of Poland is included in Article 54, which reads: 'The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.' The norm of this article indicates its subject and object scope.[17]

The former refers to every individual – a human being, irrespective of his or her nationality or independent or joint activity with other persons. The material scope, on the other hand, encompasses the whole mechanism of communication, from receiving and searching for messages to finally communicating them. Hence, freedom of expression is composed of three other freedoms, namely, the freedom to express opinions, the freedom to receive information and the freedom to disseminate information. Moreover, the indicated provision also guarantees the freedom of the media.[18] Therefore, it should be assumed that freedom of expression consists in having opinions, information, ideas, or views and communicating them to other persons. It is noteworthy, however, that these expressions may take various forms, i.e., views, opinions, information, or ideas themselves. At the same time, the scope of their protection varies. Information with objective and 'verifiable' content

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[15] Kamiński, I.C., *Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka. Analiza krytyczna*, Warszawa, 2010, pp. 28–29.

[16] Biłgorajski, A., *Granice wolności wypowiedzi. Studium konstytucyjne*, Warszawa, 2013, p. 184.

[17] Sokolewicz, W., *Prasa*…, op. cit., pp. 64–65.

[18] Sadomski, J., 'Komentarz do art. 54…', op. cit., pp. 1282–1283; Mojski, W., *Konstytucyjna ochrona wolności wypowiedzi w Polsce*, Lublin, 2014, p. 10.

remains the most protected. It is important to note that these expressions may take on various forms, from economic and social to political or artistic. The ways and forms of such communication (written, oral, symbolic) may also vary.[19]

It should be noted that this is not the only constitutional regulation related to freedom of expression in its broadest sense. Other regulations contained in the Constitution of the Republic of Poland also contribute to this concept, so a full account of freedom of speech can only be given by looking at other constitutional provisions that relate to this freedom.[20]

The key freedom in this respect is the freedom of the press, contained in Article 14 of the Constitution of the Republic of Poland,[21] which states: 'The Republic of Poland shall ensure the freedom of the press and other means of social communication.' The Constitutional Tribunal found that the relationship between these two freedoms is of a complementary nature, which manifests itself in mutual reinforcement and confirmation.[22] It is also worth noting the norm indicated in Article 49 of the Constitution, which states: 'The freedom and privacy of communication shall be ensured. Any limitations thereon may be imposed only in cases and in a manner specified by statute,' while Article 53(1) indicates that: 'Freedom of conscience and religion shall be ensured to everyone.'[23]

It is only when the above-mentioned norms are juxtaposed and understood together that it is possible to comprehensively grasp the scope of freedom of expression and thus understand the multifaceted nature of this concept, the implementation of which may manifest itself in many different areas of human activity.

However, the aforementioned differentiation occurring in national regulations cannot be perceived in the category of the displacement of one norm by another, as a broader analysis of the issue allows one to notice that in practice these norms complement each other, creating a comprehensive regulation.[24] The fundamental norm, constituting the basis for further, narrower regulations, should be perceived as the one indicated in Article 54 of the Constitution.[25] As Artur Biłgorajski postulates:

> 'Such qualification of the freedom to express one's opinions and to obtain and disseminate information should be interpreted as recognition of them as fundamental aspects of human

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[19] Braciak, J., 'Wolność słowa w Polsce', *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji*, 1997, No. 37, p. 49; Mrozek, J.J., 'Rozważania prawne wokół pojęcia "wolność słowa"', *Media – Kultura – Komunikacja Społeczna*, 2012, No. 8, p. 158; Kalisz, A., 'Rozwiązywanie kolizji norm i zasad w kontekście praw człowieka. Uwagi teoretycznoprawne', in: Biłgorajski, A. (ed.), *Wolność wypowiedzi versus wolność religijna. Studium z zakresu prawa konstytucyjnego, karnego i cywilnego*, Warszawa, 2015, pp. 10–11.

[20] The Constitutional Tribunal expressed itself more broadly in this regard in its judgment of 14 December 2011, SK 42/09, OTK-A 2011, No. 10, item 118.

[21] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78 item 483, hereinafter 'the Constitution'.

[22] Judgment of the Constitutional Tribunal of 1 May 2008, SK 43/05 OTK-A 2008, No. 4, item 57.

[23] Sarnecki, P., 'Komentarz do art. 54…', op. cit., pp. 289–290.

[24] Sobczak, J., 'Wolność badań naukowych – standardy europejskie i rzeczywistość polska', *Nauka i Szkolnictwo Wyższe*, 2007, No. 2, p. 57.

[25] See Mrozek, K., *Mowa nienawiści w działalności osób publicznych* (master's dissertation, unpublished), Rzeszów, 2016.

existence, through which the very nature of man manifests itself, and which are most closely related to this nature. This implies a statement of a particularly close connection between the freedoms in question and human dignity, which the Constitution treats as inherent, inalienable, and inviolable.'[26]

Concluding this part of the deliberations, one should also notice the fact that the protection of freedom of speech is influenced not only by the norm of Article 54 of the Constitution of the Republic of Poland, but also by the principle of freedom contained in Article 31(1) and (2) of the Constitution. This is a specific principle, as it has the nature of a constitutional function, but also the function of a principle of the system of rights and freedoms of the individual and an autonomous subjective right, which makes it a specific background for the understanding and application of the constitutional provisions. Article 31 thus constitutes, in a way, a point of departure for further deliberations on specific constitutional freedoms, including the freedom of speech.[27]

LIMITS OF THE CONSTITUTIONALLY GUARANTEED FREEDOM OF EXPRESSION

In view of the above, it is worth asking whether each and every utterance presenting a position taken in a discussion, regardless of the form in which it is formulated, falls within the limits of the constitutionally guaranteed freedom of speech?[28] The possibility of free speech, like other constitutional freedom rights, is not unlimited. To assume otherwise would oppose the principles of democracy and lead to the deprivation of due protection of democratic values such as state security, territorial integrity or public safety, order, health and morality, the good name and rights of others, the solemnity and impartiality of judicial authority and the prevention of the disclosure of confidential information.[29]

Simplifying, it can also be assumed that this is a result of the development of society, as this has made the problem of the abuse of this freedom topical. Therefore, it is nowadays indisputable that not every communication benefits from the protection guaranteed by the freedom of expression.[30] Restrictions on this freedom apply to

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[26] Biłgorajski, A., *Granice wolności wypowiedzi...*, op. cit., p. 187.

[27] Garlicki, L., Wojtyczek, K., 'Komentarz do art. 31 Konstytucji RP', in: Garlicki, L., Zubik, M. (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2016, p. 61.

[28] It is worth adding that artistic expression is also protected under freedom of expression as a specific form of expression protected under the general regime of protecting freedom of expression. Górski, M., *Swoboda wypowiedzi artystycznej. Standardy międzynarodowe i krajowe*, Warszawa, 2019, p. 228.

[29] Sokolewicz, W., *Prasa*…, op. cit., p. 229 et seq.; Chorążewska, A., Greń, W., 'Granice wolności wypowiedzi księdza rzymskokatolickiego z perspektywy prawa kanonicznego w świetle zasad ustroju Konstytucji Rzeczypospolitej Polskiej', in: Biłgorajski, A. (ed.), *Wolność wypowiedzi versus wolność religijna. Studium z zakresu prawa konstytucyjnego, karnego i cywilnego*, Warszawa, 2015, p. 258.

[30] Ciepły, F., 'Penalizacja mowy nienawiści – kontekst polityczny i normatywny', in: Blicharz, G., Delijewski, M. (eds), *Wolność słowa. Współczesne wyzwania w perspektywie prawnoporów-*

almost every sphere of life. 'There is no absolute principle of freedom of expression in any democratic state and restrictions in spheres such as national security, public order, health or public morals, state secrecy or respect for the rights of others are widely accepted.'[31] This freedom is therefore subject to restrictions contained in the Basic Law as well as in ordinary laws. In the first place, it is subject to the operation of the general limiting clause contained in Article 31(3) of the Constitution, and in this context, the norm of this provision constitutes a kind of complement to the provision of Article 54(1) of the Constitution. Thus, the Constitutional Tribunal is compelled to treat both norms jointly, even in even in situations where the applicant has not raised Article 31(1) of the Constitution as the standard of control.[32] Therefore, freedom of expression may be restricted, but only on the basis of a statute and only when it is 'necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or the freedoms and rights of others. Such limitations shall not impair the essence of the freedoms and rights.'[33]

At the same time, while in extreme cases it is not difficult to exclude a given speech from protection, the real challenge is to draw a line defining which speech is acceptable within the framework of freedom of speech and which speech, due to its content and form of expression, does not enjoy constitutional protection.[34] Thus, we may pose a question: is it even possible to draw such a line without examining the circumstances of the case and the context of the speech in each instance? The answer to the above question is negative, but this task is all the more difficult because there is no statutory definition of the concept of hate speech, which unquestionably infringes this freedom and whose status regularly stirs up heated debates in the political environment as well as in society as a whole.[35] However, the legal norms contained in the provisions of various branches of the law, above all criminal law, whose content makes it possible to clarify the scope of hate speech, may be helpful in determining this boundary.

THE ESSENCE OF HATE SPEECH

The claims formulated above necessitate an explanation of what hate speech is. At the outset, it is important to recognise that hate speech is a multifaceted phenomenon. Therefore, we can discuss hate speech in the context of freedom of

nawczej, Warszawa, 2019, p. 406.

31 Biłgorajski, A., *Granice wolności wypowiedzi...*, op. cit., p. 187.

32 Sadomski, J., 'Komentarz do art. 54…', op. cit., p. 1288. See also judgment of the Constitutional Tribunal of 30 October 2008, P 10/06, OTK-A 2006, No 9, item 128.

33 As an aside, it should also be noted that there is a possibility of suspension of this freedom based on Article 233(1) of the Constitution of the Republic of Poland provided for by the legislator during martial law and state of emergency. More extensively in this regard, Sadomski, J., 'Komentarz do art. 54…', op. cit., p. 1289.

34 Ciepły, F., 'Penalizacja…', op. cit., p. 406.

35 More on this topic, Śledzińska-Simon, A., 'Decyzja ramowa w sprawie zwalczania pewnych form i przejawów rasizmu i ksenofobii jako trudny kompromis wobec mowy nienawiści w unii Europejskiej', in: Wieruszewski, R. et al. (eds), *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne*, Warszawa, 2010, pp. 94–95.

speech from a legal perspective[36] – then this phenomenon can be described using criminal law, constitutional law, civil law,[37] human rights protection, and even administrative law[38] or labour law. Hate speech can also be observed in cultural, political, linguistic, pedagogical, or sociological research. Interestingly, each of these discourses differs from the others in terms of research perspectives, methodological tools, and language used. However, it remains important that there is currently no statutory definition of hate speech.[39] The offence commonly referred to by this name is mainly reconstructed from the provisions of the Criminal Code ('CC'):

1. Article 119 § 1 CC concerning the use of criminal threats based on race, national or ethnic origin, religion or irreligion and political affiliation;
2. Article 256 § 1 CC concerning public incitement to hatred on grounds of race, national or ethnic origin, religion, or irreligion;
3. Article 256 § 2 1 CC criminalising dissemination and other unlawful use of an object containing content propagating totalitarianism or incitement to hatred;
4. Article 257 CC concerning public insult on account of the above characteristics.[40]

Importantly, these are not the only norms referring to hate speech. References to it can be found in further articles concerning public incitement to a crime or praising a crime (Article 255 CC), criminal threat (Article 190 CC), persistent harassment (Article 190a CC), use of an unlawful threat to force another person to a specific action, omission, or suppression (Article 191 CC), defamation (Article 212 CC), insult (Article 216 CC), incitement to commit a crime (Article 18 § 2 CC), public incitement to initiate a war of aggression and praising the initiation or conduct of such a war (Article 117 § 3 CC), public incitement to or praise of genocide, certain crimes against humanity, or war crimes (Article 126a CC), public insult of the Nation or the Republic of Poland (Article 133 CC), public insult of the President of the Republic of Poland (Article 135 CC), public slander or insult of a constitutional organ of the Republic of Poland (Article 226 CC), public insult of a representative of another state (Article 136 §§ 3–4 CC), public insult of Polish and foreign state symbols (Article 137 CC), insult of a monument (Article 261 CC), insult of a corpse, ashes, or a grave, and insult of religious feelings (Article 196 CC).[41]

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[36] Giełda, M., 'Godność człowieka w otoczeniu administracji publicznej – wybrane zagadnienia', *Przegląd Prawa i Administracji*, 2017, No. 3802, p. 53 et seq. More extensively in this regard is expressed by F. Ciepły, cf. Ciepły, F., 'Penalizacja…', op. cit., p. 404 et seq.

[37] On the civil law aspects of protection against hate speech, see in more detail, Pałka, K., Kućka, M., 'Ochrona przed mową nienawiści – powództwo cywilne czy akt oskarżenia?', in: Wieruszewski, R. et al. (eds), *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne*, Warszawa, 2010, pp. 42–54.

[38] On the administrative-legal instruments for combating hate speech, see in more detail, Krotoszyński, M., 'Trzecia droga: środki administracyjne w zwalczaniu mowy nienawiści', in: Wieruszewski, R. et al. (eds), *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne*, Warszawa, 2010, pp. 114–127.

[39] Rogalska, E., Urbańczyk, M., 'Złożoność zjawiska mowy nienawiści w pozaprawnym aspekcie definicyjnym', *Studia nad Autorytaryzmem i Totalitaryzmem*, 2017, No. 2, p. 117 et seq.

[40] Cf. Ciepły, F., 'Penalizacja…', op. cit., p. 428; Starzewski, Ł., 'Jak walczyć z mową nienawiści. 20 rekomendacji RPO dla premiera', *Biuletyn Informacji Publicznej RPO*, 21 February 2019, https://bip.brpo.gov.pl/pl/content/jak-walczyc-z-mowa-nienawisci-20-rekomendacji-rpo-dla-premiera [accessed on 20 March 2023].

[41] Ciepły, F., 'Penalizacja…', op. cit., p. 430.

It should be noted, however, that the offences of insult set out in Article 216 CC and defamation contained in Article 212 CC differ from the offences cited above, as they are of a private-argument nature.[42] Also provisions of the Civil Code concerning protection of personal rights, i.e., Article 24 in conjunction with Article 23 of the Civil Code,[43] will have a private prosecutorial character in the fight against hate speech, together with Article 448 of the Civil Code.[44] It is also worth noting the fact that hate speech in the broader sense includes other types of acts such as the dissemination of untrue electoral materials (Article 111 § 1(3), Article 111 § 4–5a), contained in the Election Code.[45]

The legislator's undertaking to combat hate speech through provisions of many branches of law has resulted in the gap caused by the lack of a statutory definition being filled by academia.[46] Krzysztof Gorazdowski states that hate speech 'consists in the use of speech to promote, justify, or even glorify racial hatred, xenophobia, anti-Semitism, and the spread of other forms of intolerance that undermine democracy, security, or pluralism.'[47] J. Sobczak points out that hate speech 'may take the form of oral, written, visual communication, also of a symbolic nature'.[48] In the opinion of Sergiusz Kowalski and Magdalena Tulli, it includes statements aimed at mocking or humiliating an individual or a group for reasons 'at least partly beyond their control'.[49] At the same time, it is important to note that the target of hate speech is always a collective, even when the addressee appears to be an individual.[50]

Even a cursory glance at the problem of hate speech reveals how controversial and wide-ranging a phenomenon it is.[51] This controversial character necessitates not only discussion but also the work of state bodies, including the legislator, in this area. Therefore, the first issue on which the legislator should reflect is the formulation of a definition of hate speech. It is worth considering, following Adam Bodnar, whether the definition proposed in Recommendation No. R 97 (20) of 30 October 1997 of the Committee of Ministers of the Council of Europe should serve as inspiration. As this

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[42] Kujawa, D., 'Złożoność i niejednoznaczność mowy nienawiści', *Refleksje*, 2018, No. 17, p. 65 et seq.

[43] The doctrine distinguishes two aspects of human honour: the internal aspect denoting personal dignity, i.e., a person's idea of his or her own worth and expectation of respect from other people, and the external aspect. This, in turn, determines the good reputation, the good opinion of other people, the respect that the environment bestows on a person – in relation to the various spheres of human life: personal, professional and social, Pazdan, M., 'Dobra osobiste', in: Pietrzykowski, K. (ed.), *Kodeks cywilny. T. 1. Komentarz do art. 1–44910*, Legalis 2015, Article 23, p. 1121.

[44] Act of 23 April 1964 – Civil Code, Journal of Laws of 1964, No. 16, item 94, as amended.

[45] Act of 5 January 2011 – Election Code, Journal of Laws of 2022, item 1277. Banaszak, B. (updated by Michalska, J.), *Kodeks wyborczy. Komentarz*, Warszawa, 2018, p. 228.

[46] See more, Rogalska, E., Urbańczyk, M., 'Złożoność zjawiska mowy nienawiści…', op. cit., p. 117 et seq.

[47] Gorazdowski, K., 'Próba oceny karnoprawnych regulacji zwalczania mowy nienawiści w Polsce', *Studia Administracji i Bezpieczeństwa*, 2019, No. 6, p. 95.

[48] Sobczak, J., 'Język nienawiści w kampaniach wyborczych', *Przegląd Wyborczy. Biuletyn informacyjny*, 2017, No. 4–6, p. 48.

[49] Kowalski, S., Tulli, M., *Mowa nienawiści. Raport 2001*, akapit pierwszy, http://or.icm.edu.pl/monitoring3.htm [accessed on 20 March 2023].

[50] Pałka, K., Kućka, M., 'Ochrona przed mową nienawiści…', op. cit., p. 42.

[51] Rogalska, E., Urbańczyk, M., 'Złożoność zjawiska mowy nienawiści…', op. cit., p. 119 et seq.

author aptly notes, hate speech 'should be considered any form of expression that disseminates, incites, promotes, or justifies racial hatred, xenophobia, anti-Semitism, or other forms of hatred based on intolerance, including intolerance expressed in the form of aggressive nationalism or ethnocentrism, discrimination or hostility towards minorities or persons from immigrant communities.'[52]

HATE SPEECH AND DIGNITY

Reflections on freedom of expression and hate speech in the activities of public officials force the question of dignity to be asked: is there still a place for it? In answering such a question, it should be pointed out that the applicable constitutional and statutory provisions use the concept of dignity in various contexts.[53] Firstly, with reference to human beings, Article 30 of the Constitution states: 'The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.'[54]

Secondly, the legislator also considers it a special attribute, a desirable value characterising various subjects: the nation, the chambers of parliament, the individual, as well as persons occupying certain high public functions or associated with public institutions, who should enjoy public confidence. These heightened requirements are intended to form the basis of a person's authority, which serves to increase the respect of institutions and individuals in public activities.[55] The Constitution itself repeatedly refers to the dignity of the office and institution, e.g., in Articles 205(3), 209(3), 214(2) of the Constitution. The provisions prohibit judges of the Constitutional Tribunal (Article 195(3)), the President of the Supreme Audit Office, the Ombudsman, and members of the National Broadcasting Council from conducting activities that are incompatible with the dignity of the offices they hold. Among other provisions that use the concept of dignity, it is also worth quoting the provisions of parliamentary regulations. The current Regulations of the Sejm impose on the Speaker of the Sejm the duty to 'uphold the rights, dignity and solemnity

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[52] Starzewski, Ł., 'Jak walczyć z mową nienawiści…', op. cit.

[53] More on the essence of dignity, Wierzuszewski, R, 'Rola i znaczenie Karty Praw Podstawowych Unii Europejskiej dla ochrony praw człowieka', *Przegląd Sejmowy*, 2008, No. 2, p. 41 et seq.; Wawrzyniak J., *Etyka eutanazji. Studium filozoficzno-aksjolingwistyczne*, Poznań, 2015; Wawrzyniak, J., *Teoretyczne podstawy neonaturalistycznej bioetyki środowiskowej*. Poznań, 2000; Michalska-Sieniawska, D., 'Godność człowieka w obliczu medykazacji życia', in: Bieńkowska, D., Kozłowski, R. (eds), *Prawa człowieka i zrównoważony rozwój. Konwergencja czy dywergencja idei i polityki*, Warszawa, 2020, pp. 68–69.

[54] In doing so, it is important to bear in mind the fact that, as R. Wieruszewski highlighted in his works, 'Human rights and freedoms are only affirmed in the Constitution, not bestowed.' Cf. Wieruszewski, R., 'O pojmowaniu wolności i praw człowieka. Ani utopia, ani fikcja prawna', *Rzeczpospolita*, 6 November 2002. More on the relationship between dignity and privacy, Fleszer, D., 'Godność i prywatność osoby w świetle Konstytucji Rzeczypospolitej Polskiej', *Roczniki Administracji i Prawa*, 2015, No. XV(1), pp. 19–30.

[55] Laskowski, M., *Uchybienie godności urzędu sędziego, jako podstawa odpowiedzialności dyscyplinarnej*, Warszawa, 2019, p. 57 et seq., p. 170 et seq.

of the Sejm' (Article 10(1)(1) of the Regulations of the Sejm). An analogous duty is imposed on the Speaker of the Senate. The regulations prohibit the holders of these offices from behaving in an undignified manner in public activities, which means, in the case of hate speech, that there is no full legal protection. It can be noted that the legislator considers dignity to be a specific attribute, a value that is associated with public officials who should enjoy public trust. Elevated requirements are to constitute the basis of a person's authority and, thus, the activity of public authority.[56]

The activity of public officials should, therefore, be characterised by far-reaching restraint, relating to both the forms of their public involvement and the content thereof. This includes any manifestation of public activities that could undermine confidence in their impartiality.[57] Thus, every public official in a political debate should be guided, in the first instance, by not violating the dignity of another person, including, above all, a political opponent, setting an example, as it were, to the public. It is not possible to maintain the dignity of an office without disgracing it when, being a public functionary, one violates the dignity of others (not only politicians). For example, an MP in his or her public service should be guided by generally accepted ethical principles and respect the dignity of others, in which the Sejm's Committee on Parliamentary Ethics should assist. Indeed, this is the body in parliament that plays a leading role in countering hate speech.[58]

It is also worth noting that the lack of decisive action against hate speech has resulted and will continue to result in a further deepening of this phenomenon. In one of his recommendations in 2019, the former Ombudsman Adam Bodnar acknowledged another threat related to hate speech, namely the brutalisation of language.[59] This manifests itself in a dangerous tendency to abandon dialogue in favour of extreme radical opinions based on negative emotions. Hence, their selection is not accidental, as they are intended to evoke in the average viewer a feeling of hostility or hatred towards persons or views described as different or alien. Such a state of affairs means that, for a large section of society, the dignity of another human being no longer constitutes a specific limit to freedom of expression. Hence, the only appropriate response to hate speech and the associated threats to a democratic and pluralistic society is to build a comprehensive strategy to counter hate speech in public spaces. In this aspect, a comprehensive, external analysis of the activities of the Committee on Parliamentary Ethics regarding the response to hate speech in, for example, the Sejm or the Senate, could be helpful.[60]

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[56] Gorlewska, E., 'Profile pojęcia "godność" w Konstytucji Rzeczypospolitej Polskiej', in: Sokólska, U. (ed.), *Socjolekt, idiolekt, idiostyl*, Białystok, 2017; https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/8062/1/E_Gorlewska_Profile_pojecia_godnosc.pdf [accessed on 17 May 2024].

[57] A negative example in this respect can be seen in the bipartisan statements of the Supreme Court judges quoted in the article: Adamski, M., 'Zmiany w SN: "Szlag mnie trafia". Małgorzata Manowska oburzona komentarzem', *Rzeczpospolita*, 28 July 2022, https://www.rp.pl/sady-i-trybunaly/art36772921-zmiany-w-sn-szlag-mnie-trafia-malgorzata-manowska-oburzona-komentarzem [accessed on 8 August 2022].

[58] Starzewski, Ł., 'Jak walczyć z mową nienawiści…', op. cit.

[59] For more on the brutalisation of language, see also, Bralczyk, J., *Brutalizacja języka publicznego*, https://docplayer.pl/27357918-Brutalizacja-jezyka-publicznego.html [accessed on 8 August 2022].

[60] Starzewski, Ł., 'Jak walczyć z mową nienawiści…', op. cit.

HATE SPEECH AND FREEDOM OF EXPRESSION IN PRACTICE

In view of these considerations it seems that, due to the existence of restrictions on the exercise of freedom of expression, hate speech will not be subject to legal protection to any extent. This is because, if speech embodies any of the prerequisites allowing the restriction of freedom of expression, it loses legal protection. This interpretation, which could be considered right and reasonable, is, however, hindered by the findings of Recommendation R (97) 20 of 30 October 1997 of the Committee of Ministers of the Council of Europe on hate speech, according to which a restrictive approach to interference with freedom of expression, including in the context of hate speech, is recommended to the Member States of the Council of Europe. An analysis of the content of principle four of this recommendation shows that only 'specific instances' of hate speech do not benefit from protection, within the framework of freedom of expression. In other words, not every case of hate speech will be deprived of protection under freedom of expression, but only those instances which are of a 'specific' nature should be deprived of protection.[61] It is, however, difficult to develop uniform rules indicating which instances of hate speech will be considered of a specific nature and which should be denied such a designation.

A later document of the Council of Europe, Resolution 1510 of 2006, presented a different position on this issue, effectively removing the protection granted to hate speech. This document addressed the issue of freedom of expression and respect for religious beliefs. On the one hand, it pointed out that freedom of expression should no longer be restricted to meet increasing sensitivities of certain religious groups (paragraph 12). However, at the same time, this paragraph emphasises that that hate speech against any religious group is not compatible with the fundamental rights guaranteed by the ECHR. Thus, the resolution places this form of expression in the context of Article 17 ECHR.[62]

Public debate is, therefore, a place where two opposing values clash – on the one hand, there is political culture – the need to maintain appropriate, high standards in political debate, expressing one's own position while respecting the opinion of others and human dignity itself. On the other hand, there is the freedom of expression – the bluntness of the expressions used to convey a divergent, disapproving, or even scandalous position in the most appropriate and powerful way. Drawing the borderline between these phenomena is extremely difficult, as it is impossible to indicate unequivocally – in isolation from a given case – how far one can go in expressing one's own viewpoint while maintaining an appropriate standard of political culture. It should be noted that public expression is a value which is appreciated and recognised both by national jurisprudence and by the case-law of the European Court of Human Rights, since it constitutes the basis for the exchange of information in a democratic society, and the very fact of granting the status of public expression to messages of various content and form implements

[61] Jaskuła, L.K., 'Wolność działalności dziennikarskiej w perspektywie zjawiska mowy nienawiści (wybrane aspekty prawne)', in: Lis, W. (ed.), *Status prawny dziennikarza*, Warszawa, 2014, pp. 325–326.

[62] Kamiński, I.C., *Ograniczenia swobody wypowiedzi*..., op. cit., p. 414.

the principle of the right to information as a right of society as a whole.[63] However, when compared to the case law of the ECtHR, the position of national courts is much more restrictive with regard to the construction of public utterances, as it pays considerable attention to the acceptable shape, form, as well as the manner of expression of the utterance, pointing out the essence of social interest, including the protection of the audience from possible hate speech.

Indeed, the Supreme Court has taken the position that the right to criticism must not degenerate into the formulation of invectives and slander.[64] This principle had already been highlighted in a Supreme Court judgment in which it was stated:

> 'A person holding a public function is exposed – which is a natural phenomenon in any democratic state – to the exposure of his actions to public scrutiny and must expect criticism of his conduct, which is socially useful and desirable if it is undertaken in the public interest and has the characteristics of fairness and factuality – and at the same time does not exceed the limits necessary to achieve the social purpose of the criticism. These limits cannot be drawn generally, as they are determined by the unique circumstances of the particular case'.[65]

This thesis points to the need for a balance, an appropriate balance between the criticism – which should have the characteristics of constructiveness, and factuality, without insulting the addressee, and with the contribution of value to the discussion – and the form of this communication, within the limits of the moral norms in force. Thus, J. Taczkowska correctly observes that in domestic case-law, public expression is a narrower concept than in the position adopted by the ECtHR. It may not be characterised by arbitrariness of form and content; on the contrary, it should have informative value. Hence, public utterance is included in the framework of 'information about public matters.' The dispute between the position of the ECtHR and the position expressed in national case law is, in a way, a dispute about quality.[66] At this point, it is worth noting the standards relating to the protection of the honour of persons who are participants in public debate. The subjective differentiation of the scope of protection of honour, especially of the good name, is advocated both in doctrine and in case law and is particularly relevant to persons engaged in public activities. The scope of the protection of honour vested in public officials is, as a rule, narrower than the analogous scope of the protection of honour vested in private persons.[67] Such a solution also indicates the relative character of the protection of personal rights, even though the protection itself is based on the construction of an absolute subjective right.[68] The source of the narrowing of

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[63] Taczkowska, J., *Kategorie wypowiedzi i ich ochrona*, Warszawa–Poznań, 2008, p. 120.

[64] Order of the Supreme Court of 10 December 2003, V KK 195/03, OSNKW 2004, Vol. 3, item 25.

[65] Judgment of the Supreme Court of 28 September 2000, V KKN 171/98, OSNKW 2001, Vol. 3–4, item 31.

[66] Taczkowska, J., *Kategorie wypowiedzi*…, op. cit., p. 121.

[67] Sadomski, J., 'Ochrona czci uczestników debaty publicznej', in: Balcarczyk, J. (ed.), *Dobra osobiste XXI wieku. Nowe wartości, zasady, technologie*, Warszawa, 2012, p. 182.

[68] Cisek, A., 'Ochrona dóbr osobistych osób sprawujących funkcje publiczne', in: Machnikowski, P. (ed.), *Prace z prawa cywilnego dla uczczenia pamięci profesora Jana Kosika*, Wrocław, 2009, p. 33.

the protection of the honour of public officials is to be found in the legitimate public interest in this matter. According to the view expressed by the Supreme Court, the activities of public officials have an impact on the shaping of public life, and this justifies the interest of the public in the activities they carry out. Therefore, the level of permissible criticism in relation to such persons is broader, and the protection granted is less, than in the case of private persons.[69] Furthermore, in other rulings, the Supreme Court has emphasised the fact that public officials, due to the specific activities they carry out, must expect harsher criticism of their conduct and are exposed to stronger interference in the sphere of private life.[70] An analogous view on this issue has been expressed by the Constitutional Court. Indeed, it would be paradoxical if persons taking part in a public debate and resorting to hate speech simultaneously invoked the protection of their honour and good name.[71]

CONCLUSION

To summarise the above considerations, it should be stated that hate speech is extremely often used to pursue and carry out harsh, critical discussion and is motivated primarily by striking at a person's dignity. However, this 'striking at the dignity of a person' is apparent because hate speech is directed against society as a whole, public order, and the value system of a democratic society based on the rule of law. Hence, the conflict of public officials cannot be perceived and viewed solely in the category of a two-person dispute between the individuals concerned, as there is an important public law aspect to it.[72]

It cannot be denied that statements characterised by hatred do not have a positive impact on the shape of public debate and political culture in Poland. Therefore, they should be eliminated, or reduced to a minimum. Although the above assumption is commonly accepted, it is also common knowledge that it is impossible to completely exclude them from public life because, in practice, they have a significant influence on the shape of political life. Consequently, it should also come as no surprise that public officials use it as a kind of 'weapon' against their political opponents. However, the most dangerous practice is the demonisation of those with whom we disagree, because then politics, instead of being cooperation for the common good, becomes a fight against political opponents who deserve only contempt. Hate speech is therefore the source of a certain paradox, as a result of which society, instead of trusting its elected representatives as much as possible, disregards their statements. This is facilitated by the instruments of modern communication

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[69] Resolution by a panel of 7 Supreme Court judges of 18 February 2005, III CZP 53/04, OSNC 2005, No. 7–8, item 114.

[70] The Supreme Court judgment of 24 January 2008, I CSK 338/07; the Supreme Court judgment of 8 February 2008, I CSK 347/07.

[71] Judgment of the Constitutional Court of 5 March 2003, K 7/01, OTK-A 2003, No. 3, item 19.

[72] Orban, E., 'Regulacja prawna mowy nienawiści i przyczyny przestępstw z nienawiści', in: Blicharz, G., Delijewski, M. (eds), *Wolność słowa. Współczesne wyzwania w perspektywie prawnoporównawczej*, Warszawa, 2019, p. 289.

(e.g., portals), in which various unflattering statements by politicians are often disseminated despite the passage of years.[73]

There are many reasons for this situation. Among them are allegations of inadequate education of public officials, lack of skills in political and public debate, low level of personal culture of public officials, or more general ones, such as the brutalisation of language. However, it remains to be hoped that hate speech, because of the sanity of public officers, will be marginalised.

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[73] Sadomski, J., 'Ochrona czci uczestników…', op. cit., p. 101.

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TERMINATION OF EMPLOYMENT RELATIONSHIP IN UNIFORMED SERVICES IN CONNECTION WITH THEIR REORGANISATION OR DISSOLUTION – CONSTITUTIONAL ISSUES

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Abstract

This article addresses the legal issues arising from the transformation of internal security bodies within the structure of public administration, specifically focusing on how such events impact the service relationship of officers employed in those structures (the so-called 'uniformed services'). The analysis covers regulations governing the service relationships of officers in the State Protection Office, Government Protection Bureau, and Customs Services in connection with the dissolution of these institutions and the establishment of the Internal Security Agency, the Intelligence Agency, the State Protection Service, and the Customs and Fiscal Service. Theoretical and legal models are identified, and substantive legal provisions are presented to assess their compliance with the relevant provisions of the Constitution of the Republic of Poland.

Keywords: public administration, officer, uniformed services, public service

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INTRODUCTION

In jurisprudence, the functions of the state are defined as 'the main directions of its activity carrying out the tasks that the state sets for itself, and the scope of this activity is determined by the goals that the state wants to achieve.'[1] These functions, goals, and tasks have been debated for ages and show no sign of ceasing, as the state, being a political organisation of a large social group, is subject to various internal and external pressures that set new goals and tasks for the state, thereby influencing the evolution of state functions. The scientific debate on the tasks, goals, and functions of the state, in which political scientists, lawyers, sociologists, and philosophers particularly often express their opinions, takes place on the theoretical plane, where concepts of an ideal state are developed, and on the practical plane, i.e., in relation to the current activities of the structures and institutions created by the state. It is worth noting that observations made in connection with the actual activities of the state very often lead to *pro futuro* demands aimed at improving these activities and indicating the need to extend or, quite the contrary, reduce the state tasks.

Regardless of how the state's functions, tasks, and goals, as well as their classification are viewed, it is impossible to discuss them without considering the structures (institutions) created by the state. These structures, through the employment of people, carry out the tasks entrusted to them, striving to achieve specific goals that determine the state functions. It is evident that each state has the freedom to determine the goals it wants to achieve and can establish institutions to carry out tasks to achieve these specific goals. However, this freedom is not absolute: in legal terms, it is limited by international law binding the state, on the one hand, and by constitutional law, on the other. In a democratic state governed by the rule of law, the constitution should be perceived not only as a normative act with the highest legal force but also as a source that makes it possible to decode the state goals. There is no doubt in the literature that these goals should, in particular, include ensuring the security, in its various dimensions,[2] of both the citizens and the state. These goals are pursued by a specialised administrative apparatus, including

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[1] Seidler, G.L., Groszyk, H., Pieniążek, A., *Wprowadzenie do nauki o państwie i prawie*, Lublin, 2003, p. 64.

[2] Florczak-Wątor, M., *Komentarz do art. 5*, in: Safjan, M., Bosek, L. (eds), *Konstytucja RP. Tom I*, Warszawa, 2016, p. 288. When discussing the state security we can consider its internal and external aspects. According to K. Wojtaszczyk the essence of internal security lies in functioning of the state in such a way that ensures counteraction, elimination, or limitation of threats to the political system, public order and peace and allows for the protection of the public interest of specific societies and individual citizens, cf. Wojtaszczyk, W., 'Istota i dylematy bezpieczeństwa wewnętrznego', *Przegląd Bezpieczeństwa Wewnętrznego*, 2009, No. 1, p. 14. External security is most often interpreted as the lack of threats from foreign entities and other sources, allowing for sovereign determination and accomplishment of national interests and strategic objectives, Sulowski, S., 'O nowym paradygmacie bezpieczeństwa w erze globalizacji', in: Sulowski, S., Brzeziński, M. (eds), *Bezpieczeństwo wewnętrzne państwa. Wybrane zagadnienia*, Warszawa, 2009, p. 14. At the same time, it is worth noting that, contemporarily, due to the process of globalisation, the borderline between internal and external security is blurring, see Marczuk, K.P., 'Bezpieczeństwo wewnętrzne w poszerzonej agendzie studiów nad bezpieczeństwem (szkoła kopenhaska i human security)', in: Sulowski, S., Brzeziński, M., op. cit., p. 76.

primarily the governmental administration and, additionally, some auxiliary bodies.[3] Ensuring security in the broad sense is part of the fundamental function of the state, i.e., its protective function.[4]

People who, as part of their obligations arising from legal (employment) relationships binding them to the structures of public administration, substantially contribute to achieving the state's goals, are the most important substratum of public administration bodies. The transformation of the public administration apparatus tasked with security in its broad sense obviously has consequences in the sphere of employment, regardless of whether it is employee-related in nature and subject to the employment law regime (employment relationship) or regulated by the provisions of administrative law (public service relationship). Changes introduced in the public administration apparatus do not consist only of the redefinition of tasks and goals, a new definition of organisational structures and financing principles, or a new specification of coordination and supervision relationships between a body managing a particular entity and other public authorities, but also in the dissolution of one structure and the establishment of a new one in its place. As a result, the legislator faces the challenge of deciding on the future of employment relationships entered into by an institution carrying out specific tasks and establishing another structure to replace the former. Theoretically, several normative models can be imagined. The first consists of the abolition of all employment relationships and providing the new structure with the complete freedom to develop its own staffing policy. In the opposite model, a new structure replaces the employment relationships of the institution to which it is a legal successor, which is equivalent to taking over all the employees. Finally, the third solution, essentially a hybrid one, assumes taking over the employees but only for a transitional period, during which the employment structure is adjusted to the needs of the new entity, resulting from its tasks and organisational structure.

This article aims to evaluate the provisions specifying rules for terminating service relationships with officers of uniformed services in connection with organisational changes in those institutions. Examples of such activities after 1989 include the replacement of the State Protection Office (SPO) by the Internal Security Agency (ISA) and the Intelligence Agency (IA), and the Government Protection Bureau (GPB) by the State Protection Service (SPS), as well as the dissolution of the Customs Service and the establishment of the National Fiscal Administration (NFA) instead. The assessment of the normative models used by the legislator while dissolving these uniformed services and establishing new ones will be made from the perspective of the protective function of the state and law, because it does not seem appropriate for the legislator to have absolute discretion to act in such situations. Therefore, Article 2, as well as Article 60 of the Constitution of the Republic of Poland should be of key importance, as employment in the so-called uniformed services, which include the above-mentioned structures, is a way of performing public service.

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[3] Pieprzny, S., *Administracja bezpieczeństwa i porządku publicznego*, Rzeszów, 2008, p. 73, Liwo, M., *Status służb mundurowych i funkcjonariuszy w nich zatrudnionych*, Warszawa, 2013, p. 109.

[4] Florczak-Wątor, K., op. cit., p. 285.

NORMATIVE MODELS OF DISSOLVING INSTITUTIONS PERFORMING SECURITY RELATED TASKS: THE SPHERE OF SERVICE RELATIONSHIPS

The first normative model to be presented here is the one used by the legislator in connection with the dissolution of the State Protection Office and the establishment of the Internal Security Agency instead. In accordance with Article 1 of the Act of 24 May 2002 concerning the Internal Security Agency and the Intelligence Agency,[5] matters concerning protection of the internal security of the state and its constitutional order are within the competence of the ISA, while, pursuant to Article 2 AISAIA, matters related to protection of the internal security of the state are within the competence of the IA. The ISA and the IA were established to separate the structures responsible for the internal security of the state from the intelligence structures. Before their establishment, the State Protection Office integrated the tasks into one structure, which had the prerogatives of the state security service recognising and counteracting threats in the economic and political spheres.[6]

In accordance with Article 228(1) AISAIA, officers serving in the State Protection Office on the date of the Act entry into force, with the exception of officers of the Intelligence Directorate of the State Protection Office, became ISA officers, maintaining their former service terms and continuity of service. By analogy, the Intelligence Directorate officers became IA officers (Article 228(1) AISAIA). The solution used by the legislator allowed for the continuation of the performance of tasks that had been formerly carried out by the State Protection Office and were transferred to the two new entities established to replace it: the ISA and the IA.

The principle of continuity of service resulting from Article 228(1) and (2) AISAIA was chronologically limited due to the regulation laid down in Article 230 AISAIA. In light of Article 230(1), the Heads of the ISA and the IA, each within the scope of their activities, within 14 days of the Act entry into force, proposed new terms of service to the officers concerned or terminated their service relationships. Within the period specified in Article 230(2) AISAIA, an officer could submit a declaration of acceptance or refusal to accept new terms of service, and the lack of a declaration of refusal was treated as tantamount to acceptance of the proposal.

The termination of the service relationship was an *ad hoc* solution created for the decision-making process focused on selecting officers serving in the State Protection Office, and for the staffing policy adopted by the heads of the two newly established special services. In particular, neither the Act on the State Protection Office provided for, nor AISAIA provides for the termination of the service relationship.[7]

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[5] Journal of Laws of 2022, item 557, as amended, hereinafter 'AISAIA'.

[6] See the justification for the Bill on the ISA and IA, print 276, p. 78; https://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/276/$file/276.pdf [accessed on 23 February 2023].

[7] The provisions of the other so-called service pragmatics do not provide for this method of terminating service relationships. Cf. Szustakiewicz, P., *Stosunki służbowe funkcjonariuszy służb mundurowych i żołnierzy zawodowych jako sprawa administracyjna*, Warszawa, 2012, Wieczorek, M., *Charakter prawny stosunków służbowych funkcjonariuszy służb mundurowych*, Toruń, 2017.

Decisions on the submission of proposals for new terms of service and the termination of service relationships required the decision-making body to consider the criteria laid down in Article 230(1) AISAIA, i.e., an officer's professional qualifications, suitability for service in the ISA or the IA, employment limits and budget resources, as well as the planned organisational structure. The temporal aspect of these decisions was also important. Decisions, which had extremely significant life consequences for the officers, were to be taken within 14 days of the date of AISAIA's entry into force.

The next normative model is the one used in connection with far-reaching changes in the scope of tasks performed by the tax and customs administration. The fundamental reform of this part of the public administration apparatus, the normative framework of which is laid down in the Act of 16 November 2016 on the National Fiscal Administration,[8] was dictated, as stated *expressis verbis* in the preamble to ANFA, by 'concern for the financial security of the Republic of Poland and the need to protect the security of the customs area of the European Union.' Its implementation required, *inter alia*, determining the legal consequences of the structural transformations within the sphere of service relationships of officers of customs administration. Article 165(3)–(4) of the Act of 16 November 2016: Provisions introducing the Act on the National Fiscal Administration[9] stipulates that the service relationships of customs officers shall be transformed so that the officers maintain their employment status as officers of the Customs and Fiscal Service (CFS). At the same time, however, in accordance with the procedure laid down in Article 170 PANFA, the termination of service relationships of the CFS officers serving in the NFA units, referred to in Article 36(1)(2), (3) and (6) ANFA, is provided for. It should be noted that the termination of the service relationship resulted from generally different situations. The essence of the first situation was a failure to submit a proposal for new terms of service to an officer (Article 170(1)(1) PANFA). The termination of the service relationship also resulted from the lack of acceptance of new terms of service by an officer of the CFS (Article 170(1) (2) PANFA); failure to submit a declaration was tantamount to a refusal to accept the proposal. Service relationships of the officers who did not receive proposals for new terms of service expired on 31 August 2017, and service relationships of those officers who refused to accept new terms of service expired three months from the first day of the month following the month in which they submitted declarations of refusal to accept new terms of service, but no later than on 31 August 2017.

Regardless of whether the termination of the service relationship resulted from the lack of a proposal for new terms of service or from the refusal to accept this proposal, it was treated as dismissal from service (Article 170(3) PANFA).

At the same time, it should be emphasised that PANFA lays down the deadline for the basic assessment of officers, which determines the prospects for their employment in the NFS. Article 170(7) PANFA stipulates that officers who will not

[8] Journal of Laws of 2022, item 813, as amended, hereinafter 'ANFA'.
[9] Journal of Laws of 2016, item 1948, as amended, hereinafter 'PANFA'.

be offered new terms of service shall be informed of this fact by 31 May 2017. This means that, in practice, employment decisions had to be made within three months, as ANFA entered into force on 1 March 2017.

The decisions to submit a proposal for new service terms were based on criteria such as the officers' qualifications, service record and place of residence.

The mode of proceeding concerning service relationships in connection with the replacement of the Government Protection Bureau by the State Protection Service was determined similarly to the procedure adopted in connection with the establishment of the NFA. On the date the Act of 8 December 2017 on the State Protection Service entered into force,[10] the SPS took over the tasks formerly performed by the Government Protection Bureau, the essence of which is the protection of persons and premises.[11] By analogy to the substitution of the State Protection Office by the ISA and the IA, the dissolution of the Government Protection Bureau and the establishment of the State Protection Service required resolving the issue of service relationships of officers serving in the GPB. The legislator applied the solution laid down in Article 359(1) ASPS, intended to be a temporary one, stipulating that officers serving in the GPB on the day the Act entered into force became officers of the SPS, maintaining the existing terms of service and its continuity. The temporary nature of the takeover of the GPB officers by the SPS was expressed by the fact that the termination of service relationships with officers who were not offered new terms of service and those who refused to accept new terms of service was planned. In the case of the first group of officers, their service relationships were to expire five months after the date of the Act's entry into force; in the case of officers who refused new terms of service, three months after the first day of the month following the month when they submitted a refusal, but no later than five months after the statute entered into force.

It is worth pointing out that, in light of Article 359(5) ASPS, officers who were not offered new terms of service within a month of the date of the statute entry into force were sure that they would receive such a proposal. This resulted from the fact that the legislator determined that deadline as one by which the SPS officers should be offered the opportunity to continue their service and would be informed about the decision.

When making decisions on the retention of officers in service, the SPS Commander based the criteria on those laid down in Article 399(3), i.e., the service records, suitability for service, and qualification requirements laid down in Article 68 ASPS.

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[10] Consolidated text, Journal of Laws of 2022, item 557, as amended, hereinafter 'ASPS'.

[11] There are two groups of people that are subject to protection by the SPS. The first one is composed of persons meeting strict requirements laid down in ASPS (Article 3(1a)–(1c), connected with their functions. The second one consists of persons who are subject to protection resulting from an individual decision based on the interest of the State (Article 3(1d)). It is worth pointing out that the tasks of the SPS, in comparison to those of the GPB, have been broadened by the addition of the tasks of recognising and preventing some categories of crime.

ASSESSMENT OF THE PROVISIONS GOVERNING TERMINATION OF SERVICE RELATIONSHIPS IN UNIFORM SERVICES IN CONNECTION WITH THEIR REORGANISATION OR DISSOLUTION

The review of the provisions concerning the legal situation of officers of the dissolved uniformed services indicates that the legislator provided two solutions: (1) continuation of the existing service relationship and its termination after a certain period (the dissolution of the SPO and the establishment of the ISA and the IA); and (2) expiry of the service relationship in the situation when an officer does not meet the criteria for joining the new service (the dissolution of the GPB and the establishment of the SPS, as well as the dissolution of the CS and the establishment of the NFA).

Each of the presented solutions in fact causes similar legal consequences, because it means termination of the service relationship of officers of the previously existing service. In the former case, it is done by giving notice – i.e., in a very formalised manner in the form of an administrative decision (a personal order)[12] – in which the authority should indicate the grounds for dismissal. In the latter case, however,

> 'the expiry of the service relationship takes place *ex lege*, thus there is a legal basis for the issuance of the decision on the service relationship termination. In terms of the officer's rights and to allow for full substantive supervision by a higher instance and administrative courts, it would be desirable for such a decision to be broader and contain the motives of the NFA body that guided it, causing the expiry of the service relationship by virtue of law.'[13]

Therefore, the expiry of the service relationship requires that the body issue an administrative decision on the termination of the service relationship.[14]

It is obvious that the legislator has the right to shape uniformed services in a way that adjusts them to the challenges connected with the necessity of preventing new threats to security and public order. In this respect, the Constitutional Tribunal did not question the legislator's rights to freely shape the organisational structures of uniformed services.[15] However, it was pointed out that

> 'in practice, since the very beginning of the Third Republic, the favourite tool of the state staffing policy has been something that in the practice of employment law is colloquially called "group termination" of employment relationships in particular public institutions or sectors. The mechanism is not complicated but what is worth noting is the fact that it is most often activated and used by a new team soon after it comes to power.'[16]

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[12] Cf. judgment of the Supreme Administrative Court of 5 April 2007, I OSK 896/06, LEX No. 919869.

[13] Kotulski, M., 'Pozycja prawna funkcjonariusza podczas formowania Krajowej Administracji Skarbowej', *Opolskie Studia Administracyjno-Prawne*, 2020, Vol. 18, Issue 3, p. 39.

[14] Cf. resolution of the Supreme Administrative Court of 1 July 2019, I OPS 1/19, CBOSA.

[15] Cf. Płażek, S., 'Przekształcenie stosunku służbowego celnika w stosunek pracy', *Roczniki Administracji i Prawa*, 2021, Zeszyt Specjalny, Issue XXI, p. 391.

[16] Ibidem, p. 388.

The mechanism of terminating service relationships with officers of uniformed services in connection with the dissolution of one service and the establishment of a new one may be used for a kind of 'political vendetta' against a service that is not favoured or simply as a method of getting rid of some officers only to replace them with the new team's political nominees under the pretext of reorganisation. It should also be added that such changes have a negative impact on the state security system, as subsequent 'reorganisations' make experienced officers leave service, and they are replaced by persons who do not have the required competences; moreover, the so-called 'organisational continuity', i.e., the continuation of the performance of tasks of the given service, is disrupted.[17]

Therefore, it is necessary to define such conditions of organisational changes in uniformed services that will raise no doubts about their rationality and compliance with the law. In this respect, the provisions of the Constitution of the Republic of Poland and the judgements of the Constitutional Tribunal referring to them have protective significance. The Tribunal, still based on the then not yet binding Act of 6 April 1990 on the State Protection Office,[18] established the rule that at least one of the basic features of the service relationship of uniformed services officers is its discretionary character, which does not mean, however, complete freedom in shaping the rules of admission to and dismissal from service.[19] This stance has been consistently upheld in the Tribunal's judgements so far.

First of all, attention should be drawn to the judgement of the Constitutional Tribunal of 20 April 2004, K 45/02, which states, *inter alia*, that Article 230(1) and (7) AISAIS are unconstitutional. The Tribunal finds that the provisions infringe Articles 7, 32, and 60 of the Constitution of the Republic of Poland, i.e., the principle of the rule of law, the principle of equality, and the principle of equal access to public service.

The Tribunal emphasised that in the event the change is organisational and not structural in nature, there are no grounds for making radical changes in the staffing structure of the new special services established instead of the SPS. A structural change shapes a kind of new quality of uniformed services (as was the case with the dissolution of the uniformed services of the Polish People's Republic and the establishment of new services, the organisational structure of which and the principles of their operations were adjusted to the democratic system of the State). Meanwhile, an organisational change is only of an ordering nature; it transforms the existing structure of a uniformed service into a new one, adjusting the established structures to the new challenges connected with the protection of security, but without introducing changes in the tasks and principles of operation. Therefore, an organisational change cannot be a pretext to 'purge' of officers.

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[17] Cf. Ura, E., 'Likwidacja Biura Ochrony Rządu, utworzenie Służby Ochrony Państwa', *Acta Universitatis Lodzensis, Folia Iuridica*, 2019, No. 87, p. 128.

[18] Journal of Laws of 1999, No. 51, item 526, as amended.

[19] Cf. judgment of the Constitutional Tribunal of 8 April 1997, K. 14/96, OTK ZU No. 2/1997, item 16, p. 124.

Moreover, according to the Constitutional Tribunal,

> 'the Act on the ISA and the IA does not contain provisions giving grounds for making a choice between the officers whom the superiors desire to retain in the service and those whom the superiors want to dismiss. This type of selection, to which superiors are obviously entitled, may take place only in the manner provided for by statutory provisions. However, it cannot be carried out arbitrarily as part of the process of reorganising the state apparatus. Reorganisation cannot be used as an opportunity to replace the staff. This is a circumvention of the provisions guaranteeing officers increased durability of their employment.'[20]

The provisions laying down the principles of 'transferring' officers from dissolved services to new ones should determine clear, unambiguous rules for appointing officers of the 'old' uniformed service to new positions. Provisions formulated in an unclear way, giving the superiors excessive and unjustified freedom in assigning officers to a new service, are in conflict with the principle of equality, as well as the principle of protecting the citizen's trust in the state and the law, which is derived from Article 2 of the Constitution of the Republic of Poland, and is also referred to as the principle of the state loyalty to citizens, which is a guarantee of 'the certainty of their situation, and this should be considered from the perspective of the obligation to provide citizens with legal, social, and economic security.'[21] The principle of protecting citizens' trust in the state and the law is of a protective nature because it ensures that citizens will not be surprised by decisions of public authority bodies infringing their rights, and that the state will not introduce changes unfavourable to them for non-substantive reasons. In the case of officers of uniformed services, this principle means that 'the inclusion of the guarantee of employment stability in the statute gives grounds for reasonable expectation that the legislator will not arbitrarily change the principles of protecting the durability of employment relationships. Therefore, it is important from the point of view of arranging an individual's life plans,'[22] thus protecting the legal and economic security of a citizen who has chosen their life path to serve the state in specific services whose task is to protect security. Moreover,

> 'in a democratic state ruled by law, special guarantees of the stability of officers' service relationships, which go much further than the rules of stabilisation of the employment relationship, play multiple roles. Firstly, they constitute an important guarantee of the implementation of Article 60 of the Constitution of the Republic of Poland. It should be considered that only the law that precisely formulates the conditions for applying for admission to the service, and above all the conditions for performing it, allows for assessing whether the citizens have the right of access to the public service on equal terms. Secondly, those guarantees protect the individual rights of an officer, preventing arbitrariness in their assessment by a superior in a situation where the conditions of service require the officer's subordination and extensive availability. Thirdly, they fulfil

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[20] Judgment of the Constitutional tribunal of 20 April 2004, K 45/02, OTK-A 2004, No. 4, item 30.

[21] Chmaj, M., Urbaniak, M., *Komentarz do Konstytucji RP. Art.* 2, Warszawa, 2022, p. 153.

[22] Judgment of the Constitutional Tribunal of 20 April 2004, K 45/02, OTK-A 2004, No. 4, item 30.

an important political function. They constitute one of the guarantees of political neutrality and stability of special services, and a factor limiting their instrumental use for the political purposes of the current parliamentary majority.'[23]

The provisions establishing termination of officers' service relationships in connection with the services' dissolution or reorganisation should be constructed in such a way as not only to prevent voluntarism of superiors while taking personnel decisions, but also to define the rules of admission to a new service in a uniform manner. This way, they protect equal access to public service and guarantee that officers performing their tasks will be guided by the interests of the state and will not be afraid to undertake actions that may not be liked by people (in power or in opposition at the time) whose political interests will be affected by those actions. It is obvious that the state should be guided by objective criteria when choosing the course of action and counteracting threats. Hence, the protection of officers of uniformed services against arbitrariness in terminating their service relationships constitutes a guarantee that they will perform their tasks objectively and will not be guided by political calculations.

The legislator does not rule out the possibility of terminating officers' service relationships in the event of dissolution or reorganisation of a service. Nevertheless, decisions concerning officers should be subject to judicial supervision, as the Tribunal emphasised in its judgement of 9 June 1999, K 28/97, regarding professional soldiers: 'Article 45 (1) clearly indicates the legislator's will to cover the widest possible range of cases with the right to court. Moreover, the principle of the democratic state ruled by law results in an interpretation directive prohibiting a narrow interpretation of the right to the court.[24] The Constitution introduces a presumption of a judicial remedy. However, this does not mean that all restrictions on the judicial protection of the interests of an individual are inadmissible. The limitation of the right to court is expressly provided for in Article 81 of the Constitution, pursuant to which the rights specified in this provision may be asserted subject to limitations specified by statute. Limitations can also result from other provisions of the Constitution. In special, extraordinary circumstances, the right to court may be in conflict with another constitutional norm protecting values of equal or even greater importance for the functioning of the state and the development of an individual. The need to take into account both constitutional norms may justify the introduction of some limitations on the scope of the right to court. Such restrictions are admissible to the extent that is absolutely necessary if there is no other way to realise a given constitutional value. They must meet the requirements laid down in Article 31(3) of the Constitution. They may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health, or public morals, or the freedoms of other

[23] Ibidem.

[24] Judgments of the Constitutional Tribunal: of 21 January 1992, K. 8/91, OTK in 1992, Part I, p. 82; of 29 September 1993, K. 17/92, OTK in 1993, Part II, p. 308 et seq.; of 8 April 1997, K. 14/96, OTK ZU, No. 2/1997, p. 122.

persons. Such limitations shall not violate the essence of freedoms and rights.'[25] It is inadmissible to deprive officers of the right to have the case concerning the termination of their service relationship heard by an independent and impartial court under the pretext of changes in the uniformed services. This rule is protective in nature, because as a personal right related to an individual, it allows for the protection of their interests 'always, regardless of whether in a specific situation their rights and freedoms have been infringed. The right to the court, interpreted this way, creates a sense of security of protection by the state.'[26] Therefore, the right to the court is of extraordinary importance for officers who should be certain that in the event their status deteriorates, they will have the right to have the correctness of their superiors' actions assessed by an entity that is not involved in the case, and whose competence and independence raise no doubts.

Therefore, the dissolution or reorganisation of a uniformed service does not mean complete freedom in terminating officers' service relationships in the event the change is actually organisational and not systemic in nature. The former judgements of the Constitutional Tribunal unambiguously defined the rules of the procedure in this respect. The principles referring to the provisions of the Constitution protect officers against arbitrary actions of the legislator, who, for non-substantive reasons (e.g. the desire for revenge), may seek to remove inconvenient officers from service.

CONCLUSIONS

The literature focused on analysing the condition of the Polish administration indicates that its most important shortcomings include, in particular, its politicisation, high staff turnover and frequent organisational changes.[27] At the same time, it points out that 'the ability to change constantly and effectively is considered to be an element necessary for the survival of any organisation. In the case of public organisations, changes are permanent elements of functioning, and the system of goals and values is a basic factor influencing the need to introduce change in organisations, including public ones.'[28] *Prima facie*, there is a contradiction between the above-mentioned views. The first one considers frequent changes to be a flaw of administration; the second one treats the transformations of organisations constituting the apparatus of administration as an indispensable element of its vitality and efficiency. However, the contradiction is superficial. In a democratic state ruled by law, transformations

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[25] Judgment of the Constitutional Tribunal of 9 June 1998, K 28/97, OTK 1998, No. 4, item 50.

[26] Florczak-Wątor, M., 'Prawo do sądu jako prawo jednostki i jako gwarancja horyzontalnego działania prawa i wolności', *Przegląd Prawa Konstytucyjnego*, 2016, No. 3, p. 49.

[27] Rutkowski, M., 'Bank Światowy a poprawianie jakości rządzenia w zmieniającym się świecie. Sytuacja Polski i wyzwania kryzysu gospodarczego', *Zarządzanie Publiczne*, 2009, No. 3, p. 73.

[28] Krukowski, K., Zastempowski, M., 'Cechy zarządzania zmianami w organizacji publicznej', *Managment Forum*, 2018, Vol. 6, No. 3, p. 28.

of administration, including those resulting in a new determination of its personnel composition, are necessary if they are justified by the adopted system of goals and values.

However, it is rightly noted in the literature that 'in our democracies, it is extremely difficult to understand the difference between legitimacy and legality,'[29] while the two concepts differ substantially. 'Legitimacy is the sense that the authorities exercise their powers well, that people in power in society are in the right place. Legality is the fact that the power is exercised in accordance with certain rules.'[30] The system, values, goals and rules of exercising power primarily result from the Constitution. Transformations of administration will therefore be necessary and justified in the event the Constitution is amended, to the extent determined by it to constitute the matters that public administration shall deal with. This statement cannot, however, be perceived as a demand for petrification of public administration. The ordinary legislator has a constitutionally guaranteed wide margin of freedom in determining the tasks and structure of administration and adjusting it to current needs.

One of the consequences of determining a new structure of administration is the need to determine the results of the transformations in the sphere of employment relationships. If they result in dismissals of employees, the relevant provisions must take into account applicable constitutional standards. A key standard is laid down in Article 2 of the Constitution of the Republic of Poland; it is the principle of a democratic state ruled by law, 'which since the very beginning of its validity in the Polish legal order, has been treated as a source of subsequent principles of a more detailed nature. One such principle is the protection of an individual's trust in the state and its laws, also called 'the principle of the state loyalty to its citizens'.[31] Officers of the so-called uniformed services performing public service within the meaning of Article 69 of the Constitution cannot be excluded from the scope of this principle. The implementation of this principle is demonstrated in drafting and passing such legislation that will not become

> 'a kind of trap for the citizen, and that will enable him to arrange his affairs in the confidence that he is not exposed to legal consequences that he could not foresee at the time of taking decisions and actions, as well as in the belief that his actions undertaken in accordance with applicable law will be also recognised by the legal system in the future. New regulations adopted by the legislator cannot surprise the addressees, who should be given time to adapt to the amended regulations and calmly take decisions on their further conduct.'[32]

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[29] Calame, P., 'Proces reformy w administracji publicznej', in: Czaputowicz, J. (ed.), *Zarządzanie zmianą w administracji publicznej materiały z konferencji Warszawa, 16–17 grudnia 2010 r.*, Warszawa, 2012, p. 16.

[30] Ibidem, p. 17.

[31] Florczak-Wątor, M., 'Komentarz do art. 2, t. 4', in: Tuleja P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd ed., LEX/el. 2021 [accessed on 7 August 2023].

[32] Judgment of the Constitutional Tribunal of 7 February 2001, K 27/00, OTK 2001, No. 2, item 29.

The Constitutional Tribunal states that an individual should be able to determine the consequences of individual conduct and events based on the current legal system, as well as expect that the legislator will not change them arbitrarily.[33]

The fact that politics and law are closely related,[34] which is obvious in a democratic state ruled by law, is not in itself inappropriate and is part of the nature of democracy. The problem only occurs when law is politicised, i.e., when it is treated as a tool to achieve certain goals regardless of the constitutionally decreed values and goals of the state resulting from the Constitution. The provisions of statutes that constitute in fact a pretext for mass layoffs of officers employed in public administration bodies while transforming their structures, although neither the aims nor the tasks of the dissolved and newly established structures change, are a manifestation of this type of legislative practice. *De lege ferenda*, it is necessary to refrain from creating regulations that introduce solutions consisting in the termination of service relationships in uniformed services at the opportunity of their reorganisation. It should be taken into consideration that the provisions of statutes regulating service relationships in the so-called uniformed services specify measures allowing for effective human resources policy. The normative models applied during the reorganisation of uniformed services not only raise constitutional doubts but also may significantly contribute to the formation of opportunistic and conformist attitudes towards the law among officers. Such attitudes actually preclude the performance of public service with concern for the interests of the state and civil rights and freedoms.

Finally, the scope of personnel changes made in a short period often precludes an objective assessment of an officer's suitability for service in a 'new' institution and may lead to the weakening of the effectiveness of the security administration.

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[33] Judgment of the Constitutional Tribunal of 14 June 2000, P 3/00, OTK 2000, No. 5, item 138.

[34] Bator, A., Łakomy, J., 'Pojęciowe uwarunkowania badań nad związkami prawa i polityki', *Acta Universitatis Wratislaviensis*, No. 3994, *Przegląd Prawa i Administracji*, Issue CXXII, Wrocław, 2020, p. 11 et seq.

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