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THE PASSAGE OF TIME BETWEEN THE COMMISSION OF AN OFFENCE AND SENTENCING AS A GROUND FOR PUNISHMENT MITIGATION

JOANNA DŁUGOSZ-JÓŹWIAK*

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Abstract

This paper addresses the issue of rational sentencing in criminal proceedings, focusing specifically on the significance of the passage of substantial time between the commission of an offence and the imposition of a sentence as a potential ground for extraordinary mitigation of punishment. The aim is to resolve the question of whether a significant lapse of time between the commission of an offence and sentencing may serve as a mitigating factor in the punishment imposed by the court for that offence, or, more specifically, whether it may justify extraordinary mitigation of the statutory penalty or constitute a circumstance warranting leniency within the ordinary sentencing framework. The research hypothesis assumes that a lengthy interval between the offence and adjudication may exert a mitigating influence on the sentence imposed, both in cases where the court applies a sentence within the ordinary sentencing framework and where it resorts to extraordinary mitigation, although the time lapse does not constitute an autonomous basis for such mitigation. The study employs the dogmatic method, understood as an analysis of legal norms, with reference to relevant judicial decisions and the views of legal academics and commentators.

Keywords: judicial sentencing, extraordinary mitigation of punishment, mitigating circumstances, time in criminal law

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INTRODUCTION

The passage of time between the commission of a criminal offence and sentencing is of unquestionable significance in criminal law. Scholarly literature[1] highlights, among other things, its fundamental importance – particularly in light of the principle of legality, which requires that an act be defined as prohibited under the law in force at the time of its commission (Article 1 § 1 of the Polish Penal Code) – for classifying the offence and, in some cases, for assessing criminal liability. This is especially relevant in view of the intertemporal rule *lex mitior*, set forth in Article 4 § 1 of the Penal Code (PC), which determines the law applicable when a normative change occurs after the offence but before sentencing. Other significant implications arise in the context of the statute of limitations, which extinguishes the possibility of imposing a criminal sanction after a specified period following the commission of the offence (cf. Articles 101–102 and 105 PC), as well as in cases involving reclassification of the act as a petty offence or its decriminalisation.[2]

The significance of the lapse of time for determining punishment is equally multifaceted. It encompasses both the penalty prescribed for a given type of offence (statutory penalty) and the penalty that may be imposed by a court in a specific criminal proceeding. In the first of these aspects – that is, the statutory penalty – the aforementioned intertemporal rule of *lex mitior* under Article 4 § 1 PC may apply. In contrast, the type and severity of the penalty imposed for a specific offence, and subsequently enforced, may be governed by the provisions set out in Article 4 §§ 2–3 PC. In certain cases, the conviction may be expunged (Article 4 § 4), thereby nullifying the legal consequences of the judgment. Moreover, the passage of time between the commission of the offence and sentencing may necessitate consideration of changes in the offender's personal circumstances, which can affect both the type and severity of the penalty imposed (cf. e.g. Article 53 § 2 PC).

The aim of this study is not, of course, to provide a comprehensive account of all legal issues arising from the passage of time within the sequence: criminalisation of a specific type of act – commission of a specific offence – conviction and sentencing – enforcement of the imposed penalty. This area of inquiry is complex, with many of its dimensions having already been thoroughly examined in both judicial decisions and criminal law literature.[3] For that reason, the present analysis focuses on the specific issue of whether the passage of time may be regarded as a basis for extraordinary (special) mitigation of the statutory (ordinary) penalty, or alternatively, as a mitigating circumstance in the judicial determination of punishment within

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[1] See, e.g. J. Baściuk, P. Ochman, K. Ondrysz, 'Problematyka czasu w orzecznictwie Sądu Najwyższego i sądów apelacyjnych na tle przepisów kodeksowych', in: Bogunia L. (ed.), *Nowa kodyfikacja prawa karnego*, Vol. XXIV, 2009, pp. 11–34; T. Bojarski, 'Znaczenie czynnika czasu w zakresie karalności czynu i wymiaru kary', *Teka Komisji Prawniczej PAN – Oddział w Lublinie*, 2010, Vol. 3, pp. 48–61.

[2] The procedural consequences of this circumstance are governed by Article 17 § 1(2) of the Code of Criminal Procedure ('CCP').

[3] Cf. J. Warylewski (ed.), *Czas i jego znaczenie w prawie karnym*, Gdańsk, 2010, *passim*.

the ordinary sentencing framework.[4] More precisely, it concerns situations in which the time elapsed between the commission of the offence and the delivery of the judgment (conviction) is unduly long (substantial).

Given the inherent ambiguity of such a determinant in sentencing, a fundamental question arises: what precisely constitutes a 'substantial' passage of time, and more importantly, whether it is possible to formulate any fixed criteria for its recognition. It must be acknowledged that such an indeterminate formulation of a factor that may potentially justify mitigation – despite its evident lack of clarity and precision – simultaneously acquires a discretionary quality, which is significant from the standpoint of the court's latitude in shaping the sentence. This appears to be inevitable, albeit with the caveat that it does not concern situations that would justify a finding of undue delay in the proceedings.[5] Accordingly, it is for the court alone to determine whether the condition of a substantial passage of time has been met *in concreto*. Given that the nature, character, and gravity of the offence play a decisive role in this assessment, it is reasonable to assume that, as a general rule, the relevant period should be measured in years rather than merely in months.

MITIGATION OF PUNISHMENT IN CRIMINAL LAW

It should first be noted that the issue of punishment mitigation in criminal law may be approached along two distinct lines. First, mitigation may be considered in relation to the institution of extraordinary sentencing, understood as a departure (modification) from the statutory, ordinary sentencing framework, that is, the framework defined by the content of the sanctioning norm which sets the limits of penalty for a given type of prohibited act. The ordinary sentencing framework typically corresponds to the statutory penalty prescribed for each offence under the provisions of the Special Part of the Penal Code or in other laws that classify prohibited acts as criminal offences (cf. Article 116 PC). The basis for modifying the ordinary penalties lies

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[4] Therefore, the scope of analysis will not include, among other things, the issue of applying probationary measures regulated in the Penal Code (cf. e.g. Articles 69 § 2 and 70 § 1 PC), in which the passage of time may benefit the offender, provided that the anticipated positive criminological prognosis is borne out. Also excluded is the specific situation of so-called recidivism limitation, which concerns cases of relapse into crime after a period longer than that specified in Article 64 § 1 or § 2 PC. In such instances, the aggravating effect does not apply automatically – and is, in fact, often viewed favourably, including on humanitarian grounds; cf. e.g. T. Bojarski, *Znaczenie…*, op. cit., p. 59.

[5] That is, undue delay in the conduct and adjudication of the case, that is, proceedings that last longer than necessary to clarify the relevant factual and legal circumstances (see Article 2 of the Act of 17 June 2004 on Complaints for Violation of a Party's Right to Have a Case Heard in Preparatory Proceedings Conducted or Supervised by the Prosecutor and in Court Proceedings Without Undue Delay, i.e. Journal of Laws of 2023, item 1725). Polish law does not recognise the excessive length of proceedings as a mitigating factor, although this is the case in the legal systems of some EU Member States. In those jurisdictions, mitigation may be considered not only in relation to undue delay in the proceedings, but also with regard to the extended period between the commission of the offence and sentencing – for a detailed discussion, see: M. Budyn-Kulik, 'Dyrektywy wymiaru kary w państwach członkowskich Unii Europejskiej', *Prawo w Działaniu. Sprawy karne*, 2017, No. 3, pp. 131–134.

in the competence norms set out in the General Part of the Penal Code, which empower the court to impose a penalty below the statutory minimum established in the sanctioned norm, to apply a less severe penalty or measure (extraordinary mitigation), or, conversely, to impose a penalty exceeding the statutory minimum or maximum (extraordinary aggravation). It should be emphasised, however, that the scope of this paper is limited to the specific context of modifying the ordinary penalty through extraordinary mitigation.[6]

Secondly, mitigation of punishment may be considered from the perspective of mitigating circumstances affecting the judicial determination of sentence, which takes place within the boundaries set by the legislature for a given type of prohibited act. This process involves specifying the type and severity of the sentence to be imposed on a particular offender (or an accessory involved in a non-perpetrator form of its commission) whose guilt has been proven in criminal proceedings. It is carried out within the limits of the statutory penalty and in accordance with the principles and directives for sentencing, as set out in particular in Chapter VI of the Penal Code.[7]

The purpose of this paper is therefore to propose a resolution to the question of whether a substantial lapse of time between the commission of an offence and sentencing may serve as a mitigating factor in the sentence imposed by the court for that offence in a specific criminal proceeding, and, in particular, whether it may constitute a basis for extraordinary mitigation of the statutory penalty prescribed for the offence or, alternatively, a mitigating circumstance in the judicial determination of sentence within the ordinary sentencing framework.

This objective may be articulated in the form of a central research question concerning the significance of a prolonged lapse of time between the commission of the offence and conviction for the sentence imposed by the court in a specific criminal proceeding. This central research question may be further specified through two subsidiary questions: (1) Can the passage of a long period of time between the commission of an offence and conviction serve as a basis for modifying the statutory, ordinary penalty prescribed for a specific type of offence, by enabling the court to impose a penalty subject to extraordinary mitigation? (2) Can the passage of a long period of time between the commission of an offence and conviction be regarded as a mitigating circumstance affecting the judicial determination of sentence within its ordinary statutory framework – and, in the absence of an expressly stated normative basis, even as a non-statutory mitigating factor?

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[6] For a detailed discussion of this institution, see J. Raglewski, *Model nadzwyczajnego złagodzenia kary w polskim systemie prawa karnego (analiza dogmatyczna w ujęciu materialnoprawnym)*, Kraków, 2008; J. Raglewski, in: Kaczmarek T. (ed.), *System Prawa Karnego. Tom 5. Nauka o karze. Sądowy wymiar kary*, 2nd ed., Warszawa, 2017, pp. 409–466.

[7] For the sake of clarity, it should be noted that the principles and directives set out in Articles 53, 54 § 1, and 55 PC apply not only to the imposition of penalties, but also respectively – i.e. with due regard to their function and the degree of repression – to the adjudication of other measures regulated by the Penal Code, with the exception of the obligation to repair damage caused by the offence or to provide redress for the harm suffered, which are strictly compensatory in nature (cf. Article 56 PC).

The foregoing considerations permit the formulation of the central research hypothesis, according to which a long period of time between the commission of an offence and sentencing may have a mitigating effect on the sentence imposed by the court for that offence. This influence may arise both when the court determines the sentence within the ordinary sentencing framework and when it applies extraordinary mitigation, although the lapse of time alone does not constitute an independent basis for such mitigation.

THE PASSAGE OF TIME AS A BASIS FOR EXTRAORDINARY MITIGATION OF PUNISHMENT

In the context outlined above, particular attention should be given to the question of whether a considerable lapse of time between the commission of an offence and sentencing may be recognised as a factor enabling modification of the statutory, ordinary penalty prescribed for a specific type of offence through the imposition by the court of an extraordinarily mitigated punishment.

The general normative basis for extraordinary mitigation is provided by Article 60 PC, which defines the essence and principles of this institution (cf. Article 60 § 6) and specifies the conditions under which it may be applied, including whether its application is mandatory or discretionary. The context of the present study justifies limiting the analysis to the scope of Article 60 § 2, which grants the court discretionary authority to apply extraordinary mitigation of punishment to any offender[8] within the bounds of its sentencing discretion (cf. Article 53 § 1 PC).[9] The prerequisite for such mitigation is the existence of a particularly justified case in which 'even the lowest penalty stipulated for the offence in question would be disproportionately severe'. Points 1 to 3 of the cited provision list exemplary situations in which the legislature presumes that the minimum statutory penalty may be disproportionately severe, thereby justifying the application of extraordinary mitigation;[10] still, it should be noted, for the sake of clarity, that these examples do not include the lapse of time as a relevant factor.[11]

Since the legal framework governing extraordinary mitigation of punishment allows the court, in the process of sentencing, to take into account individual circumstances related both to the offence and to the offender, thereby enabling the application of the principles of individualised sentencing and humanitarian considerations, while also ensuring flexibility and rationality in criminal policy,[12] a question arises as to

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[8] See also V. Konarska-Wrzosek, in: Stefański R.A. (ed.), *Kodeks karny. Komentarz*, 7th ed., Warszawa, 2025, Article 60, margin number 15.

[9] See decisions of the Supreme Court: of 17 March 2021, III KK 427/20; and of 16 February 2022, V KK 69/21.

[10] Cf. judgment of the Court of Appeal in Warsaw of 13 November 2018, II AKa 372/18.

[11] Due to the absence of a statutory basis, this factor also falls outside the scope of Article 60 § 1 PC.

[12] Cf. e.g. K. Patora, in: Kulesza J. (ed.), *Prawo karne materialne. Nauka o przestępstwie, ustawie karnej i karze*, Warszawa, 2023, p. 551; I. Zgoliński, in: Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, 4th ed., Warszawa, 2023, Article 60, margin number 2.

whether the extended passage of time between the commission of the offence and the delivery of judgment may itself constitute such a circumstance. In other words, whether the passage of time, understood in this manner, can constitute grounds for recognising a particularly justified case within the meaning of Article 60 § 2 PC – that is, an exceptional circumstance which, in the context of a specific factual situation, warrants the conclusion that even the minimum statutory penalty for the offence in question would be disproportionately severe.[13]

Against this background, two fundamental questions arise. First, under what circumstances does a particularly justified case occur, in which the imposition of a sentence corresponding to the minimum statutory penalty for a specific offence would be disproportionately severe? Second, how should the severity of the applicable penalty be assessed in the context of a potential finding that it is disproportionate?

It is generally accepted that a particularly justified case arises where, in the specific factual context, there are atypical features of the event itself, numerous mitigating factors inherent in the act, as well as personal characteristics and life circumstances of the offender, such as their conduct prior to the commission of the offence and their behaviour thereafter, which warrant a distinctly positive evaluation and portray the individual in an exceptionally favourable light, thereby justifying the imposition of a penalty below the statutory minimum.[14]

The indicated severity of the applicable penalty refers to the disproportion between the statutory minimum penalty prescribed for a certain type of offence and the penalty that ought to be imposed in the specific case. Scholarly commentary emphasises that such disproportionality must be apparent, though it need not be manifestly excessive.[15] This determination is made based on the specific facts of the case, taking into account all extraordinary objective and subjective circumstances,

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[13] The exceptional nature of this circumstance is emphasised in the judicial decision: 'Extraordinary mitigation of punishment is an exceptional mechanism in the sentencing process […]. Exceptional circumstances must therefore be demonstrated by the offender in order to benefit from such mitigation.' – see decision of the Supreme Court of 24 November 2005, III KO 52/04. It is worth noting that the exceptional nature of the basis set out in § 2 is also reflected in its subsidiary character, as it applies only where extraordinary mitigation of punishment is not possible on any other ground; cf. Supreme Court judgments of 7 March 2003, WA 11/03, *OSNwSK*, 2003/1, item 539; and of 19 March 2004, WA 68/03, *OSNwSK*, 2004/1, item 622. It is also worth emphasising that particularly justified cases must be distinguished from ordinary ones, in which the standard sentencing directives apply and operate within the limits of the statutory penalty range; cf. the Supreme Court judgments of 15 December 2021, V KK 316/20; and 28 March 2019, V KK 125/18.

[14] See e.g. judgments of the Supreme Court of 28 March 2019, V KK 125/18; and of 15 December 2021, V KK 316/20. Cf. M. Kulik, in: Mozgawa M. (ed.), *Kodeks karny. Komentarz aktualizowany*, LEX/el., 2025, Article 60 § 4; K. Patora, in: Kulesza J. (ed.), *Prawo karne materialne*…, op. cit., p. 552.

[15] Cf. e.g. Z. Ćwiąkalski, in: Zoll A., Wróbel W. (ed.), *Kodeks karny. Część ogólna. Tom 1 Część II. Komentarz do art. 53–116*, 5th ed., Warszawa, 2016, Article 60, margin number 12. The Supreme Court, however, adopted a different view, stating that 'the basis for applying the institution of extraordinary mitigation of punishment under the conditions set out in Article 60 § 2 of the Penal Code is to demonstrate that there are particularly justified circumstances in the case which mean that even the minimum statutory penalty provided for by the law must be considered excessively severe'; see the Supreme Court judgment of 28 March 2019, V KK 125/18.

i.e. those relating to the offence itself (e.g. low value of the object of the offence)[16] as well as to the offender (e.g. exceptional motives for the act), with due regard to the degree of culpability and the social harmfulness of the act, alongside the general sentencing directives and any specific directives, if applicable *in concreto*.

Accordingly, a comprehensive analysis of the above elements enables an assessment of whether a just sentence[17] may be imposed within the boundaries of the statutory penalty, or whether this function can only be fulfilled by an extraordinarily mitigated sentence, given that a standard sentence would prove unduly harsh. This is to be determined by comparing and contrasting the aggravating and mitigating circumstances in the specific case, the balance of which should indicate a clear preponderance of circumstances in favour of the offender. Such a finding necessarily leads to the conclusion that an exceptional situation has arisen in which even the minimum statutory penalty prescribed for the offence would be disproportionately severe,[18] and that, in order to fulfil all the objectives of punishment, the imposition of an extraordinarily mitigated sentence is warranted.

It is evident that, due to the inherent vagueness and relativity of the condition expressed in Article 60 § 2 PC, the court exercises discretion in determining whether this particularly justified case[19] exists *in concreto*, which does not ensure either consistency or correctness of assessment. Nevertheless, the court is invariably obliged to present arguments substantiating its position. In this context, the precise and narrowly defined statutory grounds for other forms of extraordinary mitigation may be interpreted as a legislative directive addressed to the judiciary, urging a thorough, prudent, and non-automatic application of this institution in the sentencing process.[20] This implies that the court must first establish that the statutory minimum penalty would be disproportionately severe in the circumstances of the case, and only then proceed to determine the specific (extraordinarily mitigated) sentence.

In light of the foregoing considerations, when assessing the relevance of the lapse of time between the commission of an offence and conviction for the possibility of extraordinary mitigation of the penalty, it becomes apparent that the factors typically identified as decisive for the court's application of Article 60 § 2 PC predominantly concern objective and subjective circumstances present **at the time** of the offence. This same temporal perspective also shapes the sentence from the standpoint of the general sentencing directives, which emphasise the proportionality of the sentence to

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[16] Cf. judgment of the Court of Appeal in Katowice of 15 December 2005, II AKa 375/05, KZS 2006/4, item 52.

[17] Scholarly commentary rightly emphasises that a disproportionately severe penalty should be equated with an unjust one; cf. K. Patora, in: Kulesza J. (ed.), *Prawo karne materialne*…, op. cit., p. 552.

[18] See J. Majewski, in: Majewski J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2024, Article 60, margin number 29; I. Zgoliński, in: Konarska-Wrzosek V. (ed.), *Kodeks karny*…, op. cit., Article 60, margin number 2. Cf. also judgment of the Court of Appeal in Wrocław of 16 October 2013, II AKa 298/13.

[19] See also J. Majewski, in: Majewski J. (ed.), *Kodeks karny*…, op. cit., Article 60, margin number 30.

[20] Cf. also Z. Ćwiąkalski, in: Zoll A., Wróbel W. (ed.), *Kodeks karny*…, op. cit., Article 60, margin number 14; G. Łabuda in: Giezek J. (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa, 2021, Article 60, margin number 12.

the degree of social harmfulness of the act and the offender's culpability (cf. Article 53 § 1 PC). However, relevant weight must also be given to those general directives in which the legislature highlights the preventive dimension of punishment, aimed at achieving its objectives in terms of societal impact (general prevention),[21] and deterrence with respect to the convicted individual (individual prevention). Given that preventive directives require the court to incorporate into the sentencing process the element of crime deterrence, both with respect to the offender and to society at large, in order to reinforce public awareness of the reprehensibility of certain behaviours, to foster positively valued attitudes,[22] and to instil the conviction that violations of legal interests entail inevitable consequences and are not worth pursuing,[23] it is reasonable to conclude that the court should assess the achievement of these preventive goals not as of the time of the offence, but as of the time of sentencing.[24]

The passage of time becomes particularly relevant in this context insofar as the court's assessment of the preventive aims of punishment from the perspective of the sentencing moment acquires 'special significance when a considerable period has elapsed between the commission of the offence and the time of sentencing'.[25] Nevertheless, this does not mean that the mere fact of an unduly long interval can, in itself, autonomously justify the court's decision to impose an extraordinarily mitigated penalty, although it is not without relevance to such a decision. What is crucial for recognising this circumstance as a basis for departing from the ordinary sentencing framework is its coexistence and interrelation with other factors arising **after** the commission of the offence, alongside the objective and subjective circumstances present **at the time** of the act. These include, in particular, the offender's favourably assessed attitude, reflecting their stance toward the offence and the violated legal interest,[26] as well as conduct deserving of approval,[27] which reveals their personal qualities and character. Thus, only the cumulative presence of these

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[21] Under current law, this aspect reflects general prevention in its negative form. By contrast, Article 53 § 1 PC, in its version prior to the amendment introduced by the Act of 7 July 2022 amending the Penal Code and Certain Other Acts (Journal of Laws of 2022, item 2600), framed it as positive general prevention, namely 'the need to shape the legal awareness of society'.

[22] Cf. V. Konarska-Wrzosek, in: Stefański R.A. (ed.), *Kodeks karny*…, op. cit., Article 53, margin number 10.

[23] See also judgment of the Court of Appeal in Szczecin of 29 June 2017, II AKa 80/17.

[24] This interpretation was adopted, for instance, in the judgment of the Court of Appeal in Cracow of 17 December 2009, II AKa 223/09, KZS 2010/2, item 32; and further developed in subsequent rulings referring to that decision, including: judgment of the Court of Appeal in Cracow of 9 December 2015, II AKa 138/15; judgment of the Regional Court in Suwałki of 21 March 2013, II Ka 93/13; and judgments of the Regional Court in Gliwice: of 9 March 2015, V Ka 659/14; of 9 April 2015, V Ka 15/15; and of 24 March 2017, VI Ka 156/17.

[25] Cf. judgment of the Court of Appeal in Cracow of 17 December 2009, II AKa 223/09, KZS 2010/2, item 32.

[26] For example, by admitting guilt (even in separate proceedings), making efforts to repair the damage, or offering an apology to the victim; cf. Supreme Court decision of 24 November 2005, III KO 52/04; judgment of the Court of Appeal in Wrocław of 14 June 2005, II AKa 144/05.

[27] For instance, by demonstrating efforts to normalise and stabilise one's life circumstances, breaking with a previously reprehensible lifestyle, or eliciting favourable social inquiry reports regarding the offender; cf. judgment of the Court of Appeal in Cracow of 16 February 2011, II AKa 256/10, KZS 2011/5, item 41.

circumstances may warrant the recognition of a particularly justified case within the meaning of Article 60 § 2 PC, warranting extraordinary mitigation of punishment which, despite its exceptional leniency, fulfils the intended aims of social impact and individual deterrence.[28] Accordingly, if the offender consistently demonstrates appropriate attitudes and behaviours following the commission of the offence, the passage of time until sentencing may be favourable and beneficial for them, insofar as it evidences the achievement of certain preventive aims of punishment even prior to the issuance of the judgment. Yet, this is not solely attributable to the passage of time itself. As a factor external to the offence and independent of the offender, it cannot, on its own, constitute an exceptional circumstance justifying the conclusion that even the minimum statutory penalty would be disproportionately severe in the specific case. Therefore, the significance of the passage of time as a factor lies in its capacity to complement and reinforce the effect of other circumstances that may justify extraordinary mitigation of punishment, either individually or cumulatively. The cumulative occurrence of several circumstances may, however, lead to two distinct outcomes. First, it may result in a situation where multiple mitigating circumstances (including the passage of time) jointly provide sufficient grounds for finding a particularly justified case under Article 60 § 2 PC, even though none of them would warrant such recognition if considered in isolation. Second, a lapse of time between the offence and sentencing that does not qualify as excessive does not, in itself, preclude the possibility of extraordinary mitigation under Article 60 § 2 (or other relevant provisions) PC, provided that the remaining conditions for applying this institution are met.

THE PASSAGE OF TIME AS A MITIGATING CIRCUMSTANCE WITHIN THE ORDINARY FRAMEWORK OF SENTENCING

As established above, the passage of a long period between the commission of the offence and the imposition of the sentence cannot be regarded as an autonomous basis for extraordinary mitigation. At most, it may serve a supplementary and reinforcing function in relation to other circumstances that satisfy the conditions for applying this institution. Consequently, it is appropriate to examine whether this factor may constitute a mitigating circumstance within the ordinary framework of judicial sentencing.

First and foremost, it should be recalled that judicial sentencing consists in the court imposing upon a specific offender, proven to have committed a criminal

[28] As stated in the ruling of the Court of Appeal in Cracow (II AKa 223/09): 'If the offender, despite not having been punished, has reformed, lived honestly, and worked, then imposing a severe penalty is not purposeful. A harsh sentence would amount to pure repression (retribution), failing to serve the aims of punishment in terms of individual prevention. Admission of guilt, apology to the victim, and obtaining the victim's forgiveness create an **exceptional sentencing context** [emphasis added by J.D.-J.], conducive to extraordinary mitigation of punishment and indicative of the achievement of one of the objectives of criminal proceedings, namely, the redress of individual harm caused by the offence, and that prior to the issuance of the judgment.'

offence, the penal consequences prescribed by law by determining the type and severity of the penalty and, where applicable, applying other penal measures.[29] Thus, the assessment of whether the passage of an unduly long period of time may constitute a mitigating circumstance within this sentencing framework requires reference to the general sentencing directives (Article 53 § 1 PC), as well as to the circumstances defined by the legislator, which the court is obliged to consider when determining the sentence (Article 53 §§ 2–2b PC).

Bearing in mind that the role of the general sentencing directives is not only to limit judicial discretion but also to define the framework for individual sentencing decisions and to shape the model of penal policy,[30] it is worthwhile to assess the significance of the passage of time through the lens of directives that reflect the legislator's adopted purposes of punishment.

For the sake of clarity, it should be noted that the general sentencing directives requiring the court to consider the degree of social harm caused by the offence and the offender's culpability are irrelevant to the present discussion, as their temporal reference point is the moment of the offence. Subsequent circumstances, including the offender's conduct after the commission of the act, do not influence these particular considerations.

In comparison, the preventive directives – i.e. those of general prevention ('the aims of punishment in terms of its impact on society') and individual prevention ('the deterrent aims that punishment is intended to achieve with respect to the offender') – previously discussed, remain applicable in the present context. They are complemented by the circumstances listed in Article 53 §§ 2–2b PC, whose relevance to sentencing lies in the statutory obligation imposed on the court to consider all circumstances that may arise in the specific factual circumstances of the case and thereby influence the appropriate determination of punishment. These provisions thus ensure that the aims of punishment are properly defined and effectively implemented, thereby supporting the application of all general sentencing directives, including the preventive ones.[31]

Two of the circumstances listed in Article 53 § 2 PC are particularly relevant in this context: 'the personal characteristics and conditions of the offender' and '[the offender's] conduct following the commission [of the offence]'.

As emphasised in the views of legal academics and commentators,[32] the offender's personal characteristics and conditions play a crucial prognostic role, and the criminological prognosis derived from them determines the imposition of a penalty that is not only just but also consistent with the preventive aims of punishment. However, for such a prognosis to produce a favourable outcome for the offender in terms of sentencing, the court must, at the time of adjudication, positively assess both the offender's individual traits (characteristics) and their familial, financial, social,

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[29] Cf. e.g. Z. Sienkiewicz, in: Bojarski M. (ed.), *Prawo karne materialne. Część ogólna i szczególna*, 9th ed. Warszawa, 2023, p. 449.

[30] Ibidem.

[31] Cf. J. Majewski, in: Majewski J. (ed.), *Kodeks karny*…, op. cit., Article 53, margin number 28.

[32] Cf. V. Konarska-Wrzosek, in: Stefański R.A. (ed.), *Kodeks karny*…, op. cit., Article 53, margin numbers 49 et seq.

and environmental situation (conditions). Accordingly, recognising these elements as mitigating circumstances is contingent upon the court's finding that the offender does not pose a social threat throughout the entire period under consideration, that is, from the commission of the offence to the delivery of the judgment.[33] If a significant amount of time has passed between these two events, the court will undoubtedly need to take this factor into account. Nonetheless, it is impossible to determine its significance for sentencing in the abstract; rather, it may, depending on the circumstances of the case, operate either to the offender's benefit or detriment.

Similarly, the passage of a long period between the offence and sentencing may be taken into account by the court when evaluating the second of the aforementioned circumstances, namely, the offender's conduct following the commission of the offence, which determines the criminological prognosis, whether favourable or unfavourable. In this context as well, the lapse of time may influence the sentence either positively or negatively, depending on the specific circumstances of the case. The assessment made at the time of sentencing extends over the entire period beginning with the commission of the offence and continuing throughout the criminal proceedings until the judgment is rendered. It may encompass both isolated acts by the offender (e.g. remorse driven by guilt, an apology to the victim, or expressed sorrow over the victim's death) and conduct sustained over time (e.g. a demonstrable change in attitude and behaviour,[34] or a positive reputation within the community). It should be borne in mind that the mitigating effect of this circumstance may be further reinforced by its positive resonance, for instance, if it leads to forgiveness from the victim or from members of the victim's immediate family.[35]

The mitigating effect of the offender's post-offence conduct on the penalty imposed may, in principle, be justified by the fact that the offender retrospectively evaluates their prior behaviour as reprehensible and renounces the offence committed. Such a positively assessed attitude, reflecting the offender's personal characteristics and circumstances, lends credibility to the view that their earlier conduct no longer aligns with their current values or way of life. It must be emphasised, however, that the key element is a genuine change in lifestyle, manifested in the consistent observance of legal norms despite the real possibility of engaging in unlawful behaviour.[36]

A positive assessment of the offender's new attitude and post-offence conduct may, of course, be subject to gradation and rewarded accordingly, depending on the degree to which the offender's actual behaviour after committing the offence aligns to the conduct expected in the context of potential sentence mitigation and reflects a break from their previously reprehensible way of life. This assessment will include, among other things, whether the change in lifestyle consists solely in verbal

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[33] See also judgment of the Court of Appeal in Szczecin of 26 October 2017, II AKa 112/17.

[34] Cf. V. Konarska-Wrzosek, in: Stefański R.A. (ed.), *Kodeks karny*…, op. cit., Article 53, margin number 53; I. Zgoliński, in: Konarska-Wrzosek V. (ed.), *Kodeks karny*…, op. cit., Article 53, margin number 12.

[35] Cf. judgment of the Court of Appeal in Cracow of 4 November 2010, II AKa 178/10.

[36] That may be excluded, for example, when the offender remains in a coma for an extended period or is unable to engage in illegal conduct for other reasons (e.g. health issues).

dissociation from the past offence (such as expressions of remorse, apologies to the victim, or admission of guilt), or whether it is reflected in specific, desirable actions (for example, efforts to repair the harm caused by the offence).

Some difficulties may arise in assessing post-offence situations in which no other relevant circumstances are present apart from the offender's adoption of a law-abiding attitude as a member of society. The presence of this factor alone will, as a rule, be insufficient to justify sentence mitigation, particularly due to its lack of direct link to the committed offence. Such an attitude merely indicates that the offender is no longer indifferent to the legal order and, at least declaratively, recognises its binding nature. Even so, a different assessment may be warranted where this favourably assessed attitude is consistently maintained over a prolonged period following the commission of the offence and prior to sentencing. In specific cases, it cannot be excluded that the court, in the course of criminal proceedings, may regard the passage of an unduly long period of time as a compensatory factor that offsets the absence of a direct link between the offender's current attitude and the offence committed in the past, thereby allowing this to be treated as a circumstance mitigating the sentence.[37]

Separate attention should be given to the mitigating circumstances listed in Article 53 § 2b PC. This normative catalogue, introduced alongside the list of aggravating circumstances in Article 53 § 2a by the Act of 7 July 2022, was intended, according to the legislator, to support accurate determinations regarding the gravity of the offence,[38] and also 'to guide the court toward giving particular consideration to these circumstances in the sentencing process, while also exerting a motivational effect on the offender after the commission of the offence, who will be assured that, for instance, if the harm caused is repaired, this will be recognised as a mitigating circumstance, which may contribute to better protection of the victim's interests',[39] as well as to support accurate determinations regarding the gravity of the offence.

Although Article 53 § 2b PC does not explicitly list the passage of a long period of time since the commission of the offence as a mitigating factor, the enumeration it contains is open-ended, which means that the court may also take into account other circumstances established in the course of the proceedings that have a mitigating effect on the sentence.[40] However, the question of whether the mere lapse of

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[37] Without engaging in a comparative analysis, it is worth noting briefly the numerous contributions on this issue found in German criminal law doctrine; see e.g. T. Horter, 'Zeitabstand zwischen Tat und Verurteilung als ungeschriebener Strafmilderungsgrund?', *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2021, Vol. 133, pp. 393 et seq.

[38] See the explanatory memorandum to the government's draft Act amending the Penal Code and Certain Other Acts, 22 February 2022, Sejm print No. 2024, pp. 18–19; https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=2024 [accessed on 31 July 2025]. For a critical perspective on the introduction of a new catalogue of aggravating and mitigating circumstances (Article 53 §§ 2a and 2b PC), see, *inter alia*, J. Giezek, P. Kardas, 'Nowe ujęcie zasad i dyrektyw sądowego wymiaru kary. Kilka uwag na tle uchwalonych zmian normatywnych', *Prokuratura i Prawo*, 2023, No. 7–8, pp. 15–37; J. Majewski, in: Majewski J. (ed.), *Kodeks karny*…, op. cit., Article 53, margin numbers 20–21.

[39] See also the explanatory memorandum to the government's draft act (see footnote 38), p. 20.

[40] Cf. e.g. K. Patora, in: Kulesza J. (ed.), *Prawo karne materialne*…, op. cit., p. 417.

an unduly long period between the commission of the offence and sentencing may be regarded as an independent mitigating circumstance must be answered in the negative. An analysis of the catalogue of circumstances listed in Article 53 §§ 2a–2b PC leads to the conclusion that their nature has been clearly defined by the legislator in such a way that they are closely linked either to the offence itself or to the offender, encompassing their internal experiences or motives, personal circumstances, and conduct following the commission of the offence. By contrast, the passage of time is a factor entirely independent of both the offender and the offence committed.

CONCLUDING REMARKS ON THE NATURE OF THE PASSAGE OF TIME BETWEEN THE OFFENCE AND SENTENCING AS A MITIGATING FACTOR

While the court, when determining the sentence in a specific case, may take into account circumstances which, though not expressly listed in the law, affect not only the assessment of the offender's culpability and the social harm of the offence, but also the achievement of the preventive aims of punishment, the passage of a long period between the offence and sentencing does not fall within this category. This means that the passage of time cannot serve as an autonomous mitigating circumstance within the ordinary sentencing framework, nor as an independent ground for extraordinary mitigation. This is due not only to the absence of express normative grounds in the law but, above all, to the nature and distinct functions of both institutions.

Nonetheless, as demonstrated in the practical application of either institution, the passage of time may supplement and reinforce the mitigating effect of other circumstances on the sentence imposed by the court, provided that certain conditions are met. These include, in particular, the offender's consistently irreproachable conduct throughout the entire duration of the criminal proceedings, from the moment the offence was committed until the judgment is rendered, as well as favourably assessed post-offence behaviour reflecting personal qualities and characteristics. It follows that the lapse of time between the offence and sentencing should not be viewed as a distinct and autonomous ground for mitigation, whether within the ordinary or extraordinary sentencing framework, but rather as a reflection of the offender's post-offence conduct, evidencing the early realisation of certain preventive aims – that is, prior to the issuance of the judgment. It is worth emphasising, however, that the mere passage of a long period of time since the commission of the offence does not automatically indicate that the goal of special prevention has been achieved, unless it is supported by the offender's irreproachable attitude and commendable conduct following the offence. If the offender, having committed one offence, subsequently commits another, the mere fact that a long period of time has passed between these offences cannot justify a mitigating effect on the sentence. A return to criminal behaviour clearly shows that the offender's attitude and conduct have not improved, meaning that no form of 'automatic' (i.e. prior

to the judgment) rehabilitation has occurred, which, as a result, would reduce the need to exert influence on the offender through the imposition of a severe penalty.

It must be acknowledged that, on the one hand, as time passes following the commission of an offence, the rationale for imposing a penalty within the statutory sentencing framework may gradually diminish, although – as has been repeatedly emphasised – the mere passage of time is neither the sole nor the principal cause of such a reduction. On the other hand, it cannot be overlooked that a lengthy period (particularly one defined in detail by the provisions of Chapter XI of the Penal Code) may, in the case of most offences (for exceptions, see Article 105 PC), lead to the expiration of criminal liability, that is, in substantive terms, the elimination of the possibility to prosecute the act and impose an appropriate penal sanction.[41]

It is also worth noting that there is no direct or automatic correlation between the length of time elapsed from the commission of the offence to sentencing and a diminished need to pursue the penal objectives related to social impact. Under the current legal framework, the general preventive rationale for sentencing places primary emphasis on generating a deterrent effect that resonates across society, with its educational function taking secondary importance. Accordingly, the public interest in holding the offender accountable for a committed offence remains intact, regardless of the passage of time.

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[41] For a more detailed discussion, see e.g. V. Vachev, 'Charakter prawny przedawnienia karalności w polskim prawie karnym', *Studia Iuridica*, 2022, No. 93, pp. 243 et seq., as well as the literature cited therein.

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EXEMPTION FROM THE REMAINDER OF THE PENALTY OF LIMITATION OF LIBERTY (NON-CUSTODIAL PENALTY)

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Abstract
This article discusses the exemption from the remainder of the penalty of limitation of liberty (non-custodial penalty) under Article 83 of the Penal Code, a legal institution that plays a significant role in criminal policy. It is intended to encourage convicted persons to comply with the law not only during the execution of the penalty but also after exemption, once part of the penalty has been served. However, this objective may not always be achieved due to the absence of additional instruments for influencing the conduct of convicted persons following exemption. The definitive nature of exemption, which precludes any further action in the event of a violation of the legal order by the exempted person, has led to a *de lege ferenda* proposal to make this institution conditional. The article analyses the purpose and legal nature of exemption, the conditions for its application (serving part of the sentence, compliance with the legal order, fulfilment of obligations imposed on the convicted person, penal measures, compensatory measures, and forfeiture), the sentencing procedure, and the consequences of exemption leading to recognition of the sentence as served.

Keywords: legal nature, penalty of limitation of liberty, legal order, penalty amount, probation measure, exemption

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INTRODUCTION

The penalty of limitation of liberty (non-custodial penalty) is a time-limited sanction, with its statutory parameters defined in Article 34 § 1 of the Penal Code (PC). The court imposes it within this framework and within the limits specified in the sanction corresponding to the relevant criminal provision. The penalty imposed in the judgment does not necessarily have to be executed in full, as the Penal Code provides for the possibility of reducing the sentence by granting an exemption from serving part of it and deeming it completed (Article 83 PC). The considerations presented in this article are guided by the thesis that exemption from serving the remainder of the penalty of limitation of liberty constitutes a legal institution of significant importance in criminal policy. The research hypothesis assumes that, in order to enhance its role in improving the effectiveness of the penalty of limitation of liberty, this institution should be made conditional. Although the exemption is designed to encourage convicted persons to observe the legal order not only while serving their sentence but also after its reduction, this objective may not be achieved due to the absence of any further mechanisms for influencing their conduct. The article also seeks to interpret all components of this institution and to indicate possible directions for reform. Dogmatic, legal, and normative methods are employed to achieve the objectives outlined above.

EXEMPTION AIM

Polish criminal law first introduced the possibility of exemption from serving part of a non-custodial penalty in the 1969 Criminal Code. Pursuant to Article 88 of that Code, the court could exempt a person sentenced to the penalty of limitation of liberty from serving the remainder of the sentence and deem it served, provided that the convicted person had completed at least half of the sentence, respected the law, performed their work diligently, and fulfilled the obligations imposed. This regulation is similar to the current Article 83 PC.

It is rightly observed in the doctrine that exemption from serving the remainder of a penalty of limitation of liberty creates an incentive for convicted persons to observe the legal order and conscientiously fulfil the obligations imposed upon them as part of the sentence. It has educational value of both an individual and preventive nature.[1] It is a rational reward for the convicted perpetrator.[2] And serves to encourage law-abiding behaviour and the proper performance of obligations.[3] The prospect of partial reduction of the penalty is a strong motivational factor.[4]

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1 A. Marek, *Kodeks karny. Komentarz*, Warszawa, 2010, p. 252.

2 V. Konarska-Wrzosek, in: Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 555.

3 T. Kalisz, 'Wszczęcie i data zakończenia postępowania w przedmiocie wykonania kary ograniczenia wolności', in: Kalisz T. (ed.), *Nowa kodyfikacja prawa karnego*, Vol. XL, Wrocław, 2016, p. 19.

4 K. Stasiak, 'Kara ograniczenia wolności i jej rola w resocjalizacji sprawców czynów karalnych', in: Konopczyński M., Kwadrans Ł., Stasiak K. (eds), *Polska kuratela sądowa na przełomie wieków – nadzieje, oczekiwania, dylematy*, Kraków, 2016, pp. 145–159.

For this reason, exemption can be an effective instrument for enhancing the efficiency of the penalty of limitation of liberty in achieving its individual and preventive purposes.

LEGAL NATURE OF EXEMPTION

Defining the legal nature of exemption from the remainder of the penalty of limitation of liberty should begin with a clarification of terminology. Various terms are used in the literature to describe this institution, including:
(1) reduction of the penalty of limitation of liberty;[5]
(2) exemption from the remainder of the penalty of limitation of liberty;[6]
(3) exemption from a part of the penalty of limitation of liberty;[7]
(4) early exemption from serving the remainder of the penalty of limitation of liberty;[8]
(5) early recognition of the penalty of limitation of liberty as served following the exemption of a convicted person from serving a part of it;[9]
(6) conditional exemption from serving the remainder of the penalty of limitation of liberty.[10]

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[5] J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa, 1997, p. 161; E. Bieńkowska, in: Rejman G. (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa, 1999, p. 1198; K. Maksymowicz, 'Zwolnienie od reszty kary ograniczenia wolności', in: Bogunia L. (ed.), *Nowa kodyfikacja prawa karnego*, Vol. VI, Wrocław, 2000, p. 229; M. Kalitowski, in: Górniok O., Hoc S., Kalitowski M., Przyjemski S.M., Sienkiewicz Z., Szumski J., Tyszkiewicz L., Wąsek A. (eds), *Kodeks karny. Komentarz*, Vol. I, Gdańsk, 2005, p. 677; A. Marek, *Kodeks*…, op. cit., p. 252; K. Postulski, 'Stosowanie przepisów kodeksu karnego w postępowaniu wykonawczym (wątpliwości, niespójności, propozycje)', in: Kardas P., Sroka T., Wróbel W. (eds), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, Vol. II, Warszawa, 2012, p. 912; A. Ornowska, *Kara ograniczenia wolności w świetle nowelizacji kodeksu karnego i kodeksu karnego wykonawczego*, Opole, 2013, p. 247; B.J. Stefańska, *Zatarcie skazania*, Warszawa, 2014, pp. 266–267; T. Kalisz, *Wszczęcie*…, op. cit., p. 18; J. Lachowski, in: Królikowski M., Zawłocki R. (eds), *Kodeks karny. Część ogólna. Komentarz. Art. 1–116*, Warszawa, 2021, p. 1158; Z. Sienkiewicz, in: Bojarski M. (ed.), *Prawo karne materialne. Część ogólna i szczególna*, Warszawa, 2023, p. 445; M. Kulik, in: Mozgawa M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 364; K. Liżyńska, 'Skutki prawne faktycznego niewykonywania przez skazanego kary ograniczenia wolności', in: Kalisz T. (ed.), *Nowa kodyfikacja prawa karnego*, Vol. LXVII, Wrocław, 2023, p. 10; M. Filipczak, in: Kulesza J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2025, p. 207; J. Mierzwińska-Lorencka, in: Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2025, p. 636.

[6] R. Góral, *Kodeks karny. Praktyczny komentarz*, Warszawa, 2007, p. 17; G. Łabuda, in: Giezek J. (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa, 2021, p. 650; V. Konarska-Wrzosek, in: Konarska-Wrzosek V. (ed.), *Kodeks*…, op. cit., p. 555; J. Majewski, in: Majewski J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2024, p. 536; K. Stasiak, R. Momot, 'Sposoby zakończenia kary ograniczenia wolności. Czy przyjęty model sprzyja wykonaniu kary w pierwotnej formie?', in: Kalisz T. (ed.), *Nowa kodyfikacja prawa karnego*, Vol. LXXII, Wrocław, 2024, p. 112.

[7] T. Bojarski, in: Bojarski T. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, p. 256.

[8] A. Zoll, in: Wróbel W., Zoll A. (eds), *Kodeks karny. Część ogólna. Komentarz do art. 53–116*, Vol. I, Warszawa, 2016, p. 385.

[9] P. Hofmański, L.K. Paprzycki, A. Sakowicz, in: Filar M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, p. 633.

[10] S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks karny. Komentarz*, Warszawa, 2019, p. 587.

Among the above-mentioned terms, the expression 'exemption from the remainder of the penalty of limitation of liberty' has the strongest justification, as it appears in Article 83 PC and is thus a normative term. Scholars should employ legal and juridical language in their works on law. Legal language is the language in which normative acts are formulated – it is the language of the legislator, used in statutes, decrees, regulations, and other legal acts. It is of fundamental importance. Juridical language, on the other hand, is based on ordinary language but differs from it mainly through its specific semantic rules concerning the meanings assigned to terms, phrases, and expressions contained in legal texts.[11] Juridical language is that 'used by lawyers who are involved in the law'.[12] It is employed in court rulings, administrative decisions, and scholarly works in the field of jurisprudence.[13]

To determine the nature of this institution, it is essential to establish whether it belongs to substantive criminal law or executive criminal law. In the literature, it is commonly regarded as an institution of executive criminal law. This view is based on the argument that the decision on exemption is made during the execution proceedings and may rely on grounds that are also determined and assessed during those proceedings.[14] Article 83 PC regulates both the formal and substantive grounds for exemption. It has also been argued that there is no rational basis for the provision on reducing the penalty of limitation of liberty to appear in the Penal Code (Article 83). According to this view, it should instead be placed in the Penal Enforcement Code, which already contains provisions of a similar substantive nature, such as those concerning the modification of the form of fulfilling a work obligation (Article 63a § 1), the rules for recognising the penalty as served (Article 64), and the ordering of the execution of a penalty alternative to imprisonment (Article 65 § 1).[15] However, since the grounds for exemption from the remainder of the penalty of limitation of liberty are set out in the Penal Code (Article 83), it should be assumed that it is of a substantive criminal nature. The fact that the exemption is applied during the execution of the penalty of limitation of liberty does not justify classifying it as part of executive criminal law or as having a hybrid nature – i.e., both substantive and executive. The Penal Enforcement Code does not regulate this institution in any substantive respect; it merely specifies procedural aspects, including that its application falls within the jurisdiction of the courts. Regional courts in whose area the penalty is being executed have jurisdiction to adjudicate on the matter (Article 55 § 1 PEC). This Code does, however, contain a similar provision – Article 64 § 1 PEC – concerning the recognition of the penalty of limitation of liberty as served. Nevertheless, this is an entirely different institution. Pursuant to that provision, in cases where the convicted person has failed to perform the full amount of work, make all required deductions

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

[12] B. Wróblewski, *Język prawny i prawniczy,* Kraków, 1948, p. 136.

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

[14] E. Bieńkowska, in: Rejman G. (ed.), *Kodeks karny…*, op. cit., p. 989; K. Maksymowicz, *Zwolnienie od reszty kary…*, op. cit., p. 229; A. Ornowska, *Kara…*, op. cit., p. 247.

[15] K. Postulski, *Stosowanie…*, op. cit., pp. 912–913.

from remuneration, or fulfil other obligations, the court must decide whether and to what extent the penalty may be deemed to have been served, taking into account the extent to which the objectives of the penalty have been achieved. The court makes such a decision only after the period for which the penalty of limitation of liberty was imposed has expired, as only then can it be determined that the convicted person has failed to perform the full amount of work, to make all deductions from remuneration, or to fulfil other obligations. The decisive factor in this assessment is a positive evaluation of whether the aims of the penalty, as specified in Article 53 PEC, have been achieved. The penalty may be recognised as served in full or in part, for example, with respect to the work obligation or the fulfilment of other obligations.[16]

With regard to the nature of the exemption from the remainder of the penalty of limitation of liberty, the doctrine considers it a probation measure. It is argued that such a nature results from the probationary recognition of the penalty as served[17] or from the abandonment of further punishment of the perpetrator.[18] This classification, however, is questioned, as it is pointed out that the institution differs from other probation measures, particularly because it is unconditional and does not involve placing the convicted person under probation.[19] Moreover, no probationary obligations are imposed on the convicted person, and the exemption cannot be revoked.[20]

Admittedly, a systemic interpretation supports recognising this institution as a probation measure, since Article 83, which defines it, is included in Chapter VII entitled 'Measures related to placing a perpetrator on probation'. However, the unconditional nature of this institution argues against assigning it a probationary character. The placement of this provision in that chapter is explained in the doctrine by the nature of the reduction of the penalty of limitation of liberty and by its similarity – despite the absence of probationary elements – to conditional early release from the remainder of the penalty of deprivation of liberty (imprisonment). It also reflects the idea of providing the convicted person with an opportunity for early exemption from serving this sentence and encouraging them to behave appropriately, in particular by obeying the legal order, conscientiously performing the work assigned by the court, and fulfilling imposed obligations and penal measures.[21] Furthermore, more lenient treatment of offenders who have met certain conditions within the prescribed period is a typical feature of probation.[22] These

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[16] K. Postulski, *Kodeks karny wykonawczy. Komentarz*, Warszawa, 2017, p. 459; M. Laskowski, in: Gerecka-Żołyńska A. (ed.), *Kodeks karny wykonawczy. Komentarz*, Warszawa, 2023, p. 353.

[17] M. Filipczak, in: Kulesza J. (ed.), *Prawo karne materialne. Nauka o przestępstwie, ustawie karnej i karze*, Warszawa, 2023, p. 531; M. Filipczak, in: Kulesza J. (ed.), *Kodeks*…, op. cit., p. 207.

[18] M. Królikowski, R. Zawłocki, *Prawo karne*, Warszawa, 2015, p. 386.

[19] A. Ornowska, *Kara*…, op. cit., p. 247; J. Majewski, in: Majewski J. (ed.), *Kodeks*…, op. cit., p. 536; G. Łabuda, in: Giezek J. (ed.), *Kodeks*…, op. cit., p. 650.

[20] J. Śliwowski, *Kara ograniczenia wolności. Studium penalistyczne*, Warszawa, 1973, p. 162; S. Zimoch, 'O zwolnieniu od kary ograniczenia wolności', *Zeszyty Naukowe Instytutu Badania Prawa Sądowego*, 1977, No. 7, pp. 90–91; K. Maksymowicz, *Zwolnienie*…, op. cit., pp. 230–231; A. Ornowska, *Kara*…, op. cit., p. 247.

[21] M. Kalitowski, in: Górniok O. et al. (eds), *Kodeks karny*…, op. cit., pp. 677–678; S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks*…, op. cit., p. 588.

[22] R. Giętkowski, *Kara ograniczenia wolności w polskim prawie karnym*, Warszawa, 2007, p. 50.

arguments, however, are unconvincing. This legislative solution appears incorrect, as Chapter VI, 'Principles of imposing penalties and penal measures', would be a more appropriate place to regulate this matter within the Code.[23]

Making the exemption from the remainder of the penalty of limitation of liberty absolute was an inappropriate legislative choice. Given the relatively short period for which this penalty must be served before the measure can be applied, it is not possible to make an accurate assessment of the convicted person's legal, let alone moral, improvement. Such a brief period does not allow for an error-free, positive criminological prognosis. The assertion that cumulative fulfilment of the conditions provided for in Article 83 PC necessarily demonstrates a positive criminological prognosis and that the aims of the sentence have thereby been achieved, without the need to serve the entire sentence, is not convincing.[24] The finality of exemption prevents its revocation, even if the convicted person flagrantly breaches the law by committing a serious crime. Moreover, when ruling on exemption from the remainder of the penalty of limitation of liberty, the court cannot impose any obligations on the convicted person to ensure continued compliance with the law after the exemption.

As indicated in the doctrine,[25] it is not permissible to amend the exemption order under Article 24 § 1 PEC, which allows for the amendment or repeal of a previous order at any time during the execution proceedings if new or previously unknown circumstances relevant to the decision are revealed. However, such an amendment is inadmissible if it is to the detriment of the convicted person more than six months after the order has become final and binding (Article 24 § 2 PEC). This possibility is rightly rejected in the doctrine, since neither the Penal Code nor the Penal Enforcement Code provides for the revocation of a granted exemption by the court. Therefore, it would amount to 'introducing, in essence, the possibility of revoking a granted exemption "through the back door", i.e. through an interpretation of the provision that is, firstly, inconsistent with the legislator's unequivocal intent in this regard, and secondly, detrimental to the convicted person'.[26]

As a result, this leads to the *de lege ferenda* conclusion that exemption from the remainder of the penalty of limitation of liberty should be made conditional. Article 83 PC should therefore read as follows: 'A person sentenced to the penalty of limitation of liberty who has served at least half of it, respected the legal order, and fulfilled the obligations imposed on them, as well as the imposed penal measures, compensatory measures, and forfeiture, may be conditionally exempted from the remainder of the penalty by the court. The time remaining to be served shall constitute a probation

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[23] In the Criminal Code of 1969, Article 88 concerning the exemption from the remainder of the penalty of limitation of liberty was in Chapter XI 'Rules of penalty execution'.

[24] The Supreme Court ruling of 13 July 2010, WZ 29/10, *OSNKW*, 2010, No. 10, item 90; A. Zoll, in: Wróbel W., Zoll A. (eds), *Kodeks…*, op. cit., pp. 385–386; V. Konarska-Wrzosek, in: Konarska-Wrzosek V. (ed.), *Kodeks…*, op. cit., p. 558.

[25] J. Lachowski, in: Królikowski M., Zawłocki R. (eds), *Kodeks…*, op. cit., p. 1158; K. Postulski, 'Glosa do postanowienia SN z dnia 13 lipca 2010 r., WZ 29/10', *Wojskowy Przegląd Prawniczy*, 2011, No. 1, p. 125; C.P. Waldziński, 'Glosa do postanowienia SN z dnia 13 lipca 2010 r., WZ 29/10', *Prokuratura i Prawo*, 2012, No. 9, p. 187.

[26] V. Konarska-Wrzosek, in: Konarska-Wrzosek V. (ed.), *Kodeks…*, op. cit., p. 556.

period.' Article 83a should also be added, as follows: 'If the conditional exemption is not revoked during the probation period and within three months of its completion, the sentence shall be deemed served upon conditional exemption.'

The adjudication on obligations to be imposed on the convicted person during the probation period, and the revocation of conditional exemption, should be regulated in the Penal Enforcement Code, as is the case with a similar institution, namely conditional release from serving the remainder of the penalty of deprivation of liberty (imprisonment). Accordingly, Article 63d should be added to the Code, reading: 'The court may impose on the person conditionally exempted from the remainder of the penalty of limitation of liberty the obligations specified in Article 72 § 1(4)–(7a) PC,' and Article 63e, reading: 'The court may revoke conditional exemption from the remainder of the penalty of limitation of liberty if the person exempted, during the probation period, violates the legal order or evades the obligations imposed.'

GROUNDS FOR EXEMPTION

Exemption from the remainder of the penalty of limitation of liberty applies to both forms of this penalty. Article 83 PC refers to the penalty of limitation of liberty in general and is not restricted to any particular form. Interpreting this provision in accordance with the rule of linguistic interpretation *lege non distinquente nec nostrum est distinquere*, it is not permissible to limit its application to only one form of this penalty. For this reason, it is not possible to agree with the view that this institution applies solely to the penalty of limitation of liberty in the form of an obligation to perform unpaid supervised community service, and does not include the form involving remuneration deductions.[27]

Under Article 83 PC, the court may exempt a convicted person from the remainder of the penalty of limitation of liberty if they: (1) have served at least half of the sentence; (2) have complied with the legal order; and (3) have fulfilled the obligations imposed on them, as well as adjudicated penal measures, compensatory measures, and forfeiture. All these requirements must be met cumulatively. The catalogue is closed (*numerus clausus*); the court cannot invoke other circumstances. However, this does not mean that, if the requirements are fulfilled, the court is obliged to issue a positive decision when it determines that the objectives of the sentence have not been achieved. It is rightly held in the doctrine that, when making a positive decision, the court must be convinced that the objectives of the penalty have been achieved, particularly that the convicted person will continue to respect the legal order in the future and will demonstrate socially desirable behaviour.[28] Although the provision does not explicitly make exemption contingent upon

[27] S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks*…, op. cit., p. 588.

[28] J. Śliwowski, *Kara*…, op. cit., p. 163; S. Zimoch, *O zwolnieniu*…, op. cit., p. 94; W. Szkotnicki, 'Przedterminowe zwolnienie z odbycia części kary ograniczenia wolności', *Problemy Praworządności*, 1984, No. 8–9, pp. 66–67; E. Bieńkowska, in: Rejman G. (ed.), *Kodeks*…, op. cit., p. 1197; R. Giętkowski, *Kara*…, op. cit., p. 167; A. Ornowska, *Kara*…, op. cit., p. 250.

achieving the objectives of the penalty of limitation of liberty,[29] it is not possible to disregard whether those objectives have in fact been met.

However, the view that the statute assumes that the cumulative fulfilment of all requirements leads to a determination of a positive criminological prognosis – allowing the conclusion that the individual preventive objectives of the sentence have been achieved without the need to execute the entire penalty – is unfounded.[30] Therefore, it is not possible to endorse the position of the Supreme Court that: 'When all the requirements laid down in Article 83 PC are met, allowing for the exemption of the convicted person from the remainder of the penalty of limitation of liberty, and the court nevertheless refuses to grant such exemption, the court is obliged to thoroughly justify its negative position, and may not rely on circumstances other than those it took into account when imposing the penalty.'[31]

PENALTY AMOUNT TO BE SERVED

The Penal Code requires that the convicted person serve at least half of the adjudicated penalty. This is a formal requirement. The period of serving the penalty cannot be reduced by more than half. This concerns the penalty actually being served. The service of this penalty does not begin at the moment when the judgment becomes final and binding and, under Article 9 § 2 PEC, becomes enforceable, unless otherwise stipulated by statute. The Penal Enforcement Code provides differently for the penalty of limitation of liberty, specifying the commencement of execution separately for each form of non-custodial penalty.

Serving the sentence in the form of an obligation to perform unpaid supervised community service begins on the day the convicted person starts performing the assigned work (Article 57a § 1 PEC). This is considered the first day of the convicted person's service of the penalty.[32]

By contrast, serving the sentence in the form of a deduction of 10%–25% of the monthly remuneration for a social purpose designated by the court commences on the first day of the period in which the deduction is made (Article 57a § 2 PEC). This is the day when the deduction from remuneration actually occurs.[33]

Until that point, the penalty of limitation of liberty does not attain enforceability status and cannot be executed.[34] When calculating whether half of the penalty of

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[29] J. Zagórski, 'Prawnomaterialne podstawy stosowania kary ograniczenia wolności oraz pracy społecznie użytecznej w Polsce', *Państwo i Prawo*, 2004, No. 1, p. 79.

[30] P. Hofmański, L.K. Paprzycki, A. Sakowicz, in: Filar M. (ed.), *Kodeks*…, op. cit., p. 633.

[31] The Supreme Court ruling of 13 July 2010, WZ 29/10, *OSNKW*, 2010, No. 10, item 90, with a critical gloss by C.P. Waldziński, *Prokuratura i Prawo*, 2012, No. 9, pp. 184–189, and an approving one by K. Postulski, *Wojskowy Przegląd Prawniczy*, 2011, No. 1, pp. 122–126. Such a stance is also presented in the doctrine (A. Tobis, *Kara ograniczenia wolności za przestępstwa przeciwko rodzinie*, Warszawa, 1987, p. 177; K. Maksymowicz, *Zwolnienie*…, op. cit., pp. 239–240; J. Majewski, in: Majewski J. (ed.), *Kodeks*…, op. cit., p. 536).

[32] L. Osiński, in: Lachowski J. (ed.), *Kodeks karny wykonawczy. Komentarz*, Warszawa, 2021, p. 308.

[33] Ibidem, p. 309.

[34] T. Kalisz, *Wszczęcie*…, op. cit., pp. 14–15.

limitation of liberty has been served, it is also necessary to take into account any period that has reduced the execution time due to actual imprisonment in connection with the case and recognised as part of the sentence served (Article 63 § 1 PC), or any other concurrent proceedings (Article 417 PEC).[35]

There is no absolute minimum amount of the penalty that must be served. This means that, formally, there are no obstacles to granting exemption from the remainder of the penalty in cases where the sentence was imposed at its statutory minimum – namely, one month (Article 34 § 1 PC). In the literature, it is sometimes assumed that, in such cases, the required portion of the penalty to be served is 15 days.[36] However, this interpretation is inconsistent with the statutory time unit of this penalty. According to Article 34 § 1 PC, the penalty of limitation of liberty is expressed in months and years. Therefore, half of the sentence cannot be measured in days; it must amount to at least one month. For this reason, this penal measure cannot be applied in the case of one-month non-custodial penalties.

It is recommended in the literature that, in the event of very short periods of serving the penalty, this measure should be applied sparingly[37] or not applied at all.[38] This recommendation is sound, as serving this penalty for a relatively brief period does not enable the court to be convinced that the penalty has fulfilled its purpose.

The maximum amount for calculating half of the penalty served corresponds to the limit designated in the sentence as the total period for which the penalty was imposed on the convicted person. This applies not only to half of that period but also to half of the total number of hours of community service assigned by the court, or to half of the total deduction from remuneration, corresponding to the product of the monthly deductions specified in the judgment and the number of months constituting half of the penalty duration.[39] Taking into account only the period of actual service when calculating the portion of the penalty served would result in the completion of unpaid supervised community service relatively soon after its commencement. At the request of the convicted person, and for important reasons – particularly those justified by the person's gainful employment or health condition – the court may determine that the hours of unpaid supervised community service be settled in periods other than monthly, provided that these do not exceed the overall duration of the penalty imposed or the total number of hours of work performed within that period (Article 63b PEC).

In the event that the obligation to perform unpaid supervised community service or to make deductions from remuneration for a social purpose designated by the court has not been fulfilled, or the convicted person has failed to comply with

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[35] S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks*…, op. cit., p. 588; M. Kulik, in: Mozgawa M. (ed.), *Kodeks*…, op. cit., p. 364; J. Lachowski, in: Królikowski M., Zawłocki R. (eds), *Kodeks*…, op. cit., p. 1161; V. Konarska-Wrzosek, in: Konarska-Wrzosek V. (ed.), *Kodeks*…, op. cit., p. 557; J. Majewski, in: Majewski J. (ed.), *Kodeks*…, op. cit., p. 536.

[36] G. Łabuda, in: Giezek J. (ed.), *Kodeks*…, op. cit., p. 650.

[37] A. Ornowska, *Kara*…, op. cit., p. 249.

[38] M. Kalitowski, in: Górniok O. et al. (eds), *Kodeks karny*…, op. cit., p. 679; R. Giętkowski, *Kara*…, op. cit., p. 167; V. Konarska-Wrzosek, in: Konarska-Wrzosek V. (ed.), *Kodeks*…, op. cit., p. 557.

[39] R. Giętkowski, *Kara*…, op. cit., p. 166.

imposed obligations, penal measures, compensatory measures, or forfeiture, but the period for which the penalty was imposed has lapsed and there are no grounds for concluding that the person has evaded execution of the penalty of limitation of liberty, the court, in accordance with Article 64 § 1 PEC, shall decide whether and to what extent the penalty may be deemed to have been served, taking into account the extent to which the objectives of the penalty have been achieved.[40]

RESPECTING THE LEGAL ORDER BY THE CONVICTED PERSON

In the context of the convicted person's obligation to respect the legal order, certain doubts arise as to the period to which this requirement applies – whether it concerns the period of serving the sentence or the period from the date when the sentence becomes final and binding. In the doctrine, the latter interpretation is adopted,[41] and this view is correct, since from that moment onwards it is assumed that the accused has been sentenced to the penalty of limitation of liberty.

The term 'legal order' is also employed in other provisions of the Penal Code (Article 66 § 1, Article 68 § 3, Article 75 §§ 1a–3, Article 77 § 1, Article 84 §§ 1 and 2a, Article 107 § 2, and Article 115 § 21) as well as in the Penal Enforcement Code (Article 43p § 2, Article 43q § 3, Article 43zza § 1(2), Article 62 § 3, Article 139 § 1, Article 156 § 1, Article 160 §§ 2 and 3, Article 182 § 3, and Article 202b § 2). In accordance with the prohibition of homonymous interpretation, this concept should be accorded the same meaning across all these provisions.[42]

In its broadest sense, *legal order* refers to the set of norms that govern behaviour in interpersonal relations and in an individual's relations with society. It constitutes the entire body of positive statutory law within a given community. It encompasses all legal material applicable to the spatial sphere of life of that community and in force at a given time.[43] The legal order is a functioning system of law composed of multiple interrelated elements.[44] It includes legal norms contained in the Constitution, statutes, ratified international agreements, and regulations (*arg.* ex Article 87 of the Constitution of the Republic of Poland), as well as in international law (*arg.* ex Article 9 of the Constitution of the Republic of Poland).[45]

In criminal law, including in Article 83 PC, the term is not confined solely to the norms of the Penal Code or the Misdemeanour Code but also extends to the norms of other branches of law.[46]

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[40] K. Liżyńska, *Skutki prawne*…, op. cit., p. 101.

[41] J. Majewski, in: Majewski J. (ed.), *Kodeks*…, op. cit., p. 537.

[42] L. Morawski, *Wstęp do prawoznawstwa*, Toruń, 2014, p. 148.

[43] A. Kość, 'Porządek prawny jako społeczny porządek norm', *Roczniki Nauk Prawnych*, 2000, Vol. 10, Issue 1, pp. 43–44.

[44] W. Lang, 'System prawa a porządek prawny', in: Bogucki O., Czepita S. (eds), *System prawny a porządek prawny*, Szczecin, 2008, pp. 13 and 16.

[45] K. Majewski, P. Majewska, 'Legalność jako kryterium nadzoru nad samorządem terytorialnym – ius czy lex', *Roczniki Administracji i Prawa*, 2016, No. 1, p. 121.

[46] S. Strycharz, 'Pojęcie porządku prawnego w kodeksie karnym', *Nowe Prawo*, 1970, No. 6, p. 853; J. Skupiński, 'Rażące naruszenie porządku prawnego jako podstawa odwołania środka

The essence of this concept is aptly reflected in the case law, which states that:

> 'The concept of "legal order" used in criminal law as a premise relating to the perpetrator's attitude should not be reduced solely to the order within the criminal law sense. Committing a crime is only one form of violating this order. It may also concern petty offences, as well as behaviour that does not constitute a prohibited act carrying punishment, such as violating civil or employment obligations. Therefore, a violation of the legal order by the convicted person includes conduct contrary to prohibitions or orders arising from criminal law (commission of a crime), administrative law (commission of a petty offence), as well as conduct contrary to the rules whose observance falls within the scope of the aims and purposes associated in criminal law with institutions such as conditional release, conditional suspension of the execution of a sentence, conditional discontinuation of criminal proceedings, or postponement or interruption of the execution of a sentence.'[47]

FULFILMENT OF OBLIGATIONS IMPOSED ON THE CONVICTED PERSON, ADJUDICATED PENAL MEASURES, COMPENSATORY MEASURES AND FORFEITURE

Article 83 PC makes exemption from the remainder of the penalty of limitation of liberty conditional, *inter alia*, upon the fulfilment of the obligations imposed on the convicted person. These obligations include: (1) apologising to the injured party; (2) fulfilling the obligation to support another person; (3) engaging in gainful employment, education, or vocational training; (4) refraining from abusing alcohol or using other intoxicating substances; (5) undergoing addiction therapy; (6) undergoing therapy, in particular psychotherapy or psychoeducation; (7) participating in corrective and educational activities; (8) refraining from staying in certain environments or places; and (9) refraining from contacting the injured party or other persons in a specified manner, or from approaching the injured party or other persons (Article 34 § 3 in conjunction with Article 72 § 1(2)–(7a) PC). These

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probacyjnego', in: Michalska-Warias A., Nowikowski I., Piórkowska-Flieger J. (eds), *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Bojarskiemu*, Lublin, 2011, p. 317; G. Wiciński, *Postępowania incydentalne związane z wykonaniem kary pozbawienia wolności w programie probacji*, Łódź, 2012, pp. 219–220; A. Ornowska, *Kara*…, op. cit., p. 249; S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks*…, op. cit., p. 589; J. Tekliński, 'Podstawy zakończenia odroczenia wykonania kary pozbawienia wolności', *Probacja*, 2020, No. 2, pp. 77–78; M. Kulik, in: Mozgawa M. (ed.), *Kodeks*…, op. cit., p. 365; J. Lachowski, in: Królikowski M., Zawłocki R. (eds), *Kodeks*…, op. cit., p. 1162; V. Konarska-Wrzosek, in: Konarska-Wrzosek V. (ed.), *Kodeks*…, op. cit., p. 558; J. Majewski, in: Majewski J. (ed.), *Kodeks*…, op. cit., p. 489; the Supreme Court resolution of 29 January 1971, V KZP 26/69, *OSNKW*, 1971, No. 3, item 33; ruling of the Appellate Court in Kraków of 23 June 2006, II AKzw 415/06, *Krakowskie Zeszyty Sądowe*, 2006, No. 6, item 71; ruling of the Appellate Court in Kraków of 11 June 2007, II AKzw 391/07, *Prokuratura i Prawo* – supplement, 2007, No. 12, item 24; ruling of the Appellate Court in Lublin of 12 May 2010, II AKzw 188/10, LEX No. 593384; ruling of the Appellate Court in Kraków of 25 June 2013, II AKzw 631/13, *Krakowskie Zeszyty Sądowe*, 2013, Nos 7–8, item 43, with an approving gloss by K. Postulski, LEX/el., 2014; ruling of the Appellate Court in Kraków of 17 June 2013, II AKzw 444/13, *Krakowskie Zeszyty Sądowe*, 2013, Nos 7–8, item 47.

[47] Ruling of the Appellate Court in Kraków of 15 May 2019, II AKzw 373/19, *Prokuratura i Prawo* – supplement, 2020, No. 9, item 28.

obligations must be fulfilled within the period required for the application of the exemption; this also applies to obligations of a continuous nature.

This provision does not specify the quality of the convicted person's performance in any way. In the literature, it is emphasised that the fulfilment of the obligations imposed on the convicted person should be conscientious, and that the performance of work must be particularly distinguished, as this primarily ensures the achievement of the intended purpose of the imposed penalty.[48] The obligation to conscientiously perform assigned work was originally included in Article 83 PC, but this requirement was repealed by the Act of 20 February 2015 amending Act: Penal Code and Certain Other Acts.[49] It may be presumed that these requirements are related to the obligation of the convicted person, under Article 53 § 2 PEC, to conscientiously fulfil the obligations imposed on them and to observe the established rules of conduct, order, and discipline in the workplace or place of residence. However, the difficulty arises from the fact that the conditions for exemption from the remainder of the penalty of limitation of liberty, as set out in Article 83 PC, are, as previously indicated, exhaustively enumerated and cannot be supplemented by any additional requirements, including those contained in the Penal Enforcement Code.

The completion of obligations imposed on the convicted person, or of adjudicated penal measures, compensatory measures, and forfeiture, occurs when these have been fully executed or when the court has exempted the convicted person from fulfilling them (Article 35 § 4 in conjunction with Article 74 § 2 PC), or when the court has deemed the penal measures to have been executed (Article 84 PC).

ADJUDICATION MODE

Exemption from the remainder of the penalty of limitation of liberty is optional.[50] This is evidenced by the use of the word 'may' in Article 83 PC. It is 'an expression that gives the entire statement or part thereof a shade of assumption, possibility of choice, hesitation, doubt, or a weakening of decidedness'.[51] The phrase 'the court may' expresses an individual competence norm.[52] In the literature, this phrase is interpreted as introducing an additional premise by the legislator – the occurrence of which, together with other premises explicitly indicated in the provision, obliges the court to render the decision provided for in that provision, consistent with the purpose for which it was introduced into the legal system. It is argued that, in criminal law, the

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[48] K. Stasiak, R. Momot, 'Sposoby zakończenia…', op. cit., p. 113.

[49] Journal of Laws of 2015, item 396, as amended.

[50] K. Maksymowicz, *Zwolnienie…*, op. cit., p. 231; A. Ornowska, *Kara…*, op. cit., p. 248; S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks…*, op. cit., p. 588; M. Kulik, in: Mozgawa M. (ed.), *Kodeks…*, op. cit., p. 364; G. Łabuda, in: Giezek J. (ed.), *Kodeks…*, op. cit., p. 650; V. Konarska-Wrzosek, in: Konarska-Wrzosek V. (ed.), *Kodeks…*, op. cit., p. 556; J. Mierzwińska-Lorencka, in: Stefański R.A. (ed.), *Kodeks…*, op. cit., p. 636.

[51] S. Skorupka, A. Auderska, Z. Łempicka (eds), *Mały słownik języka polskiego*, Warszawa, 1968, p. 405.

[52] M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa, 2010, pp. 135–136.

phrase 'the court may' should be interpreted as 'the court is obliged to' if the conditions expressly stated in the provision containing this phrase are satisfied and the reasons underlying its introduction do not argue against the decision provided for therein. Therefore, the court is obliged not only to verify whether all the conditions expressly indicated in Article 83 PC have been met but also to consider the objectives that motivated the legislator to introduce the institution of exemption from the remainder of a non-custodial penalty into the Penal Code. The purpose of this institution is to modify the execution of the imposed penalty of limitation of liberty to achieve the aims of the sentence for the convicted person, particularly in the area of individual deterrence. There is no need to continue executing the penalty of limitation of liberty if the court is satisfied that its objectives have already been achieved, especially when the convicted person demonstrates respect for the legal order and exhibits socially desirable attitudes.[53]

The fulfilment of all requirements under Article 83 PC does not, however, obligate the court to issue a positive ruling. As mentioned above, the court must also assess whether the penalty has fulfilled its intended purposes.

It is emphasised in the doctrine that the optional nature of adjudication on exemption does not imply arbitrariness; a negative ruling is justified only by the absence of at least one of the conditions necessary for a positive decision,[54] or by the detailed indication of circumstances that argue against granting exemption.[55] It is also assumed that, when the statutory conditions are met, exemption should constitute the rule, and refusal the exception.[56] The position that the absence of even one requirement allows for the issuance of a decision refusing exemption cannot be accepted.

EXEMPTION CONSEQUENCES

Exemption from the remainder of the penalty of limitation of liberty results in the penalty being considered served. It does not occur *ex lege* but arises from the court's decision to exempt the convicted person from the remainder of the penalty. Article 83 *in fine* PC expressly provides that, by exempting a convicted person from the remainder of the penalty of limitation of liberty, the court simultaneously deems the penalty to have been served. This constitutes a legal fiction, as it is assumed that the penalty has been served in full, despite the fact that only at least half of it has actually been executed. The moment the exemption decision is issued, the penalty is deemed served.[57] Consequently, the penalty irreversibly loses its enforceable status.[58]

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53 C.P. Waldziński, 'Glosa…', op. cit., pp. 188–189.

54 K. Postulski, 'Glosa…', op. cit., p. 124.

55 S. Zimoch, *Zwolnienie…*, op. cit., p. 91.

56 J. Śliwowski, *Kara…*, op. cit., p. 164; K. Strzępek, 'Kierunki rozwoju wykonawstwa kary ograniczenia wolności', *Nowe Prawo*, 1976, No. 4, pp. 572–573; A. Duracz-Walczak, 'Kara ograniczenia wolności w ocenie prokuratorów', *Problemy Praworządności*, 1980, No. 3, p. 13.

57 K. Maksymowicz, *Zwolnienie…*, op. cit., p. 232.

58 J. Majewski, in: Majewski J. (ed.), *Kodeks…*, op. cit., p. 537.

CONCLUSIONS

1. Exemption from the remainder of the penalty of limitation of liberty, provided for in Article 83 PC, is a legal institution that plays a significant role in criminal policy. It serves as an important incentive for convicted persons to comply with the law and to fulfil the obligations imposed as part of the sentence, as well as any penal measures, compensatory measures, and forfeiture.
2. This exemption is not a probation measure, even though it is regulated in the Penal Code (Article 83) within Chapter VIII, which concerns measures related to placing a perpetrator on probation. It is not probationary in nature, as the exemption is unconditional: it is not granted for a probationary period, no probationary obligations are imposed on the convicted person, and the exemption cannot be revoked.
3. Exemption from the remainder of the penalty of limitation of liberty may be granted after a relatively short period of serving the sentence, as it may occur after at least half of the sentence has been served – which means after one year if the penalty was imposed for the maximum period. Such a short period of serving the sentence does not allow for the formulation of a reliable, positive criminological prognosis. Furthermore, the finality of exemption prevents its revocation, even if the convicted person flagrantly breaches the legal order by committing a serious crime after the exemption.
4. The aforementioned shortcomings justify the *de lege ferenda* proposal to make exemption from the remainder of the penalty of limitation of liberty conditional in nature. Exemption should be granted for a probationary period covering the remaining duration of the sentence, with the possibility of imposing specific probationary obligations on the convicted person and revoking the exemption in the event of a violation of the legal order or evasion of imposed obligations during the probationary period. The sentence should be considered served upon conditional exemption, unless the exemption is revoked during the probationary period or within three months following its completion.

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COMPARATIVE LAW ASPECTS OF CRIMINALISATION OF ACTS AGAINST FREEDOM OF RELIGION IN POLISH AND GERMAN CRIMINAL LAW

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Abstract

The criminal law protection of freedom of belief, understood here also as freedom of religion or freedom of conscience, is not only safeguarded by acts of international law but is also enshrined in the constitutions of most European states. Consequently, national authorities are obliged to ensure the peaceful coexistence of different faiths and religions. This article aims to provide an overview of the provisions of the Polish and German Criminal Codes concerning religious freedom and to compare the scope of their protection in light of the basic laws of these countries.

Keywords: freedom, religion, belief, Polish criminal law, German criminal law

Freedom of religion[1] is one of the fundamental human rights. It is an objective and primary value, i.e. independent of the legislator. The state cannot grant it to anyone nor take it away. The fundamental scope of this freedom is subject to international and constitutional protection, as well as to protection under domestic law, including criminal law.

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[1] For the purposes of this article, the terms ‘freedom of faith’, ‘freedom of religion’, and ‘freedom of conscience’ are regarded as semantically equivalent.

INTERNATIONAL REGULATIONS

Along with freedom of thought and freedom of conscience, freedom of faith is one of the three freedoms protected under Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[2] according to which everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to change one's faith or belief, and the freedom, either alone or in community with others, in public or private, to manifest one's religion or faith in worship, teaching, practice and observance. Paragraph 2 of this provision establishes that the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Freedom of faith is rightly identified with freedom of religion,[3] and there is no basis for differentiating between the normative meanings of these two concepts.

The cited provision of the Convention encompasses a broad spectrum of religious, philosophical, ideological and ethical beliefs.[4] Freedom of thought, conscience and faith forms the foundation of a 'democratic society', protecting both the identity and way of life of believers, atheists, agnostics, sceptics and those who are religiously indifferent.[5] This freedom is exercised not only by individuals but also by institutional entities, i.e. religious communities.[6]

Freedom of faith includes the right to manifest one's religion privately and publicly, including through worship, teaching, practice and ritual acts.[7] It further follows from the case law of the European Court of Human Rights that Article 9(1) ECHR ensures the possibility of preaching and converting to one's religion and imposes an obligation on the state to respect and secure the autonomous existence of religious communities, i.e. the coexistence of individuals and groups characterised by different identities and

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[2] Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, subsequently amended by Protocols Nos 3, 5 and 8, and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284), hereinafter referred to as 'the Convention' or 'the ECHR'.

[3] M. Olszówka, in: Bosek L., Safjan M. (eds), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa, 2016, margin number 43; M. Rozner, 'Prawo do wolności religijnej w Europejskiej Konwencji Praw Człowieka z 1950 r.', *Studia z Prawa Wyznaniowego*, 2002, No. 5, pp. 111 et seq.; K. Kącka, 'Geneza i źródła wolności religii w europejskiej przestrzeni politycznej i prawnej', *Seminare. Poszukiwania naukowe*, 2013, No. 34, p. 164.

[4] J. Szymanek, 'Konstytucjonalizacja prawa do wolności myśli, sumienia, religii i przekonań', *Studia z Prawa Wyznaniowego*, 2007, No. 10, pp. 90–94.

[5] Judgment of the European Court of Human Rights (ECtHR) of 25 May 1993, *Kokkinakis v Greece*, Application No. 14307/88, para. 31.

[6] M.A. Nowicki (ed.), *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa, 2021, p. 877.

[7] Judgment of the ECtHR of 31 July 2009, *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria*, Application No. 40825/98, para. 61; judgment of the ECtHR, *Kokkinakis v Greece*, para. 31; judgment of the ECtHR of 1 July 2014, *S.A.S. v France*, Application No. 43835/11, para. 125; judgment of the ECtHR of 27 June 2000, *Cha'are Shalom Ve Tsedek v France*, Application No. 27417/95, para. 73.

adherence to different beliefs.[8] This means that the state is obliged to guarantee the peaceful coexistence of all religions, as well as of those who do not identify with any religion.[9] To ensure the effective possibility of manifesting religious beliefs, the state must provide judicial protection for religious communities, their members and their property.[10] The fulfilment of this obligation may involve taking measures against certain forms of conduct, including conduct involving the dissemination of information and ideas deemed incompatible with respect for the freedom of thought, conscience and religion of others.[11] In this context, it is further emphasised in the literature that Article 9(1) ECHR protects acts of worship and devotion through which religion or belief is practised in generally recognised forms. Therefore, the state is obliged to provide legal instruments guaranteeing that prayers and other religious practices can be conducted without disturbance.[12]

Under Article 9(2) of the Convention, the freedom to manifest one's religion or faith may be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others. It therefore follows from the wording of this provision that freedom of religion itself cannot be restricted, but only the manner in which it is manifested. State interference should thus occur when, in a multi-faith society, there is a need to guarantee undisturbed religious practice for all.[13] Such restrictions must therefore have statutory status and be necessary in the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others.

It is important to note that, in practice, freedom of religion frequently comes into conflict with freedom of expression. According to Article 10 ECHR, everyone has the right to freedom of expression. This right includes the freedom to hold opinions as well as to receive and impart information and ideas without interference by public authorities and regardless of national frontiers (paragraph 1). The exercise of these freedoms, which entails duties and responsibilities, may be subject to such formalities, conditions, restrictions and 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 confidential information, or for maintaining the authority and impartiality of the judiciary (paragraph 2). In this context, the question arises as to

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[8] Judgment of the ECtHR, *Kokkinakis v Greece*, para. 31; judgment of the ECtHR of 9 July 2013, *Sindicatul 'Păstorul cel Bun' v Romania*, Application No. 2330/09, paras. 136 and 165; judgment of the ECtHR, *Religionsgemeinschaft der Zeugen Jehovas and Others v Austria*, para. 79; M.A. Nowicki (ed.), *Wokół Konwencji…*, op. cit., pp. 877–878.

[9] Judgment of the ECtHR of 21 February 2008, *Alexandridis v Greece*, Application No. 19516/06, paras. 31–32; judgment of the ECtHR of 18 February 1999, *Buscarini and Others v San Marino*, Application No. 24645/94, para. 34.

[10] M.A. Nowicki (ed.), 'Wokół Konwencji…', op. cit., p. 886.

[11] Judgment of the ECtHR of 25 October 2018, *E.S. v Austria*, Application No. 38450/12, para. 45.

[12] M.A. Nowicki (ed.), 'Wokół Konwencji…', op. cit., pp. 877, 881, 886.

[13] Judgment of the ECtHR, *Kokkinakis v Greece*, para. 33.

which right, in the event of a conflict, should prevail. This issue has been addressed by the European Court of Human Rights, which has held that in such situations it is necessary to determine, firstly, whether the interference with freedom of expression is prescribed by law, i.e. whether the limiting provisions have at least statutory or equivalent status; secondly, whether there is a legitimate aim for the interference with freedom of expression, namely the protection of the rights of others, including those safeguarded under Article 9 ECHR; and thirdly, whether the restriction is necessary in a democratic society. The third criterion is closely linked to the concept of the so-called margin of appreciation, that is, the state's discretion to determine what is 'necessary in a democratic society'.[14] In the absence of a uniform European standard for the protection of religious belief, national authorities enjoy a wide margin of appreciation as to which legal measures may be deemed necessary in a democratic society.[15] The concept of the margin of appreciation makes it possible to take into account the specific features of a given society and the cultural context in which a particular legal solution operates.[16] This does not, however, imply that the state may arbitrarily refrain from protecting religious belief. In addition to enjoying a wide margin of appreciation, the state has a positive obligation to ensure the peaceful coexistence of individuals from diverse religious backgrounds, as well as of those who profess no religion.[17]

According to P. Sarnecki, all modern constitutions of democratic states (even if only formally) take into account the individual freedom discussed here.[18]

POLISH CONSTITUTIONAL REGULATIONS

The Polish Constitution,[19] as stated in its solemn preamble, recognises that the Polish Nation comprises citizens who both believe in God and those who do not share this faith. The right to freedom of conscience and religion, on the other hand, is directly regulated in Article 53 of the Constitution. According to its wording, everyone is guaranteed freedom of conscience and religion (paragraph 1). Freedom of religion encompasses the right to profess or adopt a religion through personal choice, as well as to express that religion – individually or collectively, publicly or privately – through worship, prayer, participation in ceremonies, performance

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[14] Judgment of the ECtHR of 20 September 1994, *Otto-Preminger-Institut v Austria*, Application No. 13470/87, paras. 42–50; judgment of the ECtHR of 25 November 1996, *Wingrove v the United Kingdom*, Application No. 17419/90, paras. 36 et seq.; K. Król, 'Granice wolności artystycznej – zarys problematyki', *Santander Art and Culture Law Review*, 2018, Vol. 4, No. 1, p. 175.

[15] Judgment of the ECtHR, *E.S. v Austria*, para. 44; judgment of the ECtHR, *Otto-Preminger-Institut v Austria*, paras. 50 and 55; judgment of the ECtHR, *Wingrove v the United Kingdom*, para. 58.

[16] L. Garlicki (ed.), in: *Konwencja o ochronie praw człowieka i podstawowych wolności. Tom I. Komentarz do artykułów 1–18*, Warszawa, 2010, p. 552.

[17] Judgment of the ECtHR, *E.S. v Austria*, para. 44.

[18] P. Sarnecki, in: Garlicki L., Zubik M. (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2016.

[19] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483, as amended), hereinafter referred to as 'the Constitution'.

of rites and teaching. Freedom of religion also includes the possession of temples and other places of worship according to the needs of believers, and the right of individuals to receive religious assistance wherever they may be (paragraph 2). Parents have the right to provide their children with moral and religious upbringing and teaching in accordance with their faith (paragraph 3). The religion of a legally recognised church or other religious association may be taught in schools without infringing the freedom of conscience and religion of others (paragraph 4). The freedom to manifest one's religion may be restricted only by law and only when necessary to protect state security, public order, health, morals, or the freedoms and rights of others (paragraph 5). No one may be compelled to participate, or not to participate, in religious practices (paragraph 6). No one may be required by public authorities to disclose his or her worldview, religious beliefs or faith (paragraph 7).

The protection of freedom of conscience and religion is a constitutional principle, which derives not only from the content of Article 53 but also from Article 25 of the Constitution. The latter is a constitutional principle governing the relationship between the state and religious structures, ensuring the equality of churches and other religious associations. These freedoms are exercised primarily in the private sphere, but may also be externalised in public spaces.[20]

In the light of Article 53 of the Constitution, the state is the obliged entity, which must guarantee individuals the possibility of freely exercising their freedom of conscience and religion. The duties of the state have not only a negative dimension (the prohibition of interference with freedom) but also a positive one (the obligation to protect this freedom when it is infringed by other individuals). By contrast, other private entities are required to respect freedom of conscience and religion.

The essence of freedom lies in the individual's ability to act within certain boundaries set by the state. The necessity of such boundaries stems from the fact that freedom is generally not absolute and may be restricted, *inter alia*, to enable other individuals to exercise the same freedom simultaneously and independently.[21]

Freedom of conscience and religion is, above all, freedom from interference by the state and its bodies, which, in turn, have positive duties corresponding to this freedom, consisting primarily in ensuring freedom of expression in public life.

Freedom of belief gives rise not only to negative duties on the part of public authorities, such as the duty not to infringe this freedom, but also to positive duties consisting in ensuring conditions that allow this freedom to be exercised freely, in a manner chosen by the authorised person, yet within the limits prescribed by law. According to the Polish Constitution, freedom of conscience and freedom to profess a religion are absolute; only the freedom to manifest them may be restricted.[22]

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[20] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, LEX/el., 2021; P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warszawa, 2000, p. 73; P. Sarnecki, in: Garlicki L., Zubik M. (eds), *Konstytucja…*, op. cit., pp. 277–278.

[21] P. Tuleja (ed.), *Konstytucja…*, op. cit.; P. Sarnecki , in: Garlicki L., Zubik M. (eds), *Konstytucja…*, op. cit., pp. 278–279.

[22] P. Tuleja (ed.), *Konstytucja…*, op. cit.

POLISH CRIMINAL LAW REGULATIONS

In order to ensure the fulfilment of the state's obligations regarding the free exercise of freedom of religion, the Polish legislator introduced into the Penal Code[23] provisions criminalising offences against freedom of conscience and religion. Chapter XXIV of the Penal Code includes three types of acts, namely religious discrimination (Article 194 PC), malicious obstruction of religious acts (Article 195 PC) and insult to religious feelings (Article 196 PC).

According to Article 194 PC, any individual who restricts another person's rights on the grounds of their religious affiliation or lack thereof may be subject to a fine, restriction of liberty, or imprisonment for up to two years.

Adopting a particular worldview, which includes adherence to or rejection of a particular religion, as well as participation in activities manifesting this choice, is of great importance not only for each person's sense of identity but also for the sense of coherence between the values they profess and those to which their behaviour corresponds.[24]

This provision concerns discrimination based on belonging to a particular religion or, conversely, on not belonging to any religion. It protects the right to hold one's own beliefs as well as the right to remain irreligious, i.e. to maintain a particular religious worldview. In this context, the content of the provision corresponds closely to the constitutional regulations, defining as the protected good the freedom to hold opinions in the internal sphere of human life and to externalise them in accordance with one's conscience within the limits of the law. It also expresses the principle of equality, as set out in Article 32(2) of the Constitution, according to which everyone has the same right to participate in social life, regardless of whether they belong to a particular religious group or not.[25] The causative act of this offence will therefore be any act – whether action or omission – that results in obstructing or preventing the exercise of the injured party's rights on account of his or her religious affiliation or irreligiousness. A crucial aspect of religious discrimination is the specific intention and motivation of the perpetrator, manifested in the fact that the reason for actions detrimental to the injured party, which restrict their rights, is based on their religious affiliation or lack thereof.[26] 'Restricting a person's rights' involves imposing limitations on the broadest possible range of subjective rights.[27] Thus, criminalised discrimination may occur in both private and public relations, in the process of enacting and applying the law.[28]

At this point, it is worth recalling the well-established view that the presence of culturally rooted religious symbols in public life (for example, their display in public

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[23] Act of 6 June 1997, Penal Code (Journal of Laws of 2025, item 383), hereinafter referred to as 'PC'.

[24] Judgment of the Supreme Court of 3 March 2022, II CSK 1/13, LEX No. 1388592.

[25] S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks karny. Komentarz*, Warszawa, 2019, p. 1034.

[26] Ibidem, p. 1035.

[27] A. Marek, *Kodeks karny. Komentarz*, Warszawa, 2010, pp. 445–446.

[28] N. Kłączyńska, *Dyskryminacja religijna a prawnokarna ochrona wolności sumienia i wyznania*, Wrocław, 2005, pp. 208–219.

authority buildings) cannot be regarded as a manifestation of the discrimination in question.[29]

The offence set out in Article 194 PC is classified as a consequential crime and will be deemed to have been committed only if the restriction of rights has actually occurred. If, on the other hand, there is merely an attempt to restrict these rights, where the perpetrator acted with the intention of committing a criminal act and directed his or her conduct towards committing it, but the act did not occur, this constitutes an attempt.[30]

Article 195 PC criminalises conduct consisting of maliciously obstructing the public performance of a religious act of a legally recognised church or other religious association and provides for a penalty of a fine, restriction of liberty or imprisonment for up to two years. The same penalty applies to anyone who maliciously obstructs a funeral, ceremony or funeral rites.

This provision aims to ensure protection of the right to the public performance of religious worship, as well as protection of the honour of the deceased and the feelings of participants in funeral ceremonies and rites. It is therefore concerned with guaranteeing the freedom to publicly perform acts of religious worship, i.e. to externalise one's faith through worship, participation in rites, prayer, practice and teaching, while at the same time safeguarding the significance of funeral rites, irrespective of their nature. The conduct of the perpetrator in this case consists in disturbing the solemnity or the atmosphere of reflection, or in obstructing or preventing the performance of, disrupting, or participating in religious activities. However, the provision requires that such conduct be motivated by a specific intention on the part of the perpetrator, namely a malicious character. This means acting with the purpose of annoying the victims, showing contempt or disregard for the religious act being performed, and behaving with intransigence and persistence.[31] The same applies to interference with the performance of funeral rites.

The meaning of 'malice' as set out in Article 195 PC raises the greatest interpretative doubts and, at the same time, poses considerable evidentiary difficulties in criminal proceedings.

This 'malice' represents a specific motivation of the perpetrator, which, as the doctrine rightly indicates, may manifest itself in a desire to irritate the participants of the act or funeral, to humiliate them, distress them, offend them, insult them, or expose them to ridicule. It may also stem from a wish to profane or detract from a religious act, motivated by the conviction that the religion being obstructed contradicts the perpetrator's value system, resulting in a lack of respect and contempt for its rituals.[32]

In any case, it is necessary to ask whether, in the light of the aforementioned constitutional provisions, the absence of a 'malicious' motivation on the part of the

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[29] W. Janyga, in: Królikowski M., Zawłocki R., *Kodeks karny. Część szczególna. Tom I. Komentarz do art. 117–221*, Warszawa, 2023, p. 584; judgment of the Court of Appeal in Łódź of 28 October 1998, I ACa 612/98, *OSP*, 1999, No. 10, item 177.

[30] J. Sobczak, in: Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2025, Legalis.

[31] S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks karny…*, op. cit., p. 1038.

[32] J. Sobczak, in: Stefański R.A. (ed.), *Kodeks karny…*, op. cit.

perpetrator justifies interference during the public performance of a religious act. Other motives for such conduct may be equally reprehensible, yet under the current legal framework, they do not give rise to criminal liability, despite violating the guarantee of the unhindered manifestation of religious beliefs. Following this line of reasoning, can the absence of a specific malicious motivation in a perpetrator who nonetheless acts intentionally shield him or her from criminal liability? It seems that, *de lege ferenda*, legislative intervention is needed in order to extend the criminalisation under this provision to include conduct other than malicious behaviour by perpetrators who violate constitutional freedoms and rights.

According to the wording of Article 196 PC, whoever offends the religious feelings of others by publicly insulting an object of religious worship or a place intended for the public performance of religious rites shall be subject to a fine, restriction of liberty or imprisonment for up to two years.

'Religious feelings, by their very nature, are subject to special protection under the law, as they are directly connected to freedom of conscience and religion, which is a constitutional value.'[33] There is no doubt that the good protected by the cited provision is the religious feelings of believers as an emotional element, reflecting the worldview tolerance of a state maintaining neutrality in matters of religion and belief.[34] The objective aspect of the act consists in publicly insulting an object of religious worship or a place designated for the public performance of religious rites.

The concept of an object of religious worship is defined as an object esteemed by a particular religious community, church or religious association, deserving of the utmost respect and adoration. The term 'object of religious worship' is generally specified within a given cultural context, in relation to the religions commonly practised in a particular place and time. However, it should be noted that this clarity of meaning may not always extend to religions or cults that are not widespread within a given society. This may have a negative impact on guaranteeing equal protection of religious freedoms, particularly in terms of safeguarding individuals from offence to religious feelings, which may depend on the degree to which a particular religion is present in society and, consequently, on public awareness of the existence of its objects of worship.[35]

A place intended for the public performance of religious rites, on the other hand, refers to buildings or grounds recognised by the relevant religious community as sites for worship or for the performance of religious acts in the presence of others, such as churches, as well as places where such acts are performed occasionally, with the consent of and after notification to the competent authorities. Thus, a place 'intended for the public performance of religious rites' is not any place chosen by the participants in that rite for that purpose, but must be 'intended' for that purpose through an appropriate decision by the public authorities.[36]

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[33] Ruling of the Supreme Court of 7 June 1994, K 17/93, *OTK*, 1994, No. 1, item 11.

[34] Ibidem; resolution of the Supreme Court of 29 October 2012, I KZP 12/12, *OSP*, 2013, No. 2, item 19.

[35] J. Sobczak, in: Stefański R.A. (ed.), *Kodeks karny*…, op. cit.

[36] Ibidem.

The perpetrator's conduct is intended to offend the victim's religious feelings, which are shaped by the beliefs of a particular religion or by reverence for an object imbued with specific significance in that religion, i.e. an object of worship deserving of the utmost respect. The degrading or abusive nature of certain conduct must be assessed objectively, 'taking into account the beliefs prevailing in the cultural circle from which the victim originates'.[37] The perpetrator's behaviour may take the form of verbal expression but can also be manifested through gestures, writing or images. It is also possible for the elements of this offence to be fulfilled through omission.

The elements of the offence criminalised under Article 196 PC are only met when an insult to an object of religious reverence occurs publicly, meaning that the insult must be perceivable by a broader, indeterminate group of persons.

Similarly to Article 195 PC, Article 196 also gives rise to significant interpretative difficulties. These stem from the problem of defining the subjective element of the offence due to the way it is drafted. This results from the legislator's use in the text of the provision of two terms that may be treated as equivalent verbal elements of the *actus reus*: 'insulting' and 'offending'. Some representatives of the doctrine are of the view that this offence may be committed with direct or possible intent.[38] Others, however, limit the possibility of qualifying the perpetrator's conduct as fulfilling the elements of the act only when committed with direct intent.[39] An intermediate position between these two views should also be noted.[40]

As A. Marek aptly observes, interpretation of this provision is far from straightforward, particularly because it is difficult to make a categorical assessment of what constitutes an insult and what merely represents the exercise of freedom of speech in the form of discussion or criticism of symbols or dogmas that are objects of worship for their adherents, within the framework of so-called acceptable criticism.[41] It should be recalled that 'human freedoms', whether in the form of freedom of expression, including artistic freedom, or in the form of religious freedom, are not unlimited, since other freedoms always constitute their boundaries. It cannot be assumed that freedom of speech or freedom of artistic expression should take precedence over the right to respect for religious feelings, or *vice versa*.[42]

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[37] R. Paprzycki, *Prawnokarna analiza zjawiska satanizmu w Polsce*, Kraków, 2002, p. 43; judgment of the Supreme Court of 17 February 1993, file ref. III KRN 24/92, Wokanda, 1993, No. 10, pp. 8 et seq.

[38] M. Filar, 'Przestępstwa przeciwko wolności sumienia i wyznania', *Nowa kodyfikacja karna. Kodeks karny. Krótkie komentarze*, Issue 18, Warszawa, 1998, p. 105; I. Zgoliński, 'Komentarz do art. 196 k.k.', in: Konarska-Wrzosek V. (ed.), Lach A., Lachowski J., Oczkowski T., Zgoliński I., Ziółkowska A., *Kodeks karny. Komentarz*, LEX/el., 2023; S. Czepita, Ł. Pohl, 'Strona podmiotowa przestępstwa obrazy uczuć religijnych i jego formalny charakter', *Prokuratura i Prawo*, 2012, No. 12, pp. 72–82.

[39] J. Wojciechowska, in: Wąsek A., Zawłocki R. (eds), *Kodeks karny. Część szczególna. Tom 1*, Warszawa, 2010, p. 901.

[40] W. Wróbel, in: Zoll A. (ed.), *Kodeks karny. Część szczególna. Tom 2. Komentarz do art. 117–277 k.k.*, Kraków, 2006, p. 587.

[41] A. Marek, *Kodeks*…, op. cit., pp. 446–447.

[42] Judgment of the Regional Court in Gdańsk of 22 December 2015, I C 279/12, LEX No. 1973724; cf. judgment of the ECtHR of 15 September 2022, *Rabczewska v Poland*, Application No. 8257/13.

GERMAN CONSTITUTIONAL REGULATIONS

In order to analyse the provisions criminalising acts against religious freedom in German criminal law, it is first worth recalling the relevant constitutional regulations. The Basic Law of the Federal Republic of Germany of 23 May 1949[43] guarantees freedom of conscience and faith in several articles.

At the outset, it is worth emphasising the expressly articulated prohibition of discrimination and favouritism on the grounds of gender, social origin, race, language, country or national origin, religion, and religious or political beliefs (Article 3(3) of the GG).[44] According to Article 4 (1) and (2) GG,[45] freedom of religion, conscience, and freedom of religious and philosophical conviction are inviolable, and freedom of religious practice is guaranteed, provided that the rights of others, the principles of morality, or the constitutional order are not violated (Article 2 GG). Furthermore, under Article 33(3) GG,[46] the exercise of civil and civic rights, access to public office, and rights acquired through the performance of civil service are independent of religion. In addition, no person may be treated less favourably because of their adherence or lack of adherence to any religious or ideological denomination. Article 7(3) GG provides for religious instruction in public schools, with the state bearing the costs of its organisation. The constitutional principle of freedom of conscience and religion as fundamental individual rights is upheld by the Federal Constitutional Court, as expressed in Article 93(1)(4a).[47]

With regard to the protection of religious freedom, the Polish Constitution and the German Basic Law provide analogous solutions. Certainly, the Polish Constitution addresses this issue in greater detail, comprehensively regulating matters relating to religious freedom within a single provision, but the subjective and objective scope of regulation remains comparable.

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[43] Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949 (BGBl. S. 1), zuletzt geändert durch Artikel 1 und 2 Satz 2 des Gesetzes vom 29. September 2020 (BGBl. I S. 2048), hereinafter referred to as 'the GG'.

[44] *Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden. Niemand darf wegen seiner Behinderung benachteiligt werden.*

[45] *1. Die Freiheit des Glaubens, des Gewissens und die Freiheit des religiösen und weltanschaulichen Bekenntnisses sind unverletzlich. 2. Die ungestörte Religionsausübung wird gewährleistet.*

[46] *Der Genuß bürgerlicher und staatsbürgerlicher Rechte, die Zulassung zu öffentlichen Ämtern sowie die im öffentlichen Dienste erworbenen Rechte sind unabhängig von dem religiösen Bekenntnis. Niemandem darf aus seiner Zugehörigkeit oder Nichtzugehörigkeit zu einem Bekenntnisse oder einer Weltanschauung ein Nachteil erwachsen.*

[47] *Das Bundesverfassungsgericht entscheidet über Verfassungsbeschwerden, die von jedermann mit der Behauptung erhoben werden können, durch die öffentliche Gewalt in einem seiner Grundrechte oder in einem seiner in Artikel 20 Abs. 4, 33, 38, 101, 103 und 104 enthaltenen Rechte verletzt zu sein.*

GERMAN CRIMINAL LAW REGULATIONS

To give effect to the protection of freedom of belief guaranteed by the constitution, the German legislator has introduced relevant provisions in Chapter 11 'Offences against religion and belief' of the German Criminal Code.[48]

Article 166 StGB[49] concerns insults to beliefs, religious communities and ideological associations. According to its wording, whoever publicly or by disseminating content reviles the religion or ideology of others in a manner suited to causing a disturbance of the public peace incurs a penalty of imprisonment for a term not exceeding three years or a fine. The same punishment applies to anyone who publicly or by disseminating content reviles a church or other religious or ideological community or its institutions or customs in a manner suited to causing a disturbance of the public peace.

This provision encompasses the premise of insulting religious beliefs or other ideologies, a church or religious association, or even customs, insofar as such conduct may lead to a disturbance of public order. There is some overlap here with Article 130 StGB,[50] which protects public peace in general. The protected legal interest in this case is therefore public order, not religion itself or the religious feelings of believers.[51] The offence of blasphemy will be subject to penalisation not because of its mere occurrence, but only when it provokes opposition within society. A necessary condition, therefore, is its public character. The perpetrator, in turn, may be punished only for causing a disturbance of public peace through his or her behaviour, and not for the mere fact of offending religious feelings. The provision of Article 166 StGB is classified as an offence of abstract endangerment of a legal good. It will therefore be sufficient that there are reasonable grounds to fear that public order may be disturbed. According to Polish legal terminology, it may thus be described as a formal offence. German legal doctrine emphasises that this provision should serve as an objective measure of values, indicating clear and inviolable boundaries when social disputes arise, particularly those of a religious or ideological nature.[52]

In the context of the above, it should be emphasised that the protection guaranteed by Article 196 PC is incomparably broader than the one provided by Article 166 StGB. The main difference concerns the protected legal interest: in Poland,

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[48] Strafgesetzbuch vom 15. Mai 1871 (BGBl 1998, ch. I, p. 3322), hereinafter referred to as 'the StGB'.

[49] *§ 166. 1. Wer öffentlich oder durch Verbreiten eines Inhalts (§ 11 Absatz 3) den Inhalt des religiösen oder weltanschaulichen Bekenntnisses anderer in einer Weise beschimpft, die geeignet ist, den öffentlichen Frieden zu stören, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft. 2. Ebenso wird bestraft, wer öffentlich oder durch Verbreiten eines Inhalts (§ 11 Absatz 3) eine im Inland bestehende Kirche oder andere Religionsgesellschaft oder Weltanschauungsvereinigung, ihre Einrichtungen oder Gebräuche in einer Weise beschimpft, die geeignet ist, den öffentlichen Frieden zu stören.*

[50] *§ 130. 1. Wer in einer Weise, die geeignet ist, den öffentlichen Frieden zu stören…*

[51] B. Valerius, in: von Heintschel-Heinegg B. (ed.), *Strafgesetzbuch. Kommentar*, München, 2010, p. 1110.

[52] G. Czermak, E. Hilgendorf, *Religions- und Weltanschauungsrecht: Eine Einführung*, Berlin, 2018, p. 278.

it is religious feelings, whereas in Germany, it is public order. The interpretation of Article 196 PC does not allow public order to be identified even as a secondary object of protection.[53]

Article 167 StGB[54] provides that whoever intentionally and seriously disrupts a religious service or an act of religious worship of a church or other religious community in Germany, or commits defamatory mischief in a place which is dedicated to the religious worship of such a religious community, incurs a penalty of imprisonment for a term not exceeding three years or a fine. The ceremonies of a national ideological community are treated as equivalent to a religious service.

The provision of Article 167 StGB corresponds in substance to Article 195 § 1 PC. Its purpose is to ensure the protection of the right to perform a service, religious act, or celebration of a worldview association registered in the country, and to criminalise behaviour that undermines the freedom to manifest one's beliefs.

The same applies to interference with the performance of the burial rites of the deceased. Indeed, according to Article 167a StGB,[55] a prison sentence of up to three years or a fine shall be imposed on anyone who intentionally or knowingly disrupts a funeral. However, under Polish law, such a disturbance must be of a malicious nature, meaning it must involve consciously insulting, ridiculing, or showing disrespect. In contrast, under German law, it is sufficient that the perpetrator acts intentionally (where he or she seeks to achieve the purpose of the act, namely disruption of the ritual) or knowingly (where he or she foresees the occurrence of the disruption). It follows from the above that disruption of a burial rite will also be punishable in Germany even if the perpetrator's aim is not to cause distress, typically motivated by a desire to humiliate, mock, or insult the feelings of those participating in the religious act.

The final article in the chapter addressing crimes against freedom of religion establishes criminal liability for disturbing the peace of the deceased. Under Article 168(1) and (2) StGB,[56] whoever, without being authorised to do so, takes the body or parts of the body of a deceased person, of a dead foetus or parts thereof, or the ashes of a deceased person from the custody of the person entitled thereto, or commits defamatory mischief on them, incurs a penalty of imprisonment for a term not exceeding three years or a fine. The same penalty applies to anyone who destroys

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[53] J. Kulesza, 'Kryminalizacja obrazy uczuć religijnych. Glosa do wyroku TK z dnia 6 października 2015 r., SK 54/13', *Państwo i Prawo*, 2016, No. 9, pp. 136–142.

[54] *§ 167. 1. Wer (1.) den Gottesdienst oder eine gottesdienstliche Handlung einer im Inland bestehenden Kirche oder anderen Religionsgesellschaft absichtlich und in grober Weise stört oder (2.) an einem Ort, der dem Gottesdienst einer solchen Religionsgesellschaft gewidmet ist, beschimpfenden Unfug verübt, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft. 2. Dem Gottesdienst stehen entsprechende Feiern einer im Inland bestehenden Weltanschauungsvereinigung gleich.*

[55] *§ 167a. Wer eine Bestattungsfeier absichtlich oder wissentlich stört, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.*

[56] *§ 168. 1. Wer unbefugt aus dem Gewahrsam des Berechtigten den Körper oder Teile des Körpers eines verstorbenen Menschen, eine tote Leibesfrucht, Teile einer solchen oder die Asche eines verstorbenen Menschen wegnimmt oder wer daran beschimpfenden Unfug verübt, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft. 2. Ebenso wird bestraft, wer eine Aufbahrungsstätte, Beisetzungsstätte oder öffentliche Totengedenkstätte zerstört oder beschädigt oder wer dort beschimpfenden Unfug verübt. 3. Der Versuch ist strafbar.*

or damages a place where a body is laid out, a burial site or a public memorial for the dead, or who commits defamatory mischief on them.

This standard primarily protects the sense of respect and decency owed to the relatives of the deceased. Undoubtedly, the dignity of the deceased also forms part of this protection.[57]

This regulation corresponds to Article 262 of the Polish Penal Code. According to its wording, whoever insults a corpse, human ashes or the resting place of the deceased shall be subject to a fine, restriction of liberty or imprisonment for up to two years (§ 1). Whoever robs a corpse, grave or other resting place of the deceased shall be punished with imprisonment from six months to eight years (§ 2). In the Polish Penal Code, however, this provision is included among offences against public order.

CONCLUSION

The aim of this publication was not to provide an analytical commentary on the criminal provisions in force in Poland or Germany, taking into account the broadest possible perspectives of doctrine and case law, including an attempt to address any interpretative doubts. Rather, the author's objective was to present a comparative legal analysis of the constitutional and statutory aspects of the criminal and material protection of religion in both legal systems.

In conclusion, it is worth noting that the criminal law protection of religious freedom is safeguarded by international instruments, including the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as by the provisions of most constitutions currently in force in Europe. It is incumbent upon national authorities to ensure the peaceful coexistence of different faiths and religions, and such legislation serves precisely this purpose. In this context, the first conclusion is that offences against religious freedom, although of a different nature, are prosecuted *ex officio* in both Poland and Germany and must be committed intentionally. These are also classified as common offences.

The key provision concerning offences against religious feelings protects a fundamentally different legal good. While the Polish legislator defines such offences in reference to the infringement of the freedom and rights of religious believers, and even their feelings, the German system guarantees protection to public peace. This means that punishable offences are those behaviours by perpetrators that threaten public order. Naturally, the aim of any legislator should be to secure a certain degree of religious order within the state, which is equally necessary in pluralistic societies and in confessionally homogeneous ones. Nonetheless, it is the protection of freedom of religion, conscience and belief that should constitute the primary legal good in this context.

When comparing these provisions on the obstruction of religious acts, it is important to note that the Polish legislator criminalises only conduct motivated

[57] M. Heuchemer, in: von Heintschel-Heinegg B. (ed.), *Strafgesetzbuch…*, op. cit., p. 1119.

by a specific intent, i.e. malice, which consists in a desire to annoy or ridicule, without any other reasons justifying such behaviour. This certainly presents an evidentiary difficulty in criminal proceedings, while simultaneously precluding the punishment of perpetrators acting from other, equally reprehensible motives. Moreover, this applies exclusively to public religious acts. The German legislator, by contrast, requires that interference with religious acts must be flagrant, i.e. clearly ascertainable, unequivocal and sufficiently significant. Consequently, not every infringement will be subject to criminal liability. Furthermore, for reprehensible conduct in places of worship to be punishable, it must be insulting in nature, meaning offensive and degrading.

As regards funeral ceremonies, the German legislator adopts a more lenient approach to the elements of the offence, requiring the perpetrator to act intentionally or knowingly. The Polish legislator, by contrast again requires that the element of malice must be present, thereby avoiding weaker protection of these particular interests.

The offence concerning protection of corpses is regulated in a similar manner in both legal systems. In each case, the legislators based it on the premise of insult. In Germany, however, this provision is included in the chapter on offences committed against freedom of religion and belief, whereas the Polish legislator classifies such an act as one committed against public order, making respect and reverence for the deceased the protected interest. Thus, it may appear that the significance of these goods extends beyond faith or religion and has been generalised, that is, given a broader character. Under this interpretation, such acts would be deemed to infringe the principles of social coexistence. It is worth noting, however – contrary to the above thesis – that the legislator itself points out[58] that Chapter XXXII of the Penal Code contains offences which, due to their object of protection, are difficult to assign to other chapters.

An analysis of the solutions adopted in selected national criminal law systems leads to the conclusion that neither the Polish nor the German legislator has avoided solutions that may cause difficulties in prosecuting perpetrators of acts infringing freedom of religion or freedom of belief. Nevertheless, it does not appear that their respective provisions are so ambiguous as to make it impossible to determine whether an infringement has occurred in a given situation. However, interpretative difficulties make it challenging to predict whether the courts will recognise an offence in similar factual circumstances. The greatest issue arises from the complexity and diversity of religious phenomena and from socio-cultural changes. It therefore seems that the sources of the recurring public debates on the understanding of the limits of religious freedom should be sought not so much in 'imprecise' legislation as in the sphere of worldviews. Regardless of the foregoing, it is always necessary to advocate changes in both systems aimed at adopting solutions that ensure the highest standard of protection for freedom of religion.

[58] Explanatory memorandum to the Penal Code, Warszawa, 1997, p. 202.

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THE NOTION OF 'EFFECTIVE REMEDY' AND 'EFFECTIVE LEGAL REMEDY' IN EU LAW CONCERNING THE GATHERING OF EVIDENCE IN CRIMINAL PROCEEDINGS*

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Abstract
The article analyses the case law of the Court of Justice of the European Union concerning 'effective legal remedies' under Article 14 of the Directive on the European Investigation Order (EIO) and 'effective remedies' provided for in EU directives regulating the rights of defendants in criminal proceedings. An analysis of this case law leads to the conclusion that the CJEU has established a more specific and higher standard of protection through effective remedies in the first of the aforementioned areas when interpreting Article 14 of the EIO Directive. By contrast, the case law on 'effective remedies' provided for in directives regulating the rights of defendants is based on the general assumption that EU law does not govern the admissibility of evidence, which means that it may sometimes be regarded as inconsistent with the standard established in this area by the European Court of Human Rights. The article also argues that the right to an effective remedy does not imply an obligation to create a separate legal measure in the form of a 'complaint' or 'appeal' within the national legal system.

Keywords: Court of Justice, EU directives, admissibility of evidence in criminal proceedings, effective remedy, effective redress

* In the Polish versions of EU directives, the EU legislator uses various terms to denote 'effective remedies'. While in the set of directives concerning the rights of the accused (the so-called 'defence directives') the term środki naprawcze is used, in Article 14 of the EIO Directive the term środki odwoławcze appears. At the same time, there is no such difference in wording in the English versions of the two sets of directives, which use the general terms 'remedies' or 'legal remedies'. The title of this article reflects the difference in wording found in the Polish versions of the directives.

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INTRODUCTION

The European Union law affects criminal proceedings in Member States in two ways. Chronologically, the first impact occurred, and continues to occur, through the transposition into national legal systems of successive EU legal acts (previously framework decisions, now directives) regulating the mutual recognition of decisions in criminal matters. With regard to the gathering of evidence in another Member State for criminal proceedings conducted in Poland, a key role is played by the Directive on the European Investigation Order (EIO).[1] Although this Directive concerns the specific issue of obtaining evidence from another Member State, its implementation process may significantly affect the general procedural rules of Member States. A particularly important role in this process is played by the case law of the Court of Justice of the European Union (CJEU), which interprets the provisions of EU legal acts, conferring on them normative value that is often autonomous in relation to that established within a given legal system. The CJEU's case law also concerns the remedies that should be available to persons against whom evidence obtained through the execution of an EIO is to be used, as well as to those whose rights may be infringed as a result of gathering such evidence. On the basis of this case law, a key question arises as to whether the effectiveness of the 'remedy' that should be guaranteed in situations where evidence has been obtained in breach of the law requires the exclusion of such evidence from criminal proceedings, or whether such violations may instead be addressed through other procedural means.

The legal systems of EU Member States are also affected by EU legal acts aimed at harmonising national legislation to facilitate the mutual recognition of decisions in criminal matters. However, in this case the impact is direct, since proper implementation of such legal acts should result in the introduction into national law of rights for defendants or victims that ensure the same standard of protection as that provided for in the relevant EU directive. All EU directives regulating the rights of defendants in criminal proceedings contain provisions on 'effective remedies', albeit to varying degrees of generality. The concept of an 'effective remedy' used in these directives, in the context of the general right to an effective remedy guaranteed in Article 47 of the Charter of Fundamental Rights (the Charter), has already been interpreted by the CJEU in several judgments delivered upon requests for preliminary rulings.

The purpose of this article is to analyse the case law of the CJEU concerning effective remedies/legal remedies in both of the aforementioned areas (i.e. the mutual recognition of judgments in criminal matters and the remedies provided in directives regulating the rights of the accused in criminal proceedings) that the accused should have at their disposal in connection with the process of gathering evidence. It is our preliminary assessment that the case law on this issue is not uniform and that the Court of Justice has established a more specific and higher

[1] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, p. 1); hereinafter referred to as 'the EIO Directive'.

standard of protection through 'effective legal remedies' in the first of the above-mentioned areas. By contrast, the case law on 'effective remedies' contained in the directives regulating the rights of defendants is based on the general assumption that EU law does not govern the admissibility of evidence. This means that the standard established by the CJEU can sometimes be regarded as inconsistent with that applied in this area by the European Court of Human Rights (ECtHR).

THE RIGHT TO AN EFFECTIVE LEGAL REMEDY IN THE EIO PROCEDURE

The currently applicable EU legal acts do not regulate the issue of the admissibility of evidence obtained in another Member State.[2] This issue is addressed only partially and to a limited extent in relation to proceedings conducted by the European Public Prosecutor's Office, in recital 80 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.[3] The recital states that

> 'The evidence presented by the EPPO in court should not be denied admission on the mere ground that the evidence was gathered in another Member State or in accordance with the law of another Member State, provided that the trial court considers its admission to respect the fairness of the procedure and the suspect or accused person's rights of defence under the Charter.'

The issue of the inadmissibility of evidence obtained in breach of the law as a result of the execution of an EIO is not regulated in the EIO Directive either.[4] However, importantly, this Directive contains a general provision on 'legal remedies'. Article 14 of the EIO Directive, as relevant, reads as follows:

> '1. Member States shall ensure that legal remedies equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in the EIO.
> 2. The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State.
> […]

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[2] However, some conceptual works are conducted on this topic. See K. Ligeti, B. Garamvölgyi, A. Ondrejová, M. von Galen, 'Admissibility of Evidence in Criminal Proceedings in the EU', *Eucrim*, 2020, No. 3, pp. 201–208; see also the publication of the European Law Institute (2023) finalising the project led by L. Bachmaier Winter and F. Salimi, *ELI Proposal for a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings. Draft Legislative Proposal of the European Law Institute*; https://www.europeanlawinstitute.eu/news-events/news-contd/news/eli-publishes-a-legislative-proposal-on-mutual-admissibility-of-evidence-and-electroniC-evidence-in/ [accessed on 27 September 2025].

[3] OJ L 283, 31.10.2017, p. 1.

[4] For more information, see S. Steinborn, D. Świeczkowski, 'Verification in the Issuing State of Evidence Obtained on the Basis of the European Investigation Order', *Review of European and Comparative Law*, 2023, No. 3, pp. 172 et seq.

7. The issuing State shall take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law. Without prejudice to national procedural rules, Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO.'

Despite the general wording of the quoted provision, it contains an important reference to the obligation to ensure 'the rights of the defence and the fairness of the proceedings'. However, it does not specify whether a violation of this obligation should lead to the inadmissibility of evidence obtained through the execution of an EIO. A similar reference to the general standard of fairness in criminal proceedings, in provisions concerning 'effective remedies', can also be found in other EU directives, which will be discussed in greater detail in the subsequent section of this paper.

In the case of cooperation based on the mechanism of mutual recognition of decisions, procedural steps are taken in two or more Member States, which undoubtedly complicates the drafting of procedural regulations aimed at ensuring that individuals have access to an appropriate remedy (legal remedy). This is particularly evident in the case of cross-border evidence gathering, where criminal proceedings are conducted in one Member State while part of the evidence is collected in one or more Member States. The extent of this difficulty is illustrated by the case law of the Court of Justice concerning the European Investigation Order.

In its judgment in *Gavanozov II*,[5] the Court of Justice examined whether the law of the issuing Member State must provide for a remedy against the issuance of an EIO for a search and the hearing of a witness by videoconference. The Court noted that the EIO Directive requires only that remedies equivalent to those available in a similar domestic case, i.e. concerning the investigative measure in question, be made available against an EIO. However, irrespective of this, Member States are obliged to ensure respect for the right to an effective remedy provided for in the first paragraph of Article 47 of the Charter of Fundamental Rights of the EU. Therefore, where a specific investigative measure interferes with rights and freedoms guaranteed by EU law, an appropriate remedy must be provided. The Court did not elaborate on the nature or characteristics of such a remedy. However, referring to Article 47 of the Charter, the CJEU identified two essential features of an effective remedy. First, it should allow for the contestation of the lawfulness (*régularité*) and necessity of investigative measures. Second, the remedy should make it possible to obtain appropriate redress (*redressement*)[6] if those measures have been unlawfully ordered or carried out. At the same time, the Court pointed out that it is for the Member States to provide in their national legal systems the legal remedies necessary

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[5] Judgment of the Court of Justice of 11 November 2021, *Ivan Gavanozov*, C-852/19, ECLI:EU:C:2021:902 (hereinafter referred to as the 'judgment in Case C-852/19'); see also S. Steinborn, 'Środek odwoławczy od wydania europejskiego nakazu dochodzeniowego dotyczącego wideokonferencji. Wyrok Trybunału Sprawiedliwości z dnia 11 listopada 2021 r., C-852/19, postępowanie karne przeciwko Ivanowi Gavanozovowi', *Gdańskie Studia Prawnicze*, 2024, No. 2, pp. 134–146.

[6] In the Polish version of the judgment in Case C-852/19, the word 'change' (*zmiana*) was used, whereas the English version uses 'redress'.

to achieve these purposes.[7] Furthermore, in view of the wording of Article 14(2) of the EIO Directive, which states that the substantive grounds for issuing an EIO may be challenged only in an action brought in the issuing State, the CJEU held that such an 'action' or remedy should enable challenges to the necessity and lawfulness of an EIO, at least with regard to the substantive reasons for its issuance.[8] Importantly, the Court appears to treat the right to an effective remedy under Article 47 of the Charter as a prerequisite for the application of instruments based on the principle of mutual recognition of judicial decisions between Member States.[9]

It follows from the above that the CJEU does not set out specific requirements regarding the type of remedy that should be provided when an EIO is issued for the purpose of conducting investigative measures in another Member State. It appears that the Court places greater emphasis on the *effectiveness* of the remedy. Since it is intended to allow for the challenge to the correctness of the measure, it must be assumed that it should give the entitled person the opportunity to present arguments contesting not only the lawfulness of the investigative measure but also its factual basis.

Because the remedy in question must meet the requirements of Article 47 of the Charter, it should be assumed that it ought to be available to any person whose rights and freedoms are affected by a given investigative measure. The category of eligible persons should therefore not be limited solely to suspects and defendants in criminal proceedings. Investigative measures may interfere with the rights and freedoms of other individuals, who should likewise be able to avail themselves of such a remedy.[10] It seems, however, that access to an effective remedy within the meaning of Article 47 of the Charter does not have to be provided to suspects and accused persons in every case. If a particular investigative measure does not directly interfere with their rights and freedoms, Article 47 of the Charter does not, in itself, imply that such a remedy must be available. It should be emphasised that in the *Gavanozov II* case, the CJEU did not rule on whether the effectiveness of the remedy requires that evidence obtained in violation of the law be deemed inadmissible.

For the first time, this issue arose in the *EncroChat* judgment.[11] One of the matters examined in that case concerned the admissibility of evidence obtained on the basis of an EIO issued by a public prosecutor, where that evidence was already in the possession of the competent authorities of the Member State executing the EIO. The issue of ensuring access to a remedy arose in this context with regard

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[7] Judgment in Case C-852/19, paragraph 33. On the concept of an effective legal remedy in Article 47 of the Charter, see S. Steinborn, 'The Concept of an Effective Remedy Under Article 47 of the Charter in the Context of the European Investigation Order', *European Criminal Law Review*, 2024, Vol. 14, No. 2, pp. 135–147. On the genesis and meaning of the notion of 'effective remedy', see P. Wiliński, 'Introducing effective remedies', in: Wiliński P. (ed.), *Effective Legal Remedies in Criminal Justice System. European Perspective*, Berlin, 2023, pp. 13–29.

[8] Judgment in Case C-852/19, paragraphs 41 and 49.

[9] Ibidem, paragraph 56.

[10] See also ibidem, paragraph 46.

[11] Judgment of the Court of Justice of 30 April 2024, *M.N. (EncroChat)*, C-670/22, ECLI:EU:C:2024:372 (hereinafter referred to as the 'judgment in Case C-670/22' or 'the *EncroChat* judgement').

to the guarantees that should be provided in the Member State issuing the EIO. The Court essentially held that the issuing authority is not competent to review the lawfulness of the separate procedure by which the executing Member State obtained the evidence sought to be transmitted under an EIO.[12] However, it follows from the Court's reasoning that such verification may nevertheless take place indirectly through an examination of the proportionality and necessity of issuing the EIO, based on a remedy lodged pursuant to Article 14(1) of the EIO Directive. This is because that provision imposes an obligation to ensure equivalent remedies in the EIO procedure to those available in a domestic case concerning the same investigative measure.[13] Although the CJEU referred to the transmission of evidence that would be disproportionate to the objectives of the criminal proceedings in the issuing State, it is impossible to assess the proportionality of the transmission of evidence without a closer examination of the manner in which it was obtained. The Court then referred to Article 14(7) of the EIO Directive and held that if a party to the criminal proceedings is unable to comment effectively on a piece of evidence likely to have a preponderant influence on the findings of fact, such evidence should be excluded from the case, as its admission would risk violating the right to a fair trial.[14] Even though the Court emphasised that the admissibility of evidence in criminal proceedings is generally a matter for national law, it derived an exception to this rule from Article 14(7) of the EIO Directive and expressly required the exclusion of evidence on the grounds of the right of defence and the right to a fair trial.[15]

Although the CJEU's position lacks the precision desirable in such situations, it seems that reasonably clear conclusions can be drawn from it. In paragraph 105 of the *EncroChat* judgment, the Court states:

> 'If a court takes the view that a party is not in a position to comment effectively on a piece of evidence that is likely to have a preponderant influence on the findings of fact, that court must find an infringement of the right to a fair trial and exclude that evidence in order to avoid such an infringement.'

At first glance, this statement could be understood to mean that the sanction of excluding evidence should apply only in situations where a party is unable to challenge the evidence and that the evidence is relevant to the case.[16] However,

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[12] Ibidem, paragraph 100.

[13] Ibidem, paragraphs 102–103.

[14] Ibidem, paragraphs 105 and 130.

[15] The Court of Justice does not use the term 'inadmissibility' of evidence but rather refers to the 'rejection' or 'exclusion' of evidence. The German version of the judgment refers to 'ignoring' evidence (*unberücksichtigt zu lassen*), as does the English version ('courts are required to disregard'). It should therefore be assumed that by using the term 'exclusion', the Court of Justice meant treating the evidence as inadmissible, since case law distinguishes between the inadmissibility of evidence and the assessment of the value of a given piece of evidence. See, *inter alia*, judgment of the Court of Justice of 2 March 2021, *Criminal Proceedings against H.K.*, C-746/18, ECLI:EU:C:2021:152, paragraphs 43–44 (hereinafter referred to as the 'judgment in Case C-746/18').

[16] Two conditions for the admissibility of evidence obtained from EncroChat are derived in the literature from this judgment of the Court of Justice: (1) the defence must be given the opportunity to comment effectively on every piece of such evidence; and (2) the evidence must

limiting the possibility of excluding evidence to this situation alone would be entirely incomprehensible.

From the *EncroChat* case, one may infer that the CJEU treats the mechanism of excluding evidence as a specific sanction aimed at ensuring that defendants are afforded an adequate opportunity in criminal proceedings to challenge evidence obtained on the basis of the principle of mutual recognition. It should be noted that, in the case of the transfer of evidence on the basis of an EIO, there will most often be no remedy against the issuance of the EIO in the issuing Member State, since, under Article 14(1) of the EIO Directive, there is an obligation to provide a remedy equivalent to that available in a similar domestic case. In the national procedural systems, the mere transfer of evidence from one criminal proceeding to another does not usually amount to an act against which an appeal or formal complaint can be lodged. Moreover, it is not an act that, in itself, interferes with the rights and freedoms of the individual, and therefore there are no grounds for deriving an obligation to provide such a remedy directly from Article 47 of the Charter. Consequently, the CJEU resorts to the mechanism of verifying evidence at the stage of proceedings on the merits in the State issuing the EIO.

Member States are obliged to ensure that a person against whom criminal proceedings are conducted is afforded the right of defence and the right to a fair trial. It may be assumed that, on the one hand, these requirements mandate the provision of an adequate opportunity to challenge evidence and, on the other, are a fundamental criterion to be applied when assessing the admissibility of evidence. The issue is not limited to formally guaranteeing a party the possibility to contest evidence obtained from another Member State, but rather ensuring that the party is able to 'comment effectively' on such evidence. The Court therefore requires that national law provide an effective mechanism for verifying evidence obtained from another Member State. This does not entail a direct examination of the procedure by which such evidence was obtained in the State executing the EIO, but rather an assessment of whether the use of that evidence in the criminal proceedings in the country issuing the EIO would render those proceedings unfair. It is evident that such an assessment cannot be carried out entirely independently of the manner in which the evidence in question was obtained in the country executing the EIO.

It is important to note that the Court of Justice places emphasis on the effectiveness of the mechanism that should be provided for in national law, rather than on any specific procedural solution. It therefore appears that it is not necessary to introduce a particular procedural instrument, such as a remedy of appeal or a formalised complaint. Objections to evidence obtained under the EIO procedure may also be raised in the ordinary course of proceedings before the court. In this respect, the standard indicated in the *EncroChat* judgment seems to correspond to the features of a legal remedy outlined in *Gavanozov II*, where the Court did not, after all, require the provision of a measure enabling *ex ante* review of an EIO. It

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not have a significant (decisive) impact on the findings of fact in the case. See V. Bajović, 'Encro-Chat and Sky ECC Data as Evidence in Criminal Proceedings in Light of the Court of Justice Decision', *European Journal of Crime, Criminal Law and Criminal Justice*, 2025, Vol. 33, No. 2, p. 255.

instead pointed to the requirement to ensure the possibility of redress in the event that an investigative measure is unlawful, which must be understood as including the subsequent elimination of the consequences of a breach of the law committed when carrying out the investigative measure. In this sense, the possibility for a party to trigger verification of the evidence, which may result in its exclusion, constitutes such a form of *ex post* review. Importantly, through this mechanism it will generally remain possible to fully remove the negative consequences of obtaining defective evidence for the fairness of the proceedings in the Member State issuing the EIO.

To recapitulate, it is worth emphasising that the *EncroChat* judgment is not the first case in which the Court of Justice has ruled on the effects of obtaining evidence in violation of the guarantees of a fair trial. However, in this judgment, the CJEU did so for the first time on the basis of Directive 2014/41, whereas previous judgments indicating a similar effect (i.e. the possibility of disregarding evidence or information in criminal proceedings)[17] concerned the interpretation of Directive 2002/58/EC.[18]

It is important to note that, despite emphasising the procedural autonomy of Member States in regulating the admissibility of evidence and the absence of regulation of this issue at the EU level,[19] the CJEU in the *EncroChat* case clearly recognised that the need to ensure the fairness of proceedings and the right of defence may, in some cases, require the exclusion of evidence obtained through the EIO procedure.[20] With regard to this issue, the CJEU did not refer in any way to the extensive case law of the European Court of Human Rights on the admissibility of evidence. However, the Strasbourg Court did address this matter when examining complaints against France concerning the execution by the French authorities of EIOs requesting the transfer of evidence obtained from *EncroChat*. The ECtHR had no doubt that the remedy available to the applicants in France, as the State executing the EIOs, which could have led to the exclusion of this evidence as inadmissible, constituted an 'effective remedy' within the meaning of Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Consequently, it dismissed the complaints as inadmissible on the grounds that this domestic remedy had not been exhausted.[21]

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[17] Judgment of the Court of Justice of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791, paragraphs 226–227; judgment in Case C-746/18, paragraph 44.

[18] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ L 337, 18.12.2009, p. 11).

[19] Judgment in Case C-670/22, paragraphs 128–129.

[20] Despite this, some authors criticise the Court of Justice's ruling in this regard. See, in particular, A. Hoxhaj, 'The Court of Justice Ruled that the EncroChat Data Can Be Admissible Evidence in the EU', *European Journal of Risk Regulation*, 2025, Nos 1–13, pp. 9–12; https://www.researchgate.net/publication/395161249_The_Court_of_Justice_Ruled_that_the_EncroChat_Data_can_be_Admissible_Evidence_in_the_EU#fullTextFileContent [accessed on 15 September 2025].

[21] ECtHR decision of 24 September 2024, *A.L. and E.J. v. France*, Applications Nos 44715/20 and 47930/21.

THE RIGHT TO AN 'EFFECTIVE REMEDY' IN THE 'DEFENCE DIRECTIVES'

Currently, in European Union law, the rights of defendants (a term which also includes suspects) in criminal proceedings are regulated by six EU directives. These are, in chronological order: the Directive on access to interpretation and translation;[22] the Directive on the right to information in criminal proceedings;[23] the Directive on access to a lawyer;[24] the Directive on the presumption of innocence;[25] the Directive on child defendants;[26] and the Directive on access to legal aid.[27]

Each of the above-mentioned legal acts contains a provision or provisions regulating the right to 'remedies'. In the Directive on interpretation and translation, the issue of access to remedies is regulated by Article 2(5) with regard to interpretation and by Article 3(5) with regard to the translation of documents. Both provisions are similar in content and provide for the possibility of challenging two circumstances: a decision stating that there are no grounds for providing interpretation or translation, respectively, and the quality of that interpretation or translation. However, both provisions include a reservation that Member States are to ensure access to remedies 'in accordance with procedures in national law'. At the same time, the preamble to this Directive states that 'that right does not entail the obligation for Member States to provide for a separate mechanism or complaint procedure in which such a finding may be challenged' (recital 25 of the Preamble). As a result, it should be assumed that the minimum implementation of this right is the obligation of the procedural authorities conducting a given stage of the proceedings to check and verify the quality of the translation. In the only ruling to date concerning the judicial interpretation of Article 2(5) of this Directive, the CJEU held that it is not permissible

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[22] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1); hereinafter referred to as 'the Directive on interpretation and translation'.

[23] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1); hereinafter referred to as 'the Directive on information'.

[24] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; (OJ L 294, 6.11.2013, p. 1); hereinafter referred to as 'the Directive on access to a lawyer' or 'Directive 2013/48.'

[25] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1); hereinafter referred to as 'the Directive on the presumption of innocence' or 'the Directive 2016/343'.

[26] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1); hereinafter referred to as 'the Directive on minor defendants'.

[27] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 4.11.2016, p. 1); hereinafter referred to as 'the Directive on legal aid'.

to try a person *in absentia* if, due to inadequate interpretation, that person was not informed of the charges in a language which he or she understands, or if it is impossible to determine the quality of the interpretation provided and, therefore, to establish that the person was informed of the charges in a language which he or she understands.[28]

A similar, very general wording and reference to national procedures is found in the provision granting the right to a remedy in the Directive on information. Article 8(2) of that Directive simply refers to the right to challenge the possible failure or refusal of the competent authorities to provide information.[29] The two most recent directives – the Directive on child defendants and the Directive on legal aid – also provide, in similarly general terms, that defendants should be entitled to 'an effective remedy under national law in the event of a breach of their rights under this Directive'.

More detailed regulation of the right to an effective remedy is provided only in the Directive on access to a lawyer and the Directive on the presumption of innocence.[30] Both directives specify that Member States shall ensure that, in criminal proceedings, when assessing statements made by suspects or accused persons or evidence obtained in breach of the rights guaranteed in those directives, the rights of the defence and the fairness of the proceedings are respected (Article 10 of Directive 2016/343; Article 12 of Directive 2013/48).[31] At the same time, as in the other directives, the reference clause to national law is repeated here, supplemented by the statement that an effective remedy shall be provided without prejudice to national rules on the admissibility of evidence.[32]

It is precisely the CJEU's interpretation of Article 12 of Directive 2013/48, linked to its interpretation of the provisions on effective remedies contained in other directives, that allows for the reconstruction of the standard of an 'effective remedy' in the area of obtaining evidence in violation of the rights of the accused guaranteed in the 'defence directives'. The judgments of the CJEU in the following cases appear to

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[28] Judgment of the Court of Justice of 23 November 2021, *IS*, C-564/19, ECLI:EU:C:2021:949.

[29] A more specific remedy, requiring either a court decision or the possibility of appeal to a court, is provided only in Article 7(4) of that directive, in relation to the refusal of access to the investigation file to a person who has been arrested or detained.

[30] This directive also refers to the reopening of proceedings as an effective remedy in cases of criminal proceedings conducted *in absentia*, which, however, lies beyond the scope of this study.

[31] The high degree of generality of the provisions regulating the right to a remedy is highlighted in the literature. See, *inter alia*, critical comments: K. Kiejnich-Kruk, *Prawo do skutecznego środka naprawczego w postępowaniu dowodowym*, Warszawa, 2023, pp. 89–92; Z. Branicka, 'Implementation of the right to effective legal remedies in European Parliament Directives', in: Wiliński P. (ed.), *Effective Legal Remedies in Criminal Justice System. European Perspective*, Berlin, 2024, p. 137.

[32] 'Without prejudice to national rules and systems on the admissibility of evidence' (Article 12(2) of the Directive on access to a lawyer). On the evolution of this provision in the process of drafting the Directive, see P. Wiliński, K. Kiejnich-Kruk, 'Right to Effective Legal Remedy in Criminal Proceedings in the EU. Implementation and Need for Standards', *Review of European and Comparative Law*, 2023, Vol. 54, No. 3, pp. 155–159.

be of particular importance in this regard: C-209/22,[33] C-603/22,[34] C-15/24 PPU,[35] and C-530/23.[36] The conclusions drawn from them are as follows.

The right to an effective remedy does not imply an obligation to provide for a separate legal remedy in national law in the form of an appeal or other type of 'complaint' aimed at ensuring compliance with the rights provided for in the directives.[37] This follows directly from the preambles of certain directives (see, e.g. recital 36 of the Directive on the right to information in criminal proceedings and recital 25 of the Directive on interpretation and translation) and has been confirmed in the case law of the CJEU. The Court has consistently emphasised that Articles 47 and 48 of the Charter of Fundamental Rights do not require Member States to establish independent actions that suspects or accused persons could bring in order to defend the rights conferred on them by directives establishing the so-called minimum standard of protection of the rights of the accused. As indicated in the first of the above-mentioned judgments, delivered in Case C-209/22,

> 'According to settled case-law, EU law, including the provisions of the Charter, does not have the effect of requiring Member States to establish remedies other than those established by national law, unless it is apparent from the overall scheme of the national legal system in question that no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law.'[38]

Therefore, the possibility of effectively raising the objection of an infringement of the directive before the court hearing the case on its merits, i.e. in the main proceedings, is regarded as a sufficient 'remedy'. In the aforementioned Case C-209/22, the CJEU ruled that the provisions regulating remedies in the Directive on the right to information and in the Directive on access to a lawyer, interpreted in conjunction with Articles 47 and 48 of the Charter, do not preclude national case law according to which a court competent under applicable national law to examine an application for retrospective authorisation of a personal search and the subsequent seizure of illegal substances carried out during the preliminary stage of criminal proceedings does not have jurisdiction to examine whether the rights of the suspect or accused person guaranteed by those directives were respected on that occasion. However, the CJEU added two conditions to this assessment:

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[33] Judgment of the Court of Justice of 7 September 2023, *AB,* C-209/22, ECLI:EU:C:2023:634 (hereinafter referred to as the 'judgment in Case C-209/22').

[34] Judgment of the Court of Justice of 5 September 2024, *M.S. and Others*, C-603/22, ECLI:EU:C:2024:685 (hereinafter referred to as the 'judgment in Case C-603/22').

[35] Judgment of the Court of Justice of 14 May 2024, *Stachev*, C-15/24 PPU, ECLI:EU:C:2024:399 (hereinafter referred to as the 'judgment in Case C-15/24').

[36] Judgment of the Court of Justice of 8 May 2025, *Barało,* C-530/23, ECLI:EU:C:2025:322 (hereinafter referred to as the 'judgment in Case C-530/23').

[37] See P. Wiliński, 'Closing remarks', in: Wiliński P. (ed.), *Effective Legal Remedies in Criminal Justice System. European Perspective*, Berlin, 2023, p. 203.

[38] Judgment in Case C-209/22, paragraph 54; almost identical: judgment in Case C-530/23, paragraph 99.

> 'first, that that person is able subsequently to establish, before the court hearing the substance of the case, any infringement of the rights arising from those directives, and, secondly, that that court is then required to draw conclusions from such an infringement, in particular as regards the inadmissibility or the probative value of the evidence obtained in those circumstances.'[39]

Thus, the CJEU clearly indicated two ways in which a national court may address a finding of an infringement of the rights provided for in the directives when gathering evidence: by considering the issue of inadmissibility or by assessing the probative value of such evidence. However, it did not rule that evidence obtained in breach of the rights provided for in the above-mentioned directives must be declared inadmissible. This was not necessary in this case, as the CJEU also stated that stopping a person and carrying out a personal search during a roadside check, which gave rise to self-incriminating statements, does not amount to such a significant restriction on the freedom of action of the person concerned as to make legal assistance mandatory at that stage of the proceedings. The final assessment of the circumstances of such a case, however, is left to the national courts.[40]

In two judgments issued upon the preliminary questions from two Polish courts, the CJEU was more precise and clearer in determining the consequences of obtaining evidence in violation of the requirements set out in EU directives. It stated that the required response of the court to the gathering of evidence in violation of the rights provided for in the directives (in both cases these were statements given by the suspect) is not to consider that evidence inadmissible but to draw 'all the consequences' of that violation, in particular with regard to the probative value of the evidence obtained in those circumstances.

In Case C-603/22, the CJEU had the opportunity to rule on the legal consequences of violating the requirement to provide access to a lawyer for suspects who were under 18 years of age at the time of the criminal proceedings. Three minors were interrogated during the preliminary investigation by police officers without being guaranteed prior access to a lawyer, despite the fact that Directive 2016/800, as a rule, provides for the obligation to ensure that such suspects have access to a lawyer, if necessary appointed *ex officio*, before the first interrogation.[41] Their parents were also

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[39] Judgment in Case C-209/22, paragraph 61.

[40] Paragraph 74 of the judgment. In this regard, the Court of Justice has almost replicated the standard set by the European Court of Human Rights in the case *Zaichenko v. Russia* (judgment of 18 February 2010, Application No. 39660/02). For more on the standard of access to a defence lawyer at an early stage of criminal proceedings established by the Strasbourg Court, see S. Steinborn, M. Wąsek-Wiaderek, 'Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej i międzynarodowej', in: Rogacka-Rzewnicka M., Gajewska-Kraczkowska H., Bieńkowska B.T. (eds), *Wokół gwarancji współczesnego procesu karnego. Księga Jubileuszowa Profesora Piotra Kruszyńskiego*, Warszawa, 2015, pp. 436–442.

[41] See Article 6(2) and (3) of Directive 2016/800 (with the exceptions provided for in Article 3(6) thereof). It is rightly assumed in the literature that Article 6(6) of Directive 2016/800 imposes an obligation to provide mandatory defence for a child before their first interrogation in the pre-trial proceedings. The provision clearly refers not only to access to a defence lawyer but also to ensuring that children are assisted by a lawyer, which implies an active role for the procedural authorities (see also recital 25 of the preamble to the Directive). It is therefore considered that children accused of a crime are not in a position to waive their right of access to a defence lawyer. See S. Cras,

not allowed to attend the interrogation, and the minors were simply given standard instructions on their rights and obligations. In this situation, the District Court in Słupsk, which heard the case, sought first to determine whether Article 168a of the Code of Criminal Procedure, which prohibits the court from considering the statements of minors as inadmissible evidence in such circumstances, is contrary to EU law. The CJEU's answer was unequivocally negative. It found that the provisions of Directive 2016/800 do not preclude national legislation that does not allow a court to consider as inadmissible incriminating statements made by a child during police questioning in breach of the right of access to a lawyer provided for in Article 6 of Directive 2016/800. However, at the same time, the CJEU emphasised that acceptance of this regulation must be linked to the power of the national court hearing the case to verify whether that right, interpreted in the light of Articles 47 and 48(2) of the Charter, has been respected and, secondly, to draw all the inferences from that infringement, in particular as regards the probative value of the evidence obtained in those circumstances. The Court did refer to the possibility of drawing 'all the inferences' from such a breach, yet at the same time it had previously ruled out the inadmissibility of such evidence as a possible reaction to the breach of the right of access to a lawyer, since it had found that Article 168a of the Code of Criminal Procedure was not contrary to EU law. It thus ruled out the competence of a national court to disapply this provision on the basis of the principle of the supremacy of EU law. Moreover, the CJEU recalled that the provisions governing 'remedies' in the directives are not intended to regulate national systems concerning the admissibility of evidence, since they are to apply 'without prejudice' to those national provisions. The Court clearly stated that, in the current legal situation, the issue of the admissibility of evidence belongs exclusively to national law.[42]

An almost identical position was expressed in another, more recent judgment of the CJEU delivered in the framework of the preliminary ruling procedure initiated by the District Court in Włocławek. Importantly, in this case as well, the suspect was a person who, in the light of Strasbourg case law, should be considered a 'vulnerable person'. The CJEU had no doubt that persons with mental disorders belong to the category of 'vulnerable suspects' covered by Article 9 of Directive 2016/1919, for whom Member States are required to take their special needs into account when implementing this Directive. In view of this circumstance, the Court ruled that an essential element of the effective protection granted by Article 12 of

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'The Directive on Procedural Safeguards for Children Who Are Suspects or Accused Persons in Criminal Proceedings: Genesis and Descriptive Comments Relating to Selected Articles', *Eucrim*, 2016, No. 2, p. 114; similarly, on the inadmissibility of waiving this right: Opinion of Advocate General Tamara Ćapeta of 22 February 2024 in Case C-603/22, paragraph 70; contrary opinion: S.E. Rap, D. Zlotnik, 'The Right to Legal and Other Appropriate Assistance for Child Suspects and Accused: Reflections on the Directive on Procedural Safeguards for Children Who Are Suspects or Accused Persons in Criminal Proceedings', *European Journal of Crime, Criminal Law and Criminal Justice*, 2018, Vol. 26, No. 2, pp. 121–122.

[42] Judgment in Case C-603/22, paragraphs 168–169. For more on the implications of this ruling from the perspective of the *nemo se ipsum accusare tenetur* principle, see M. Wąsek-Wiaderek, 'Vulnerable Suspects and the *Nemo Tenetur* Principle in Poland – A Few Remarks on the Judgment of the Court of Justice in Case C-603/22', in: *Nemo tenetur: The Many Faces of a Fundamental Principle*, forthcoming, planned publication: December 2025.

Directive 2013/48 and Article 8 of Directive 2016/1919 is that decisions concerning the examination of a suspect's potentially particularly difficult situation and the refusal to grant legal aid to such a person, as well as whether to interrogate such a person in the absence of a lawyer, must be reasoned and subject to an effective remedy. At the same time, however, the Court stated that these provisions:

> 'do not preclude national legislation which, in criminal proceedings, does not allow a court to declare inadmissible incriminating evidence contained in statements made by a vulnerable person during questioning by the police, by another law enforcement authority or by a judicial authority in breach of the rights laid down by Directive 2013/48 or 2016/1919, provided, however, that, in criminal proceedings, that court is in a position, first, to verify that those rights, read in the light of Article 47 and Article 48(2) of the Charter […], have been respected and, second, to draw all the inferences from that breach, in particular as regards the probative value of the evidence obtained in those circumstances.'[43]

Thus, the CJEU again emphasised the need to take into account violations of the law in the process of obtaining evidence (statements) when assessing them, clearly stating that the directives do not require automatic exclusion of all evidence obtained in violation of the rights granted therein.[44]

Slightly different conclusions may be drawn from the analysis of the *Stanchev* case,[45] in which the CJEU responded to preliminary questions from a Bulgarian court concerning the consequences of questioning an illiterate suspect after he had waived his right of access to a lawyer. The preliminary questions were referred by the court ruling on the application of pre-trial detention. The CJEU had no doubt that Article 12 of Directive 2013/48 and Article 47 of the Charter preclude national case law which implies that a court deciding on the application of this preventive measure is deprived of the possibility of assessing whether evidence presented in support of the accusation and the application of pre-trial detention has been obtained in breach of the requirements of that directive and, where appropriate, of disregarding such evidence. This judgment explicitly refers to 'disregarding' evidence obtained in breach of the directive. In paragraph 98 of that judgment, the CJEU stated that:

> 'the obligation, arising from Article 12(2) of Directive 2013/48, to ensure that the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained in breach of the right to a lawyer, means that evidence on which a party is not in a position to comment effectively must be excluded from the criminal proceedings.'

Having said that, the CJEU referred to the content of Article 14(7) of the EIO Directive and to its own judgment in the *EncroChat* case.[46]

The analysis of the above-mentioned judgments leads to the conclusion that the CJEU's case law on effective remedies is inconsistent. Moreover, despite repeated declarations in successive judgments that the Court takes into account the standard established by the ECtHR, treating it as a minimum, it should be noted that with

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43 Judgment in Case C-530/23, paragraph 108.
44 Ibidem, paragraph 102.
45 Judgment in Case C-15/24.
46 Judgment in Case C-670/22, paragraph 130.

regard to suspects with special needs, i.e. vulnerable suspects such as children or persons suffering from mental disorders, the standard set out the CJEU's case law appears to be lower than that which can still be derived from the ECtHR's judgments. Although the *Salduz*[47] doctrine has been significantly 'blurred' in subsequent case law,[48] establishing facts unfavourable to the accused on the basis of self-incriminating statements obtained in violation of the right of access to a lawyer may still directly lead to a finding that the entire proceedings were unfair. In one of its most recent rulings concerning the use as evidence of incriminating statements made by a suspect with a significantly limited intellectual capacity, the Court found that he was not capable of effectively waiving his right to defence counsel. Therefore, any subsequent measures taken to remedy this violation, including confirmation of those statements in the presence of a defence lawyer during the remand hearing, did not alter the assessment that the use of these statements as evidence rendered the entire trial unfair. This is an important judgment because, despite formally applying the new approach developed in *Ibrahim and Others v. the United Kingdom*,[49] the ECtHR clearly stated that in the case of a suspect with special needs (a vulnerable suspect), when there was no justification for restricting his right of access to a lawyer before the first interrogation, the use as evidence of his self-incriminating statements, which constituted key evidence in the case, resulted in a finding that the proceedings as a whole were unfair.[50] The concept of a 'fair trial' used in Article 12(2) of Directive 2013/48 should be interpreted by the CJEU in accordance with the case law of the Strasbourg Court, and this sometimes requires the Court to apply a 'sanction' in the form of declaring evidence inadmissible in order to maintain the standard of a fair trial.

In two cases initiated by preliminary questions from Polish courts (C-603/22 and C-530/23), Advocate General Tamara Ćapeta submitted her opinions, proposing an interpretation of an effective remedy that should be available to the accused in the event of a violation of their right of access to a lawyer, which differed from that ultimately adopted by the CJEU. In her opinion, she clearly indicated that in such situations, the national court should be entitled to consider such evidence

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[47] Initiated by the judgment of the ECtHR of 27 November 2008, *Salduz v. Turkey*, Application No. 36391/02, according to which 'the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction' (paragraph 55 *in fine*, in conjunction with paragraphs 60–63). Similarly, with regard to a suspect suffering from alcoholism and therefore classified as a 'vulnerable suspect': see ECtHR judgment of 31 March 2009, *Płonka v. Poland*, Application No. 20310/02.

[48] See, on this issue, W. Jasiński, 'Dostęp osoby oskarżonej o popełnienie czynu zagrożonego karą do adwokata na wstępnym etapie ścigania karnego – standard strasburski', *Europejski Przegląd Sądowy*, 2019, No. 1, pp. 24–30; A. Sakowicz, 'Suspect's Access to a Lawyer at an Early Stage of Criminal Proceedings in View of the Case-Law of the European Court of Human Rights', *Revista Brasileira de Direito Processual Penal*, 2021, Vol. 7, No. 3, pp. 2000–2009; R. Goss, 'The Disappearing "Minimum Rights" of Article 6 ECHR: The Unfortunate Legacy of Ibrahim and Beuze', *Human Rights Law Review*, forthcoming (20 August 2023), ANU College of Law Research Paper No. 23.6; http://dx.doi.org/10.2139/ssrn.4541954 [accessed on 27 September 2025].

[49] ECtHR judgment of 13 September 2016, *Ibrahim and Others v. the United Kingdom*, Applications Nos 50541/08, 50571/08, 50573/08 and 40351/09.

[50] ECtHR judgment of 12 June 2025, *Krpelík v. the Czech Republic*, Application no 23963/21, in particular paragraphs 94–99.

inadmissible. In Case C-603/22, she stated that it is for the referring court to ensure the full effectiveness of the rights established in the cited directives, in accordance with their interpretation by the Court. This could be achieved by excluding evidence gathered in breach of those legal acts, if the referring court considers that otherwise the rights guaranteed in Articles 24(2), 47 and 48 of the Charter would be infringed. This approach differs from that taken by the CJEU, which held that neither the provisions of the Charter nor the right to a remedy regulated in the 'defence directives' preclude the application of Article 168a of the Code of Criminal Procedure, which was understood by the referring court as prohibiting the exclusion of evidence obtained in breach of the law on the grounds of inadmissibility.

CONCLUSIONS

It can be concluded from the CJEU's jurisprudence that the 'common denominator' of an effective remedy under the EIO Directive and an effective legal remedy required by the so-called 'defence directives' is the reference to the general standard of a fair trial and the right of defence. This is intended to set the standard for an effective remedy and determine its consequences. Certainly, it cannot be inferred from the judgments discussed that the CJEU advocates a straightforward concept whereby a violation of the law in obtaining evidence automatically renders that evidence inadmissible.

However, this does not mean that the current case law of the CJEU concerning this issue is consistent and clear. With reference to evidence gathered by means of an EIO, the CJEU explicitly allows for the sanction of inadmissibility of such evidence as a component of an effective remedy, as it did, for example, in the *EncroChat* case, if the defence was not given the opportunity to effectively challenge such evidence and that evidence would have a significant, indeed decisive, impact on the findings of fact in the case. Moreover, the CJEU's position in this regard corresponds to the case law of the ECtHR, although the Luxembourg Court did not refer to the ECtHR's case law when interpreting Article 14 of the EIO Directive in that judgment.

The position of the CJEU on the consequences of violating the right of access to a lawyer for suspects, particularly those requiring special support (such as children or persons suffering from mental disorders), is both distinct and, in some respects, surprising. Despite the clear reference in Article 12 of Directive 2013/48 to the obligation to respect the right of defence and the right to a fair trial, in two judgments delivered in response to preliminary questions from Polish courts, the CJEU clearly distanced itself from the possibility of treating as inadmissible statements made by such suspects, if such self-incriminating statements were obtained in violation of the rights guaranteed in that directive. One of the findings of the judgment in Case C-603/22 should even be read as limiting the possibility of declaring such statements inadmissible, since it explicitly states that Article 168a of the Code of Criminal Procedure is not contrary to European Union law. Furthermore, as demonstrated in the second part of this study, such an interpretation of the right to an effective remedy may raise significant concerns regarding its compliance with

the standard set out in the case law of the European Court of Human Rights. Only in the *Stanchev* case does the CJEU seem to recognise the aforementioned 'common denominator' between the right to an effective remedy under Article 14 of the EIO Directive and the right to an effective remedy under the 'defence directives'.

In its case law on directives concerning the procedural rights of defendants, the CJEU clearly limits the consequences of violating the rights guaranteed by these directives, shifting the examination of this issue to the stage of assessing the evidence. A much more far-reaching sanction would be to declare such evidence inadmissible in such situations. However, at the stage of assessing the evidence, the evaluation of the violation in terms of the right of defence and the fairness of the proceedings will, as a rule, be only one aspect of the analysis carried out by the court adjudicating the case. In judicial practice, it will inevitably be necessary to take into account other circumstances as well, such as the type and nature of the evidence and its significance for the outcome of the case. As a result, the effects of the infringement may be 'blurred' and the effectiveness of the remedy that should be provided under EU law may consequently be significantly weakened.

However, there should be no doubt that the obligation to provide for both 'effective remedies' and 'effective legal remedies' does not entail the obligation to create a separate legal remedy in the form of a 'complaint' or 'appeal' in the national legal system.[51] In both areas described in this article, the objective is to ensure an effective mechanism of legal protection, which may equally be implemented during the court's examination of the merits of the case – for example, through objections raised at the hearing or grounds of appeal advanced by a party to the criminal proceedings.

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[51] See also S. Steinborn, 'Środek odwoławczy…', op. cit., pp. 143–144; S. Steinborn, 'The Concept…', op. cit., p. 141.

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ACCESS TO THE DISCIPLINARY FILE OF AN ACADEMIC TEACHER

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Abstract

The article is of a scientific and research-based nature. It analyses the transparency of disciplinary proceedings against academic teachers, which are conducted under the Act on Higher Education and Science. The article examines issues of transparency in light of the provisions of that Act, the Code of Criminal Procedure, and the Act on Access to Public Information. The research objective was clear: to determine whether persons not involved in disciplinary proceedings (namely the accused, their defence counsel, or the disciplinary advocate) may request access to the records of such proceedings (in whole or in part), or seek information from them other than official documents, under the Act on Access to Public Information. The analysis covered the regulations concerning the parties to disciplinary proceedings contained in the Higher Education and Science Act, the 2022 Implementing Regulation governing disciplinary procedures, and the Code provisions applicable to disciplinary matters. The rules concerning access to public information were also analysed, both in normative terms and in light of administrative court rulings. The research employed the dogmatic method, and its findings are original and significant for both legal scholarship and practice. The study has conclusively demonstrated that information from disciplinary proceedings involving academic teachers, as well as the files of such proceedings, although considered public information, are not subject to disclosure to persons requesting access under the Act on Access to Public Information. This is because a special regulation – namely the appropriate application, under Article 305 of the Higher Education and Science Act, of Article 156 § 1 of that Code – excludes such applicants, until the conclusion of the disciplinary proceedings, from the group of persons who, under the current legal framework, have access to disciplinary files.

Keywords: disciplinary proceedings of academic teachers, disciplinary files, access to files, public information

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INTRODUCTION

Disciplinary proceedings against academic teachers are conducted under the provisions of the Higher Education and Science Act[1] (hereinafter referred to as the 'HESA'), as well as, by virtue of the reference in Article 305 of that Act, the correspondingly applied provisions of the Code of Criminal Procedure[2] (hereinafter referred to as the 'CCP'). In matters relevant to the issues discussed below, the provisions of the Regulation of the Minister of Education and Science of 8 June 2022 on the detailed procedure for conducting mediation, explanatory proceedings, and disciplinary proceedings in matters concerning the disciplinary responsibility of academic teachers, as well as on the manner of executing disciplinary penalties and their expungement[3] (hereinafter referred to as the 'Ministry of Education and Science Regulation' or 'MESR'), also apply.

Disciplinary proceedings against academic teachers are conducted by a disciplinary committee. Depending on the charge brought against the teacher by the disciplinary spokesperson, the matter may be considered by one of three types of committees, as provided for in Article 278 of the HESA. These include university committees, the disciplinary committee of the Main Council of Science and Higher Education (hereinafter 'the MCSHE'), and the disciplinary committee of the minister (currently the Minister of Science and Higher Education). The committees are independent in their decision-making and are autonomous from public authorities and university bodies.[4] They independently establish the facts and decide on legal issues, without being bound by the decisions of other law enforcement bodies, except for a final conviction handed down by a criminal court, as well as the opinion of the Committee for Ethics in Science of the Polish Academy of Sciences. In the literature, the independence of the committee is consistently defined as the inadmissibility of any extra-procedural influence on its decisions.[5] This applies in particular to university committees and university authorities, but also to other state bodies in relation to committees operating at the General Council for Science and Higher Education or those at the Ministry. Independence is further understood as the conferral of powers and competences that cannot be exercised by other entities, coupled with organisational separation, among other safeguards.[6]

All the normative acts indicated above contain provisions regulating the issue of the so-called transparency of disciplinary proceedings against academic teachers,

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1 Act of 20 July 2018 (consolidated text: Journal of Laws of 2024, item 1571).

2 Act of 6 June 1997 (consolidated text: Journal of Laws of 2024, item 46).

3 Regulation of the Minister of Education and Science of 8 June 2022 on the detailed procedure for conducting mediation, explanatory proceedings and disciplinary proceedings in matters of disciplinary responsibility of academic teachers, as well as the manner of executing disciplinary penalties and their expungement (Journal of Laws of 2022, item 1236).

4 Cf. Article 278(7) of the Act on Higher Education and Science.

5 Cf. K. Wiak, in: Pyter M. (ed.), *Prawo o szkolnictwie wyższym. Komentarz*, Warszawa, 2012, Article 143, p. 782; J. Kosowski, in: Jakubowski A. (ed.), *Prawo o szkolnictwie wyższym i nauce. Komentarz*, Article 278, LEX/el., 2023.

6 P. Wiliński, P. Karlik, in: Bosek L., Safjan M. (eds), *Konstytucja RP. Tom II. Komentarz do art. 87–243*, Warszawa, 2016, Article 173, p. 968.

including the rules governing access to the documentation of such proceedings. There is no doubt that all documents collected in the course of disciplinary proceedings, including the files of the explanatory proceedings conducted by the disciplinary officer for academic teachers, as well as the request to initiate disciplinary proceedings before the disciplinary committee, constitute a set of documents forming the disciplinary proceedings file. These are subject to a special regime concerning access, both for the participants in the proceedings – namely the parties, i.e. the disciplinary officer and the accused – and for the defence counsel.

The question of transparency in proceedings conducted before the disciplinary committee (only at this stage of the process can one in fact speak of disciplinary proceedings) must be considered in relation to ongoing proceedings. Neither the HESA nor the MESR regulate access to the files of completed proceedings.

The possibility of invoking the provisions of the Act on Access to Public Information[7] (hereinafter referred to as the 'AAPI') to request that the bodies conducting disciplinary proceedings (disciplinary committees) make certain information available to an applicant, most often in the form of specific documents contained in the files of disciplinary proceedings, creates a significant problem in this context. The question that must be addressed is whether it is legitimate to apply the provisions of this Act to obtain access to information from ongoing disciplinary proceedings, what type of information may be accessed, and which entities may lawfully be granted such access.

PRINCIPLE OF OPENNESS AND DISCIPLINARY PROCEEDINGS AGAINST ACADEMIC TEACHERS

As previously indicated, disciplinary proceedings are conducted by a disciplinary committee and are initiated at the request of the disciplinary officer, as provided in Article 293(1) HESA. Detailed provisions governing the course of this procedure are set out in the Ministry of Education and Science Regulation, which defines not only the conduct of the proceedings but also the powers of the respective disciplinary bodies at each stage of the process, including the stage before the disciplinary committee. The disciplinary proceedings, which are modelled on criminal proceedings, are initiated – like the jurisdictional stage of criminal proceedings – at the request of an authorised entity, which, in proceedings against an academic teacher, is the disciplinary officer. The decision to commence such proceedings before the committee is made by the chairperson of the committee through the issuance of an appropriate order. At that point, the disciplinary proceedings commence – this is what is referred to as the 'course of proceedings'. This explanation is important for the following analysis, as it should be emphasised that the term 'disciplinary proceedings' refers only to a specific stage of the broader procedure aimed at determining whether an academic teacher has committed a disciplinary offence (the explanatory proceedings conducted by the disciplinary officer)

[7] Act of 6 September 2001 on Access to Public Information (consolidated text: Journal of Laws of 2022, item 902).

and adjudicating disciplinary responsibility for the alleged act constituting a disciplinary offence (disciplinary proceedings *sensu stricto*). The disciplinary proceedings, initiated by a complaint (a request to initiate proceedings) submitted by the authorised disciplinary officer, are conducted before the committee until their legally binding conclusion. The decision of the university committee or the committee of the Council, against which no appeal has been lodged within the prescribed time limit or from which the appeal has been effectively withdrawn, becomes final and subject to enforcement. The finality of the decision is then declared by the chairperson of the disciplinary committee.[8] In other cases, the disciplinary proceedings are deemed to have been legally concluded when the decision to terminate the proceedings is issued by the committee adjudicating the case in the second instance.

The principle of openness, which determines the course of the individual stages of criminal proceedings, is implemented in a slightly different manner in disciplinary proceedings against academic teachers, even though, under Article 305 HESA, certain CCP provisions also apply correspondingly to proceedings before the disciplinary committee. This also includes provisions implementing the principle of openness of proceedings.

The key stage in disciplinary proceedings concerning academic teachers is the disciplinary hearing before the committee. However, from the point of view of the efficiency of the proceedings, closed sessions held by adjudicating panels appointed by the chairperson of the committee to examine a given case are no less significant. Hearings are open to a defined group of participants specified in the regulations, or to other designated persons acting in the proceedings as representatives of a particular entity or group. Conversely, closed sessions, as their name suggests, are not accessible to participants in disciplinary proceedings other than the adjudicating panel. This follows from § 19(1)(1) MESR, which specifies two adjudicating forums: the disciplinary hearing and the closed session.

With regard to the external aspect of the openness of disciplinary proceedings, it should be emphasised that the disciplinary hearing is open only to a specific group of entities defined by law. These include employees of the university where the accused academic teacher is employed, representatives of the student and doctoral student councils (if the offence concerns the rights of a student or doctoral student), the victim, and representatives of the MCSHE, as well as representatives of the Minister. With the consent of the accused, representatives of the trade union of which he or she is a member may also be present at the disciplinary hearing. It should be noted that the presence of these persons does not confer the right to participate in the hearing. From a procedural standpoint, a distinction must be drawn between participation, understood as the right to take an active part in a given procedural act, and mere presence at such an act. A person entitled to be present during a procedural act is only an observer, whereas a participant in the act fulfils a specific procedural role – as a member of the adjudicating body, a party to the proceedings, a personal source of evidence (witness, expert), an auxiliary to the body (court reporter, interpreter), or a representative of a party (for instance,

[8] Cf. § 42(2) MESR.

the defendant's defence counsel). It should be noted that neither the victim of the accused nor the person reporting the disciplinary offence possesses the status of a party to the disciplinary proceedings. This means that, unless they belong to the group of persons indicated in Article 293(5) HESA, they are not entitled to participate in a disciplinary hearing before the disciplinary committee.

There is no doubt that entities other than the adjudicating body cannot participate in closed sessions. These sessions are convened by the chairperson of the committee to address organisational matters; they do not serve as a forum for adjudicating on the merits (that is, in matters of disciplinary responsibility). Consequently, only members of the adjudicating body and the minute taker attend them.

In terms of internal transparency, which concerns both parties' access to the disciplinary proceedings file and their ability to participate in procedural activities undertaken by the disciplinary committee, the provisions of the Ministry of Education and Science Regulation –particularly § 23(4) – are of key importance, as will be discussed later.

Participation in disciplinary proceedings, including the hearing, constitutes a right of the parties to the proceedings; therefore, both the disciplinary officer (the active party) and the accused (the passive party) may actively participate in the hearing. It should be emphasised that this is a right, not an obligation. If a party neither requests to be excused from attending the hearing nor applies for its postponement, the hearing may be conducted in their absence. However, if such a request is submitted, a new hearing date must be set, at which the requesting party may – according to their rights – attend and actively participate.[9] This is confirmed by § 5(6) MESR. A prerequisite for such a procedure is that the parties are properly notified of the date and venue of the hearing, which should be done through a postal operator or a university employee.[10] Due to the specific nature of this regulation (*lex specialis*), the notification procedures applicable in criminal proceedings cannot be used in this instance, as the provisions of the Code of Criminal Procedure do not apply here (cf. Article 305 HESA).[11] Although the literature draws attention to the possibility of using simplified forms of notification (for example, by telephone or e-mail), this remains limited in scope – applicable only to the disciplinary officer,

[9] Cf. § 34(2) MESR.

[10] Cf. § 5 MESR.

[11] For more on the proper application of regulations see: J. Nowacki, 'Odpowiednie stosowanie przepisów prawa', *Państwo i Prawo*, 1964, No. 3, pp. 370 et seq.; S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki prawodawczej z dnia 20 czerwca 2002 r.*, Warszawa, 2012, p. 302; as regards the appropriate application of the CCP provisions in disciplinary proceedings, cf. K. Dudka, *Zasady i zakres odpowiedniego stosowania przepisów Kodeksu postępowania karnego w sprawach odpowiedzialności dyscyplinarnej notariuszy. Zasady ponoszenia kosztów postępowania dyscyplinarnego notariuszy na tle regulacji dotyczących innych zawodów prawniczych*, Warszawa, 2015, p. 10; also K. Dudka, 'Stosowanie przepisów kodeksu postępowania karnego w postępowaniach dyscyplinarnych uregulowanych w prawie o adwokaturze oraz ustawie o radcach prawnych', *Prawo w Działaniu*, 2014, No. 18, p. 48; and K. Dudka, *Odpowiedzialność dyscyplinarna w prawniczych zawodach zaufania publicznego. Analiza orzecznictwa kar dyscyplinarnych*, Warszawa, 2013, p. 14; P. Czarnecki, 'Odpowiednie stosowanie przepisów prawa karnego w postępowaniach represyjnych', in: Czarnecki P. (ed.), *Postępowanie karne a inne postępowania represyjne*, Warszawa, 2016, pp. 13 et seq.

as such a form of notification does not infringe upon their procedural rights.[12] This matter has been regulated by the legislator in § 5(2)–(5) MESR.[13]

The regulation concerning access to the files of disciplinary proceedings against academic teachers is essentially exhaustive only in relation to the parties to the proceedings. The relevant provision governing the accused's access to the file or parts thereof, as well as the right to make copies, is found in § 21(4) MESR, which provides that from the moment the order setting the date of the hearing is served on the accused, only the accused or their defence counsel may inspect the case file and make extracts, notes, and photocopies thereof, in the presence of a person appointed by the chairperson of the adjudicating panel.

However, when applying by analogy the technique of the appropriate application of the CCP provisions, as permitted by Article 305 HESA, it becomes apparent that this issue is regulated in a similar manner in Article 156 §§ 1–2 CCP. These provisions clearly state that only the parties, defence counsels, attorneys, and legal representatives have access to the court case files and are entitled to make copies or duplicates thereof. With the consent of the president of the court, these files may also be made available to other persons. The law does not define the group of such persons nor does it specify the criteria for recognising them as eligible for access to court case files. In the literature, it is suggested that the guiding principle in this respect should be that such persons must demonstrate a legitimate reason for inspecting all or part of the documentation constituting the case file. It is, for example, indicated that such persons may include representatives of the media, individuals conducting scientific research, or others who can demonstrate a legitimate reason for requesting access to the file.[14]

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[12] This is pointed out by A. Jakubowski, *Komentarz do ustawy prawo o szkolnictwie wyższym i nauce*, comment on Article 293, LEX/el., 2023 [accessed on 12 February 2025].

[13] '§ 5. 1. In proceedings concerning the disciplinary responsibility of an academic teacher, summonses, notifications, decisions, rulings, orders and other documents shall be delivered against a receipt.

2. Summonses, notifications and other documents, the delivery date of which determines the deadline, shall be served by an authorised employee of the university or a postal operator within the meaning of Article 3(12) of the Act of 23 November 2012 – Postal Law (Journal of Laws of 2022, item 896).
3. Summonses and notifications may also be made by telephone, with an annotation including the date and content of the summonses or notification, together with the signature of the person who made the call, being placed in the case file.
4. Documents other than summonses and notifications may also be delivered by fax or e-mail, with a printout of the delivered document and confirmation of data transmission being included in the case file.
5. The provisions of paragraphs 3 and 4 shall apply if it serves the interest of ensuring the efficient conduct of the proceedings and does not result in a violation of the rights of its participants.
6. The provisions of paragraphs 3 and 4 shall not apply to the delivery of summonses, notifications and other documents addressed to:
   (1) the person to whom the notification or information relates;
   (2) the person whose act is the subject of the explanatory proceedings;
   (3) the accused.'

[14] Cf. H. Paluszkiewicz, in: Dudka K. (ed.), *Komentarz do kodeksu postępowania karnego*, Warszawa, 2023, p. 324.

The Ministry of Education and Science Regulation does not address the issue of granting access to the files of ongoing disciplinary proceedings to other persons, which implies the necessity of applying special provisions governing access to such files. The possibility of applying such special provisions is ensured by Article 305 HESA, which, in matters concerning the disciplinary responsibility of academic teachers not regulated by that Act, refers to the corresponding application of the Code of Criminal Procedure. Accordingly, the rules on access to the disciplinary proceedings file of academic teachers are also regulated, through appropriate application, by the provisions of Article 156 §§ 1 and 2 CCP. As noted in case law, the CCP provisions comprehensively regulate the issue of access to files during ongoing preparatory proceedings and exclude the application of the AAPI in this respect. This position is based primarily on the fundamentally different procedural standing of the parties to the proceedings at this stage of the criminal process compared with other entities that do not hold such status. The Supreme Administrative Court (NSA) has emphasised that it would be a violation of the principle of equality enshrined in Article 32(1) of the Constitution of the Republic of Poland if a party to criminal proceedings, whose vital interests are directly affected by the case, were to obtain access to the case file under the formalised rules of the Code, while other persons could gain access under the less formal provisions of the AAPI.[15] Since the present considerations concern disciplinary proceedings, which are a functional equivalent of the pre-trial stage of criminal proceedings, it is necessary to consider whether any legal basis exists for access to the files of such proceedings other than those provided for in the HESA, CCP, or MESR. The only potentially applicable legal act in this regard is the Act on Access to Public Information, provided that its provisions can be interpreted as encompassing disciplinary proceedings pending before the disciplinary committee.[16]

ACCESS TO THE RECORDS OF DISCIPLINARY PROCEEDINGS UNDER THE ACT ON ACCESS TO PUBLIC INFORMATION

The term ‘public information’ is a statutory concept defined by the legislator in Article 1(1) and Article 6 AAPI. Pursuant to Article 1 AAPI, any information concerning public matters constitutes public information and is subject to disclosure according to the rules and procedures prescribed by law.[17]

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[15] Judgment of the Supreme Administrative Court (NSA) of 25 May 2017, I OSK 1399/15, LEX No. 2323346.

[16] Cf. the Supreme Administrative Court (NSA) order of 19 January 2011, I OSK 8/11, LEX No. 741678, which states that the right of access to public information includes the right to request public information concerning specific facts and circumstances existing at the time the information is provided.

[17] An interesting analysis of this concept in the light of case law was carried out by P. Szustakiewicz, who indicated that the classification of certain information as subject to disclosure within the meaning of the aforementioned Act is determined by various criteria. The first is the material criterion, namely the content and nature of the information (see judgments of the Supreme Administrative Court of 24 May 2013, I OSK 260/13, and of 30 November 2012, I OSK

Article 6 of this Act lists information and documents that constitute public information. However, this catalogue is not exhaustive, as indicated by the use of the phrase 'in particular' in the provision. It includes, among other things, information about the entities referred to in Article 4(1) AAPI and the principles governing their operations. In the case law of administrative courts, it is consistently recognised that public information includes any data produced by broadly understood public authorities and by persons performing public functions, as well as by other entities exercising such authority or managing municipal or State Treasury property within the scope of their competences. This also extends to information not produced by public entities but relating to them.[18] In another judgment, the Supreme Administrative Court stated that not every document produced by a public authority is public information; what is decisive is the content and nature of the data, not the title or classification of the document containing it.[19] Consequently, not all information held by an entity obliged to disclose public information qualifies as such in the legal sense. Only information concerning matters related to the functioning of the state is public information, and moreover, such information must relate to events occurring in reality.[20]

In this context, it is reasonable to ask whether disciplinary proceedings against academic teachers, and the documentation collected during those proceedings which constitutes the case file, fall within the notion of public information.

In light of Article 4(1) AAPI, a public university is an entity obliged to disclose public information, both because it performs public tasks and because it disposes of public property. As a rule, therefore, a university is subject to the obligation to disclose public information, and disciplinary proceedings against an academic teacher,

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1835/12), where the criteria determining that the requested information is of a public nature are set out in Article 6 AAPI, which establishes the types of information relating to public matters. This provision develops Article 1 AAPI, linking the concept of 'public information' with that of a 'public matter', and therefore 'the subject of the information must be a public matter and, although its understanding is quite broad, it should nevertheless concern the sphere of facts' (judgment of 18 December 2013, I OSK 1944/13). Another criterion is the subjective criterion, according to which 'public information is everything that is directly related to the functioning and mode of operation of the entities referred to in Article 4(1) of the Act' (as stated in the judgment of the Supreme Administrative Court of 2 October 2014, I OSK 501/14). There is also a subjective-objective criterion, according to which public information is any message produced by, or relating to, public authorities, as well as information concerning other entities performing public functions in the exercise of their public authority tasks (judgment of the Supreme Administrative Court of 27 June 2013, I OSK 513/13; similarly, judgment of 10 January 2014, I OSK 1966/13). Two elements are decisive in determining whether a specific piece of information is public information: the subjective element – the entity in question is classified as a public authority or performs public tasks on behalf of the state; and the objective element – the information concerns matters related to the performance of public tasks by these entities. See more extensively, P. Szustakiewicz, 'Definicja informacji publicznej w orzecznictwie Naczelnego Sądu Administracyjnego', *Przegląd Prawa Publicznego*, 2016, No. 10, pp. 53–62.

[18] Cf. judgment of the Regional Administrative Court in Warsaw of 11 June 2010, II SAB/Wa 9/10, LEX No. 643859.

[19] Judgment of the Supreme Administrative Court of 5 March 2013 I OSK 2888/12, Legalis No. 760481.

[20] Judgment of the Supreme Administrative Court of 18 December 2013, I OSK 1944/13, LEX.

together with the documentation produced in the course of those proceedings, are public information, as they are created in the performance of public tasks by the competent authority, namely the disciplinary committee.[21] However, this position is subject to certain limitations when considering disciplinary committees other than those operating at universities. The disciplinary committee at the MCSHE, like the disciplinary committee operating under the minister, does not dispose of any public property, nor does it have its own budget. Its administrative service is provided by the relevant organisational unit within the office of the minister responsible for science and higher education. Nevertheless, as noted by the Regional Administrative Court (WSA) in Poznań,[22] disciplinary liability is provided for in official regulations governing the status of officers of uniformed services (for example, the Police), in the provisions governing the legal status of other appointed employees (such as teachers or judges), and in statutes regulating the organisation and functioning of professional associations (for example, the Bar Association). This is a form of criminal liability, although it is most often exercised by entities operating, in a functional sense, as public administration bodies, for disciplinary offences. This term most commonly refers to a breach of an employee's duties, but it is equally often extended to cover violations of dignity or breaches of the ethical principles of a given profession. Furthermore, disciplinary sanctions belong to the category of state coercive measures that bear the characteristics of punishment. It therefore follows that disciplinary liability is a form of criminal liability, as it concerns responsibility for committing a punishable act. Consequently, the exercise of disciplinary power by university authorities is a form of exercising public authority.

On the other hand, the Regional Administrative Court in Opole, in its judgment of 18 May 2020,[23] expressed the view that the right of access to public information in the form of documents is not limited exclusively to official documents. In the opinion of the court, the term 'document' in the context of the AAPI should be understood broadly, in line with the right to public information. For the purposes of the constitutional right to information, 'document in general' should be interpreted as any information concerning the activities of public authorities or public affairs, expressed and recorded on some medium, most often in written form. In the broadest sense, a document is any data carrier, whether paper, electronic, or digital. This position was expressed in relation to a document in a disciplinary case file which served as evidence in the case. According to the WSA, the inclusion of this document in the file as evidence in the disciplinary proceedings does not deprive it of the character of public information, nor does it exclude it – by virtue of the special regulations of the Ministry of Education and Science and the CCP – from the obligation of disclosure under the AAPI. The court emphasised that the existence of such a document as an independent entity, separate from the disciplinary proceedings, cannot be disregarded, as it may function autonomously, detached

[21] Judgment of the Regional Administrative Court in Poznań of 25 November 2020, ref. No. II SAB/Po 87/20, LEX No. 3108996.

[22] Ibidem.

[23] Judgment of the Regional Administrative Court in Opole of 18 May 2020, II SAB/Op 26/20, LEX No. 3007525.

from the disciplinary case. This means, according to the WSA, that if a document displaying the characteristics of objectivity, independence, and impartiality has been included in the case file solely as evidence of a particular circumstance, it remains subject to disclosure under the AAPI provisions. The fact that disciplinary proceedings have been concluded or are still ongoing is irrelevant to the possibility of disclosing such a document under the AAPI, since the document's evidentiary function within the proceedings does not alter its legal status as public information. Acceptance of this view would mean that, in practice, disciplinary committees receiving a request from a person who is not a party to the proceedings for access to a specific document from the case file (which, according to this interpretation, constitutes public information) would be obliged to assess the document's role and significance in the course of the disciplinary proceedings, as well as its relevance to determining the disciplinary responsibility of the accused academic teacher. It should be noted that documents in a disciplinary case file may include, for instance, documents containing the procedural submissions of the parties, such as a request by the disciplinary officer to initiate disciplinary proceedings; documents representing authoritative statements of the disciplinary committee, such as a non-final decision regarding the disciplinary liability of the accused; and other documents possessing independent legal existence and included in the file for evidentiary purposes, such as an audit of the organisational unit in which the accused is employed.

In its judgment of 21 November 2014,[24] the Supreme Administrative Court stated that the right of access to public information gives rise to the right to inspect official documents, but not the right to inspect the entire case file. This interpretation is consistent with Article 6(1)(4)(a) AAPI, which provides that the content and form of official documents shall be made available. In the opinion of the Supreme Administrative Court, the material scope of access to public information excludes a person's unrestricted access to case file. Consequently, not every collection of documents may be made available under the AAPI. The Act's material scope does not require the obliged entity to provide access to entire collections of documents (case files) for free inspection by an interested party. In this respect, Article 6(1)(4)(a) AAPI defines the extent of the individual's right by limiting the concept of public information to individual documents.

Such a firm approach, as reflected in the case law, indicates that documents constituting the files of ongoing disciplinary proceedings are, in the court's view, public information. However, this raises the question of whether the regulations governing access to public information are in fact applicable to such documents.

The answer to this question requires consideration not only of the Act on Access to Public Information but also of all regulations governing the disciplinary proceedings of academic teachers, including the provisions of the Act on Higher Education and Science, the relevant CCP provisions, and the provisions of the Ministry of Education and Science Regulation applied correspondingly in matters not regulated by the HESA.

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[24] Judgment of the Supreme Administrative Court of 21 November 2014, I OSK 779/14, LEX No. 2787769.

The assumption that information contained in documents forming part of ongoing disciplinary proceedings constitutes public information – since it meets the conditions of the legal definition set out in Article 1 AAPI – does not necessarily mean that such information is subject to disclosure to a person requesting access under the procedure provided for in that Act.

The Supreme Administrative Court, in a resolution of a panel of seven judges on 9 December 2013,[25] clarified that the AAPI provisions do not override the provisions of other acts that establish different rules and procedures for accessing information that also is public information. This means that the AAPI provisions do not apply in situations where they are incompatible with the provisions of specific acts that regulate the rules and procedures for access to public information differently. Such special provisions include, among others, Articles 156 and 321 CCP. Pursuant to Article 156 § 1 CCP, the right to access court files and to make copies thereof is granted to the parties, defence counsels, attorneys, and legal representatives. With the consent of the president of the court, such files may also be made available to other persons. Although this provision does not state this *expressis verbis*, it should be assumed that it applies to court files in both ongoing and completed proceedings. As noted by the Supreme Administrative Court in this judgment, the provisions of Article 156 §§ 1, 5, and 5a CCP apply to all potential addressees, not only to the parties to criminal proceedings, and concern documents that are public information contained in court files of criminal cases and files of ongoing preparatory proceedings. These are special provisions referred to in Article 1(2) AAPI, and therefore, the Act does not apply to them.

In contrast, in its judgment of 21 August 2013,[26] the Supreme Administrative Court emphasised that information in the form of court judgments is subject to disclosure. In support of this conclusion, the Court referred to Article 6 AAPI, noting that this provision precisely defines the catalogue of information that must be disclosed under the Act, and therefore, by its nature, such information is subject to disclosure. In that case, the Supreme Administrative Court ruled on the obligation to disclose a non-final court decision under the Act on Access to Public Information, recognising that such a decision is an official document which, regardless of its finality, represents public information and is therefore always subject to disclosure. With regard to disciplinary proceedings against an academic teacher, it should be observed that Article 156(1) CCP is another special provision excluding the disclosure of documents contained in the disciplinary proceedings file, by virtue of the provision contained in Article 1(2) AAPI. The very wording of the Act thus implies a prohibition on granting access to the files of pending disciplinary proceedings to entities other than those expressly indicated therein, including the prohibition on providing access to parts of those files in the form of specific documents contained within them.

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[25] Resolution (7) of the Supreme Administrative Court of 9 December 2013, I OPS 7/13, *ONSAiWSA*, 2014/3/37.

[26] Judgment of the Supreme Administrative Court of 21 August 2013, I OSK 754/13, LEX No. 1350343.

CONCLUSIONS

Based on the position presented by the Supreme Administrative Court in its judgment of 15 December 2021,[27] and summarising the above considerations, the following conclusions may be drawn.

Firstly, it should be assumed that the provisions of Article 156 §§ 1, 5, and 5a CCP apply to everyone, and therefore not only to the parties to criminal proceedings. This is confirmed, among other things, by the wording of the second sentence of Article 156 § 1 CCP, which provides that the files may, in exceptional circumstances, be made available to persons other than the parties (defenders, attorneys, legal representatives).

Secondly, these provisions establish a comprehensive and self-contained framework governing the rules of access to the files of criminal proceedings and to the public information included therein, both at the preparatory stage and at the stage of court proceedings, as well as, together with other relevant provisions, in relation to files of proceedings that have already been completed.

Thirdly, the CCP provisions constitute 'provisions of other acts' within the meaning of Article 1(2) AAPI, which establish different rules and procedures for accessing public information. Consequently, they preclude the application of the provisions of that Act to public information contained in criminal case files.

In conclusion, it should therefore be assumed that although information from the disciplinary proceedings against academic teachers, as well as the files of those proceedings, are public information, they are not subject to disclosure to persons requesting access under the Act on Access to Public Information. This is because a special regulation – namely, the appropriate application, under Article 305 HESA, of Article 156 § 1 CCP – excludes such applicants, until the disciplinary proceedings have been concluded, from the group of persons who, under the current legal system, have access to the disciplinary proceedings file. The position adopted here refers primarily to disciplinary proceedings that are ongoing, i.e. from their initiation by order of the chairperson of the disciplinary committee in response to a request by the disciplinary officer to initiate proceedings against a specific accused academic teacher, until their final conclusion. Access to the files of proceedings that have been legally concluded, including rulings issued in the course of those proceedings concerning disciplinary liability, remains – pursuant to the appropriately applied Article 156 § 1 CCP – at the discretion of the chairperson of the disciplinary committee, who has the authority to make such files available to persons other than the parties, defence counsels, attorneys, and legal representatives. Given the significance of such rulings for the academic community, as well as more broadly for society, and bearing in mind that they fall within the definition of public information under the Act on Access to Public Information, it should be recognised that there

[27] Judgment of the Supreme Administrative Court of 15 December 2021, III OSK 4343/21, LEX No. 3275807.

exist both factual and legal grounds for granting access to such information to persons requesting it under the procedure for access to public information, once the disciplinary proceedings have been lawfully concluded.[28]

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[28] The technical method of providing information, including the possible anonymisation of personal data, is a separate issue.

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THEORETICAL APPROACH TO PLANNING AUTHORITY (IN TERMS OF THE MUNICIPALITY'S GENERAL PLAN)

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Abstract
In normative terms, spatial planning constitutes an authoritative means of shaping space. By exercising its planning authority, a municipality influences how property rights are exercised and, in extreme cases, may lead to their deprivation. The law must set limits on this authority by establishing instruments that guarantee adequate protection of property rights. The municipality's general plan is one such legal instrument, fulfilling the constitutional condition for the admissibility of interference with real estate ownership, which may be based on a statute. It must not only specify the manner in which restrictions are to be introduced, but also provide a source of values that justify such restrictions. The municipality's general plan meets these conditions. Thus, it becomes not only an important instrument of planning policy but also a crucial mechanism for protecting the property rights of real estate covered by the planning process.

Keywords: planning authority, municipality, general plan, property protection

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INTRODUCTION

A municipality's planning authority[1] is an important legal element of its functioning. It relates to the quality of public space and, ultimately, to the proper performance of tasks imposed on the municipality. Its effects extend to various areas of activity of legal entities subject to municipal authority. For this reason, it can be analysed from different perspectives. One such aspect is the relationship between this form of public authority and the protection of rights and freedoms, particularly concerning the limits of permissible interference with property rights. Identifying this relationship is legally significant, as property ownership represents a fundamental value of the Polish constitutional order. Moreover, this type of authority can serve as a universal tool for describing the scope and nature of a municipality's law-making activities as a local government unit. With its assistance, it is possible to outline the permissible extent of municipal interference in the rights of entities covered by planning processes and to compare these with the standards set out in the Constitution. The literature indicates that 'planning authority' is a doctrinal concept. Concepts with a similar meaning are also used in case law and doctrine, particularly 'municipal planning autonomy', which refers to the constitutional principle of municipal autonomy. In doctrinal terms, the concept of planning autonomy largely overlaps with that of the municipality's planning authority, although elements of freedom of action and freedom to shape content[2] also emphasised.

The considerations presented herein do not aim to provide a comprehensive overview of the issue. They focus on aspects essential for understanding the limits of a municipality's planning authority from the perspective of property protection. For this reason, they concentrate primarily on identifying and assessing the formal basis for spatial planning by a municipality. The intention is not to generalise existing doctrinal and jurisprudential trends, but to formulate proposals that may serve as a basis for discussion on the content and scope of municipal planning authority.

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[1] This concept is commonly used in the case law of Polish administrative courts; see, e.g. the reasoning of the judgment of the Supreme Administrative Court of 14 October 2020, II OSK 3942/19, *CBOSA*, nsa.gov.pl. When reviewing planning acts of municipal authorities, administrative courts usually rule on whether the limits of planning authority have been exceeded in relation to specific local law standards; see, e.g. judgment of the Supreme Administrative Court of 14 March 2018, II OSK 1281/16, *CBOSA*, nsa.gov.pl, in which, referring to the lack of exceeding the limits of planning authority, it was recognised that the municipal planning authority has the right to introduce prohibitions and restrictions in the local spatial development plan regarding the increase of livestock production in order to limit odour emissions.

[2] Z. Niewiadomski (ed.), *Planowanie i zagospodarowanie przestrzenne. Komentarz*, Warszawa, 2021, p. 21.

SPACE AS AN OBJECT OF SPATIAL PLANNING

Space can be understood in various ways.[3] For the purposes of this discussion, the colloquial meaning of the term has been adopted. In this sense, space is the environment – the material and immaterial world that surrounds us (values, norms). Space understood in this way defines two spheres of human functioning: public and private. Public space is the sphere in which critical discussion takes place. Thus, conflict and the evaluation of an individual's actions increasingly arise from the perspective of criteria defined by public authorities, as these authorities often become not only the organisers but also the hosts of such a sphere, setting the legal norms that govern its functioning.[4] This situation has inevitable consequences, such as the tendency to equate the public interest with the interest of public authorities themselves, rather than with the collective interest of individuals, and the creation of a specifically defined public sphere. This tendency is confirmed by legislation that excessively and bureaucratically interferes with rights and freedoms.

Since the space that surrounds us is part of the public sphere, it represents a valuable asset for contemporary legal systems, which are subject to extensive regulation. Hence, interference by public authorities in this area always appears to have rational grounds. However, practice shows that this need not be the case. A striking example of this is the number of planned roads in Poland, which includes a relatively small number of local plans developed by municipalities, as well as areas designated for over 60 million potential residents, and the design of private roads with public road parameters in such plans. These paradoxes reveal shortcomings in the spatial planning model currently operating under the law, which does not seem to provide the proper mechanisms for meeting genuine social needs and expectations.

Furthermore, in the field of spatial design, public authorities often assume the role of creators of social needs, as well as the means to satisfy them, regardless of whether such needs are actually felt. Consequently, such a dissonance inevitably gives rise to conflicts which could be avoided if, alongside the municipality's freedom to shape space, two other elements were recognised as equally important in planning: greater participation of the local community in planning processes and adequate protection of the rights and freedoms of that community. It seems that the latter element is even more significant, since with proper protection of rights and freedoms, community participation in shaping space may become a secondary issue. There is no doubt that the adoption of a local plan produces multidirectional effects.[5]

Currently, planning authority is no longer primarily focused on eliminating threats from the public sphere and ensuring safety, as it was in the past, but is

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[3] J. Zimmermann points out that, as a rule and in common parlance, when we juxtapose administrative law with space, we mean space in the simplest and most literal sense, as contained in legal regulations concerning spatial development, construction law, real estate law, and other areas of substantive law, see J. Zimmermann (ed.), *Przestrzeń w prawie administracyjnym*, Warszawa, 2013, p. 14.

[4] For a broad discussion of this topic, see J. Habermas, *Strukturalne przeobrażenia sfery publicznej*, transl. Lipnik W., Łukasiewicz M., Warszawa, 2007, pp. 3–94.

[5] This has long been noted in legal doctrine; cf. e.g. L. Leoński, M. Szewczyk, M. Kruś, *Prawo zagospodarowania przestrzeni*, Warszawa, 2012, pp. 166–190.

instead becoming an active co-creator of the phenomena that determine how space is used for various purposes.[6] Under these assumptions, the municipality becomes an actor operating on behalf of different interests or lobbies, and thus, in a sense, loses its legitimacy to invoke the general interest. The result is the introduction of incomprehensible restrictions or legal mechanisms into local plans. Examples include the obligation to connect properties to the sewage system established by the municipality, or the classification of digital telephone stations and wind turbines generating electricity as public purpose investments. With the scope of spatial planning and the municipality's role in this process shaped in this way, the clear definition of the legal framework within which planning objectives may be implemented becomes particularly important. In this respect, it is crucial that any interference with property ownership has a statutory basis and that an effective mechanism of social control over the municipality's planning authority is ensured.

THE LEGAL NATURE OF THE MUNICIPAL PLANNING AUTHORITY

Spatial planning is an organised activity that involves shaping space in order to implement the principle of sustainable development. This activity is one of the municipality's own tasks. Therefore, the municipality, as a local government unit, becomes the entity responsible for shaping space.[7] Assigning such a role to the municipality required identifying a mechanism for the performance of these tasks. To achieve this goal, the classic structure of public law – administrative authority – was employed.

Administrative authority is an attribute of public power. In general terms, it may be understood as the ability to alter the legal status of an entity through the application of state coercion.[8] The essence of authority lies in the unilateral power to decide on the rights and obligations of an entity outside the administration, with the possibility of applying sanctions if a specific action is not performed. Authority understood in this way is based on legal provisions and involves coercion. In modern rule-of-law systems, coercion is generally indirect and potential, meaning that it can be exercised only after the use of measures aimed at achieving the intended objective.[9]

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[6] See H. Huber, *Recht, Staat und Gesellschaft*, Bern, 1954, p. 32, quoted in J. Habermas, *Strukturalne…*, op. cit., p. 288.

[7] In the spatial planning system, the municipality plays a special role, as the local spatial development plan bindingly determines the legal status of the real estate it covers. This follows directly from Article 6 of the Act of 27 March 2003 on Spatial Planning and Development (Journal of Laws of 2024, item 1130, as amended; hereinafter referred to as 'the SPDA'). Plans developed by other entities – the county, province, and state – do not have this effect. As regards the legal basis for the municipality as a planning entity, there are also views which derive the authorisation for such activities from the Act as a whole rather than from its Article 6(1); see H. Izdebski, I. Zachariasz, *Planowanie i zagospodarowanie przestrzenne. Komentarz*, Warszawa, 2023.

[8] For more details, see J. Zimmermann, *Prawo administracyjne*, Zakamycze, 2005, pp. 30–32 and 334–335; also W. Chróścielewski, 'Imperium a gestia w działaniach administracji publicznej (W świetle doktryny i zmian ustawodawczych lat 90-tych)', *Państwo i Prawo*, 1995, No. 6, pp. 50–51.

[9] Similarly: J. Zimmermann, *Prawo…*, op. cit., p. 31.

In the context of spatial planning, the municipality, as a public authority, possesses the legal power to unilaterally determine how local space is developed.[10] This power is granted under Article 7(1)(1) of the Act on Municipal Self-Government.[11] This task is specified in detail in Article 3(1) of the Spatial Planning Act, which states that shaping and implementing spatial policy within the municipality is its own responsibility, excluding internal sea waters, territorial waters, the exclusive economic zone, and closed areas designated by an authority other than the minister responsible for transport. An analysis of the above provisions, in conjunction with the theoretical understanding of administrative authority, leads to the conclusion that the municipality's power as a public authority to determine the use of local space is a specific privilege granted to it by law. The nature of this authority allows the conclusion that it constitutes administrative authority, as it satisfies the definitional criteria of this legal category. It is vested in the public authority as a unilateral power to determine the use of real estate. It should therefore be assumed that the municipality's planning authority is a form of administrative authority, making it legitimate to consider this concept in relation to spatial development. The theoretical dimension of the analysed construct is not in doubt, yet positive law does not employ this term. As a result, even within doctrine, there is no universally accepted definition of this authority.[12] Legal scholarship uses the concept to describe the overall legal situation that arises in the process of shaping public space. The consequence of this authority is the possibility of introducing orders or prohibitions concerning the use of real estate and of attaching sanctions for failure to comply with the rules arising from them.

In planning authority, an issue arises regarding its scope, which results from the principle of optionality and the dualistic system of planning acts.[13] Another issue concerns the possibility of specifying the rules for spatial development in a decision establishing the conditions for development or the location of a public purpose investment.[14] This situation allows the conclusion that the scope of the municipality's planning authority operates on two levels: a general level, which is somewhat optional, and an individual level. Naturally, one may argue whether a decisive manner of shaping space represents an exercise of planning authority. Opinions on this issue may be divided; however, in light of the doubts outlined above, the normative status arising from the SPDA is undoubtedly beginning to diverge from the essence of the concept. Therefore, it seems reasonable to argue that planning authority refers more to a municipality's general competence to act in the

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[10] See Z. Niewiadomski, 'Charakter prawny miejscowego planu zagospodarowania przestrzennego', in: Posłuszny J. (ed.), *Aktualne problemy administracji i prawa administracyjnego*, Przemyśl–Rzeszów, 2003, p. 75; also Z. Niewiadomski (ed.), *Planowanie i zagospodarowanie*…, op. cit., p. 42.

[11] Act of 8 March 1990 on Municipal Self-Government (Journal of Laws of 2024, item 1153; hereinafter referred to as 'MSGA').

[12] See L. Leoński, M. Szewczyk, *Podstawowe instytucje planowania przestrzennego i prawa budowlanego*, Poznań, 1997, p. 32.

[13] This view is presented by Z. Niewiadomski, 'Gospodarowanie przestrzenią w gminach w świetle nowych rozwiązań prawnych', in: Brzozowski A. et al. (eds), *Praworządność – sprawność – rozwój lokalny a samorząd terytorialny*, Zeszyty Naukowe CSSTiRL, Warszawa, 2004, p. 110.

[14] On the dilemmas related to this method of spatial management, see T. Bąkowski (ed.), *Rozprawa z decyzją o warunkach zabudowy*, Gdańsk, 2022.

field of planning and spatial development than to a specific relationship between the municipality and the entities affected by the space it shapes.

Planning is an activity aimed at drawing up a plan, while a plan is the product of this activity.[15] Distinguishing between these categories allows for an assessment of the municipality's competence to undertake and carry out the planning process and to adopt a plan as a general act, and thus as local law, in the exercise of its planning authority. From the perspective of entities covered by the planning procedure, all standards resulting from the plan must have a statutory basis. The fulfilment of this assumption was not, and still is not, evident. The situation was particularly uncertain under the legal framework prior to the 2023 amendment of the SPDA,[16] that is, before the introduction of the institution of the general municipal plan. It also remains unclear how the implementation of this type of plan within the legal system will proceed, especially since the adoption of such plans has been postponed.[17] In practice, this means that spatial planning within municipalities continues to involve the Study of the Conditions and Directions of Municipal Development – an act that is not a statute. This situation violates the fundamental and constitutional conditions for restricting property ownership, which state that the only basis for such actions may be a statute. In legal scholarship, referring to the freedom-based right to develop property and to the content of Articles 64 and 21 of the Constitution, a well-founded view is presented according to which, both property, as a freedom right, and the right to develop property derived from it – which likewise has the character of a freedom – may be restricted only by statute and only to the extent that such restriction does not violate the essence of that right. Interference with the freedom-based right to develop property is permissible only when justified by the public interest.[18]

Against this background, it should be emphasised that planning authority is exercised through the local plan, that is, through an act of law. In the case of a municipality acting in this legal form, control over the scope and manner of exercising its powers is largely illusory. It is limited to assessing the correctness – that is, the formal aspect – of the plan's adoption and does not in any way address the substance of the provisions contained therein. This situation is troubling, as it turns the municipality's planning authority into a sphere in which the substantive provisions adopted, that is the restrictions introduced, cannot be challenged. From a legal perspective, the municipality's freedom in this respect is even broader than that of the legislator, since the latter is always exposed to the possibility of a negative assessment of statutory solutions if a provision of the statute is found unconstitutional. It should be emphasised that the unconstitutionality of a statute concerns both the formal aspect and, above all, the material aspect, namely, the

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[15] For more details, see H. Maurer, *Allgemeines Verwaltungsrecht*, München, 2000; Polish ed.: *Ogólne prawo administracyjne*, transl. Nowacki K., Wrocław, 2003, pp. 221–222.

[16] Act of 7 July 2023 amending the Act on Spatial Planning and Development and Certain Other Acts (Journal of Laws of 2023, item 1688).

[17] See Article 4 of the Act of 22 April 2025 amending the Act on Spatial Planning and Development and Certain Other Acts (Journal of Laws of 2025, item 572).

[18] W. Jakimowicz, *Wolność zabudowy w prawie administracyjnym*, Warszawa, 2012, p. 65.

incompatibility of the adopted solutions with specific values. In the case of local plan review, the legal order does not guarantee such control, and therefore the existing model of review raises serious doubts.

At first glance, stronger protection of property ownership appears to be ensured in decision-making processes concerning spatial planning, since the scope of restrictions on subjective rights is largely influenced by the principle of 'good neighbourliness'. This principle is shaped mainly within the 'authority' of the urban planner preparing the relevant documentation for issuing a decision on development and land use conditions[19] and can be subject to limited control in administrative proceedings. Of course, this is not an ideal solution either, as judicial review remains essentially formal in nature, but it is nonetheless more effective than review conducted at the stage of adopting the plan as local law.

This model of control over planning authority does not comply with the fundamental rule that conflicts between different interests must always be resolved on the substantive level, because only then can criteria such as justice or fairness be invoked, allowing for a reasoned decision on the permissible extent of interference of the common good with individual rights. When the legal order fails to make such an assumption, it effectively grants preference to the general interest over the individual interest. In our view, such a situation is unacceptable under constitutional values, which link the permissible scope of interference by public authorities in individuals' rights and freedoms with principles such as proportionality.

Since the planning authority of a municipality is empowered by law to determine the conditions for spatial development, it is necessary to establish the scope and rules governing its operation in this area. Undoubtedly, the definition of these rules must be based on the contemporary concept of administration as an activity conducted within the limits of the statutes. Therefore, when determining the content of planning authority, the main issue is to define the extent to which the provisions of the statute are binding. This assumption is all the more important because, from the perspective of real estate ownership, a municipality, as a local government unit, is an entity equivalent to other participants in legal transactions.

Under current law, a municipal planning authority may be regarded as a discretionary activity concerning space. However, such an understanding of this authority appears unacceptable. For this reason, views that reduce authority merely to planning recognition – the substance of which would be the municipality's unrestricted power to shape local space – cannot be accepted.[20] In the current legal system, such an approach is particularly untenable where authority must sometimes be exercised outside the local plan and specified by an individual act.[21] In such cases, it becomes

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[19] For more details see W. Maciejko, 'Władztwo planistyczne osoby sporządzającej projekt decyzji o warunkach zabudowy', *Administracja. Teoria, Dydaktyka, Praktyka*, 2015, No. 4, pp. 47–58.

[20] See A. Agopszowicz, 'Raumplanungsrecht, Bergbau und kommunale Planungshoheit in Polen', *Archiv für Kommunalwissenschaften*, 1991, Vol. 30, No. 2, pp. 310 et seq., cited in Z. Niewiadomski, 'Charakter prawny…', op. cit., p. 75.

[21] See judgment of the Provincial Administrative Court in Kraków of 21 July 2008, II SA/Kr 345/08, LEX No. 510194; indirectly, judgment of the Supreme Administrative Court of 26 March 2009, II OSK 439/08, LEX 525855.

essential to identify the limits of this freedom, as these limits, in fact, define the very concept itself. It seems that, under this approach, relying solely on the provisions of the SPDA when construing this term is insufficient. At the same time, even when one confines oneself to the cited Act, it must lead to determining the scope of authority depending on the manner in which that authority is exercised. Regardless of the form in which this authority is exercised, it always requires a statutory basis. The need for such a basis is inseparably linked with the implementation of the plan's objectives. In general terms, when a municipality introduces tasks into the plan, it should simultaneously establish the legal basis for their implementation, and these must have a foundation in statute.[22] Since planning authority serves to shape the use of space, including real estate, in an authoritative manner, it must have a statutory basis. Any other interpretation of this authority would be inconsistent with contemporary legal norms. For this reason, provisions that lack a basis in substantive administrative law cannot form the content of this authority. After all, any authority is merely a means of implementing the norms of substantive law.[23]

Based on the foregoing general remarks, it is necessary to characterise the normative mechanisms operating within the Polish legal system. Of course, such an assessment cannot involve an analysis of individual statutory solutions. Rather, it serves to indicate trends in light of the assumptions described above. It should, therefore, be assumed that a municipality's general plan may represent the first step towards normatively shaping the municipality's planning authority.

THE MUNICIPALITY'S GENERAL PLAN AS A PLANNING ACT

Article 15(2) of the Spatial Planning Act sets out the parameters that shape space, which are determined by the municipality in the local spatial development plan. However, the mere enumeration of these areas does not resolve the issue of the scope and basis of the municipality's activities. The starting point for properly constructing planning authority within the planning process must be the relevant statutory provisions and the assumption that the municipality, as a public authority, may act only when authorised by a statute. This postulate derives from Article 7 of the Constitution of the Republic of Poland.[24] The consequence of this is that statutes determine the content of authority, and only they can serve as the basis for a municipality's actions in the planning process. This is not to suggest that the process itself, merely by being regulated by statute, validates all actions taken

[22] Specifying public objectives in a plan without indicating the time frame for their implementation is a violation of Article 1 of Protocol No. 1; see judgment of the European Court of Human Rights of 23 September 1982, *Sporrong and Lönnroth v. Sweden*, in: M.A. Nowicki, *Kamienie milowe. Orzecznictwo Europejskiego Trybunału Praw Człowieka*, Warszawa, 1996, pp. 409–414.

[23] It seems that a distinction should be made between the manner in which the law is implemented and the form in which it is implemented, e.g. by issuing a decision or other act. Thus, the manner of implementation refers to a series of actions taken by the authorities to enforce orders or prohibitions. Such an action is the planning process

[24] Journal of Laws 78, item 483, as amended and corrected; see also judgment of the Constitutional Tribunal of 7 February 2001, K 27/00, *OTK*, No. 2/2001, item 29.

within it or automatically gives them the character of a statute. The point is that every planning action undertaken in the course of developing a draft plan, and subsequently the plan itself, must have a statutory basis.

Against this background, it must be stated unequivocally that the provisions of the SPDA, in particular Article 15(2) and Article 7(1) MSGA, are not and cannot constitute the basis for determining the content of planning authority, as the norms contained therein are of a competential nature. Although the legislator employed different legislative techniques in their formulation, these provisions are essentially norms that, at most, permit the regulation of specific issues within the plan. Only such an interpretation of these provisions allows for the construction of a concept of authority that complies with constitutional standards.

The need to clearly define the scope of planning authority and to indicate its statutory (material) basis does not mean depriving the municipality of the ability to individualise the planning solutions it adopts. Planning policy must take into account, among other things, the requirements of spatial order, property rights, the needs of the public interest, and the development of technical infrastructure, in particular broadband networks. It should be borne in mind that the public interest in planning is a generalised objective encompassing aspirations and actions that take into account the objective needs of the general public or local communities in relation to spatial development (Article 2(4) of the Spatial Planning Act).

The local spatial development plan, as an act of local law, specifies the manner in which this right is exercised. This follows directly from Article 6 of the Spatial Development Act, which states that the provisions of the local spatial development plan, along with other regulations, determine how the right of ownership of real estate is to be exercised.[25] Therefore, the legal status of real estate is inextricably linked to the restrictions introduced by the plan.[26] This requires the boundaries of planning authority to be constructed in such a way that the constitutional criteria for the protection of property are met. It seems that the only correct approach is to adopt the assumption that the content of a local plan may only include restrictions that can be justified by a statutory provision. This means that a municipality cannot introduce regulations shaping local space into the plan unless they are grounded in substantive law.

The 2023 amendment to the Spatial Planning Act abolishes the study of conditions and directions of municipal development and introduces the institution of a general plan as an act of local law. The content of this general plan does not merely replace the existing study. The introduction of this normative construct is intended by its authors to

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[25] In academia, this statement is not unequivocal; for more details, see H. Izdebski, I. Zachariasz, *Planowanie…*, op. cit., p. 120. The author points out that the provisions of the Spatial Development Act do not meet the standard of decent legislation. A similar view was expressed by Z. Niewiadomski, *Nowe prawo o planowaniu i zagospodarowaniu przestrzennym. Komentarz*, Warszawa, 2003, p. 12; P. Kwaśniak, *Plan miejscowy w systemie zagospodarowania przestrzennego*, Warszawa, 2009, pp. 223–228; and K. Małysa-Sulińska, *Normy kształtujące ład przestrzenny*, Warszawa, 2008, pp. 288 et seq.

[26] See T. Bąkowski, *Ustawa o planowaniu i zagospodarowaniu przestrzennym. Komentarz*, Zakamycze, 2004, thesis 6 to Article 4 of the Act, LEX/el.; Z. Niewiadomski (ed.), *Planowanie i zagospodarowanie…*, op. cit., pp. 27–33.

strengthen planning authority in the field of spatial policy.[27] The mandatory content of a municipality's general plan consists of two elements: the definition of planning zones and municipal urban standards. The second important element of the municipality's general plan, which is optional, is the designation of areas for supplementary development.[28] The literature has positively assessed the requirement to prepare a justification for the general plan, which is to be made publicly available, including in the Public Information Bulletin, to facilitate public access.[29] The general plan will influence other planning instruments, as its provisions will be taken into account when adopting local plans, similarly to the way the study's provisions previously were.[30]

The general plan of the municipality, as an institution introduced into the Polish spatial planning system,[31] allows for a more precise definition of the concept of municipal planning authority from the perspective of the values guaranteed in the SPDA. Of course, this solution is not perfect, but it represents an important step towards standardising the statutory basis for restrictions on rights and freedoms affected by the local spatial development plan. Although the uniform description of restrictions in this plan is primarily formal, it remains linked to statutory provisions and thus serves as a universal method for determining the material basis for restricting property ownership.

Until the introduction of the general plan of the municipality as the basis for defining the framework for spatial development, the study of the municipality's conditions and directions for spatial development was in place. This act was not only internal in nature, although numerous provisions referred to its content as an element shaping various administrative decisions; in essence, however, it was left to the discretion of the municipality, which, within the scope of its authority, could determine its form. In practice, this led to a far-reaching relativisation of the protection of real estate ownership. This resulted from the fact that the municipality, within its planning authority, could establish various ways of exercising or restricting this right. The flaw of such a solution was that none of these measures had any material basis in statute. In other words, from a constitutional perspective, real estate ownership was shaped in a dubious manner, as it was limited not by statute but by a lower-level act. This occurred even where the restriction was linked to the local spatial development plan, since that plan itself had no connection with the statutory grounds justifying the introduction of such restrictions.

The institution of the general municipal plan partially alters this situation, rendering it more consistent with constitutional requirements. The fundamental

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[27] Cf. Sejm print No. 3097, 9th term, https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=3097 [accessed on 24 October 2025].

[28] J. Mrozek, 'Plan ogólny gminy: charakterystyka i zagadnienia problemowe', *Samorząd Terytorialny*, 2024, No. 6, p. 57.

[29] M.J. Nowak, 'Plan ogólny – nowy instrument w planowaniu przestrzennym', *Nieruchomości*, 2023, No. 11, p. 6.

[30] A. Maziarz, 'Plan ogólny gminy w znowelizowanych przepisach ustawy o zagospodarowaniu i planowaniu przestrzennym', *Przegląd Ustawodawstwa Gospodarczego*, 2024, No. 5, p. 29.

[31] Articles 13a–13m of the Spatial Development Act introduced by the Act of 7 July 2023 amending the Act on Spatial Planning and Development and Certain Other Acts (Journal of Laws of 2023, item 1688). See also K. Szlachetko, 'Plan ogólny – nowe (?) narzędzie legislacji planistycznej', in: Bąkowski T. (ed.), *Legislacja planistyczna*, Gdańsk, 2024, pp. 105–116.

change consists in a closer connection between the norms of the local plan and the statute as the source and basis of material restrictions. This means that under the current legal framework, it can be argued that any restrictions on property rights introduced at the level of the local plan have a statutory basis in a material sense, as they derive from the general plan and are therefore universal in character. Although the municipality, within its planning authority, continues to determine the manner of restricting real estate ownership by shaping the parameters of the municipality's general plan pursuant to Article 13a(4) and Articles 13b–g of the SPDA, it must, to a large extent, do so by reference to statutory models. The framework for these models is set out in only general terms, as follows from Article 13m of the aforementioned Act. In other words, it should be stated that, at the level of the general plan, the municipality's planning authority is statutorily determined by outlining the framework of permissible and possible restrictions on real estate ownership. The municipality still retains the freedom to define specific restrictions, but it cannot exceed the universally (statutorily) defined limits. Moreover, the municipality's general plan, as an act of local law and the basis for adopting a local plan, fulfils the requirement of a proper legal foundation for property restrictions, which can only derive from statute.

CONCLUSION

Spatial planning in developed human communities is an essential activity. However, this does not mean that it may be conducted in a manner that disregards other values protected by contemporary legal systems, including real estate ownership. Properly understanding the essence of planning requires defining the content of planning authority and the role of the municipality in this process. It is equally important to correctly delineate the scope and forms of the plan's interference with constitutionally protected values, particularly freedom and property. The pursuit of complete control over public space through planning regulations, by imposing numerous requirements and restrictions on land use, may be anachronistic if it fails to take into account the protection of the rights and freedoms of the entities situated within that space. The municipality's general plan is a legal institution that offers an appropriate means of reconciling the conflict between public and private interests – a conflict inherent in spatial planning. This solution does not provide a definitive answer as to how this conflict should be resolved. However, it establishes limits on the municipality's planning authority within which the conflict is to be addressed and makes the statute the ultimate criterion for reconciling competing interests, thereby meeting the constitutional requirements for restricting the rights and freedoms of legal entities.

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ACCESS TO PUBLIC INFORMATION IN THE FORM OF DOCUMENTS OF THE SUPREME AUDIT OFFICE AUDIT PROCEEDINGS

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Abstract

Access to public information, regulated in Article 61 of the Constitution of the Republic of Poland and the Act of 6 September 2001, is an element of public scrutiny of public authorities that enables the public to supervise public entities on a regular basis. The Supreme Audit Office (NIK), as the chief organ of state audit, is obliged to provide public information. The application of the Act on Access to Public Information to NIK's audit results raises doubts, particularly in the context of other acts specifying different rules of access to information. Article 10 of the Act on the Supreme Audit Office establishes the obligation of the President of NIK to disclose certain documents; however, this does not preclude the application of the Act on Access to Public Information to other documents after the conclusion of audit proceedings. Audit programmes and subject matters are protected by audit confidentiality, but they may be disclosed once the audit has been completed, provided they are not deemed internal documents. These documents are crucial for assessing the integrity of NIK's activities. Although audit proceeding files may not be considered public information as a whole, individual documents contained within the files constitute public information.

Keywords: Supreme Audit Office, Supreme Chamber of Control, public information, internal document, audit files

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The right of access to public information, enshrined in Article 61 of the Constitution,[1] is of a supervisory and political nature. Firstly, as an element of public transparency, 'it is part of the entire set of legal mechanisms that allow for the exercise of social control over the exercise of public authority',[2] and thus, through access to public information, society gains a tool for the actual and continuous supervision of entities exercising public authority and spending public funds. Secondly,

> 'in the Polish legal system, in which the constitutional right of access to public information is a public subjective right of a positive nature, the legislator has not clearly indicated anywhere what values underlie the construction of such a right. This is especially true of the Act on Access to Public Information, which contains no such indication. However, it is determined that the right of access to public information is a political right, because Article 61 of the Constitution, which establishes this right, is placed among the provisions concerning political freedoms and rights. This provides a clue to the interpretation of the values underlying this right. If we assume that the right of access to public information, as a political right, is based on values that underpin the exercise of power in the state system, within which transparency holds a significant position, it would be an abuse of the right of access to public information to invoke the openness of public life by using it to undertake illegal actions (not based on and within the limits of the law), undermining the efficiency and reliability of public institutions, and aiming at disregarding the inherent and inalienable dignity of the human being or obtaining, gathering and disclosing information about citizens other than that necessary in a democratic state governed by the rule of law.'[3]

Therefore, access to public information is a key element in building a democratic, civic society that takes an interest in public affairs not only every four years during election periods, but also actively participates in political life on a daily basis, exercising ongoing civic oversight of public entities. In accordance with Article 61(4) of the Constitution of the Republic of Poland, the procedure for the provision of information shall be specified by statute. The statute implementing this provision is the Act on Access to Public Information of 6 September 2001.[4] However, this Act is not merely a technical regulation specifying the procedure for disclosing public data; it also defines the subjective and objective scope of access to public information. This naturally raises doubts regarding the principles of applying the provisions of the Act, especially in relation to other acts, including the Act of 23 December 1994 on the Supreme Audit Office (NIK).[5] At the same time, the nature of NIK's competences naturally arouses public interest, and the Office's activities, also reported in the media, further encourage citizens to observe NIK's work.

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1 Act of 2 April 1997: The Constitution of the Republic of Poland, Journal of Laws No. 78, item 483, as amended.

2 M. Chmaj, *Komentarz do Konstytucji RP. Art. 61, 62*, Warszawa, 2020, p. 40.

3 The Supreme Administrative Court judgment of 18 October 2024, case No. III OSK 42/23, *CBOSA*; similarly, the Supreme Administrative Court judgments: of 30 August 2012, I OSK 799/12; of 7 September 2019, I OSK 2687/17; of 11 July 2022, III OSK 2851/21; of 26 January 2023, III OSK 7265/21, *CBOSA*.

4 Journal of Laws of 2022, item 902, as amended, hereinafter referred to as 'AAPI'.

5 Journal of Laws of 2022, item 623, hereinafter referred to as 'ASCC'. As regards the NIK itself, it is worth mentioning that the previously used English translation of the institution's name was 'Supreme Chamber of Control'.

There is no doubt that the Supreme Audit Office is an entity obliged to provide public information. In accordance with Article 4(1)(1) AAPI, public authorities are entities obliged to provide public information. Article 202(1) of the Constitution of the Republic of Poland explicitly defines the Supreme Audit Office as 'the chief organ of state audit', which 'means that the Chamber constitutes a functionally separate, professional state body with a leading role in the implementation of audit tasks in the state'.[6] NIK is a public body entrusted with crucial powers to audit the activities of the state in its broadest sense, in particular the expenditure of public funds and the functioning of the audit system in Poland.[7]

However, doubts may arise regarding the application of the AAPI to the disclosure of audit results. In accordance with Article 1(2) AAPI, its provisions do not affect the provisions of other acts specifying different principles and procedures for accessing information that is public. Therefore, this provision establishes the principle that 'in the event of a conflict between the principles and procedures for accessing information classified as public in the Act on Access to Public Information and those provided for in other acts, the Act on Access to Public Information shall not take precedence, in accordance with the legislator's intention'.[8] Thus, the AAPI provisions are not applied when another act specifies the rules for access to public data. In this regard, attention should be drawn to Article 10 ASCC, under which the President of NIK is obliged to make public such documents as analyses of the implementation of the state budget and monetary policy assumptions; opinions concerning the vote to approve the accounts for the preceding fiscal year presented by the Council of Ministers; information on the results of audits requested by the Sejm or its bodies; information on the results of audits conducted at the request of the President of the Republic of Poland or the President of the Council of Ministers; information on the results of other important audits; motions submitted to the Sejm to consider issues related to the activities of bodies performing public tasks; statements containing allegations arising from audits concerning the activities of members of the Council of Ministers, heads of central offices, the President of the National Bank of Poland, and heads of institutions referred to in Article 4(1) ASCC; analyses of the use of conclusions resulting from audits concerning the enactment or application of law; and annual reports on the Office's activities. This provision may be regarded as a special one in relation to the provisions of the AAPI and, consequently, it could be argued that only the documents listed therein may be made available, and only by the President of NIK.[9] However, this view is erroneous, because, as the Supreme Administrative Court emphasised in its resolution of 9 December 2013, I OPS 8/13,

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[6] M. Niezgódka-Medek, in: Jarzęcka-Siwik E., Liszcz T., Niezgódka-Medek M., Robaczyński W., *Komentarz do ustawy o Najwyższej Izbie Kontroli*, Warszawa, 2000, p. 16.

[7] Cf. the Supreme Administrative Court judgment of 6 December 2022, case No. III OSK5445/21, *CBOSA*.

[8] A. Piskorz-Ryń, J. Wyporska-Frankiewicz, in: Sakowska-Baryła M. (ed.), *Ustawa o dostępie do informacji publicznej. Komentarz*, Warszawa, 2023, p. 53.

[9] The Voivodeship Administrative Court in Lublin held so in its judgment of 24 February 2022, II SAB/Lu 3/22, LEX No. 3342370.

> 'other principles or procedures for disclosing public information exclude the application of the Act on Access to Public Information only to the extent expressly regulated by those specific acts. As emphasised in the legal literature, the provision of Article 1(2) of the Act on Access to Public Information means that wherever specific matters concerning the principles and procedures for accessing information that is public are regulated differently in the Act on Access to Public Information and differently in a special act on the disclosure of information, and the application of both acts cannot be reconciled, the provisions of the special act take precedence. However, where a given matter is only partially regulated or not regulated at all in a special act, the relevant provisions of the AAPI shall apply – in the former case, they are supplementary, and in the latter, they constitute the exclusive legal regulation in the given area.'[10]

Therefore, if a legal act under which an entity operates and to which a request for access to information has been submitted does not provide for any separate, specifically defined type of secrecy or procedure for disclosing information, then it cannot be interpreted in such a way as to effectively create a new type of secrecy or restriction preventing the receipt of the requested data. The AAPI is general in nature, and other procedures for disclosing information shall apply only when other normative acts expressly stipulate this. Therefore, one cannot 'interpret' procedures for disclosing public information or new types of secrecy in a manner inconsistent with the aforementioned Act of 6 September 2001. Hence, it should be recognised that

> 'Article 10 of the ASCC establishes the obligation of the President of NIK to make publicly available, in compliance with the provisions on statutorily protected secrets, the documents referred to in Article 7(1) and (1a), Article 8 and Article 9, as well as post-audit statements. Therefore, this provision does not lay down separate principles and procedures for access to public information, but only establishes the obligation of the body to publish the documents specified therein on the Public Information Bulletin (BIP) website administered by NIK.'[11]

Thus, the Act on the Supreme Audit Office does not establish separate principles for disclosing public information regarding documents relating to audit proceedings, and therefore the entire provisions of the AAPI shall apply in this respect.

The document prepared before the initiation of an audit is an audit programme (for planned audits) or an audit topic (for *ad hoc* audits). Both documents serve as a guide for auditors, specifying, *inter alia*, the scope of the audit and its subject matter. In accordance with Article 28a(3) ASCC, these documents are protected by auditor secrecy and may be disclosed only by the President of NIK. The wording of Article 28a(3) ASCC indicates that this provision constitutes *lex specialis* in relation to the solutions contained in the AAPI, as the legislator clearly defined both the documents covered by auditor secrecy (the audit programme and subject matter) and the grounds and procedure for their disclosure (a justified case and the consent of the President of NIK). There is no doubt that this provision applies to the programmes and subject matters of on-going audits. However, the question

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[10] *ONSAiWSA*, 2014, No. 3, item 38.

[11] The Supreme Administrative Court judgment of 27 September 2023, case No. III OSK 1367/22, LEX No. 3766689.

arises as to whether these documents may be disclosed on the basis of the AAPI once an audit has been completed and its results have been made public. It has been pointed out that 'an employee is not obliged to keep information secret if the information he or she acquired in connection with their work for NIK has already been legally published.'[12] Information contained in the audit programme and topic may be significant for the implementation of the audit function within the right to public information, as it allows for an assessment of the audit's assumptions and the extent to which they were actually implemented during the audit activities. Therefore, it seems that, after the completion of audit proceedings, there are no grounds for concluding that these documents may be disclosed only in accordance with the rules set out in Article 28a ASCC.

However, a question arises as to whether an audit programme or audit topic are considered internal documents and, consequently, whether they contain public information at all. It should be recalled that the Constitutional Tribunal indicated in its judgment of 13 November 2013, P 25/12,[13] that the broad scope of public information excludes the content of internal documents, interpreted as working information (notes, memos) that have been recorded in traditional or electronic form and represent a certain thought process, a process of deliberation, a stage in developing a final concept, and the adoption of a final position. In their case, one may speak of a certain stage in the process of creating public information. Thus, according to the Tribunal, internal documents serve to implement a public task, but they do not determine the direction of a body's activities. They do not express the position of the body and therefore do not constitute public information. The concept of internal documents has been widely adopted in the case law of the Supreme Administrative Court, which recognises that, in principle, internal documents or technical activities constitute a type of activity of an entity that does not serve as a carrier of public information. Therefore, internal correspondence, which serves the exchange of information and the collection of materials necessary to resolve a case, does not possess the features of such information. It neither contains information regarding the manner in which the case was resolved nor such that could be recognised as expressing the body's position[14] or as an official document, i.e. one possessing the features referred to in Article 6(2) AAPI, but is developed solely for the needs of the entity that prepared it and does not present its position externally.[15] The audit programme or topic appears to meet the characteristics of an internal document, as these are prepared solely for the purposes of audit proceedings and are addressed to the auditors conducting the audit. However, it should be noted that the significance of these documents, both for the audited entity itself and for the public's assessment of the reliability of NIK's performance of its tasks,

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[12] M.T. Liszcz, in: Jarzęcka-Siwik E., Liszcz T., Niezgódka-Medek M., Robaczyński W., *Komentarz do ustawy o Najwyższej Izbie Kontroli*, Warszawa, 2000, p. 199.

[13] *OTK-A*, 2013, No. 8, item 122.

[14] Cf. the Supreme Administrative Court judgment of 25 March 2014, case No. I OSK 2320/13, *CBOSA*.

[15] Cf. the Supreme Administrative Court judgments: of 8 March 2023, case No. III OSK 7293/21, and of 26 November 2024, case No. III OSK 1192/24, *CBOSA*.

seems to support the view that such documents may be disclosed after the audit has been completed, under the provisions of the AAPI. In this respect, it is worth quoting the stance contained in the reasoning of the judgment of the Voivodeship Administrative Court in Gdańsk of 9 July 2022, III SAB/Gd 74/22, in which it was stated, in the context of a case concerning the inspection of a body of the National Revenue Administration, that

> 'the information regarding the circumstances related to the instigation of searches of containers with medicine N. indicated by the authority falls within the concept of information on the rules of functioning of entities referred to in Article 4(1) of the AAPI (i.e. entities obliged to provide public information), including the mode of operation of these entities (public authorities), as well as the manner of receiving and handling cases by these entities (Article 6(1)(3)(a) and (d) AAPI).'[16]

Thus, the Court assumed that even the documents leading to the instigation of inspection proceedings constitute public information and should be made available. In this way, the public can assess whether the grounds for the audit were justified and how the audit body itself, having prior knowledge of potential irregularities, acted. However, this does not mean that the audit body is always obliged to disclose such data, as

> 'the limitations of the right to public information, as provided for in Article 5 AAPI, are a separate matter. In accordance with Article 5(1) AAPI, the right to public information is subject to limitation within the scope and under the principles specified in the regulations on the protection of classified information and on the protection of other secrets stipulated by statute; and fiscal secrecy, the scope of which is laid down in Article 293 of the Tax Law, is one of the secrets statutorily protected. However, these limitations cannot be regarded as a legal narrowing of the meaning of the concept of public information.'[17]

Therefore, in a situation where a request for information has been submitted and such information may reveal personal data of whistle-blowers or information subject to one of the statutory secrecy protection regulations, it is justified to issue a decision refusing to provide public information. However, it cannot be deemed that such data do not constitute public information at all.

In accordance with Article 35a(1) ASCC, an auditor shall document audit findings in the audit files. In turn, in the case of ongoing audit files, under Article 35(4) ASCC, audit files or individual documents comprising them may be made available to persons other than the head of the audited entity or a person authorised by them, in compliance with the provisions on statutory confidentiality, only with the consent of the President of NIK. This provision, like Article 28a ASCC, constitutes *lex specialis* in relation to the rules for disclosing public information specified in the AAPI. However, it does not apply to situations where a request for access to files concerns completed audit proceedings, since, as stated in the justification for the Bill amending the Act on the Supreme Audit Office, which introduced the current

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[16] LEX No. 3362043.

[17] The Supreme Administrative Court judgment of 27 October 2023, case No. III OSK 2285/22, *CBOSA*.

wording of Article 35a ASCC, 'it does not seem rational to disclose the auditor's documents before a final decision is made in a given case, because the assessment of the audited entity's actions may change as a result of appeals lodged.'[18] It should be noted that the Supreme Administrative Court indicated in its resolution of 9 December 2013, I OPS 7/13, that

> 'the files of a preparatory proceeding, as a whole, constitute a collection of various materials systematised by the body that gave them a specific form and uses them in the proceeding conducted. Therefore, the files are a specific object that is subject to specific provisions concerning their creation, recording, storage and disclosure. A request for disclosure of case files as a whole, as well as files of completed preparatory proceedings, is not a request for access to public information, but a request for access to a specific set of materials. A request formulated in this way does not indicate the public information that the applicant is seeking. It should also be noted that the right to information applies to information about a public case, i.e. information about something, and not the provision of a set of materials as such. Therefore, such a request does not contain one of the elements necessary for its consideration and cannot be processed under the provisions of the Act on Access to Public Information.'[19]

Administrative courts, guided by the aforementioned resolution of the Supreme Administrative Court, have found that it also applies to the files of other proceedings.[20] Thus, in the case of a request for public information in the form of access to entire files of an audit proceeding, such a request should be deemed not to concern public information. However, the situation is different when such a request concerns a document contained within the case files, as this constitutes a request for public information.[21]

Therefore, the Act on the Supreme Audit Office does not constitute *lex specialis* in relation to the Act on Access to Public Information. Documents from audit proceedings, including audit reports in particular, shall be made available in accordance with the rules laid down in the Act on Access to Public Information; however, its provisions should be interpreted in a way that makes it possible to disclose the greatest possible amount of data. It is clear that the public has the right to become acquainted with audit results in order to form an opinion 'on the state of public affairs' and thus make rational voting decisions. Moreover, it should be emphasised that limiting access to public information does not foster public trust in public institutions, including NIK. The atmosphere of a certain 'authorities' secrecy' creates the impression that public entities are not acting in the public interest and are attempting to conceal this. Obviously, this negatively affects the perception of the functioning of the state and, as a consequence, actually hinders its performance, since citizens are reluctant to submit to entities they do not trust. That is why it is so important that the Office's materials have the widest possible public reach,

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[18] *Uzasadnienie do projektu ustawy o zmianie ustawy o najwyższej Izbie Kontroli*. Sejm print No. 1349, 6th term of the Sejm, p. 4.

[19] *ONSAiWSA*, 2014, No. 3, item 37.

[20] Cf. the Supreme Administrative Court judgment of 7 November 2024, case No. III OSK 554/24, LEX No. 3780802, concerning access to administrative proceeding files.

[21] Cf. the Supreme Administrative Court judgment of 11 July 2024, case No. III OSK 2449/24, *CBOSA*.

especially as NIK does not possess authoritative powers. At the same time, the fact that NIK discloses detected irregularities to the public prompts the entities responsible for their removal to take appropriate action to correct them and to hold those responsible to account.

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THE IMPACT OF MICA REGULATION IMPLEMENTATION ON THE POLISH CRYPTO-ASSET MARKET – CONSEQUENCES, REGULATORY CHALLENGES AND PROSPECTS FOR REFORM

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Abstract

The aim of this article is to provide a critical assessment of the compliance of the Polish draft act implementing the MiCA Regulation with the objectives and the letter of the Regulation, and to verify the hypothesis that certain provisions constitute instances of gold-plating, increasing compliance costs without delivering proportionate benefits, while simultaneously leaving significant regulatory gaps unaddressed. The study applies a comparative legal analysis (Poland vs. selected EU Member States), a functional analysis (substance over form), and a regulatory impact assessment.

Findings. 1. Poland effectively shortened the transitional period for CASPs to six months; after this date, MiCA authorisation or passporting (Article 65) is required. The claim of an 'automatic 18-month' period for Poland is incorrect. 2. The draft introduces regulations exceeding the scope of MiCA (including a public domain register and preventive account freezes), which require a rigorous proportionality test and consistency with the DSA. 3. The fee model of up to 0.4% of revenues is not extreme by EU standards but may significantly burden entities with high volumes and low margins. 4. Identified gaps include: the absence of 'soft law' instruments and clear criteria for DeFi and NFTs; in the area of stablecoins, prudential and infrastructural issues and overlaps between the MiCA, PSD2, and EMD regimes remain key barriers.

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The research hypothesis was largely confirmed: the Polish implementation is restrictive and, in parts, overly detailed, increasing both costs and uncertainty while failing to adequately address technologically sensitive areas (DeFi, NFTs, PLN-EMTs). It is therefore advisable to calibrate above-minimum instruments and close the identified gaps through soft-law measures and operational solutions. The second part of the conclusion presents systemic and operational recommendations.

Keywords: MiCA; crypto-assets; CASP; transitional period; passporting; gold-plating; KNF; DeFi; NFT; e- money token (EMT); AML / PSD2 / EMD, economy and finance

INTRODUCTION

Regulation (EU) 2023/1114 of the European Parliament and of the Council on markets in crypto-assets (hereinafter referred to as 'the MiCA')[1] is one of the key pillars of the Digital Finance Package and is a regulation of fundamental importance for the functioning of the European Union's single market. Its overarching objective is to establish a harmonised legal framework for crypto-assets, which until now have operated largely in an unregulated or only partially regulated environment. MiCA pursues a dual purpose: on the one hand, to support innovation and the development of the crypto-asset market by ensuring legal certainty for its participants, and on the other, to protect consumers and investors while safeguarding financial stability and market integrity (recital 6 MiCA).

MiCA is a directly applicable legal act across all Member States. Nevertheless, its effective implementation requires national legislators to take a number of complementary measures, including the designation of competent supervisory authorities, the establishment of sanctioning regimes, and the integration of new provisions into the existing legal order. In Poland, this process has taken the form of the draft Act on the Crypto-Asset Market (hereinafter referred to as 'the draft act').[2]

The central research focus of this article is a critical analysis of the compliance of the Polish draft act with the objectives and the letter of the MiCA Regulation. The research hypothesis assumes that certain provisions of the Polish draft act go beyond what is necessary for the implementation of MiCA, thereby giving rise to gold-plating and increasing compliance costs in a manner disproportionate to the expected benefits. At the same time, the draft does not fully address important regulatory gaps arising from the dynamic development of technology. This combination of over-regulation in some areas and under-regulation in others may have an adverse effect on the competitiveness and innovativeness of the Polish crypto-asset market, thus undermining MiCA's pro-innovation objectives.

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[1] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets and amending Regulations (EU) No. 1093/2010 and (EU) No. 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (OJ L 150, 9.06.2023, p. 40, as amended). In Western Europe, the abbreviation *MiCAR* (MiCA Regulation) is more commonly used.

[2] Government draft Act on the Crypto-Asset Market, adopted by the Council of Ministers on 25 June 2025, Sejm print No. UC2; https://www.sejm.gov.pl/sejm10.nsf/agent.xsp?symbol=RPL&Id=RM-0610-101-25 [accessed on 27 June 2025].

MiCA, as a regulation, is in principle an act of direct applicability and uniform effect throughout the European Union (Article 288 TFEU), meaning that it is binding in its entirety and directly applicable in all Member States. National measures are permissible only where they: (i) exercise competences explicitly left to Member States under MiCA (so-called national options or discretions); (ii) concern areas falling outside the scope of MiCA; or (iii) ensure uniform conditions for the implementation of EU acts (Article 291 TFEU), while respecting the principles of proportionality and the freedom to provide services.[3] This means that legislative intervention at national level is permissible only in areas expressly left to Member States ('open clauses' or executive competences), such as: (i) the designation of competent authorities and the allocation of supervisory responsibilities; (ii) the catalogue of supervisory and administrative measures and the sanctioning regime; (iii) supervisory fees and procedural matters; (iv) the organisation of licensing processes; and (v) the implementation of delegated and implementing acts (RTS/ITS)[4] once adopted by the European Securities and Markets Authority (ESMA) or the European Banking Authority (EBA). The boundary is set by the principles of primacy and uniform application of EU law: national provisions may not modify the substantive obligations established under MiCA or create overlapping obligations in a way that would violate the principle of proportionality. This implies that 'tightening' requirements in areas subject to full harmonisation under MiCA may infringe the principle of primacy of EU law, potentially giving rise to the phenomenon of gold-plating. In this article, the term is used to describe national solutions which, going beyond MiCA's authorisations, effectively increase regulatory burdens without demonstrating necessity in light of the principles of proportionality and internal market coherence.

To verify the research hypothesis, two complementary research methods were applied. The primary method is a doctrinal analysis, consisting in the interpretation of legal norms contained in MiCA and in the Polish draft act, as well as the assessment of their consistency with the general principles of EU law, such as proportionality, legal certainty, and the primacy of EU law. This is supplemented by a comparative legal analysis, in which the Polish legislative proposals are juxtaposed with implementation measures adopted in Germany and selected Central and Eastern European countries (Czechia, Slovakia, Lithuania, Latvia, Estonia). Such a perspective allows the Polish approach to be assessed in a broader regional context and enables identification of potential risks to the competitiveness of the domestic market.[5]

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[3] N. Moloney, *EU Securities and Financial Markets Regulation*, Oxford, 2023; D. Chalmers, G. Davies, G. Monti, *European Union Law*, Cambridge, 2019.

[4] Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS) are technical standards prepared by ESMA and EBA under MiCA mandates and adopted as delegated or implementing regulations of the European Commission. They further specify substantive and reporting obligations of CASPs and issuers. See European Securities and Markets Authority, *Overview of Level 2 and Level 3 measures under Markets in Crypto-Assets (MiCA)*, 16 July 2025; https://www.esma.europa.eu/document/overview-level-2-and-level-3-measures-under-markets-crypto-assets-mica [accessed on 13 September 2025]. Note: for EMTs and ARTs (Titles III–IV MiCA), part of the RTS/ITS is developed by EBA rather than ESMA).

[5] See P. Craig, G. de Búrca, *EU Law: Text, Cases, and Materials*, Oxford, 2021; F. Annunziata, *The European Regulation on Markets in Crypto-Assets (MiCA)*, Cham, 2024.

The structure of the article is shaped by the adopted research objectives. The second part presents a detailed analysis of identified areas of potential over-regulation in the Polish draft act, including the transitional period, supervisory fees, powers of supervisory authorities, and the overall scale of the proposed regulation. The third part focuses on identifying regulatory gaps that have not been fully addressed either by MiCA or by the Polish legislator, with particular attention to decentralised finance (DeFi), non-fungible tokens (NFTs), and stablecoins linked to the Polish zloty. The article concludes with a summary of the main findings and formulates recommendations for the Polish legislator and supervisory authorities.

POLISH IMPLEMENTATION OF MICA – ANALYSIS OF POTENTIAL OVER-REGULATION (GOLD-PLATING)

The MiCA Regulation, as a directly applicable legal act, aims to create a uniform framework for the crypto-asset market across the European Union. Nevertheless, Member States retain a certain margin of discretion in its implementation, which gives rise to the risk of so-called gold-plating.[6] The authors aims to identify areas in which the Polish legislator may have gone beyond what is necessary for the implementation of MiCA and to assess the potential legal and economic consequences of such actions. The analysis is based on the text of the draft act and the accompanying 'reversed table of concordance',[7] which maps domestic provisions to their EU counterparts or other justifications. This analysis indicates several areas where the Polish legislator appears to be following precisely such an approach.

The explanatory memorandum and the Regulatory Impact Assessment attached to the draft emphasise above all: consumer protection and market stability, full coverage of the costs of new supervisory tasks, the alignment of domestic procedures with MiCA's supervisory architecture, and the mitigation of AML/CFT risks. In this article, these objectives are examined in light of their economic effects (compliance costs, market entry barriers, and concentration risks), with attention drawn to areas where the intensity of national measures may exceed what is strictly necessary, thereby justifying their qualification as gold-plating.

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[6] In this article, the term 'gold-plating' is used strictly to designate national solutions going beyond what is necessary to implement MiCA (Article 288 TFEU), not to describe every divergence from the Regulation. It does not include areas explicitly left to national legislators (designation of authorities, sanctions, procedures, fees), unless their scope creates disproportionate entry barriers or undermines MiCA's objectives of market integration and CASP passporting.

[7] A reversed table of concordance is a legislative tool which, unlike the standard table of concordance (demonstrating how EU provisions are transposed into national law), starts from national draft provisions and indicates their source or rationale in EU law, other national statutes or regulatory objectives. It facilitates understanding of the origins and functions of domestic provisions in a wider legal context.

TRANSITIONAL PERIOD: POLISH NOTIFICATION AND MARKET IMPLICATIONS

MiCA applies in stages: the main body of provisions – including the regime for crypto-asset service providers (CASPs) – applies from 30 December 2024, while the titles concerning asset-referenced tokens (ARTs) and e-money tokens (EMTs) have been applicable since 30 June 2024. For CASPs lawfully operating before 30 December 2024, a transitional mechanism is provided for in Article 143(3) MiCA: in principle until 1 July 2026 (i.e. 18 months) or until the authorisation or refusal of authorisation of a CASP. Member States could shorten this period (or even waive it altogether) by notifying the European Commission and ESMA by 30 June 2024. Poland notified a six-month transitional period for CASPs,[8] i.e. from 30 December 2024 to 30 June 2025.

In public debate, this notification has given rise to confusion. The EU limit of 18 months was mistakenly equated with Poland's actual transitional period. Some experts (e.g. Artur Bilski) argued that, in the absence of a Polish statute in force by 30 December 2024, Polish entities had acquired the right to the full 18-month period.[9] This argument was supported by references to the case law of the Court of Justice of the EU, according to which rights acquired under EU law cannot be curtailed by subsequent national legislation.[10] However, in reality, Poland cannot 'avail itself' of the 18-month period once it has notified six months.

Furthermore, this period expired on 30 June 2025. This means that as of 1 July 2025, entities operating in Poland should, in principle, either: (i) be authorised as CASPs by the competent authority of their home Member State in accordance with Articles 59 and 63 MiCA; or (ii) operate in Poland under a passport (the freedom to provide services cross-border or through a branch) after obtaining authorisation in another EU Member State and completing the relevant notifications. In practice, however, entities entered in Poland's VASP register before 30 December 2024 continue to operate.

As noted above, MiCA is directly applicable, the effective functioning of procedures (designation of the authority, fee schedules, sanctions, appeal routes) requires national legislation. In Poland, the draft Act on the Crypto-Asset Market was submitted for legislative work in 2025, but at the time of writing this article, the process remains ongoing. In practice, this means that:

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[8] European Securities and Markets Authority, *List of grandfathering periods decided by Member States under Article 143 of Regulation (EU) 2023/1114 Markets in Crypto-Assets Regulation (MiCA)*; https://www.esma.europa.eu/sites/default/files/2024-12/List_of_MiCA_grandfathering_periods_art._143_3.pdf [accessed on 14 September 2025].

[9] M. Misiura, 'Polski blamaż w Unii. Nie zdążyliśmy z ustawą o rynku kryptoaktywów, a oto konsekwencje', *bankier.pl*, 2023; https://www.bankier.pl/wiadomosc/Polski-blamaz-w-Unii-Nie-zdazylismy-z-ustawa-o-rynku-kryptoaktywow-a-oto-konsekwencje-8865542.html [accessed on 27 June 2025].

[10] See P. Mendez de Vigo, LinkedIn commentary, 2025; https://linkedin.com/posts/pedro-mendez-de-vigo_listofmicagrandfatheringperiodsart-activity-7343663284606177280-qML_ [accessed on 27 June 2025]. The author refers to established CJEU case law in this regard.

(a) CASP authorisation and supervision in Poland require the formal empowerment of a national authority and the establishment of procedures, which have not yet been adopted (during the transitional period);
(b) entities authorised in another EU Member State may already exercise passporting rights within the territory of Poland under MiCA;
(c) the absence of a national statute does not exempt domestic operators from holding MiCA authorisation after the transitional period has ended.

This means that, at the time of writing, as of 1 July 2025 in Poland, the following entities may legally operate in Poland:

- CASPs holding MiCA authorisation granted in another Member State, following cross-border notification by the home authority (Article 65(1)–(2) MiCA);
- financial institutions referred to in Article 60 MiCA (such as banks or investment firms), which may provide certain crypto-asset services without a separate CASP licence, after notifying their home authority; this also constitutes passporting (Article 60 in conjunction with Article 65 MiCA).

Entities without authorisation (neither CASP nor under Article 60) cannot provide services under Title V MiCA (Article 59). Violations may additionally entail sanctions.[11]

The Polish draft act also introduces transitional arrangements. Articles 162 and 163 of this draft provide that, following the entry into force of the act, entities listed in the register of virtual currency businesses and others may continue their operations for four months, or for nine months if they submit a complete CASP application within three months (with confirmation of completeness under Article 63(4) MiCA).[12] However, this cannot be regarded as a continuation of the EU-level 'grandfathering' period but rather a purely domestic administrative transition – the duration of this period is calculated only from the date of entry into force of the act (with a proposed *vacatio legis* of 14 days).[13] Doubts may arise as to the practical feasibility of this period. Statements by representatives of the Polish Financial Supervision Authority (KNF) during parliamentary hearings indicated that the expected duration of licensing procedures before the KNF could reach up to two years. In practice, this would mean that no entity would be able to obtain a licence within the proposed timeframe, leading either to market paralysis or

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[11] Under Article 111(1)(d) MiCA, the provision of services under Title V without authorisation (Article 59) or passporting (Article 65) qualifies as an infringement. Consequently, the Regulation requires Member States to ensure that the competent authority has at least the following powers (minimum EU standards):
(i) order cessation of infringement;
(ii) public announcement ('naming & shaming') – Article 111(2)(a)–(b);
(iii) administrative fines of at least:
  – EUR 700,000 for natural persons (management/board members) – Article 111(2)(d);
  – EUR 5 million or 5% of annual turnover for legal persons – Article 111(3)(a), (c);
(iv) temporary bans on management functions – Article 111(4).

[12] According to ESMA, 11 countries opted for the full 18-month transitional period, seven for 12 months, one for nine months, six (including Poland) for six months, and two failed to submit a notification. European Securities and Markets Authority, *List of grandfathering…*, op. cit.

[13] The explanatory memorandum to the draft act provides no substantive justification for the chosen deadlines. They are described, but no rationale is given.

forcing operators to act under conditions of legal uncertainty and potential conflict with the supervisory authority. This, in turn, may prompt some firms to pursue the passporting route by obtaining authorisation in another EU Member State.

Moreover, in the absence of an enacted statute, entities on the market currently preparing to apply for a CASP licence in Poland are unable to submit their applications, as no supervisory authority has yet been formally designated.

SUPERVISORY FEES AS A MARKET ENTRY BARRIER

Another area in which the Polish draft act shows a tendency towards over-regulation concerns the financial burdens imposed on supervised entities. The MiCA Regulation does not harmonise the level of supervisory fees, leaving their determination to the discretion of Member States. However, national measures remain subject to the general principles of EU law, including the principle of proportionality, which requires that the measures imposed (including fees) be appropriate to the objectives pursued and not impose excessive burdens – particularly those that could create barriers to accessing the single market.[14]

Articles 80–83 of the draft introduce a system of fees, including annual contributions to cover supervisory costs.[15] In the latest version of the draft (adopted by the Council of Ministers on 24 June 2025 and submitted to the Sejm two days later), the upper limit of the supervisory fee for CASPs was set at 0.4% of the average gross revenue over the past three years, with a minimum equivalent of EUR 500 in PLN.[16] A draft regulation of the Prime Minister complements these provisions by detailing the calculation method (though not without shortcomings).[17]

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[14] See recital 6 of MiCA. The principle of proportionality is a general principle of EU law; see, for example, Case C-331/88, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte Fedesa*, ECLI:EU:C:1990:391.

[15] The explanatory memorandum to the draft act does not clarify how the supervisory fees were calculated. During public consultations at the Ministry of Finance (Spring 2024), one of the co-authors of this article raised this question, but no response was provided. At a meeting of the 'Proste Podatki' [Simple Taxes] working group (Spring 2025), KNF representatives replied that the system had been modelled on Liechtenstein's approach. At subsequent meetings, they maintained that it was an adaptation of the brokerage fee system. The difficulty lies in the fact that brokerage firms in Poland compete locally with other similar entities, whereas cryptocurrency exchanges operate internationally or globally. Moreover, when defining the methodology for calculating the annual supervisory fee, no account was taken of the fact that, in the case of currency exchange offices, all transactions constitute revenue, effectively introducing a *quasi*-revenue tax.

[16] See Article 81 of the Government draft Act on the Crypto-Asset Market.

[17] According to the co-author, the following drafting issues arise:

(i) § 8 refers to § 4(2) and § 5(2) (costs and allocation), whereas it should refer to § 6(3) and § 7(3) (rates);
(ii) § 10 links the deadline for filing declarations to § 9 (payment), rather than to § 7(1);
(iii) in § 6, the symbol Pd_{n-1} is used inconsistently, denoting both the value of an individual firm and the total market sum – these should be distinguished and clarified;
(iv) a rule for calculating fees for entities operating in the market for less than three years should

A comparative analysis of supervisory fee models adopted in other EU Member States shows that the Polish proposal is relatively exceptional and among the most onerous for the market.

Most Member States that have already published their implementing regulations have adopted one of three supervisory fee models:

(i) Hourly rate with a cap – for example, the Netherlands: EUR 200 per hour, capped at EUR 100,000 for application review;[18] also used in Germany and the Netherlands in the cost-recovery model, where supervised entities share the actual annual costs incurred by the supervisory authority (e.g. BaFin, DNB) in a given year, often with a fixed minimum fee (EUR 6,500 in Germany).[19]

(ii) Fixed tariff schedules laid down in implementing acts, e.g. in Malta (an extensive fee grid);[20] France (EUR 10,000 annually); Italy (a minimum fee of EUR 5,790, increasing progressively with the number of services);[21] Czechia (one-time licensing fee between EUR 813 and EUR 2,033 with no annual fee); and Estonia (an annual fee amounting to at least EUR 3,500).[22]

(iii) A revenue-based model for supervisory contributions combined with a moderate licensing fee (e.g. Latvia: EUR 2,500 per application; supervisory cost up to 0.6% of gross revenue, with a minimum of EUR 3,000 per year).[23] Poland combines a low application fee with an annual supervisory contribution of up to 0.4% of the average gross revenues from the past three years (minimum EUR 500), exempting entities operating exclusively on a passporting basis (Article 60 in conjunction with Article 65 MiCA).

For CASPs comparing potential jurisdictions for MiCA authorisation, Latvia ranks among the most attractive in terms of low application fees and predictable, revenue-based supervisory charges. It is the only EU country, apart from Poland, that has opted for a percentage-based model (a 0.6% rate of gross revenue, set out

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be established.

[18] AFM, *Costs for non-recurring activities*; https://www.afm.nl/en/sector/beleggingsinstellingen/kosten-en-heffingen-voor-beheerders/kosten-voor-eenmalige-verrichtingen [accessed on 27 October 2025].

[19] See Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin), *Finanzierung – Die Gebühren der BaFin*; https://www.bafin.de/DE/DieBaFin/GrundlagenOrganisation/Finanzierung/Gebuehren.html [accessed on 27 June 2025]; De Nederlandsche Bank (DNB), *Fees for registration, assessment and supervision*; https://www.dnb.nl/en/sector-information/open-book-supervision/open-book-supervision-sectors/crypto-service-providers/registration-of-crypto-service-providers/fees-for-registration-assessment-and-supervision/ [accessed on 27 June 2025].

[20] Leġiżlazzjoni Malta, *Regolamenti dwar Markets in Crypto-Assets Act (Fees)*, Legal Notice 295/2024; https://legislation.mt/eli/ln/2024/295/eng [accessed on 27 October 2025].

[21] *Décret n° 2025-169 du 21 février 2025 relatif aux marchés de crypto-actifs*, JORF n°0045 du 22 février 2025 (France); *Delibera Consob* n. 23352 del 22 gennaio 2025 (Italy).

[22] See Manimama Law Firm, *MiCA implementation in the Czech Republic*, 2025; https://manimama.eu/mica-implementation-in-the-czech-republic/ [accessed on 27 June 2025]; Regulated United Europe, *Crypto License in Estonia*; https://regulatedunitedeurope.com/crypto-licence/estonia/ [accessed on 27 June 2025].

[23] Latvijas Banka, *Crypto-asset service providers*; https://www.bank.lv/en/operational-areas/licensing/crypto-asset/crypto-asset-service-providers [accessed on 27 October 2025].

in a concise, ten-article implementing act).[24] The Netherlands may be categorised as a procedural jurisdiction (hourly rate with a cap), while Malta follows a tariff-based model (detailed schedule in Legal Notice 295/2024). Poland proposes a hybrid system with a moderate application fee and a 'ceiling' of 0.4% for the annual supervisory charge, excluding entities operating in Poland solely under passporting rights (Article 60 in conjunction with Article 65 MiCA).

The Polish model, based on gross revenue rather than margin or profit, disproportionately affects entities with high transaction volumes but low profitability (such as exchanges or currency offices). Simulations based on publicly available financial statements indicate that an entity with annual revenue of PLN 18.7 million (approx. EUR 4.25 million) would incur a fee of around PLN 75,000 (EUR 17,000) – several times higher than the fixed fees in Czechia or Estonia. This amount is nearly seven times higher than the fixed annual fee in France and more than double the minimum fee in Germany. For larger entities, with revenues of around PLN 100 million, the fee would reach PLN 400,000 (approx. EUR 90,000), a figure significantly exceeding European standards.[25]

Consequently such a structure may lead to:

- an increase in market entry barriers, discouraging new market participants from establishing in Poland;
- a restriction of competition by favouring large global players for whom Poland is only one part of their operations, to the detriment of local innovative companies;
- an increased risk of regulatory arbitrage (as acknowledged by the KNF itself), reflected in a tendency among market participants to choose jurisdictions with a more predictable and proportionate fee frameworks, thereby weakening Poland's position as a potential technological hub.

EXPANSION OF SUPERVISORY POWERS AND NEW INTERVENTION TOOLS

The Polish draft act provides for the implementation of a number of supervisory powers that have direct counterparts in MiCA (Article 94), including, among others, the ability to request the removal of content or restriction of access to online interfaces and, in extreme cases, the deletion of full domain names and the freezing (seizure) of assets. However, the method of implementation (for instance, the establishment of a domain register) goes beyond the minimum requirements set out in MiCA and must therefore be assessed in terms of proportionality, procedural safeguards, and consistency with the Digital Services Act (DSA). A comparative analysis of the legislation adopted in Germany, the Czech Republic, Lithuania, Latvia, and Estonia shows that none of these countries have introduced intervention tools of such far-reaching scope.[26]

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[24] See Z. Veidemane-Bērziņa, *Crypto-asset service providers are on the move to find their residence: will Latvia make the 'shortlist'?*, Ellex, 2024; https://ellex.legal/crypto-asset-service-providers-are-on-the-move-to-find-their-residence-will-latvia-make-the-shortlist/ [accessed on 27 June 2025].

[25] Authors' own elaboration based on publicly available financial reports and the draft Act on the Crypto-Asset Market (version of 25.06.2025).

[26] Authors' own elaboration based on analysis of laws and supervisory communications from Germany, Czechia, Lithuania, Latvia and Estonia. See e.g. F. Murar, J. Stastny, *Digital*

A particular example is the proposed creation of a National Register of Internet Domains Used for Activities in Breach of Regulation 2023/1114. The supervisory authority (the Commission) would maintain this register by listing domains offering, for example, crypto-asset services without authorisation. Telecommunications operators and hosting service providers would be required to block access to such websites or redirect users, without compensation.[27]

MiCA grants competent authorities the power to: (i) remove content or restrict access to an interface; (ii) order a hosting service provider to remove or disable such an interface; and (iii) instruct domain registries or registrars to delete a domain name and allow its registration by the authority (Article 94(1)(aa)). However, MiCA does not require the creation of a central domain register with mandatory blocking by internet service providers or hosting providers –this is a national solution that must be evaluated against the principles of proportionality, due process, and coordination with the DSA (Articles 9–10, 'orders to act / to provide information'). In the jurisdictions examined, interventions take the form of case-by-case orders under MiCA/DSA rather than a standing domain register.

It should be emphasised that earlier versions of the draft act envisaged even more extensive powers, including the possibility for the KNF to take ownership of domain names. This proposal was strongly criticised by industry stakeholders as a grossly disproportionate measure that could infringe the right to property under the Polish Constitution. Even in its softened version, however, the mechanism may raise constitutional doubts with regard to the freedom to conduct business and freedom of expression.

Another measure is the power to block accounts at the request of the Chair of the KNF. MiCA grants competent authorities powers to request the freezing or sequestration of assets (Article 94(3)(f)), as well as a catalogue of investigative, supervisory and intervention measures (Article 94(1)). The Polish draft specifies this instrument in terms of duration (up to 96 hours, with possible extensions up to six months) and competence. The key requirements in this respect are: (i) judicial oversight and the availability of an appeal procedure; (ii) application of a proportionality test and the existence of a concrete factual basis (e.g. suspected infringements of Articles 88–92 MiCA); and (iii) transparency obligations and notification to ESMA in cases involving public funds (see Article 102 and the relevant registry mechanisms). In other jurisdictions analysed, supervisory authorities base

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Finance Act: A new era for crypto-assets in the Czech Republic, Kinstellar, 2025; https://www.kinstellar.com/news-and-insights/detail/3213/digital-finance-act-a-new-era-for-crypto-assets-in-the-czech-republic [accessed on 27 June 2025]; T. Stamm, *What does the enforcement of the MiCA Regulation bring to cryptocurrency service providers in Estonia?*, Grant Thornton, 2023; https://www.grantthornton.ee/en/insights1/what-does-the-enforcement-of-the-mica-regulation-bring-to-cryptocurrency-service-providers-in-estonia/ [accessed on 27 June 2025].

[27] Article 69 of the Polish draft act was justified as an implementation of Article 94(1)(aa) of Regulation (EU) 2023/1114, which requires Member States to empower competent authorities to: (i) remove or restrict access to online interfaces; (ii) order hosting service providers to remove or disable such interfaces; and (iii) instruct domain registries or registrars to delete full domain names. However, unlike in other countries, Poland transposed this concept in the form of a 'domain register'.

their actions on the classical administrative sanctions provided for in MiCA, such as fines or licence withdrawals, avoiding the creation of additional, specifically national instruments of such an invasive nature.

It is therefore necessary to examine in greater detail whether such powers are proportionate and whether they duplicate or unduly extend the competences provided for under the Market Abuse Regulation (MAR), which MiCA partially adapts to the crypto-asset market.

The Polish draft also extends the range of authorities entitled to receive information. MiCA allows cooperation between the competent authority and other public bodies ('pursuant to Union or national law'), including tax and AML/CFT authorities and third-country regulators (Article 98), subject to professional secrecy (Article 100) and GDPR (Article 101). The expansion of this list in the Polish draft act (for example, to include the Police and Border Guard) is, in principle, consistent with MiCA, provided that it is accompanied by: (i) a clear objective and scope; (ii) proportionality; (iii) an appropriate confidentiality regime; and (iv) a strict functional link with MiCA-related tasks. Otherwise, the risk of excessive interference and gold-plating increases.

At the EU level, MiCA provides for temporary intervention measures: for ESMA (Article 103) in case of crypto-assets other than ARTs/EMTs, for EBA (Article 104) in case of ARTs/EMTs, and product intervention powers for national competent authorities (Article 105), coordinated by ESMA and EBA (Article 106). National instruments should remain consistent with this framework, particularly with respect to proportionality and the publication of measures.

LEGISLATIVE DELEGATIONS AND THE RISK OF EXCESSIVE CASUISTRY

MiCA as a harmonising regulation, sets out the framework of obligations for crypto-asset market participants while entrusting the European Supervisory Authorities (EBA and ESMA) with the development of detailed regulatory and implementing technical standards (RTS/ITS). This approach is designed to ensure uniform application of the rules across the European Union.

The Polish draft act, however, in several provisions (including Articles 4, 12 and 14), introduces broad statutory delegations empowering the minister responsible for financial institutions to define, by way of secondary legislation, detailed requirements for the activities of CASPs. These include, *inter alia*, the specification of technical and organisational requirements, the rules for securing claims, and the qualification criteria for natural persons providing advisory services. Although the rationale for such delegations may be to ensure regulatory flexibility, they create a risk of gold-plating if the resulting regulations become overly detailed or more restrictive than the EU-level standards eventually adopted. Such national casuistry may lead to several negative effects:

- legal uncertainty, since market participants may for an extended period operate without knowing the final shape of the detailed requirement, pending the adoption of numerous implementing regulations;

- higher compliance costs, as more detailed and potentially more restrictive domestic requirements may generate additional implementation expenses for CASPs;
- fragmentation of the EU internal market as regards the single market for crypto-asset services, should Polish executive acts diverge significantly from the standards adopted in other Member States (or from RTS/ITS), thereby hindering the cross-border provision of services.

Rather than introducing broad delegations on a national level, a more appropriate approach would be to rely as much as possible on the directly applicable provisions of MiCA and to await harmonised technical standards issued by the European authorities.

SANCTIONING REGIME AND PUBLICATION OF DECISIONS (MICA VS. NATIONAL SOLUTIONS)

MiCA establishes a catalogue of administrative measures and sanctions, as well as minimum thresholds for their severity. Competent authorities must have at least the power to order the cessation of infringements, to publicly announce decisions (including the identification of the entity and the nature of the infringement), to impose financial penalties, and to apply measures against individuals performing managerial functions (including temporary bans on holding such positions). For infringements of provisions relating to CASPs (in particular Articles 59, 60, 64 and 65–83 MiCA), the minimum sanctions include at least EUR 700,000 for natural persons and at least 5% of annual turnover (or, alternatively, EUR 5,000,000) for legal persons. MiCA also allows Member States to introduce criminal sanctions under national law, provided that administrative measures remain available in parallel.

As a rule, sanctioning decisions must be published by the competent authority, together with information on the type of infringement and the identity of the sanctioned entity. MiCA, however, provides for certain exceptions (for instance, where publication would cause disproportionate damage or infringe data protection rules), allowing for anonymisation, deferred publication, or non-publication, subject to appropriate justification. National authorities are required to periodically report aggregated sanctioning data to ESMA and EBA, while ESMA publishes an annual report, which also includes data on criminal sanctions where these have been introduced by Member States.

MiCA requires that the imposition of sanctions and measures respect procedural rights, including the right to appeal before a court (Article 113 MiCA). At the same time, Article 112 emphasises the need for competent authorities to possess effective powers of enforcement and sanctioning, ensuring proportionality and a deterrent effect.

The Polish draft act designates the KNF as the competent authority[28] and introduces a national sanctioning framework consistent with MiCA's minimum

[28] Each country must designate a supervisory authority. In some cases, two were designated; in others, central banks. In Poland, the KNF was designated (Article 58). The explanatory memorandum provides no rationale. This choice was criticised by certain MPs from PiS (Janusz Kowalski) and the Confederation.

standards. This includes the publication of sanctioning decisions and the right of appeal to an administrative court. The levels of administrative penalties under national law cannot be lower than MiCA's minimum thresholds. The draft also specifies procedural aspects (service of decisions, deadlines, anonymisation, and scope of publication) and clarifies the relationship with other sectoral statutes (for instance, obligations under AML/CFT rules), while maintaining the direct applicability of MiCA.

POLAND IN THE EU CONTEXT: ASSERTIVE ELEMENTS OF MICA IMPLEMENTATION AND COMPARATIVE ANALYSIS

The tendencies towards over-regulation (gold-plating) in the Polish draft act become particularly evident when compared with the approaches adopted by other Member States in implementing MiCA, especially Germany and the countries of Central and Eastern Europe. A comparative analysis of the key regulatory areas shows that Poland is pursuing a considerably more restrictive and complex path, which – as noted above – may adversely affect its competitive position.

First, the scale and length of Polish regulation are far greater than in neighbouring states. The government package submitted to the Sejm included not only the draft act but also numerous implementing regulations and extensive explanatory memorandum, with 1,227 pages in total. The draft act itself is 104 pages long, accompanied by an 86-page explanatory memorandum and additional regulations, amounting to 334 pages, even without the explanatory memorandum.[29] By contrast, as we have calculated, the Czech act implementing MiCA (Zákon 31/2025 Sb.) takes the form of a concise statute that primarily designates the powers of the ČNB and establishes the sanctioning framework, referring to MiCA without extensive casuistry, and is only 14 pages long. The Latvian Crypto-Asset Services Act consists of merely 10 articles spanning approx. 5 pages. Estonia's Crypto-Asset Market Act is a 30-page regulation, while in Cyprus the law is just one page long (other examples include: Finland – 10 pages, Hungary – 9, Slovenia – 5, and Romania – 10). The EU average is 27 pages. This means that the Polish draft is around five times longer than the regional average. Such casuistry and legislative overproduction in themselves creates a barrier for businesses, particularly SMEs and start-ups, generating legal uncertainty and higher legal service costs.

Second, Poland's supervisory fee model, based on a percentage of gross revenues, is atypical in the region. The vast majority of EU Member States base their systems on flat fees or cost-recovery models. Only Latvia has also adopted a revenue-based fee (0.6%). Poland's 0.4% rate may, as simulations show, be more

[29] A. Bilski, 'Nieuchwalenie ustawy o krypto do końca roku oznacza 18-miesięczny okres przejściowy, którego nie da się skrócić' [Failure to adopt the crypto law by the end of the year means an 18-month transitional period that cannot be shortened], LinkedIn commentary, 2025; https://www.linkedin.com/posts/abilski_nieuchwalenie-ustawy-o-krypto-do-ko%C5%84ca-roku-activity-7275195141802336256-9hFj/ [accessed on 15 September 2025].

onerous than in other jurisdictions, particularly for entities with high turnover but low profit margins.

Third, the range of additional supervisory intervention powers in Poland is unusually broad. The comparative analysis of MiCA implementation in Germany, Czechia, Lithuania, Latvia, and Estonia shows that none of these countries opted for such far-reaching measures as the Poland's National Register of Internet Domains Used for Activities in Breach of MiCA or the power to pre-emptively freeze accounts based solely on suspicion.[30] These countries rely to a much greater extent on harmonised supervisory and sanctioning tools under MiCA, such as fines or withdrawal of authorisation, avoiding the creation of additional, nationally specific tools of such an invasive nature.

Fourth, Poland's transitional period provisions are among the most restrictive. As noted earlier, Poland notified a six-month transitional period for CASPs, placing itself among the countries with the shortest durations in the EU; however, it failed to enact the implementing statute within that very period. By comparison, Germany also shortened the transitional period, but offset this by introducing simplified procedures for entities already holding a national license. Czechia adopted a flexible, two-stage mechanism that encouraged early submission of applications while allowing completion of the licensing process without the risk of an abrupt interruption of business activity.

In summary, the comparative analysis shows that the Polish legislator has adopted a maximalist strategy, creating one of the most restrictive and complex regimes for crypto-assets in the EU. While arguably motivated by a desire to ensure the highest possible level of security, it risks producing the opposite effect – weakening the competitiveness of the domestic market, hindering innovation, and prompting domestic operators to relocate to more accommodating jurisdictions.

REGULATORY GAPS AND DIRECTIONS FOR FURTHER REFORM

Despite the comprehensive nature of the MiCA Regulation and the significant effort devoted to preparing the Polish draft act, a comparative analysis of the provisions and the rapidly evolving market practice reveals several areas of misalignment or gaps that may affect the competitiveness of the Polish crypto-asset ecosystem and the level of protection afforded to market participants. As the first regulation of its kind, MiCA cannot, by its very nature, address all technological challenges. Identifying these gaps and proposing directions for further reform is therefore crucial to creating an optimal and forward-looking regulatory environment in Poland.

[30] Authors' own elaboration based on analysis of laws and supervisory communications from Germany, Czechia, Lithuania, Latvia and Estonia. See e.g. F. Murar, J. Stastny, *Digital Finance Act…*, op. cit.; T. Stamm, *What does the enforcement…*, op. cit.

DECENTRALISED FINANCE – A CHALLENGE FOR THE TRADITIONAL REGULATORY APPROACH

One of the most significant gaps – both in MiCA and, consequently, in the Polish draft act – concerns the decentralised finance (DeFi) sector. MiCA is, by design, based on a traditional, entity-centred regulatory model: it imposes obligations on identifiable legal persons or other undertakings, such as crypto-asset issuers or service providers (CASPs). In contrast, many DeFi protocols (for example, leading decentralised exchanges or lending platforms) operate through self-executing smart contracts, often without any clearly identifiable central entity that could be held responsible.[31]

As stated in recital 22 of MiCA, where crypto-asset services are provided in a fully decentralised manner without intermediaries, they should not fall within the scope of the Regulation. This reflects a deliberate policy decision by the EU legislator to defer the resolution of this complex issue. In practice, however, even limited elements of centralisation – such as control over the access interface, a material influence on governance, or the ability to unilaterally modify key parameters – may lead to the conclusion that a service is not 'fully decentralised' and thus falls within MiCA's scope.

Consequently, the Polish draft act implementing MiCA – being an instrument of limited, executive scope – likewise does not introduce any specific provisions addressing DeFi. It does not foresee, for instance, tools such as regulatory sandboxes or a statutory functional test (substance over form) aimed at identifying the actor exercising control or significant influence over a given service. Such mechanisms could help balance operational risk with the need for innovation in this area.

This situation creates a significant regulatory gap. In its October 2023 report, the European Securities and Markets Authority (ESMA) highlighted serious risks associated with DeFi, including the speculative nature of certain protocols and the absence of a clearly identifiable responsible entity, which suggests the need for further regulatory action.[32] For Poland to become a competitive and safe market for innovation in this field, proactive steps would be desirable.

Based on the above considerations, this article formulates several recommendations for further reforms in the DeFi area, namely:

- considering authorising the KNF to issue – in the form of communications or 'soft law' – minimum standards for DeFi protocols that have a significant impact on the Polish market (e.g. security audits of smart contracts, transparency of governance structures, fair disclosure of risks);

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[31] See e.g. D.A. Zetzsche, R.P. Buckley, D.W. Arner, 'Decentralized Finance', *Journal of Financial Regulation*, 2020, Vol. 6, No. 2, pp. 172–203.

[32] European Securities and Markets Authority, *ESMA assesses market developments in DeFi and explores the smart contracts system*, 2023; https://www.esma.europa.eu/press-news/esma-news/esma-assesses-market-developments-defi-and-explores-smart-contracts-system [accessed on 27 June 2025].

- establishing a legal framework for regulatory sandboxes, which would allow innovative DeFi solutions to be tested in a controlled environment while ensuring ongoing risk monitoring;
- maintaining a continuous, substantive dialogue between the KNF and the web3 industry on DeFi-related issues in order to clarify supervisory expectations and reduce regulatory uncertainty.

THE UNCLEAR LEGAL STATUS OF NON-FUNGIBLE TOKENS (NFTS)

Another area characterised by significant regulatory uncertainty is that of NFTs. MiCA, in recitals 10 and 11, generally excludes from its scope crypto-assets that are unique and non-fungible with other crypto-assets – such as digital artworks or collectibles – whose value derives from their unique characteristics and utility for the holder. However, the same regulation introduces an important qualification: the issuance of crypto-assets as NFTs in large series or collections is an indicator of their *fungibility*. Likewise, *fractionalisation* of a 'unique' NFT means that its parts can no longer be considered unique or non-fungible. The mere assignment of a unique identifier is therefore not sufficient to classify a crypto-asset as 'unique and non-fungible'.

Moreover, crypto-assets that qualify as *financial instruments* within the meaning of MiFID II remain outside the scope of MiCA (Article 2(4)). Any classification ambiguities should be resolved on a functional basis (substance over form), also in light of ESMA's guidelines on the classification of crypto-assets as financial instruments.

This blurred distinction gives rise to legal uncertainty for issuers and trading platforms.[33] The Polish draft act, following MiCA, does not specify the criteria for assessing the 'unequivocal non-fungibility' of NFTs, nor does it introduce a functional test that would allow for a more precise classification of such tokens. As a result, entities operating in this area may be exposed to the risk of supervisory measures or administrative sanctions (Articles 111–115 MiCA), even when they have, in good faith assumed that their assets fall outside the MiCA regime. Where an appropriate assessment leads to the conclusion that a given asset fails to meet the criteria of uniqueness and non-fungibility (for instance, due to issuance in series, collections, or fractionalisation), the obligations set out in Title II (including the white paper) shall apply to the issuer, while intermediaries fall under Title V. Any violations are subject to the measures and administrative penalties under Articles 111–115.

Regulatory uncertainty regarding the classification of NFTs may be mitigated through soft supervisory instruments. The French financial regulator (AMF), in its official publication on MiCA, emphasises that the criteria for qualifying NFTs under the Regulation will be further clarified in forthcoming ESMA guidelines.[34] Until

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[33] See e.g. CMS Law, *NFTs under MiCAR – regulated or not according to legal experts?*, 2023; https://cms.law/en/int/publication/legal-experts-on-markets-in-crypto-assets-mica-regulation/nfts-under-micar-are-they-regulated-or-not [accessed on 27 June 2025].

[34] Autorité des Marchés Financiers, *The European Regulation Markets in Crypto-Assets (MiCA)*, 29 November 2024; https://www.amf-france.org/en/news-publications/depth/mica [accessed on 11 September 2025].

then, the interpretative rules are derived directly from MiCA's recitals themselves. The AMF makes extensive use of soft law in the crypto-asset field (e.g. Instruction DOC-2019-23 on PSAN) and maintains a Fintech Forum (ACPR–AMF), which issues practical guidance (for example, on smart contract certification). This demonstrates how supervisory communication can serve as a practical 'bridge' between supervision and innovation.

In March 2025, ESMA published guidelines on the conditions and criteria for classifying crypto-assets as financial instruments (Article 2 MiCA), which are particularly relevant to the assessment of so-called *investment-like NFTs*. The *Overview of Level 2 and Level 3* (July 2025) confirms that further implementing measures under MiCA are in progress;[35] however, no separate, dated document dealing exclusively with NFTs has yet been published. Therefore, it is advisable to avoid rigid declarations regarding the timing or form of any future NFT-specific guidance.

In light of this, Poland could consider several steps in the NFT area:

- pending detailed ESMA guidance, and independently of national implementing measure, the KNF could issue a communication explaining how NFT projects should be assessed in light of recitals 10–11 MiCA and clarifying when MiFID II regime applies;
- KNF could recommend the use of a functional test that examines not only on the technical uniqueness of a token, but also its economic purpose, marketing, purchasers' expectations, and actual use. Such an approach, based on the principle of 'substance-over-form', is consistent with MiCA's rationale and enables a more effective distinction between digital collectibles and financial-type instruments;
- educational initiatives could be undertaken, aimed at issuers and investors, to clarify the consequences of misclassification and to promote good disclosure practices.

CHALLENGES FOR THE DEVELOPMENT OF PLN-LINKED STABLECOINS

MiCA introduces a detailed regulatory framework for so-called e-money tokens (EMTs), i.e. stablecoins pegged to a single official currency. While the objective is to enhance safety and trust, the current design of the rules may – paradoxically – hinder the development and competitiveness of stablecoins linked to the currencies of non-euro area Member States, including the Polish zloty (PLN).

Under MiCA, EMTs must be issued at par value and are redeemable at any time at face value; the granting of interest on EMTs is explicitly prohibited (Articles 49–50 MiCA). Funds received in exchange for EMTs must be safeguarded under mechanisms similar to those in the E-Money Directive, while MiCA further specifies that such funds must be invested in assets denominated in the same currency as the token (Article 54 MiCA). The key challenge is that only EMT issuers linked to the euro have potential access to deposit their reserves with the European

[35] European Securities and Markets Authority, *Overview…*, op. cit.

Central Bank, which significantly reduces operational costs and counterparty risk.[36] In Poland, by contrast, potential issuers of zloty-denominated EMTs are required to hold reserves with commercial credit institutions. Particularly in periods of low or negative interest rates (as in previous years), this requirement could generate additional costs and render a PLN-denominated stablecoin considerably less competitive compared with its euro- or dollar-based counterparts.

An additional challenge for the Polish e-money token (EMT) framework concerns the overlap of regulatory regimes. In its opinion of June 2025, the European Banking Authority confirmed the cumulative application of PSD2/EMD2 and MiCA with respect to certain payment services performed using EMTs, expressly excluding the possibility of 'double counting' capital. This means that a CASP offering EMT transfers may simultaneously be subject to capital requirements under both MiCA and PSD2, insofar as its activities fall within the scope of a regulated payment service.

There are also significant market challenges. Data clearly indicate the dominance of USD-linked stablecoins (e.g. USDT, USDC), which together account for 99.2% of total market capitalisation.[37] These are preferred by Polish users due to their high liquidity and global acceptance. At the same time, with the entry into force of MiCA, many exchanges and platforms operating within the EEA/EU have introduced restrictions on stablecoins not compliant with MiCA requirements (e.g. USDT).[38] – including Coinbase (December 2024), Crypto.com and Kraken (Q1 2025), and Binance (as of 31 March 2025 for EEA users).This creates a market gap that could be filled by a fully regulated, locally issued stablecoin. However, without adequate systemic support, high operational costs and initially low liquidity may cause a PLN-denominated stablecoin to remain a niche product.

To prevent the marginalisation of the zloty in the digital money environment, several reforms could be considered:

- creating a framework that would allow MiCA-compliant issuers of PLN stablecoins to deposit part or all of their reserves with the National Bank of Poland (NBP). Such a solution would reduce counterparty risk (e.g. insolvency of a commercial bank holding the reserves) and lower reserve maintenance costs, thereby enhancing trust and competitiveness of the Polish stablecoin;

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[36] Clarification: access to central bank accounts follows from the status of a credit institution (and, in the euro area, from relations with the Eurosystem), not merely from EMT issuance. Generally, e-money institutions do not hold central bank accounts and place reserves with commercial banks or other safe assets; an exception applies to credit institutions as EMT issuers. In Poland, the NBP may open accounts for banks and – with the Governor's consent – for other legal persons (Article 51 of the NBP Act), which *de lege ferenda* could allow specialised account solutions for PLN-denominated EMTs.

[37] Observation based on publicly available analytics (e.g. CoinGecko, CoinMarketCap) confirming USD stablecoin dominance. At the XII Digital Money & Blockchain Forum (Łazarski University, 11 June 2025), Jacek Czarnecki presented findings showing that dollar stablecoins accounted for 99.2% of total market capitalisation. See also K. Piech, *Stablecoins under Siege. How MiCA might dollarise Europe's digital future?*, Substack, 18 June 2025; https://kpiech.substack.com/p/stablecoins-under-siege [accessed on 27 June 2025].

[38] See e.g. Tangem, *MiCA-compliant Stablecoins: What You Need to Know*, 2025; https://tangem.com/en/blog/post/swap-mica-stablecoins/ [accessed on 27 June 2025].

- introducing tax relief on interest income generated by reserve assets or other fiscal incentives to partially offset issuance costs.

Undertaking such measures is essential to prevent the progressive 'euroisation' or 'dollarisation' of the Polish crypto-asset market and to create favourable conditions for the development of local innovation in this strategically important segment of the modern financial system.

THE NEED TO OPTIMISE REPORTING AND INVESTOR EDUCATION

The final area identified as requiring attention in the MiCA implementation process concerns operational and informational issues which, although less prominent, are nonetheless important for the effectiveness and safety of the market.

With regard to reporting, the draft act implementing MiCA imposes new reporting obligations on supervised entities. There is a risk of partial overlap between these obligations and the extensive AML/CFT requirements arising from the Act of 1 March 2018 on Counteracting Money Laundering and the Financing of Terrorism (hereinafter referred to as 'the AML Act').[39] The Regulatory Impact Assessment (RIA) attached to the draft indicates an increase in the total administrative time devoted to reporting, representing an additional burden, particularly for smaller entities. To avoid inefficiencies, it is advisable to implement the 'once-only' principle, understood as the re-use of the same reference data (data field taxonomy, client identifiers, transaction metadata) across different regulatory regimes, while preserving the separation of legal bases and reporting channels.[40]

Investor education is another important issue. MiCA imposes extensive disclosure obligations on market participants. For offers of 'other crypto-assets', Title II specifies the content of the white paper (including the characteristics, functions, and risks of the asset) as well as the requirements for marketing communications (notably Articles 6–7), including the obligation to include a warning that the communication has not been approved by a competent authority and to indicate the website address where the white paper is available. Analogous rules apply to ARTs (Title III, Article 29) and EMTs (Title IV, Article 53, including a clear statement of the right to redeem at par value). In addition, CASPs are required to act honestly, fairly, and professionally, and to provide information that is clear, fair, and not misleading (Article 66).

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[39] Act of 1 March 2018 on Counteracting Money Laundering and Terrorism Financing, consolidated text: Journal of Laws of 2023, item 1124, as amended.

[40] In particular:

- AML (SAR) – suspicious activity reports to the GIIF under the AML Act / ZMLR 2024/1624;
- MiCA – market abuse (STOR) reports to the KNF under Article 92 MiCA (Title VI) and ESMA standards;
- Travel Rule (TFR) – information exchange on crypto-asset transfers between CASPs (no threshold), and for self-hosted wallet transfers above EUR 1,000 – verification of ownership.

It would be advisable for the KNF and GIIF to develop a joint data taxonomy and technical interfaces to automate reporting, eliminate duplication and improve data quality, while maintaining confidentiality appropriate to each regime.

However, both academic literature and experience from traditional financial markets suggest that formal warnings alone become less effective as product complexity increases (OECD, 2019) – a finding particularly relevant for crypto-assets. Therefore, investor education measures should complement MiCA's minimum disclosure requirements and be designed with behavioural considerations in mind, using plain language, layered formats, comprehension testing, and *just-in-time* warnings within user interfaces.

The current version of the Polish draft act does not provide mechanisms to support investor education, nor does it envisage a nationwide information campaign on the risks associated with investing in crypto-assets. This regulatory gap may increase the likelihood that retail investors make uninformed or excessively risky decisions.

In this respect, the following complementary measures are proposed (*de lege ferenda* / supervisory practice):

- the KNF should recommend that marketing communications for 'other crypto--assets' include a standardised risk label and a mandatory disclaimer pursuant to Article 7 MiCA; for EMTs, a standard formula referring to the right of redemption under Article 53;
- the introduction of layered disclosure practices (a plain-language summary followed by detailed information) and A/B testing of warning effectiveness (e.g. comprehension thresholds, placement, and timing within the customer journey);
- a nationwide KNF-led programme, developed in cooperation with industry representatives and institutions such as UOKiK, the Ministry of Education and Science, and the Ministry of Digital Affairs, focusing on the risks of crypto--assets, differences in regulatory protection (MiCA vs. deposit insurance), and principles for verifying marketing materials in social media. Funding could be provided from a portion of supervisory fees. The French AMF model of cooperation with financial education stakeholders may serve as a useful reference.

CONCLUSION

The entry into force of the MiCA Regulation marks a milestone in the development of the EU single financial market. It represents one of the most ambitious legislative undertakings of the Union in the field of digital finance, comparable in scale to the MiFID framework in the capital markets. For the first time, a harmonised regime for crypto-assets has been established, offering both legal certainty and enhanced protection for investors and consumers.

The Polish draft act implementing MiCA, however, demonstrates a clear tendency towards regulatory maximalism. The shortened transitional period, the revenue-based supervisory fee model, the introduction of far-reaching intervention instruments (such as the domain register and account freezes), and extensive statutory delegations together place Poland among the most restrictive jurisdictions in the EU. In comparative perspective, the Polish approach is distinguished by its breadth, volume and intensity.

The analysis confirms the research hypothesis: the Polish draft act contains solutions that amount to gold-plating, raising compliance costs without delivering proportionate benefits, while at the same time leaving important regulatory gaps unaddressed. Among these are the absence of a framework for decentralised finance, the unresolved classification of NFTs, and barriers to the development of PLN-denominated stablecoins. Such an approach risks undermining the competitiveness and innovativeness of the domestic crypto-asset market and may drive firms to seek more favourable jurisdictions within the EU.

The findings therefore point to the need for corrective measures. National regulations should be proportionate, consistent with the principles of EU law, and properly calibrated to the structure of the domestic market. Above-minimum national requirements – such as supervisory fees or intervention powers – should be carefully reviewed in light of their economic consequences. At the same time, regulatory gaps should be addressed through soft law, supervisory guidance and experimental tools such as sandboxes.

The implementation of MiCA is not only a matter of transposing obligations but also of shaping the environment in which innovation will develop. By balancing security with openness to new technologies, Poland has the opportunity to fulfil its EU commitments while fostering an innovative and competitive domestic digital finance ecosystem.

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OBLIGATIONS OF IMPORTERS, DISTRIBUTORS AND DEPLOYERS OF HIGH-RISK AI SYSTEMS UNDER THE AI ACT

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Abstract

The Artificial Intelligence (AI) Act distinguishes between the different actors involved in the supply chain of high-risk AI systems. The purpose of this paper is to outline and compare the obligations of importers, distributors and deployers, and to analyse the circumstances in which these obligations may be extended and aligned with those of providers of high-risk AI systems. The obligations of importers and distributors are primarily of a verification nature. In general, the obligations of distributors are more limited than those of importers, who bear the burden of primary verification of compliance by providers. In contrast, the obligations of deployers are generally not subordinate to those of providers but constitute an independent responsibility arising from the need to address the risks posed during the deployment phase of high-risk AI systems. A specific situation arises where interference with AI systems results in the imposition of obligations on a non-deployer that are equivalent to those imposed on providers of high-risk AI systems. This is because AI-based systems are, among other things, susceptible to changes in their purpose in ways that are independent of their design and the intentions of their providers. Proper identification and understanding of the responsibilities of the various actors in the supply chain are key to minimising the risks associated with the use of high-risk AI systems across the European Union and to avoiding the imposition of financial sanctions.

Keywords: AI Act; artificial intelligence; importers; distributors; deployers

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INTRODUCTION

The Artificial Intelligence Act[1] represents a breakthrough in the legal regulation of actors involved in the creation, supply and use of systems based on artificial intelligence (AI) technology, in particular those classified as high-risk systems. In doing so, the AI Act distinguishes between the various actors involved in the supply chain of these systems and imposes differentiated obligations upon them. The distribution of the burden and the scope of these obligations may, at times, be questionable.

Most analyses in this area, both domestically and internationally, focus on the obligations of providers, bearing in mind that they shoulder the majority of obligations under the AI Act and are the most extensively regulated.[2] However, it should not be overlooked that importers, distributors and deployers of high-risk AI systems also play an important role in the supply chain and in safeguarding fundamental rights, as well as in mitigating the risks associated with the implementation of these systems.

The purpose of this paper is to outline and compare the obligations of these three entities under the AI Act and to analyse the circumstances in which these obligations may be extended and aligned with those of providers of high-risk AI systems. In addition, the paper identifies how these entities can, in practice, fulfil their obligations and what the scope of those obligations is. These issues are not clear-cut, and sources of practical clarification remain limited. Given the frequency with which these questions arise and the constraints resulting from the format of this study, the discussion is confined to the most significant obligations and those that raise the greatest interpretative uncertainty in terms of the relevant provisions and their practical application.

OBLIGATIONS OF IMPORTERS

An importer is an entity that places on the market an AI system bearing the name or trademark of a natural or legal person whose registered office is located in a third country (Article 3(6)). 'Placing on the market' means making an AI system

[1] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), PE/24/2024/REV/1 (OJ L 189, 12.7.2024), hereinafter referred to as 'the AI Act' or 'the Regulation'.

[2] See, *inter alia*, M. Jacobs, J. Simon, 'Assigning Obligations in AI Regulation: A Discussion of Two Frameworks Proposed by the European Commission', Digital Society, 2022, Vol. 1(6); L. Enqvist, '"Human oversight" in the EU artificial intelligence act: what, when and by whom?', *Law, Innovation and Technology*, 2023, Vol. 15, No. 2, pp. 508–535; L. Edwards, *The EU AI Act: a summary of its significance and scope*, pp. 7–8, 16; https://www.adalovelaceinstitute.org/resource/eu-ai-act-explainer/ [accessed on 8 April 2025]; K. Hewson, E. Lu, *The roles of the provider and deployer in AI systems and models*, Stephenson Harwood, 2024; https://www.stephensonharwood.com/insights/the-roles-of-the-provider-and-deployer-in-ai-systems-and-models [accessed on 8 April 2025].

or AI model available for the first time on the EU market (Article 3(9)). 'A third country' is a country other than an EU Member State, as indicated in Article 2(1)(a), which presents EU Member States and third countries as alternative concepts. Typically, the third country will be the place of origin of the system's provider, which assigns its name to the system.

The obligations of importers are set out in Article 23 of the AI Act. The importer in the supply chain of high-risk AI systems plays a crucial role in relation to systems placed on the EU market and supplied by entities established in third countries. It acts as an intermediary between foreign providers and distributors or deployers within the EU. The importer assesses whether the provider has applied the standards required under the AI Act and whether the AI system concerned ensures compliance with EU requirements, thereby allowing it to be placed on the EU market.

It is necessary to consider what actions importers should take to comply with the obligations referred to in this provision. These include, in the first instance, verifying that the provider has complied with its obligations:

(1) to carry out the relevant conformity assessment procedure;
(2) to draw up the technical documentation;
(3) to affix the required CE marking and attach an EU declaration of conformity and an instruction manual; and
(4) to appoint an authorised representative.

The conformity assessment procedure is governed by Article 43 of the AI Act and is the responsibility of the provider to conduct. By contrast, the importer's task is to verify formally that the provider has fulfilled this obligation; the importer is not required to assess whether the procedure has been carried out correctly.[3] This verification can be undertaken by consulting the database established under Article 71 of the AI Act. According to Annex VIII, Section A, the database must contain information about the authorised representative, include copies of the EU declaration of conformity and the instructions for use, and provide information on certification. The EU declaration of conformity must state that the high-risk AI system concerned complies with the requirements set out in Section 2, including those relating to conformity assessment. The notion of 'adequacy' should relate to the form of the procedure, not to the quality of its execution. The conformity assessment procedure may be carried out in accordance with Annex VI or Annex VII. Where the conformity assessment procedure and the technical documentation are prepared in accordance with Annex VII, the results of the procedure are externalised in the form of a decision by the notifying body and a certificate. Consequently, verification is only possible by consulting the database referred to in Article 71 of the AI Act.

The obligation to verify whether the provider has prepared the technical documentation may likewise be fulfilled by consulting the database created under Article 71 of the AI Act.[4] The duty is to verify formally that such documentation exists, rather than to assess its accuracy.

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[3] L. Riede, O. Talhoff, 'Article 23', in: Pehlivan C.N., Forgó N., Valcke P. (eds), *The EU Artificial Intelligence (AI) Act: A Commentary*, Alphen aan den Rijn, 2024, p. 510.

[4] See Annex VIII, Section A.

The obligations to affix the required CE marking to the system and to include an EU declaration of conformity and an instruction manual rest with the provider. The first two are specified in Article 16(1)(g) and (h), while the third – the instruction manual – forms part of the technical documentation referred to in Article 11(1).[5] The importer is required to verify formally that the provider has complied with these obligations. It is also possible to verify the existence of the EU declaration of conformity and the instruction manual by consulting the database established pursuant to Article 71 of the AI Act.[6] With regard to verification of the CE marking, guidance is provided by Article 48(3), which stipulates that the marking shall be affixed to the AI system in a visible, legible and indelible manner. If, owing to the nature of the high-risk AI system, it is not possible or reasonable to label the system in this way, the marking shall be affixed to the packaging or, where appropriate, to the accompanying documentation.

The provider's obligation to appoint an authorised representative is laid down in Article 22. The importer's duty is limited to verifying that such a representative has been appointed. This verification is performed by consulting the database, in which information about the representative must be recorded.[7]

It is good practice to draw up a verification protocol in which importers indicate the measures taken to verify the provider's compliance with EU regulations and, if necessary, attach relevant documents (for example, printouts from the database or photographs).

Obligations are also imposed on importers to refrain from certain actions. According to Article 23(2) of the AI Act, if an importer has sufficient reason to believe that a high-risk AI system does not comply with the Regulation, or that it or its documentation is falsified, the importer shall not place such a system on the market until it has been ensured that the system complies with the Regulation. This is therefore an absolute prohibition.

A question that must be answered is what constitutes 'sufficient reasons' for believing that a product has been supplied with falsified documentation or does not comply with EU requirements. The importer's positive obligations to verify systems are set out in paragraph 1 of the provision, as previously discussed. However, the importer may – but is not required to – undertake additional verification activities when assessing the compliance of the provider's actions and the system's conformity with EU standards. For example, the importer may obtain relevant information from media reports or whistleblowers. If such information indicates that a high-risk AI system poses a risk within the meaning of Article 79(1), the importer must notify the authorities indicated in that provision and suspend the import process. The process of placing the system on the market may resume once the dossier has been completed or amended, the relevant procedures have been finalised, or – although this case is not expressly provided for in the Regulation – when it is

5 See Annex IV, point 1(h).
6 See Annex VIII, Section A.
7 Ibidem.

established that the importer's objections were unfounded, for example, due to an incorrect conformity assessment.

An important obligation is also provided in Article 23(6) of the AI Act. This article specifies the nature of the cooperation expected from importers in relation to the competent authorities. According to this provision, importers are required, upon a reasoned request, to provide the authorities with all necessary information and documentation. The notion of a competent authority relates to the supervision of the standards set out in Articles 8–15. These entities include national market surveillance authorities,[8] authorities responsible for the protection of fundamental rights,[9] and the EU authority – the AI Office. Sectoral bodies will also be involved, such as data protection supervisory authorities.[10]

It must be recognised that an inappropriate legislative technique has been applied here, namely the use of different terms to describe identical concepts. The expressions 'competent national authorities' and 'relevant national authorities' should be synonymous in meaning (this is also the case in other language versions, such as Polish). In several other linguistic versions these terms are identical – for instance, *autorités compétentes* (French), *autoridades competentes* (Spanish), and *autorità competente* (Italian). These expressions are synonymous and should be interpreted as referring to the same concept.

The concept of a 'reasoned request' must be linked to the competence and duties of the authorities concerned. This means that the purpose of obtaining information or documentation from importers must relate to the authority's intention to fulfil its statutory obligations. These will primarily be supervisory functions, the proper performance of which requires a range of information concerning the operation of a high-risk AI system.

The purpose of establishing the obligation to cooperate is to demonstrate that the high-risk AI system complies with the requirements set out in Section 2. These are as follows:

(1) the establishment of a risk management system,[11]
(2) proper data management,[12]
(3) preparation of technical documentation,[13]
(4) event logging,[14]
(5) transparency of operations and the provision of information to deployers,[15]
(6) human oversight,[16] and
(7) achievement of accuracy, robustness, and cybersecurity in the systems applied.[17]

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[8] See Article 74.
[9] See Article 77.
[10] See recital 10 of the Preamble.
[11] See Article 9.
[12] See Article 10.
[13] See Article 11.
[14] See Article 12.
[15] See Article 13.
[16] See Article 14.
[17] See Article 15.

The AI Act does not specify the scope of the information or documents subject to the obligation to provide them. In the absence of a regulatory limitation, all information and documentation that the competent authority may require to assess the compliance of a high-risk AI system with the requirements set out in Section 2 of the Regulation are subject to the obligation of transmission. This information and documentation must be provided in a language easily understood by those authorities. The term should refer to the relevant language version.[18] In the case of national authorities, this will be the official language of the country concerned (or another, if the authority so indicates). In the case of EU bodies, reference should be made to the rules of procedure of those institutions.[19] If language requirements are not specified, any of the 24 official EU languages should be considered acceptable.[20]

Article 23(7) of the AI Act also imposes a general obligation on importers to cooperate with the relevant national authorities, including market surveillance authorities (in the field of AI as well as sectoral authorities, such as those responsible for personal data protection or competition rules) and other authorities for the protection of fundamental rights. Importers are required to cooperate with these authorities concerning any actions undertaken by them in relation to the high-risk AI system supplied by the importer. The aim of these measures is, in particular, to reduce or limit the risks posed by such systems. Certain cooperation obligations are specified in other provisions of the Regulation, for example those concerning the provision of documentation and information, as well as notification obligations. Paragraph 7 should therefore be understood as imposing a general obligation on importers to cooperate beyond the specific duties expressly detailed in the Regulation. At the same time, the provisions do not set out a catalogue of actions with which importers are obliged to cooperate. The duty to cooperate extends to any action undertaken by the authority concerned that falls within its competence. In other words, an importer may refuse to cooperate only if the authority's request to take a specific action (or omission) concerns a matter that lies beyond its competence.

Failure to comply with the obligations referred to above is subject to an administrative fine, the amount of which is specified in Article 99.

OBLIGATIONS OF DISTRIBUTORS

The obligations of distributors of high-risk AI systems are laid down in detail in Article 24. These are mainly verification obligations. The distributor acts as an intermediary (most often as a vendor or service provider) and does not influence the design of AI systems or their subsequent use. Consequently, its responsibilities

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[18] L. Riede, O. Talhoff, 'Article 23', in: Pehlivan C.N., Forgó N., Valcke P. (eds), *The EU*…, op. cit., p. 513.

[19] In accordance with Article 6 of Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385), hereinafter referred to as 'the Regulation No 1', the institutions may lay down detailed rules for the use of the language regime in their rules of procedure.

[20] See Article 1 of Regulation No 1.

in providing high-risk AI systems are considerably less extensive than those of providers and deployers. The verification duties of distributors are also more limited than those of importers and are of a more formal nature.

It is the distributor's responsibility to verify that the other entities involved in the supply chain of a high-risk AI system have properly fulfilled their obligations, as provided in Article 16(b) and (c) and Article 23(3) of the AI Act, respectively. The provider or importer (in cases where the high-risk AI system is placed on the market from a third country) is required to confirm to the distributor that the high-risk AI system includes:

(1) CE conformity marking,
(2) copies of the EU declaration of conformity,
(3) instructions for use,
(4) information on the AI system, on its packaging or in the accompanying documentation, indicating the name, registered trade name or registered trademark and the address at which the provider or importer can be contacted, and
(5) a quality management system that complies with Article 17.

Once again, it is good practice to prepare a verification protocol in which distributors record the measures taken to verify the provider's compliance with EU regulations and, if necessary, attach relevant documentation (for example, a database printout or photographs).

The verification of part of the data is carried out by checking the database established under Article 71. According to Annex VIII, Section A, the database must contain information on the authorised representative, include copies of the EU declaration of conformity and the instructions for use, and contain certification details and provider information. Information concerning the CE marking must be verified by the distributor in the database of the relevant certification body. A copy of the declaration of conformity should be presented to the distributor, along with confirmation that the provider has an appropriate quality management system in place. The quality management system takes the form of written policies, procedures and instructions;[21] therefore, a copy may be shown. The distributor can verify the existence of information relating to the provider and importer by inspecting the system's packaging, the accompanying physical documentation, or by reproducing the documentation under test conditions in the case of electronic documentation or information incorporated within the system itself.

Under Article 24(2), a distributor is obliged not to make a high-risk AI system available if, in its assessment, the system does not meet the requirements set out in Section 2 of Chapter III (Articles 8–15). As with importers and their corresponding obligation of omission, this provision should be understood to mean that the distributor's obligation to perform a positive verification is limited solely to checking that the AI system possesses the necessary documents and required features. This obligation does not extend to verifying whether the system in fact meets the substantive requirements of Articles 8 to 15 of the AI Act. It may be assumed that obtaining a CE certificate and an EU declaration of conformity signifies that the

[21] See Article 17.

system complies with those requirements. However, this assumption may prove to be unfounded. If the distributor obtains information – from any source – indicating that the AI system may not comply with these requirements (and such information need not be confirmed; a reasonable assumption suffices), the distributor must not make the AI system available.

As in the case of importers, such information may originate, for instance, from media reports (for example, when it is revealed that a particular provider does not design high-risk AI systems in accordance with data collection requirements for training) or from whistleblowers. It is also possible that a distributor may undertake verification activities beyond those required by law, and the results of those activities may provide grounds to believe that the system does not meet the prescribed requirements.

It has been aptly noted in the legal doctrine[22] that this obligation is more limited than that imposed on importers. This may be explained by the fact that distributors typically have less detailed insight into the functionality of AI systems and less direct contact with the providers of high-risk AI systems. It has also been observed that, in practice, Article 23(2) may be interpreted as a stricter version of Article 24(2); however, it is debatable whether this is in fact the case. If the distributor does not have a 'sufficient' reason for concern, it can hardly be expected to take targeted action to refrain from making the system available on the market.[23]

A specific obligation of the distributor arises where a high-risk AI system poses a risk within the meaning of Article 79(1).[24] In such a situation, the distributor shall inform the provider or the importer of the system, as the case may be, of the existence of that risk. Against the background of this obligation, the question arises as to whether the distributor has a positive duty to act to verify the existence of such a risk, or whether, as with the other requirements listed in paragraph 2, the obligation to provide information arises only when the distributor becomes aware of such a circumstance, without being under a duty to actively seek it. Given that this obligation is provided for in Article 24(2) and not in paragraph 1, the absence of its inclusion in the closed catalogue of duties in paragraph 1 should be interpreted to mean that there is no positive obligation to verify whether a system poses the risk referred to in Article 79(1). Obtaining the CE marking and the declaration of conformity should, in principle, exclude the existence of such a risk. However, it may occur that once the system has been labelled, certain characteristics or forms of use are revealed that justify considering it as a product posing a risk to health, safety or the fundamental rights of individuals.

The procedure for identifying a product as posing a risk, and for undertaking corrective action and notification, is carried out by the supervisory authority. By interpreting the phrase 'poses a risk', which employs the indicative rather than the conditional mood (as in the case of other risks described in this provision), it may

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[22] L. Riede, O. Talhoff, 'Article 24', in: Pehlivan C.N., Forgó N., Valcke P. (eds), *The EU Artificial Intelligence*…, op. cit., p. 521.

[23] T. Fülöp, P. Poindl, 'Article 27', in: Pehlivan C.N., Forgó N., Valcke P. (eds), *The EU Artificial Intelligence*…, op. cit., p. 522.

[24] See Article 79.

be concluded that confirmed knowledge is required in this regard; that is, it cannot rest merely on a reasonable assumption. In this context, the 'creation of a risk' refers to an abstract hazard. It is not necessary that harm be caused to any entity, nor is it necessary to establish certainty that a risk to health, safety or fundamental rights will materialise. This means that any non-compliance of the system – arising, for instance, from the processing, collection or selection of data – may be likely to adversely affect rights such as privacy, non-discrimination or personal data protection, regardless of whether those risks actually materialise or whether any damage results.

Article 24(3) makes distributors responsible for the high-risk AI system for as long as it remains in their possession. Regardless of whether the system is stored in digital or tangible form, if it is modified or if AI Act compliance assessments become outdated, responsibility lies with the distributor. In this context, cybersecurity obligations are of particular significance. It is necessary to take proactive measures, similar to those required of providers,[25] aimed at preventing unauthorised third-party access to the system that could alter its use or affect its results or operational effectiveness by exploiting vulnerabilities. The distributor bears responsibility for the ineffectiveness of any such measures.

The obligations set out in Article 24(4) mirror those provided for in paragraph 2, although they concern situations in which irregularities have already been identified after the high-risk AI system has been made available. As the likelihood of threats to the rights of users increases in such cases, the obligations of the distributor are correspondingly greater. The distributor is required to take the corrective measures necessary to ensure that the high-risk AI system complies with the requirements set out in Section 2, to withdraw it from the market or from use, or to ensure that such corrective measures are taken by the provider, importer or relevant operator, as appropriate. This obligation corresponds to that imposed on providers under Article 20.

Corrective measures are actions aimed at bringing a high-risk AI system into compliance with the requirements set out in Articles 8–15. Consequently, they require the identification of non-compliance and the modification of the system in such a way as to achieve conformity.[26] By analogy with paragraph 2, the distributor is obliged to inform the provider or importer of the system, as well as the competent authorities, when a high-risk AI system poses a risk to health, safety or fundamental rights.

The obligations laid down in paragraphs 5 and 6 duplicate those of importers as set out in Article 23(6) and (7), although they are phrased somewhat differently. Once again, failure to comply with these obligations is subject to the imposition of an administrative monetary penalty.[27]

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[25] See Article 15.
[26] See Article 20.
[27] See Article 99.

OBLIGATIONS OF ENTITIES USING HIGH-RISK AI SYSTEMS

The obligations of entities applying high-risk AI systems are mainly set out in Article 26 of the AI Act. For those applying high-risk AI systems (referred to as deployers), the EU legislature imposes – immediately after providers – a significant number of obligations. Importantly, the notion of an applying entity is not synonymous with that of a person using or benefiting from the system.[28] The obligations provided for in this provision in the case of the use of AI systems in recruitment processes are imposed, for example, on the entrepreneur and not on the employee from the human resources department who operates the system (software).

As indicated in recital 93 of the Preamble, the risks associated with AI systems may arise from the manner in which they are used. Therefore, entities deploying high-risk AI systems play a key role in ensuring the protection of fundamental rights, supplementing the obligations of the provider during the system's development. These entities understand how the high-risk AI system will be used and are able to identify potential risks that were not foreseen at the design stage.

The provisions of Article 26(1)–(4) impose the following obligations on those deploying high-risk AI systems:

(1) to take technical and organisational measures to monitor the compliance of the AI system with the operating instructions;
(2) to entrust supervision to individuals who possess the necessary competence, training and authority, as well as adequate support; and
(3) to the extent that they have control over the input data, to ensure the adequacy and sufficient representativeness of such data with regard to the purpose of the high-risk AI system.

Technical and organisational measures aimed at monitoring compliance of the AI system with the user manual may include, for example, the establishment of appropriate procedures to be followed whenever an anomaly is detected by a user, regular internal audits to verify compliance with the manual, periodic staff training, or the introduction of automatic alerts in cases where the results significantly deviate from the average.

Supervisory responsibilities entail the introduction of a principle of *human-on-the-loop* control over system operation, rather than active *human-in-the-loop* participation.[29] This means that the human role is to oversee the functioning of the system rather than to actively interact with it – for example, by continuously providing feedback on the accuracy of the results as part of an ongoing learning process. At the same time, such supervision must be genuine and not merely formal. The supervisor must possess appropriate competence, training and authority, that is, knowledge and experience regarding the operation of high-risk AI systems, the applicable standards and the risks associated with their violation, the potential for irregularities, and the correct responses to their detection. It is advisable

[28] See Article 3(4).

[29] R. Pinto, T. Mettler, M. Taisch, 'Managing supplier delivery reliability risk under limited information: Foundations for a human-in-the-loop DSS', *Decision Support Systems*, 2013, Vol. 54, Issue 2, pp. 1076–1084.

for supervisors to rotate periodically, since research indicates that individuals often become fatigued or distracted when working with autonomous systems.[30] Consequently, they cannot maintain effective supervision of AI systems for extended periods without an increased risk of undetected anomalies. This is also related to the psychological tendency of individuals to assume that such systems cannot fail or make errors – a presumption that is frequently incorrect.[31]

With regard to input data, the applying entity is obliged to ensure the adequacy and sufficient representativeness of the input data in relation to the purpose of the high-risk AI system. Input data refers to data provided to, or directly extracted by, the AI system from which it generates results.[32] As a general rule, the architecture of the system determines what input data must be provided in order to produce a given output. For example, in recruitment systems, the relevant data will include information concerning education. However, the inclusion of data on race could lead to outcomes that appear discriminatory. It appears that the requirement for data representativeness will not apply to all instances of high-risk AI system deployment. Job centres or private recruiters, for example, have no control over who chooses to apply for a given position (for instance, whether the applicants will all be women).

A case study concerning the use of such a system by public administration should be mentioned. In May 2014, the Polish Ministry of Labour and Social Policy introduced an automated decision-making system aimed at tackling unemployment by categorising jobseekers into three distinct groups based on specific characteristics.[33] The categorisation process began with a computer interview, after which various factors were entered into a database, with each factor assigned a particular score. The system took into account two key variables: 'distance from the labour market' and 'readiness to enter or re-enter the labour market'. These criteria assessed factors that hindered entry into employment, such as gender, age and education. The system has been subject to considerable criticism due to its lack of transparency, data protection concerns, potential discriminatory effects and the absence of genuine human oversight.[34] The provisions enabling the use of the system were examined by the Constitutional Court in relation to the lack of a legal remedy and the question of whether the system had been correctly regulated by means of a regulation.[35] The Court held that profiling does not constitute a case, decision or ruling within the meaning of the Constitution. The mere collection or processing of data does not determine the

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[30] R. Weitkunat, M. Bestle, 'Computerized Mackworth vigilance clock test', *Computer Methods and Programs in Biomedicine*, 1990, Vol. 32, Issue 2, pp. 147–149.

[31] Ibidem, pp. 147–149.

[32] See Article 3(33).

[33] Ministry of Labour and Social Policy, *Profilowanie pomocy dla osób bezrobotnych. Podręcznik dla pracowników powiatowych urzedów pracy*, 2014; https://panoptykon.org/sites/default/files/podrecznik_profilowania.pdf [accessed on 5 February 2025].

[34] J. Niklas, K. Sztandar-Sztanderska, K. Szymielewicz, *Profiling the Unemployed in Poland: Social and Political Implications of Algorithmic Decision Making*, Warszawa, 2015, p. 33; https://panoptykon.org/sites/default/files/leadimage-biblioteka/panoptykon_profiling_report_final.pdf [accessed on 5 February 2025]; K. Sztandar-Sztanderska, M. Zielenśka, 'When a Human Says "No" to a Computer: Frontline Oversight of the Profiling Algorithm in Public Employment Services in Poland', *Sozialer Fortschritt*, 2022, Vol. 71, No. 6, p. 468.

[35] Judgment of the Constitutional Court of 6 June 2018, K-53/16, *OTK-A*, 2018/38.

legal situation of an individual. For this reason, it was held that, despite the absence of a means to challenge the act of determining a profile for an unemployed person, the provisions were compatible with Article 45(1) and Article 78 of the Constitution. However, the Court concluded that the appropriate form of regulation should be a statute rather than a regulation.

Furthermore, Article 26(5) reiterates the obligation to monitor the compliance of system use with the user manual, supplementing it with the duty to provide the system provider with data concerning the performance of the high-risk AI system.[36] Where appropriate, this may also include data necessary for analysing interactions with other AI systems. The AI Act does not specify the form of data transmission, its timing, frequency or on whose initiative – the provider's or the deployer's – the data should be transmitted. Nevertheless, it should be assumed that the transmission of data should take place on a durable medium, either electronic or paper, or in the form of an electronic or paper document. The frequency of data transmission should correspond to the monitoring plan established by the provider on the basis of the template developed by the Commission pursuant to Article 72(3) of the AI Act. The deployer is required to collect the data on an ongoing basis (a duty implied by the relevant provision) and to transmit it to the provider without undue delay.[37]

In the event that deployers identify the occurrence of a serious incident, they shall immediately inform the provider, followed by the importer or distributor, and the relevant market surveillance authorities. Pursuant to Article 3(49) of the AI Act, a serious incident means an incident or malfunction of an AI system that directly or indirectly results in any of the following events:

(a) the death of a person or serious harm to a person's health,
(b) serious and irreversible interference with the management or operation of critical infrastructure,
(c) a breach of the obligations provided for in Union law that are intended to protect fundamental rights, or
(d) serious damage to property or to the environment.

If the deployer is unable to contact the provider, the EU legislature requires the corresponding application of Article 73 of the AI Act. In such a case, the deployer is obliged to notify the market surveillance authorities of the Member State in which the incident occurred. Notification must be made immediately, and, in any case, no later than 15 days after the deployer becomes aware of the serious incident; and in the case of a serious and irreversible disruption to the management or operation of critical infrastructure, no later than two days after the operator becomes aware of that incident. These time limits define the period between becoming aware of the incident and notifying the authority. Accordingly, the provider's response to the deployer's notification must occur more swiftly; otherwise, the deployer must notify the authority within the deadline. This will be particularly demanding in the case of the two-day deadline; however, it appears that the deployer may notify the authorities almost simultaneously with the provider if the latter fails to respond

[36] See Article 72(2).
[37] See Article 72.

immediately. It should also be recalled that such an obligation, in any case, already rests with that deployer.

With regard to entities that are financial institutions subject to requirements concerning their internal management systems, arrangements or procedures under Union financial services law, the monitoring obligation shall be deemed fulfilled where the financial institution complies with the relevant provisions of that law. The AI Act thus establishes an exception for financial institutions (primarily banks), exempting them from the obligation to report provider data or to inform entities of significant risks or serious incidents, provided they are already subject to requirements relating to internal management systems, arrangements or procedures under EU financial services legislation. This exception exists because such regulations already impose analogous obligations, and financial institutions are strictly supervised by the competent authorities in this respect.

Accordingly, information on risks or incidents will still be transmitted, but through the specific procedures applicable to financial institutions, such as those provided for in Article 96 of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC, 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC; and in Article 17 et seq. of Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on the operational digital resilience of the financial sector, amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011).

Paragraph 6 requires those deploying high-risk AI systems to retain the event logs that are automatically generated by the system. The retention period should be no less than six months, unless otherwise provided by other provisions. According to Article 16(e), event logs shall be kept by providers for as long as the logs remain under their control. The provision in Article 25(6) thus complements this regulation by indicating that, when the logs are under the control of the deployer, it is the deployer's responsibility to store the event records for a specified period.[38] It is more likely that such records will be under the control of the deploying entity when the AI system is operated within its own infrastructure. It is less likely that such records will fall under its control when the AI system is provided as an external service (outsourcing).

A specific obligation is imposed by Article 26(8) on deployers of high-risk AI systems that are public bodies or institutions, or bodies and agencies of the Union. They are required to register as referred to in Article 49. Indeed, pursuant to Article 49(3), deployers must register themselves, select the relevant system and register its use in the EU database referred to in Article 71, even before putting into use or operating a high-risk AI system listed in Annex III. Excluded from this obligation are AI systems constituting critical infrastructure, that is, AI systems intended for use as safety process elements in the management of critical infrastructures, such as digital networks, traffic systems and processes, or in their operation or in the

[38] See Article 19.

supply of water, gas, heat or electricity. Unlike providers, deployers do not register the system itself but only themselves as deployers.

The expression 'before commissioning' is not entirely clear, since the commissioning of an AI system is carried out by the provider. According to Article 3(11) of the AI Act, 'commissioning' means the delivery of an AI system for first use directly to the deployer or for its own use within the Union in accordance with its intended purpose. A situation referred to in Article 25 may arise in which a deployer modifies a system in such a way that it becomes classified as a system provider. In that case, it would be subject both to the obligations of providers with regard to commissioning and to those of deployers concerning use.

If deployers establish that a high-risk AI system they intend to use has not been registered in the EU database referred to in Article 71, they shall refrain from using that system and shall inform the provider or distributor accordingly. The deploying entity is obliged to abstain from using the system until it has been registered in the EU database. The AI Act does not specify the form or timing of the provision of such information; however, it should be assumed that this must be done without undue delay and in a manner that allows the fact of the notification to be recorded.

As with other actors in the supply chain, paragraph 12 introduces a general obligation to cooperate with the relevant authorities in any actions these authorities undertake in relation to the high-risk AI system for the purpose of implementing the AI Act. All the observations made concerning the obligations of importers and distributors in this respect apply here as well. Failure to comply with the obligations laid down in Article 26 of the AI Act is subject to an administrative fine.[39]

The provisions of the AI Act also impose another, in principle, key obligation on deployers – namely, to assess the impact of high-risk AI systems on fundamental rights, as provided for in Article 27. A discussion of this issue lies beyond the scope of this paper; however, unlike other obligations, it has been the subject of doctrinal analysis that may serve as guidance for practitioners and deployers.[40]

ASSUMPTION OF PROVIDER OBLIGATIONS

Article 25 of the AI Act regulates the modification of liability for high-risk AI systems in certain circumstances. Paragraph 1 sets out the situation in which, after the marketing or commissioning of a high-risk AI system, an entity other than the original provider interferes with the system in such a way that – by the intention of the legislature – it results in the assumption of the responsibilities and obligations of the system provider.

The inclusion of this provision stems from the fact that operators may use AI systems available on the market, modify them and, in doing so, effectively create a new system, for example, one tailored to the profile of a specific business.

[39] See Article 99.

[40] See, *inter alia*, A. Mantelero, 'The Fundamental Rights Impact Assessment (FRIA) in the AI Act: Roots, legal obligations and key elements for a model template', *Computer Law & Security Review*, 2024, No. 54, and sources cited therein.

The original system then serves as the foundation for the functioning of the modified system.

The personal scope of the provision encompasses distributors, importers, deployers or other entities. It appears that the term 'third party' should be understood as referring to any entity undertaking the activities described in paragraph 1. This term should not, however, be equated with the term 'third party' used elsewhere in the AI Act to refer to an entity performing the conformity assessment.[41]

The actions that result in the transfer of responsibility for a high-risk AI system are listed in Article 25(1). These actions – by a distributor, importer, deployer or other third party – include:

(1) the inclusion by one of these entities of its name or trademark on a high-risk AI system already placed on the market or put into service, without prejudice to contractual arrangements providing otherwise for the sharing of responsibilities;
(2) making a material change to a high-risk AI system already placed on the market or put into service, such that it remains a high-risk AI system; and
(3) changing the purpose of an AI system, including a general-purpose AI system that is not classified as a high-risk AI system and that has already been placed on the market or put into service, in such a way that the AI system concerned becomes a high-risk AI system.

The first action concerns the inclusion of a name or trademark on a high-risk AI system, without prejudice to contractual arrangements providing for a different allocation of responsibilities. The final part of the provision means that the parties (the original provider and the distributor, importer, deployer or other third party) may agree that, despite the labelling, liability and the status of provider are not transferred to another party. By applying *a contrario* interpretation to the last sentence of paragraph 2, it should be assumed that if the indications are affixed in a manner contrary to such an agreement, responsibility as provider is transferred to the party introducing the indications. However, that party remains liable to the original provider for conduct contrary to the agreement. This regulation therefore has a protective function for users and an indirect sanctioning function for those who introduce the labelling.

The second action concerns making a substantial change to the system, such that it remains a high-risk AI system. The notion of a 'substantial change' is defined in Article 3(23). The EU legislature has not provided examples of situations falling within this definition. Creating such a list would be difficult due to the considerable diversity of systems classified as high-risk AI systems. In particular, substantial changes will relate to modifications of the system's purpose (such as the broadening or narrowing of its scope; a mere alteration in the types of results obtained will not constitute a substantial change) or changes that significantly affect the system's operation (e.g., the scope of validation data used, the method of data processing, processing rules, or rules of human supervision). Other, non-substantial changes do not have the consequences described in the provision, although they still need to be assessed in light of the contractual arrangements between the provider and the

[41] See Article 3(21).

modifier, as well as under EU and national product safety and market surveillance regulations in this area.

The third action concerns changing the purpose of any AI system in such a way that the system in question becomes a high-risk AI system. No requirement of materiality is expressly imposed here; however, it should be assumed that any change that alters the system's classification constitutes a material change. This means that if any modification results in an AI system that was not previously classified as high-risk becoming so classified, the modifier acquires the status, duties and responsibilities of a provider.

A literal interpretation indicates that contractual agreements may exclude the consequences of actions provided for in the provision only in the case referred to in Article 25(1)(a). This result is also supported by a purposive interpretation. The purpose of the provision is to preserve legal certainty.[42] Consequently, end users, supervisory authorities and operators should not be in doubt as to which entity bears the obligations of the provider. In cases where contractual arrangements exist, this certainty is significantly diminished if the contracts are not public, are subject to national restrictions, or are potentially contentious between the parties. Thus, it cannot be maintained that a purposive interpretation supports a uniform reading of Article 25(1)(a)–(c) with respect to the possibility and extent of contractual sharing of obligations.[43]

In the situations described above, the modifier assumes the obligations of the provider as laid down in Article 16 of the AI Act.

Paragraph 2, in turn, provides that if the modifier is deemed to be the provider in accordance with paragraph 1, the original provider is no longer regarded as the provider of that specific AI system. Nevertheless, this provision also establishes certain obligations for the original provider. The original provider is required to make the necessary information available and to provide the reasonably expected technical access and other support necessary to ensure compliance with the obligations of the provider under the AI Act, particularly those relating to the criteria for assessing the compliance of high-risk AI systems.

This provision does not in any way specify the scope of the original provider's obligations, using vague concepts such as 'necessary' and 'reasonably expected', as well as an open catalogue of duties ('other support'). Given these interpretative difficulties, the obligations to provide informational or technical support should be regarded as limited strictly to those imposed on the new provider (the modifier). These will primarily include information on the functioning of the system, models or components used, training data, validation data, technical documentation, conformity assessment, certificates and labels, and compliance with the requirements of the AI Act. Verification of certain data may be carried out by consulting the database established under Article 71 of the AI Act. According to Annex VIII, Section A, the database must include information on the authorised representative,

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42 See recital 84 of the Preamble.

43 L. Riede, O. Talhoff, 'Article 25', in: Pehlivan C.N., Forgó N., Valcke P. (eds), *The EU Artificial Intelligence…*, op. cit., p. 531.

attached copies of the EU declaration of conformity and the user manual, as well as information on certification. However, the extraction of other data requires the cooperation of the original providers.

For example, it may occur that a competent national authority requests information from a new provider under Article 21(1). However, the latter may not possess all the necessary information, since some of the events covered by the request may have taken place prior to the modification of the system within the meaning of paragraph 1. Without this information, the provider cannot properly assess certain risks. Therefore, the provider shall request such information from the original provider in order to obtain complete data, analysis or assessment.

The request for cooperation must not extend beyond the information and support necessary for the proper fulfilment of the obligations under the AI Act which the new provider cannot obtain using its own personal, technical or financial resources – or where doing so would entail a disproportionate effort compared to the effort required from the original provider to transfer the relevant data or support. In particular, the duty to cooperate does not apply to the transfer of information, access or other forms of support that are not required for compliance with the AI Act, but are instead directed towards the economic development of the new provider, the acquisition of know-how or technological support, or the substitution of its own resources (knowledge, means, time, personnel) for those of the original provider.

Article 25(4) of the AI Act regulates the obligation to conclude a contract between the provider of a high-risk AI system and a third party supplying an AI system or other goods or services for that system, to enable the proper performance of the obligations set out in the Regulation. The provision introduces a concept not found elsewhere in the Regulation – namely, that of a third party providing an AI system with tools, services, components or processes used in, or integrated with, a high-risk AI system. These persons include all entities that supply the goods or services referred to in the provision to the high-risk AI system in question. The provision requires the provider to enter into written agreements with such entities. The question arises as to which entities supply these components and, consequently, with whom the contracts should be concluded – whether with the manufacturer, supplier or possibly a distributor with whom the supplier has a contractual relationship. It should be considered that the relevant entity is the supplier. Indeed, the provision does not refer to a 'third-party manufacturer' or a 'third-party distributor', but to a 'third-party supplier'.

An exemption from this obligation applies to third parties that make tools, services, processes or components available to the public under a free, open software licence, provided these are not purpose-built AI models. This means that a provider using such goods or services is not required to conclude the contract referred to in the first sentence of the provision. Recitals 102 and 103 of the AI Act clarify the meaning of a free and open licence.[44] Such software will generally be distributed in source code form through open repositories. According to recital 89 of the Preamble,

[44] See recitals 102 and 103 of the Preamble.

the purpose of this exemption is to relieve those working under free and open licences from liability throughout the value chain.

An example of a repository that publishes source code for algorithms under an open licence is MIT. Excluded from this exception are general-purpose AI models as defined in Article 3(63) of the AI Act. Thus, the provision distinguishes between a system and a general-purpose AI model. While the popular ChatGPT constitutes a system, a model would be, for example, GPT-4o.

The second paragraph of the provision states that the AI Office may develop and recommend voluntary model contractual provisions for agreements between providers of high-risk AI systems and third parties. These model contracts will remain non-binding and are likely to be highly general, given the specific characteristics of the industries to which such contractual provisions will apply. Nonetheless, they will undoubtedly embody sound contractual practices that may serve as valuable guidance on how to draft agreements that comply with the requirements of the AI Act. It will, however, be necessary to adapt such templates to the particular features of the high-risk AI regime, its purpose, its application, its users and the relevant industry.

CONCLUSION

In conclusion, identifying the role an actor plays in the supply chain of high-risk AI systems is of fundamental importance. The EU legislature has placed a significant burden of verification on importers and distributors. Most of this burden concerns the obligations of providers and the need to verify that providers are complying with their own responsibilities. The obligations imposed on importers and distributors primarily involve the formal verification that a particular procedure or task has been carried out, without requiring an analysis of whether it has been performed correctly. The provisions concerning the obligations imposed on importers and distributors are largely similar. Although certain differences in wording exist, these should not, in practice, lead to significant discrepancies in their application. Nevertheless, it remains the case that the obligations of distributors are generally more limited than those of importers, who bear the primary burden of verifying compliance. This is because the relationship between importer and provider is, in principle, closer than that between distributor and provider.

The situation differs for entities deploying high-risk AI systems. The obligations imposed on such entities are not usually subordinate to those of providers. They consist of independent responsibilities arising from the need to address the risks inherent in the deployment phase of high-risk AI systems. The EU legislature has assumed – rightly, it appears – that violations of fundamental rights may occur at this stage, even when the obligations intended to minimise such risks have been properly fulfilled during the development and distribution stages of high-risk AI systems. Indeed, deployers exert a crucial influence on how these systems are ultimately used, how data are protected, how results are utilised or verified, and on the procedures governing their use.

There exists a particular situation in which interference with AI systems results in the imposition of obligations on a non-provider equivalent to those of providers of high-risk AI systems. This stems from the fact that AI-based systems are, among other things, susceptible to changes in their purpose in ways that are independent of their design and of the intentions of their providers. In such circumstances, it is not justified to hold providers responsible for ensuring compliance with the requirements of the AI Act. It should, therefore, always be borne in mind that the responsibilities of importers, distributors and deployers may evolve depending on the circumstances and, in certain cases, may be equivalent to those of providers of high-risk AI systems.

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THE LEGAL ASPECTS OF THE USE OF THE ELECTRONIC FISCAL AND CUSTOMS SERVICES PLATFORM BY ENTREPRENEURS ENGAGED IN THE INTERNATIONAL TRADE OF GOODS

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Abstract
Entrepreneurs engaged in international trade are required to use the Electronic Fiscal and Customs Services Platform for the purpose of communicating with the National Tax Administration on matters relating to economic and tax policy. This modern technological tool plays an important role in the day-to-day operations of businesses and in the settlement of customs and other border taxes levied on economic operators engaged in the cross-border trade of goods within the European Union customs territory. The Electronic Fiscal and Customs Services Platform is an institution established under Polish law, aimed at implementing systemic, comprehensive solutions related to EU customs law. The objective of this article is to demonstrate that EU standards have been sufficiently detailed by the provisions of the Customs Law Act to ensure the functional implementation of this platform by Polish entrepreneurs. Without taking into account the specific circumstances of national legislation, electronic data-processing systems would be unable to function effectively within the context of the Polish economic framework.

Keywords: PUESC, custom, trade of goods, entrepreneur

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INTRODUCTION

Contemporary technologies are of pivotal significance to international trade operations. Their integration into the daily practices of entrepreneurs is imperative for the performance of such economic activities. A notable example is the Electronic Tax and Customs Services Platform (pl. *Platforma Usług Elektronicznych Skarbowo-Celnych*), commonly referred to by its acronym PUESC.[1] The use of capital letters in this acronym clearly signifies that it is regarded as a proper name for a specific instrument of contemporary technology. A linguistic and grammatical interpretation of this legal term also leads to the conclusion that the platform is associated with tax and customs services. In colloquial Polish, the term 'platform' is polysemous. However, in the analysed acronym, the meaning should be interpreted as referring to a 'domain of joint activity'.[2] The provision of tax and customs services is therefore dependent on the cooperation of various entities. It is evident that the services in question are of a public nature rather than of a private-law character. The administration of taxes and customs falls within the competence of public authorities, who are entrusted with the execution of public tasks. PUESC's historical connection to the Customs Service is evident in the institution's nomenclature, wherein the final two letters of the acronym, 'SC' (pl. *Służba Celna*), serve as a remnant of this historical association. However, following the reform of the tax, customs, and fiscal control administration, the National Revenue Administration (hereinafter referred to as 'the NRA') was established, within which the Customs and Tax Service now operates.[3] For this reason, the previous full nomenclature of the platform required adjustment to reflect the new legal framework, as it had become inaccurate and misleading. Currently, this instrument of modern technology – and the term 'services' used in its name – are defined objectively in Polish law. It is important to note that this modification did not necessitate a change to the acronym PUESC. Clearly, the legal change was formal and linguistic in nature, as emphasised through this legislative adjustment. Nevertheless, the use of the linguistic construction 'tax and customs' gives rise to significant concerns, as both the service and the procedures it applies are referred to in the National Revenue Administration Act by the term 'customs and tax'. As demonstrated in the existing literature, concerns have already been raised regarding both the nomenclature of the control procedure[4] and the NRA model.[5] That said, the fundamental nature and purpose of the platform itself have remained unaltered. It serves as an instrument for the provision of customs and tax services by the NRA, whose authorities and supporting apparatus may be referred

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1 Cf. Article 10a(1) of the Act of 19 March 2004: Customs Law (consolidated text: Journal of Laws of 2024, item 1373, as amended), hereinafter referred to as 'the CL', and Article 35a(1) of the Act of 16 November 2016 on the National Revenue Administration (consolidated text: Journal of Laws of 2023, item 615, as amended), hereinafter referred to as the 'the NRAA'.

2 *Wielki Słownik Języka Polskiego (WSJP PAN)*; https://wsjp.pl [accessed on 3 February 2025].

3 See Article 1(3) NRAA.

4 A. Gorgol, 'Krytyczne uwagi o nomenklaturze kontroli celno-skarbowej', *Dyskurs Prawniczy i Administracyjny*, 2022, No. 3, pp. 13–21.

5 A. Gorgol, 'Krytyczne uwagi o ustawowym modelu kontroli celno-skarbowej', *Białostockie Studia Prawnicze*, 2023, No. 28, pp. 43–50.

to as 'service providers'. At the same time, it should be noted that the 'service recipients' may include not only entrepreneurs but also national public authorities, the administrations of European Union Member States, and EU bodies. The existing literature clearly indicates that the PUESC platform is regarded by many as the core ICT system of the NRA. It is considered an essential and mandatory tool for businesses in their interactions with the authorities of this administration.[6]

A wide variety of entities expressing interest in accessing the PUESC platform and using it to pursue their own objectives necessitates cooperation among them, the essential condition for which is mutual communication. The transmission of informational messages must be standardised, transmitted remotely, and decoded in a manner that ensures they are comprehensible to their recipients. In the context of the international environment, the prospect of effective cooperation – whether on vertical or horizontal levels – depends on the use of a uniform system of remote communication. The optimal instruments necessary to achieve this outcome are techniques for the electronic transmission, collection, processing, and utilisation of data. The necessity for technical standardisation and legal regulation is paramount in this context. It is evident that no individual Member State possesses the capacity to fulfil this requirement independently. Therefore, the European Union (EU) assumes a pivotal role in the regulatory oversight of the PUESC platform, in addition to its establishment and operational management. The prevailing system for the implementation of electronic communication techniques among businesses and the customs administrations of Member States – as well as among these administrations themselves and between them and EU bodies – is predicated on a legal framework delineated by the Union Customs Code.[7] In the Polish legal system, this regulation takes precedence over national statutes, as it is directly applicable in every Member State.[8] Accordingly, any statute governing customs matters must not contain provisions that conflict with the provisions of the UCC. Furthermore, it would be incompatible with the established principles of legislative drafting if the provisions of the Code were to be replicated in such a statute without substantive amendments to their wording.[9] Under the prevailing statutory provisions, the Customs Law is to be regarded as a secondary governing authority, applicable in conjunction with the established provisions of European Union law.[10] It should first be noted that the scope of national customs law extends to matters not regulated by the Union Customs Code. In such cases, provisions that are absent

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[6] B. Rogowska-Rajda, 'Elektronizacja wiążących informacji – pierwszy krok w kierunku pełnej elektronizacji procedur podatkowych w działalności gospodarczej', *Przegląd Podatkowy*, 2024, No. 2, p. 21.

[7] See Article 6(1) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, (OJ L 269, 10.10.2013), hereinafter referred to as 'the UCC'.

[8] See Article 91(3) of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483, as amended, hereinafter referred to as 'the Constitution'.

[9] See § 4(2) of the Annex to the Regulation of the President of the Council of Ministers of 20 June 2002 on the 'Principles of Legislative Technique' (consolidated text: Journal of Laws of 2016, item 283, as amended), hereinafter referred to as 'the PLT'.

[10] See Article 1 CL.

from EU law – where it remains incomplete – are supplemented. The Customs Act serves to eliminate specific gaps in the field of customs legislation. Second, it encompasses issues listed in the mandatory authorisations provided by the Code and delegated to Member States for implementation through executive regulations. In the specific context under consideration, the act in question may be considered a standard implementation measure with regard to European Union law. Third, the relatively binding provisions of EU customs law permit Member States to regulate certain matters in a manner that deviates from the established standard. In such cases, national legislation establishes exceptions to EU regulations. For instance, the codified list of business entities was amended to include civil-law partnerships.[11] In light of the aforementioned considerations, a key question arises: does the PUESC fulfil the requirements set out in the Union Customs Code?

The field of customs law comprises two layers of regulation: fiscal and economic.[12] Revenues from customs duties exemplify its fiscal function, while its economic function involves the use of these revenues to regulate the directions, types, and volumes of international trade in goods. Relevant literature highlights the correlation between implementation of new ICT solutions and their fiscal determinants. The increased use of internet-based technologies in response to financial and budgetary constraints is accelerating the transformation of traditional frameworks governing commerce, governance, and public sector administration.[13] The field of customs law is characterised by its interdisciplinary nature. It constitutes an element of financial law and forms part of public economic law. Customs matters may thus be categorised according to their substance as either fiscal or economic in nature. The PUESC platform may be utilised by entrepreneurs in either category of matter. Nevertheless, the nomenclature employed is inadequate and misleading. It is notable that economic customs are the only category that does not possess a fiscal character. This distinction is not adequately reflected in the platform's acronym.

The European Union possesses exclusive jurisdiction over customs union affairs; however, this authority does not extend to taxation or other forms of public charges.[14] Consequently, PUESC does not represent a mandatory instrument for entrepreneurs in their interactions with tax authorities across the Member States. However, it should be noted that international trade in goods entails fiscal consequences, including the payment of customs duties and standard border taxes. On this basis alone, the solution adopted in the NRAA appears justified, whereby it establishes an obligation, analogous to that under customs law, for entrepreneurs to communicate with tax authorities via the PUESC platform.[15] The definition provided is as follows: 'The ICT system of the NRA, intended in particular for the submission and delivery

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[11] See Article 73 CL.

[12] W. Wójtowicz, 'Prawo celne', in: Brzeziński B., Dębowska-Romanowska T., Kalinowski M., Wójtowicz W. (eds), *Prawo finansowe*, Warszawa, 1996, p. 265.

[13] M.E. Milakovich, *Digital Governance: New Technologies for Improving Public Service and Participation*, 1st ed., New York, 2011, p. 3.

[14] See Article 3 of the Treaty on the Functioning of the European Union of 26 October 2012 (consolidated version: OJ C 326, 26.10.2012, p. 47).

[15] Cf. Article 35a(1) and (6a) NRAA.

of documents between NRA authorities and PUESC users in matters concerning customs law, excise duty, value added tax on the importation of goods, value added tax in the case of intra-Community acquisition of motor fuels, tax on the extraction of certain minerals, fuel charge, emission charge, and gambling.' It should be noted that PUESC is an information and communication technology system. Therefore, it would be inaccurate to characterise it simplistically and misleadingly as an internet portal.[16]

Entrepreneurs engaged in international trade in goods use the PUESC platform both to conduct their business activities and to settle the fiscal consequences of those activities with the NRA. This finding suggests that this modern technological apparatus plays a substantial role in foreign trade.[17] The objective of this study is to substantiate the hypothesis that the EU standard has been stipulated by the provisions of the Customs Law in a manner sufficient to enable its practical implementation by Polish entrepreneurs. This clearly defined research objective requires the use of the dogmatic legal method as the primary analytical approach to the source material. The comparative method will enable a juxtaposition of systemic solutions in Polish and EU law. However, there is little justification for applying it in a horizontal dimension, as PUESC is an platform governed exclusively by Polish law.

THE EUROPEAN UNION STANDARD GOVERNING MUTUAL COMMUNICATION BETWEEN ECONOMIC OPERATORS AND CUSTOMS AUTHORITIES IN THE E-CUSTOMS FRAMEWORK

Public economic law provides a statutory definition of an entrepreneur, whose distinguishing features include legal subjectivity conferred by legislation other than the Entrepreneurs' Law, and the conduct of business activity.[18] From the perspective of civil law status, an entrepreneur may be classified as a natural person, a legal person, or an organisational unit without legal personality (a *quasi*-legal entity). However, a civil-law partnership does not qualify as an entrepreneur, since – unlike partnerships governed by commercial law – it is the individual partners who possess that status.[19]

It should be noted that EU customs law does not employ the term 'civil-law partnership', as this concept is specific to Polish law. Instead, it introduces a broader and more collective notion of an organisational unit without legal personality. This legislative approach is fully justified, as the application of the UCC is not contingent upon a case-by-case enumeration of all equivalents to the civil-law partnership that may exist in the Member States. The codified standards should

[16] This erroneous perspective has been articulated in various publications, including: R. Michalski, 'Komentarz do art. 10(a) Digitalizacja wymiany informacji z organami celnymi', in: Komorowski E., Laszuk M., Michalski R., *Prawo celne. Komentarz*, Warszawa, 2022, pp. 181–189; P. Szymanek, *Nowe narzędzia informatyczne służące monitorowaniu podatników. Problematyka prawna*, Warszawa, 2023, p. 310.

[17] E. Gwardzińska, 'The standardisation of customs services in the European Union', *World Customs Journal*, 2012, Vol. 6, No. 1, p. 97.

[18] See Article 4(1) of the Act of 6 March 2018 – the Entrepreneurs' Law (consolidated text: Journal of Laws of 2024, item 236, as amended), hereinafter referred to as 'the EL'.

[19] See Article 4(2) EL.

reflect solutions common to the functioning of the Customs Union, rather than the specific features of national legal systems. It is important to note that customs law holds a special status in relation to the Entrepreneurs' Law. The general legal definition of an entrepreneur does not apply when this legal term is separately defined for the purposes of regulations within a specific branch of public economic law. It is evident that customs law represents a distinct branch of such legislation. The Union Customs Code contains its own definition of an 'economic operator', which differs substantively from the one used in the Entrepreneurs' Law. This definition is set out in an EU regulation, which occupies a superior position over national statutes within the Polish hierarchy of legal sources. Consequently, the statutory definition of an entrepreneur cannot be applied within the framework of customs law. It is also impermissible to alter the semantic scope of the definition provided by EU law – whether by omitting elements of its content or by expanding it through the introduction of new defining components, including those derived from the statutory definition. In applying the provisions of customs law, entities engaged in economic activity involving the trade of goods with foreign countries should therefore be identified solely on the basis of the codified definition.[20]

In the context of customs law, the term 'economic operator' is defined as a 'person'. Such an operator is considered a qualified person, as they engage in economic activity that is subject to the provisions of customs law. However, it is considered inappropriate and misleading to describe organisational units lacking any legal or natural personality as 'persons'. This results in a logical inconsistency and an internal contradiction within the provision defining the subject of customs law. In codified terms, a person is defined as a natural person, a legal person, or an organisational unit without legal personality but recognised – under EU or national law – as having legal capacity.[21] A civil-law partnership is not endowed with legal capacity. Under Polish civil law, it is treated as a named contract.[22] It does not function as a separate legal entity and therefore cannot independently acquire rights or incur obligations. Consequently, the assets utilised over the course of its operations are subject to joint ownership by the partners, who are the contracting parties.[23] The absence of legal capacity means that a civil-law partnership does not comply with the EU requirement for recognition as a person or an economic operator. Its designation as an 'organisational unit' is also questionable, since its essential contractual element is not its organisational structure. The recognition of a civil-law partnership as both a person and an economic operator under the provisions of customs law constitutes a legal fiction that is inconsistent with the provisions of the Entrepreneurs' Law and EU customs law. Nevertheless, in practice, it is identified as such under national customs regulations and is permitted to use the PUESC system.

Economic operators engaged in cross-border trade in goods are subject to differing legal obligations with respect to the fulfilment of the formal requirements imposed by customs law. These requirements depend on the location of the registered office

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[20] See Article 5(5) UCC.

[21] See Article 5(4) UCC.

[22] See Article 860 of the Act of 23 April 1964 – Civil Code (consolidated text: Journal of Laws of 2024, item 1061), hereinafter referred to as 'the CC'.

[23] See Article 863 CC.

of the operator, i.e. within or outside the customs territory, which is defined as a third country. The codified standard dictates that the registration obligation applies exclusively to operators whose registered office is situated within the EU territory, signifying that they are EU-based entities.[24] It is evident that economic operators from third countries are subject to registration only in exceptional circumstances, when required to complete the relevant documentation. Such obligations arise only under particular circumstances defined by customs law and do not serve as a general requirement for all non-EU entities.[25] A basic principle is that individuals or entities lacking the status of an economic operator are not subject to registration by the customs administration.[26] It is imperative to emphasise that the concept of 'seat', as interpreted under civil law, deviates from its meaning within the Union Customs Code. In the context of civil law, this concept pertains to a legal attribute that is exclusively applicable to entities other than natural persons. The definition of this attribute is derived through reference to the registered place of residence of the entity.[27] The seat of an organisational unit, irrespective of whether it possesses legal personality, is the location of its governing body.[28] Exceptions to this rule arise in circumstances where a specific legal provision or the entity's articles of association designate a different location as its seat. It is important to note that the Union Customs Code does not provide a definition of the general concept of a seat. Instead, it offers a definition of its qualified variant, namely the 'permanent business establishment'. In accordance with Article 5(32) UCC, a 'permanent business establishment' is defined as a fixed place of business in which the necessary human and technical resources are permanently available, enabling the person concerned to carry out all or part of their customs-related operations. It is an irrefutable fact that the term 'seat of an economic operator engaged in cross-border trade' refers to the place of business activity, encompassing operations subject to customs regulations. This interpretation is applicable to all legal forms of such operators, including natural persons. In such cases, the individual's place of residence is irrelevant for the purposes of customs law. This term is not defined by geographical location, but rather by the actual place where the business is conducted. The concept of a seat is materially expressed through the presence of human and technical resources concentrated in a given location by the economic operator. It should be noted that a key deficiency in EU customs law is its failure to provide a definition for the fundamental concept of a 'seat', limiting its scope to the more specific variant of the 'permanent business establishment'. This discrepancy can only be addressed through legal reasoning founded upon induction rather than deduction. Broadening the characteristics employed in the delineation of the codified term introduces a substantial degree of uncertainty into the resulting assertions – an uncertainty that would not arise if the term were assigned a clear statutory legal definition.

Upon completion of the registration process, an economic operator is assigned a unique identification number, which serves as the basis for its recognition within

[24] See Article 9(1) UCC.
[25] See Article 9(2) UCC.
[26] See Article 9(3) UCC.
[27] See Article 25 CC.
[28] See Article 41 CC.

the relevant legal and administrative frameworks. This identifier must be used in legal and commercial transactions to ensure that such activities are conducted securely, safeguarding both the public interest and the legitimate individual interests of other entrepreneurs and consumers. The Entrepreneurs' Law introduces an obligation to register the intention to conduct business activity.[29] Furthermore, the entrepreneur is bound by the stipulation to utilise the Tax Identification Number (NIP).[30] This number is the primary identifier used to identify entities conducting business activity in official registers. It is important to emphasise that the PUESC system is not a tool employed for the purpose of registering business activity or acquiring this number. However, it should be noted that fulfilling the conditions set out in the Entrepreneurs' Law is insufficient to conduct business activities involving the trade of goods subject to customs law regulations. Entities engaged in foreign trade must meet additional legal requirements, the strict observance of which is mandatory. Accordingly, such entities register via the PUESC platform in the Integrated Registration System for Entrepreneurs Engaged in Trade in Goods, abbreviated as SZPROT. In its present form, this official register – centrally maintained by the Ministry of Finance – is also employed for the management of entrepreneurs' applications. Its full title is as follows: 'The Integrated System for the Registration of Entrepreneurs and Application Processing (SZPROT)'.[31]

Entrepreneurs from EU Member States must not be afforded privileges or subjected to discrimination on the basis of their place of residence or registered office. The principle of fair market competition is predicated on the notion of equality among entities engaged in commercial activity. It is therefore imperative that EU entrepreneurs are registered in accordance with uniform legal principles. Discrepancies in regulations, procedures, and instruments have the potential to impede the effective operation of market mechanisms. The Polish Tax Identification Number (NIP) is not a suitable identifier for entities conducting business activity outside Polish territory, as foreign entrepreneurs do not use it. Consequently, in cases of cross-border trade involving the external border of the EU customs territory, the use of the EORI number becomes necessary. The acronym stands for 'Economic Operators Registration and Identification'.[32] According to the EU definition, it refers to the registration and identification number of an economic operator, which is unique within the EU customs territory and assigned by a customs authority to an entrepreneur or another person for the purpose of customs-related registration.[33]

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[29] See Article 17 EL.

[30] See Article 20(2) EL.

[31] See § 1 of the Ordinance of 26 November 2020 amending the Ordinance on the organisation of the National Revenue Administration, the Revenue Administration Office, the Tax Office, the Customs and Tax Service, and the National School of Tax Administration, and on granting them statutes (Official Journal of the Ministry of Finance, Funds and Regional Policy of 2020, item 20).

[32] Ministry of Finance, *EORI. Informacje na temat EORI (Economic Operators' Registration and Identification)*; https://www.podatki.gov.pl/clo/informacje-dla-przedsiebiorcow/eori [accessed on 10 February 2025].

[33] See Article 1(18) of the Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (OJ L 343, 29.12.2015, as amended), hereinafter referred to as 'the DR'.

In the context of EU legislation, the EORI system is also referenced more broadly.[34] From a functional perspective, PUESC is the ICT-based component of the EORI system. The competent customs authority employs this instrument to collect, store, exchange, and provide access to information about registered entities.

The EORI identifier is unique in terms of both the entity and the object it designates. Every duly registered business entity is issued a single, distinct identification number.[35] This arrangement reduces bureaucratic burdens and facilitates the conduct of business activities in the field of foreign trade. Registration in one EU Member State renders any further registration unnecessary and legally inadmissible, both within that Member State and throughout the EU customs territory. Re-registering the same entity would violate the principle of single application of this procedure and the use of a unique EORI number. However, EU customs law does not automatically invalidate an EORI number in such circumstances. The customs authority may only carry out this action upon request from the registered entity or, *ex officio*, if it becomes aware that the registered entrepreneur has ceased the activity requiring registration.[36]

The ICT system has technical requirements that cannot be met by individuals who are digitally excluded for subjective reasons, such as lack of knowledge, or objective factors, such as the absence of electricity, remote communication devices, or software. This issue has been recognised and addressed in EU customs legislation.[37] The European Commission has been authorised to issue decisions introducing derogations from the application of the ICT system, which may be addressed to an individual EU Member State or a group of states. However, the term 'group of states' must not be interpreted as referring to 'all Member States'. An interpretation of this kind would be *contra legem*, entirely overriding the codified obligation to communicate in customs matters through electronic data-processing techniques. The granting of a derogation depends on the specific circumstances of the requesting Member State, which constitutes an indeterminate expression, thereby establishing a discretionary margin. It is important to emphasise that the exception under consideration cannot be implemented at the exclusive discretion of an EU authority. The Commission adopts a time-bound decision, thus specifying the duration of the derogation. However, it should be noted that the duration of this period is subject to alteration – either extended or shortened – depending on the persistence or cessation of the grounds justifying its application. This solution has never been applied in relation to Poland. This finding suggests that the prevalence of digital exclusion among Polish entrepreneurs does not impede the operational efficiency of the PUESC system.

It should be noted that all ICT systems are susceptible to potential failures, during which they cannot be used for transmitting information between users. Issues related

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[34] Cf. Article 3 DR, and Article 7(1) of the Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (OJ L 343, 29.12.2015, as amended), hereinafter referred to as 'IR'.

[35] See Article 7(2) IR.

[36] See Article 7(2) DR.

[37] See Article 6(4) UCC.

to remote communication can be analysed across three functionally interconnected dimensions: technical, semantic, and efficiency-related.[38] Consequently, addressing this issue within EU customs law appears fully warranted.[39] The concept under discussion pertains to the facilitation of communication through methods involving the exchange and storage of information, excluding electronic data-processing techniques. This suggests that system failure is interpreted too narrowly, as it is considered solely from a technical perspective. Although the Union Customs Code defines alternative instruments negatively – by essentially emphasising what they are not – it should be acknowledged that, in practice, this represents a return to the classical form of a written document. Each document functions as a medium of information, thereby facilitating access to its content.[40] The identity of a document is determined by its content; therefore, the medium on which the content is presented is irrelevant. It is important to emphasise that the discontinuation of the ICT system in the customs environment due to a failure does not amount to a permanent derogation but rather a temporary solution. The scope of this exception is limited to the time required to restore system functionality, which is achieved by resolving the failure. It should be noted that the concept of an ICT system, within the context of customs law regulations, is interpreted broadly. It encompasses both the official subsystem, located within the organisational structures of public administration operating at national and EU levels, and the subsystems of individual economic operators. From a functional failure perspective, the location and nature of the malfunction are considered irrelevant. The potential for malfunctions to affect any of the electronic devices utilised for remote communication, in addition to the network connecting its individual components, is a distinct possibility. It is necessary to acknowledge the potential for exploitation of the examined statutory derogation by unscrupulous economic actors. The customs authority is not equipped with the necessary mechanisms to verify the veracity of claims concerning deficiencies in the technical infrastructure of a stakeholder within the customs administration. It is recognised that certain economic operators may engage with the customs administration in matters pertaining to customs without consistently using the ICT system. The application of a permanent derogation is permissible only when it is duly justified by the inherent nature of the trade, or when the utilisation of electronic data-processing techniques is deemed unsuitable for managing customs formalities. This exception is grounded in praxeological and functional reasoning. The outcome of this process does not result in the privileging or discrimination of specific categories of economic operators. The underlying reason for this is that the derogation is not based on subjective characteristics of the entities involved, but rather is determined by objective aspects of trade in goods and their relevant legal and customs-related consequences.

As previously mentioned, EU institutions play a crucial role in the creation and regulation of the ICT system used in customs matters. Decision No 70/2008/EC[41] of

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38 J. Fiske, *Introduction to Communication Studies*, 2nd ed., New York, 1990, pp. 22–23.

39 See Article 6(4) UCC.

40 See Article 77[3] CC.

41 Decision No 70/2008/EC of the European Parliament and of the Council of 15 January

the European Parliament and of the Council was pivotal in the implementation of e-customs administration. This decision was adopted prior to the establishment of the European Union in its current form and before the adoption of the Union Customs Code, highlighting its significant impact on the development of customs administration within the European Union. This assertion is corroborated by the document's title, which underscores the objective of eradicating the use of paper documentation within the domains of customs and trade. The decision was premised on the assumption of the complete elimination of paper documentation,[42] without anticipating any exceptions in the implementation of this objective. It is evident that this approach is contentious, as it fails to consider the potential impact of communication system failures on economic operators and customs authorities. In such circumstances, users have no means of avoiding paper documentation. Fortunately, the Union Customs Code introduced reasonable derogations from the principle of eliminating paper documentation in the customs environment.

The decision delineates the requirements that the ICT system must satisfy.[43] The following key characteristics of the system are emphasised: security, integration, interoperability, and accessibility. In the decision, these features are associated with the term 'electronic customs systems', which is used in the plural form. This creates an inconsistency with the terminology employed in the Customs Code, which refers to the 'ICT system'. The use of the plural term 'systems' constitutes a substantive error, as it would imply the absence of integration into a single, functionally and praxeologically coherent whole. Within a single system, three distinct components can be identified, each oriented towards the movement of goods across the EU customs border (import, export, transit), the identification and registration of economic operators, and the procedures for granting authorisations and certificates.[44] The PUESC platform serves the purpose of transmitting all information formally designated within the content of the analysed decision. It is a single, secure, integrated, interoperable, and accessible platform, rather than a system of separate platforms.

NATIONAL REGULATION GOVERNING THE OPERATION OF THE ELECTRONIC CUSTOMS AND TAX SERVICES PLATFORM

It is important to note that an entrepreneur reserves the right to conduct any and all customs procedures independently or, alternatively, through a designated customs representative.[45] According to the definition set out in the Customs Code, a representative is defined as any individual formally appointed by another to undertake actions and obligations stipulated by customs legislation before the relevant

2008 on a paperless environment for customs and trade (OJ L 23, 26.1.2008, as amended), hereinafter referred to as 'the Decision No 70/2008/EC'.

[42] See recitals 4, 9 and 11 of the preamble to Decision No 70/2008/EC.

[43] See Article 1 of Decision No 70/2008/EC.

[44] See Article 4(1) of Decision No 70/2008/EC.

[45] See Article 18(1) UCC.

customs authorities.[46] A distinctive feature of the customs legal framework is the entrepreneur's entitlement to select either direct or indirect customs representation.[47] The concept of direct representation is based on acting in the name and for the benefit of the entrepreneur, thus reflecting the legal construct characteristic of a mandate or power of attorney.[48] The authority to act on behalf of the principal derives from a unilateral legal declaration – specifically, the principal's express will. In the context of indirect representation, the customs agent operates autonomously in their own name, albeit on behalf of the principal's interests. This legal construct differs from a power of attorney and constitutes indirect agency. Consequently, it is incumbent upon customs authorities to ascertain the representative status of the entity accessing PUESC, including the form and scope of representation. Errors in determining the nature of representation can have substantial procedural ramifications, potentially rendering activities related to customs administration invalid. It is therefore both necessary and justified that legal provisions mandate customs representatives to disclose their role and the form of representation – direct or indirect – at the outset of interactions with customs authorities.[49] Any breach of this obligation, including unauthorised representation or actions beyond the scope of authority, provides grounds for the customs authority to treat the representative as a procedural party. Such legal fiction and codified presumption are indispensable for the consistent application of customs legislation, particularly in the context of PUESC operations.

In order to ensure the effective implementation of the ICT system, it is imperative to employ precise identification procedures for both entrepreneurs and their designated customs representatives. User authentication within the PUESC system is permitted solely through one of the three methods defined by the Minister of Finance's implementing regulation: (1) login credentials (identifier and password); (2) an electronic identification instrument issued within a system linked to the national eID node; and (3) an electronic certificate, such as that provided via the mObywatel mobile application.[50] In accordance with the prevailing statutory provisions, the transmission of electronic communications with customs authorities necessitates prior registration with the PUESC system, accompanied by the presentation of a document that validates the user's entitlement to access the services provided therein.[51] It is imperative that this document be submitted in electronic form. The Union Customs Code does not regulate the issue of electronic document signing by PUESC participants. Consequently, it is deemed appropriate to delineate this matter through statutory provisions. The signing of electronic documents is permitted through one of the following means: (1) a qualified electronic signature; (2) a signature that is recognised as reliable or personal; (3) an advanced

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46 See Article 5(6) UCC.

47 See Article 18(1) UCC.

48 See Article 96 CC.

49 See Article 19(1) UCC.

50 See § 2 of the Regulation of the Minister of Finance of 6 July 2022 on the authentication of users on the Electronic Customs and Tax Services Platform (PUESC), Journal of Laws of 2022, item 1434.

51 See Article 10a(2) CL.

electronic signature verified by a customs certificate; or (4) a method commonly used for signing electronic tax documents.[52] It is evident that the scope of these tools exceeds that of the user authentication options provided by PUESC, as well as the statutory methods for executing electronic signatures on official documents produced by customs authorities.[53] This solution is advantageous for entrepreneurs, as it facilitates optimisation of the method used to sign their data carriers. For instance, it allows them to avoid the financial obligations associated with the use of electronic signatures or the acquisition of relevant certifications.

The corporate privileges granted to Polish professionals, including advocates, legal advisors, and tax consultants, are not addressed within the framework of Union customs law. These professionals are authorised to independently certify copies of documents submitted to public authorities. Consequently, there is no justification for excluding this right in the context of customs proceedings. It is therefore considered appropriate to affirm the applicability of this provision within the Customs Law, particularly in cases where the document is submitted through an electronic data interchange system.[54] The scope of document authentication extends to powers of attorney as well.[55] In such situations, the customs authority may request the principal's official signature if doubts arise regarding the actions of a purported customs representative, or concerning the authenticity or reliability of the document in question. It is important to note that this measure exceeds the standard stipulated in the Union Customs Code. In accordance with Article 19(2) UCC, a customs authority is permitted to request evidence of authorisation solely from individuals claiming to be customs representatives. It is evident that extending the entitlement to independently certify copies of documents in customs matters to certain business entities beyond the scope of advocates, legal advisors, and tax consultants would be advantageous. This provision applies exclusively to entities recognised as Authorised Economic Operators or those granted authorisation to use simplifications as defined under customs legislation.[56] The simplification of customs procedures for such entities has been shown to contribute to a reduction in the operational costs of business activity by removing the need to pay for document authentication services, thereby supporting more efficient business operations.

CONCLUSION

PUESC constitutes part of the EU teleinformatics system, which enables entrepreneurs to communicate with the National Revenue Administration in economic and fiscal matters governed by customs and tax law. The European Union's customs legislation establishes uniform provisions to be implemented across all Member States. However, the implementation of these provisions in Poland required consideration

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[52] See Article 10b(1) CL.

[53] See Article 10b(2) CL.

[54] See Article 10a(2) CL.

[55] See Article 138a § 4 of the Act of 29 August 1997: Tax Ordinance (consolidated text: Journal of Laws of 2023, item 2383, as amended), in conjunction with Article 73(1)(1) CL.

[56] See Article 10a(2a) CL.

of specific national economic and legal conditions. Consequently, it was necessary to implement, supplement, and elaborate upon the provisions of the Union Customs Code through statutory regulation. It is important to acknowledge that the Customs Law cannot be employed as a means of eradicating defective codified norms. This conclusion follows from the superior hierarchical position of EU regulation over national Customs Law within the Polish legal system.

The recognition of a civil partnership as an entrepreneur within the meaning of customs law represents an atypical solution under public economic law. Treating it in every case as an organisational unit without legal personality entails the application of a legal fiction and statutory presumption. Such a partnership does not meet the codified requirement of performing legal acts within the sphere of civil and commercial transactions. Conferring civil-law subjectivity upon this named agreement simultaneously divests such status from its partners, who, in accordance with the provisions of the Entrepreneurs' Law, are the actual entities engaged in business activity. The Union Customs Code does not automatically classify a civil partnership as a person, nor as a qualified form thereof, such as an entrepreneur. Consequently, there is no legal requirement to apply its current customs-law classification as a legal entity. This solution is controversial from the perspective of the Polish legal system, as it results in an inconsistent approach to the legal subjectivity of the civil partnership and its partners within the context of public economic law.

PUESC does not function as a discrete teleinformatics system or a standalone portal. It is an electronic, interactive tool for remote communication between entities from both the public and private sectors. A necessary systemic component is the National Revenue Administration, which provides public services to stakeholders of this administration. It is erroneous to characterise these services as 'fiscal-customs' from the standpoint of the NRAA terminology. This nomenclature lacks precision in designating the referent of these services and gives rise to disruptions in the process of decoding legislative communications addressed to entities applying customs law provisions.

The failure rate of the remote communication system using PUESC confirms the justification for applying a temporary exception to the codified solution typical of the 'e-customs' environment. The rationale for reinstating the possibility of using paper documentation in communication between entrepreneurs and the National Revenue Administration is neither precisely regulated in EU customs law nor described in statutory provisions. Communication theory indicates that system malfunction need not be perceived solely in a technical dimension. It is therefore reasonable to propose resolving the identified ambiguity by defining the term 'teleinformatics system failure'. It is evident that the semantic scope of the term does not encompass digital exclusion. The utilisation of PUESC stipulates that Poland is not at liberty to petition the European Commission to determine a provisional cessation of 'e-customs' standards for Polish entrepreneurs.

In order to gain access to the EU teleinformatics system, both users and their customs representatives must undergo registration and identification procedures. The application of the EORI number serves as a rational measure for this purpose, with the stipulation that it should be unique, singular, and non-repetitive across the entire EU customs territory. Entrepreneurs' access to PUESC is permitted via various

methods defined in the implementing provisions of Polish law. From a functional and praxeological perspective, it is appropriate to reaffirm the corporate rights of professionals to certify documents as true copies. Nevertheless, the utilisation of this instrument requires the National Revenue Administration to eliminate instances of action by fraudulent representatives. Extending corporate rights to entrepreneurs deemed reliable by the tax authority in terms of compliance with customs law is a concept that merits approval. It is both necessary and appropriate to supplement the codified standard for the use of electronic documents by establishing, within the Customs Law, a catalogue of methods for their authentication.

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REGULATION OF AIRPORT CHARGES IN EU LAW, AND IN POLAND AND GERMANY: LIMITS OF AIRPORT MANAGING BODIES' AUTONOMY AND THE PRINCIPLE OF TRANSPARENCY AND NON-DISCRIMINATION

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Abstract
This article analyses the regulation of airport charges under European Union law and within the national legal systems of Poland and Germany, with particular focus on the relationship between the autonomy of airport managing bodies and their obligation to observe the principles of transparency and non-discrimination. The authors discuss the legal framework established by Directive 2009/12/EC and examine its implementation in two distinct national contexts. The analysis demonstrates that, although airport managing bodies formally possess the right to determine the level and structure of charges, their discretion is constrained by both EU legislation and national oversight mechanisms.

Keywords: airport charges, non-discrimination, transparency, EU law, EU air transport

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INTRODUCTION

Airports play a key role in the development of both domestic and international air transport. Access to airport infrastructure – and consequently, airport charges – significantly affects relationships between air carriers, as well as between carriers and passengers, shaping route networks and the quality of services provided. To prevent abuses in this area, the system of airport charges is subject to fundamental principles established at the international level, as well as to detailed national regulations and, in the case of airports within the European Union, to EU-level rules.

One of the crucial elements in the legal regulation of airport charges is the role of airport managing bodies and their influence on the operational conditions of airports. This article explores the issue within the context of EU law, aiming to assess the extent to which the current model of airport charge regulation, shaped primarily by Directive 2009/12/EC,[1] promotes transparency, a balance of interests, and non-discriminatory access to infrastructure. The research hypothesis is as follows: the current model of airport charge regulation effectively achieves the aforementioned objectives. The analysis covers both the Directive and selected national regulations in Poland and Germany, as well as reform proposals put forward by the European Commission and market stakeholders, including airlines, airport managing bodies, and public authorities. The discussion concludes with a review of relevant EU and national case law concerning airport charges, which serves as a basis for evaluating the effectiveness of the existing legal framework and for outlining possible reforms.

LEGAL BASIS

The legal regulation of airport charges aims to ensure transparency, non-discriminatory access to airport services, and a balance between the interests of airport managing bodies and airport users. To illustrate how the relevant rules are structured, it is necessary to refer to legal acts at the international, EU, and national levels, which will be examined in this part.

INTERNATIONAL LAW

At the international level, the issue of airport charges is governed by Article 15 of the Convention on International Civil Aviation of 1944,[2] according to which 'Every airport in a contracting State which is open to public use by its national aircraft shall likewise (…) be open under uniform conditions to the aircraft of all the other contracting States.' Consequently, charges related to the use of an airport by aircraft of another contracting State shall not exceed those levied on domestic

[1] Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges (OJ L 70, 14.3.2009, p. 11); hereinafter referred to as 'the Directive'.

[2] Convention on International Civil Aviation, done at Chicago on 7 December 1944, 15 UNTS 295; hereinafter referred to as 'the Chicago Convention'.

aircraft engaged in similar services[3] – this principle applies to both scheduled and non-scheduled air services. Moreover, these charges must be published and notified to the International Civil Aviation Organization (ICAO), established under Article 43 of the Chicago Convention.

During its seventy-eight years of existence, ICAO has repeatedly addressed the issue of airport charges[4] – including during Assembly sessions and through Council resolutions – clarifying, among other things, the distinction between a charge and a tax. Specifically,

> 'an airport charge is a levy that is designed and applied specifically to recover the cost of providing facilities and services for civil aviation, while a tax is a levy that is designed to raise national or local government revenues which are generally not applied to civil aviation in their entirety or on a cost-specific basis.'[5]

Directly referring to Article 15 of the Chicago Convention, ICAO has also published extensive guidelines on airport charges, known as Doc. 9082,[6] which also covers charges for air navigation services – an area beyond the scope of this article. Although these guidelines are not legally binding in themselves, they have gained the status of generally accepted practice among contracting States.[7] The guidelines base the airport charges system on the following fundamental principles:

– non-discrimination, including between domestic and foreign users as well as users from different States;
– cost-relatedness of charges;
– transparency; and
– consultation with airport users.

All these principles are reflected in the legal framework adopted by the European Union.[8]

EU LAW

As mentioned above, under the current legal framework, Directive 2009/12/EC of the European Parliament and of the Council regulates the issue of airport charges. It obliges Member States to ensure a mandatory consultation procedure between the airport managing body and its users, including discussions regarding the level of

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[3] W.R. Grove Jr, 'International Law – Chicago Convention Interpreted – Discriminatory Airport Charges to Foreign Airlines', *University of Miami Law Review*, 1963, No. 18, p. 483.

[4] See T.M. Markiewicz, 'Airport Charges as an Instrument of Competition Between Airports in the European Union: Legislative Aspects', *Zeszyty Naukowe Akademii Sztuki Wojennej*, 2019, No. 2 (115), pp. 6–11.

[5] The Directive, preamble, recitals 9–10.

[6] International Civil Aviation Organization, *ICAO's Policies on Charges for Airports and Air Navigation Services*, Doc. 9082 (9th ed.) 2012.

[7] International Civil Aviation Organization, *ICAO's Policies on User Charges & Taxation*; https://www.icao.int/sustainability/pages/eap-im-policies.aspx [accessed on 29 May 2025].

[8] G. Schiller, 'Neue gemeinschaftsrechtliche Vorgaben zur Festsetzung von Flughafenentgelten. Die Richtlinie 2009/12/EG über Flughafenentgelte', *Zeitschrift für Luft- und Weltraumrecht*, 2009, Vol. 58, No. 3, p. 356.

airport charges, and to guarantee the principle of non-discrimination among airport users in the setting of such charges. It should also be noted that the Directive defines an 'airport charge' as 'a levy collected for the benefit of the airport managing body and paid by the airport users for the use of facilities and services (…)' (Article 2).

It is essential to point out that the applicability of the Directive is limited to airports located within the territory where the Treaty applies, which are open to commercial traffic and handle over five million passengers annually, as well as to the airport with the highest passenger traffic in each Member State. Consequently, the Directive does not apply to airports handling fewer than five million passengers.

Alongside ensuring non-discrimination and equal treatment of airlines in the setting of airport charges, the main objectives of the Directive also include guaranteeing transparency (Article 7), allowing for the differentiation of charges (Article 10), consultation on the charging system (Article 6), and supervision by an independent body (Article 11). These measures aim to promote competition and fair access to airport infrastructure. It is important to emphasise that Member States, in accordance with the will of the EU legislator, are responsible for appointing the independent supervisory authority tasked with overseeing the correct application of the Directive's provisions. Consequently, there is currently no single common supervisory authority at the EU level.

SELECTED NATIONAL LAW

This part analyses the regulation of airport charges in the legal systems of Poland and Germany, focusing on their seemingly differing approaches to the implementation of EU provisions stemming from administrative differences. Poland, as a Central and Eastern European country of a unitary nature, and Germany, a federal state and one of the key air transport hubs in Europe, provide an interesting comparative case. This selection allows for a better understanding of how different administrative and economic models influence the scope of autonomy of airport managing bodies, as well as the application of the principles of transparency and non-discrimination arisingfrom EU law.

POLAND

At the national level, one of the legal acts regulating the issue of airport charges is the Aviation Law Act.[9] Article 75 thereof provides that the airport managing body may charge fees for the use of facilities, equipment, or services provided exclusively by that airport managing body, related to take-off, landing, lighting, parking of aircraft, or the handling of cargo (goods and mail) or passengers (airport charges). An important aspect is that the airport managing body may also impose a noise charge.

[9] Act of 3 July 2002: Aviation Law (Journal of Laws of 2023, item 2110, as amended), hereinafter referred to as 'the Aviation Law Act' or 'the AL'.

Another legal act regulating airport charges is the Regulation of the Minister of Infrastructure and Development of 2014.[10] This regulation specifies the conditions, manner, and procedure for conducting consultations. It also sets requirements regarding airport charge tariffs, as well as the methods for their approval and publication. An analysis of these provisions reveals that the legislator precisely defines who may set airport charge tariffs. As specified, this responsibility lies with the managing body of a public-use airport (§ 2). Thus, the scope of entities is limited to airport managing bodies that are open to all aircraft at times and hours determined by the managing body and made publicly known (Article 54 AL).

As a result, airports for exclusive use fall outside this category and, as noted by K. Marut, are considered private airports.[11] A key aspect distinguishing them from public-use airports is that commercial flights cannot be operated at these airports. However, there are exceptions to this rule, as the managing body of an exclusive-use airport may, under Article 54(7) AL, apply for permission to temporarily open the airport for public use. This decision is issued by the President of the Civil Aviation Authority.

The aforementioned 2014 Regulation specifies the types of airport charges that may be established. The catalogue of charges includes, among others, take-off and landing charges (§§ 2 and 7), parking charges for the provision and maintenance of parking stands (§§ 2 and 8), passenger charges related to passenger terminal infrastructure (§§ 2 and 9), and cargo charges levied for the use of cargo terminal buildings and their equipment (§§ 2 and 10). Additionally, charges may be set for noise (§§ 2 and 11), as well as for the provision of passenger, baggage, and cargo security and safety checks, and for the protection of aircraft on the apron. The noise charge, pursuant to Article 75(4) AL, may be introduced in cases of problems related to excessive noise. Under Article 75(4a) AL, the airport managing body may also establish an environmental charge if issues arise concerning the protection of obstacle limitation surfaces or the functioning of visual navigation aids due to trees or shrubs.

Another important issue is the method of setting airport charges. According to the 2014 Regulation, the managing body of a public-use airport must adhere to the principle of transparency, allowing aircraft users or other entities operating aircraft to verify the correctness of the fees charged. This obligation aligns with the principle of non-discrimination. It is also crucial to ensure the stability of charges during a given scheduling season, except in justified cases. When setting charges – both basic (§ 2(1): take-off, parking, passenger, and cargo charges) and additional (§ 2(4)) – the commercial nature of the airport managing body's activity must be taken into account. Furthermore, the level of charges should reflect the actual costs of services and the provision and maintenance of infrastructure necessary for handling flight operations, passengers, and cargo, while maintaining appropriate levels of safety and quality, excluding costs covered from other sources.

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[10] Regulation of the Minister of Infrastructure and Development of 8 August 2014 on Airport Charges (Journal of Laws, item 1074), hereinafter referred to as 'the 2014 Regulation'.

[11] K. Marut, in: Żylicz M. (ed.), *Prawo lotnicze. Komentarz*, Warszawa, 2016, Article 54.

In this context, two questions arise: does the managing body of a public-use airport have the right to independently determine the level of airport charges, and can it differentiate the charges for individual entities? In response to the first question, reference should be made to § 6, according to which the airport managing body takes into account the costs incurred in providing services. These may include, among others, direct operating costs related to the maintenance and operation of the airport, indirect costs, including administrative expenses, infrastructure costs (e.g. depreciation and fixed assets under construction), as well as financial costs of external capital. Additionally, the inclusion of the cost of equity capital is permitted. In answering the second question, §§ 4 and 5 provide for the possibility of granting discounts and modulating the level of airport charges based on public or social interest. An example given by the legislator is environmental protection.

Finally, consultations regarding airport charges must be conducted within a specified period before the tariff is announced or approved by the President of the Civil Aviation Authority (§ 14). The procedure depends on the volume of passenger traffic at the given airport: for airports handling over five million passengers annually, the tariff requires approval, whereas for airports with lower traffic, it only needs to be announced. Examples of airports in the first category include Kraków-Balice (11,071,897 passengers in 2024) and Gdańsk Lech Wałęsa Airport (6,698,533 passengers). Airports in the second category include, among others, Wrocław-Strachowice (4,467,264 passengers) and Poznań-Ławica (3,597,147 passengers).[12] The legislator stipulates that consultations take place in writing; however, the managing body of a public-use airport may waive this requirement and organise a meeting with interested parties. Airport charge tariffs are approved by the President of the Civil Aviation Authority, who issues an administrative decision in this regard.

GERMANY

As a result of the Directive's transposition, airport charges have been regulated in German law under § 19b of the Aviation Act (de. *Luftverkehrsgesetz*, LuftVG).[13] Unlike Directive 2009/12/EC, the German regulation covers not only airports handling over five million passengers annually but all commercial airports and airfields. For large airports (over five million passengers), a more comprehensive consultation procedure has been established[14] – as discussed below.

Under § 19b(1), the airport managing body is obliged to prepare an *Entgeltordnung* – a charges regulation, which specifies the fees for using infrastructure related to aircraft movements (take-offs, landings, parking) as well as passenger and cargo handling. This regulation must be approved by the competent supervisory authority.

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[12] Statistics available on the website of the Polish Civil Aviation Authority (pl. *Urząd Lotnictwa Cywilnego*, ULC), *Podsumowanie wyników rynku lotniczego w 2024 roku*; https://ulc.gov.pl/aktualnosci/podsumowanie-wynikow-rynku-lotniczego-w-2024-roku [accessed on 29 May 2025].

[13] Aviation Act (*Luftverkehrsgesetz*) in the version published on 10 May 2007 (BGBl. I S. 698), as last amended by Article 3 of the Act of 23 October 2024 (BGBl. 2024 I Nr. 327).

[14] L. Giesberts, 'Neuregelung von Flughafenentgelten nach § 19b LuftVG. Zur Umsetzung der Direktive 2009/12/EG in das deutsche Recht', *Zeitschrift für Luft- und Weltraumrecht*, 2012, No. 61, p. 187.

However, the provision does not specify which body performs this supervisory function – in practice, these are the regional administrative authorities responsible for overseeing civil aviation in the respective federal state.[15] Charges must be set in advance, in a cost-justified, objective, transparent, and non-discriminatory manner. Differentiation of charges is permitted on public interest grounds, especially concerning noise and emissions.

For airports exceeding the threshold of five million passengers annually, the procedure for setting charges is more formalised. Under paragraph 3, the managing body is obliged to provide users with a draft of the charges regulation no later than six months before its planned entry into force.[16] Users' comments must be taken into account when submitting the approval application, which should be filed at least five months before the planned effective date.[17] The approving authority examines, among other things, whether the charges are proportionate to the expected costs and whether the managing body demonstrates an efficiency orientation in its activities.[18] Additionally, the managing body is required to disclose a range of information to users, such as cost structure, calculation methods, planned investments, and traffic forecasts.[19]

Regardless of the approval of charges, according to paragraph 3, point 5, the managing body is required to hold consultations with airport users at least once a year, giving one month's notice. Industry organisations may also participate in these consultations. However, C. Koenig and F. Schramm point out that the effectiveness of these consultations may be limited by an imbalance of bargaining power – the dominance of one carrier can lead to outcomes disadvantageous to smaller ones. Therefore, in their view, it is worth considering the introduction of additional protective mechanisms.[20]

In summary, § 19b of the LuftVG largely fulfils the core regulatory objectives of the EU Directive – ensuring transparency, non-discrimination, proportionality, and linking charges to actual costs. However, in practice, the unilateral setting of charges by airport managing bodies, approved by the supervisory authority, still predominates, without effectively strengthening the bargaining position of airlines.[21] The national case law and the rulings of the Court of Justice of the European Union (CJEU) concerning this provision, discussed below, focus precisely on this issue.

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15 See *Hessisches Ministerium für Wirtschaft, Energie, Verkehr, Wohnen und ländlichen Raum, Flughafenentgelte: Jahresbericht zur Genehmigung der Entgeltordnung 2017 des Flughafens Frankfurt*, https://wirtschaft.hessen.de/Jahresbericht-zur-Genehmigung-der-Entgeltordnung-2017-des-Flughafens-Frankfurt [accessed on 29 May 2025].

16 § 19b(3)(1) LuftVG.

17 Ibidem, point 2.

18 Ibidem, point 3.

19 Ibidem, point 6.

20 C. Koenig, F. Schramm, 'Die Regulierung von Flughafenentgelten', *Netzwirtschaften und Recht*, 2014, No. 11, p. 239.

21 Ibidem.

AIRPORT CHARGES AT SELECTED AIRPORTS

As mentioned above, various types of airport charges can be distinguished, including landing fees, passenger charges, and parking fees. It is clear that there may be further types of charges depending on the circumstances and the specific environment of a given airport. Consequently, additional charges may also arise, including those related to environmental factors[22] (e.g. noise charges or environmental charges).

To illustrate the practical dimension of the discussed regulations, the authors have compiled a comparison of airport charges applicable at selected airports in Poland and Germany for the year 2025. The table below presents data for the airports: Kraków-Balice (KRK), Gdańsk-Rębiechowo (GDN), Hamburg (HAM), and Leipzig/Halle (LEJ). All charges are presented in Polish zlotys (PLN), with conversions from euros (EUR) made according to the exchange rate of 18 May 2025. Considering that charges often depend on the maximum take-off weight (MTOW) of the aircraft, the values in the table have been calculated for a Boeing 737-800, with an MTOW of 70,530 kg.

Table 1. Airport charges at selected airports in Poland and Germany

Airport	Landing charge	Parking charge	Passenger charge (departing, not in transit)	Charge for providing passenger and baggage security screening
KRK[(a)]	PLN 32.00 for every started tonne of MTOW	PLN 12.20 for every started tonne of MTOW and every started 24 hours of parking	PLN 45.00 for each departing passenger	PLN 11.68 for each departing passenger
GDN[(b)]	MTOW > 2 tons – PLN 25.00 for every started tonne of MTOW	PLN 4.50 for every started tonne of MTOW and every started 24 hours of parking. No charges apply for parking up to 120 minutes	PLN 48.00 for each departing passenger	PLN 8.00 for each departing passenger

[22] E. Marciszewska, A. Hoszman, 'Zróżnicowanie polityki opłat za korzystanie z infrastruktury portów lotniczych', *Logistyka*, 2015, No. 3, p. 5225.

Table 1. (cont.)

Airport	Landing charge	Parking charge	Passenger charge (departing, not in transit)	Charge for providing passenger and baggage security screening
HAM[(c)]	PLN 14.22 for every started tonne of MTOW (turbojet aircraft)	MTOW > 7t – PLN 0.51 for every tonne of MTOW and every started 15 minutes of parking. The minimum charge is PLN 19.51. No fee is charged for the period from 23:00 to 04:59	Domestic flights – PLN 43.76 per departing passenger	PLN 5.85 for each departing passenger
			Flight to another EU Member State, Iceland, Norway, Switzerland, or the United Kingdom – PLN 43.76 per departing passenger	
			Flight outside the EU – PLN 51.92 per departing passenger	
LEJ[(d)]	PLN 21.86 per every started tonne of MTOW	PLN 13.41 per every started tonne of MTOW and every started 24 hours of parking. The minimum parking fee for each 24 hours is PLN 31.42. No fee is charged for parking shorter than 8 hours	Flight to another EU Member State, Iceland, Norway, or Switzerland – PLN 60.75 per departing passenger	PLN 10.33 for each departing passenger
			Flight outside the EU – PLN 74.80 per departing passenger	

(a) Kraków Airport, *Taryfa Opłat Lotniskowych*; https://krakowairport.pl//storage/2024--12/2025-krk-pl-taryfawnioski-1733920829NOkQL.pdf [accessed on 29 May 2025].

(b) Announcement No. 2 of the President of the Civil Aviation Authority of 22 January 2009 on the Airport Charges Tariff at Gdańsk Airport Ltd. (*Official Journal of the Civil Aviation Authority*, 2009, No. 2, item 49).

(c) Hamburg Airport, *Airport Charges*; https://www.hamburg-airport.de/resource/blob/79030/311ddbec4ba75adf134f139d19fcce00/airport-charges-april-2024-data.pdf [accessed on 29 May 2025].

(d) Leipzig-Halle Airport, *Regulation on Fees Aviation*; https://www.mdf-ag.com/media/user_upload/Leipzig_Halle/PDF/LEJ_RoF_Aviation_2024-12-01_rev05-24.pdf [accessed on 29 May 2025].

Source: Authors' own elaboration.

WORK OF THE EUROPEAN COMMISSION ON AMENDMENTS TO DIRECTIVE 2009/12/EC CONCERNING AIRPORT CHARGES

Over the years, opinions have emerged suggesting that the provisions of the current Directive are no longer fully adequate – particularly in light of new business models in aviation, increasing market competition, and growing sustainability requirements. As part of the so-called fitness check of the Directive in 2024, the European Commission (EC) conducted an evaluation of the functioning of the existing regulations, which concluded that although certain objectives have been achieved, the current rules require modification.

One element of the evaluation involved inviting EU aviation market stakeholders to submit their feedback. Airlines, their representative organisations, airports, and national authorities were among those who expressed their views on the need to amend the Directive. This part presents a synthesis of these positions, concluding with recommendations adopted in recent years by an informal expert group – the so-called Thessaloniki Forum – established to support the European Commission in implementing the Directive.

POSITION OF AIRLINES AND ORGANISATIONS REPRESENTING AIRLINES

In the responses provided by airlines and organisations representing them to the invitation to submit feedback as part of the fitness check of airport charges legislation, several clear trends can be identified.

Firstly, both low-cost carriers (e.g. Ryanair and easyJet) and legacy carriers (including Air France/KLM)[23] highlighted the positive impact of applying a single till financing system when setting airport charges. According to their position, this system promotes greater transparency and limits the risk of abuse of dominant market positions by airports with significant market power.[24] The single till system assumes that the entire airport operation – both aeronautical and commercial activities – is

[23] European Commission, *Feedback from: Air France-KLM*; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14193-Aviation-fitness-check-of-EU-airport-legislation/F3469518_en [accessed on 29 May 2025].

[24] European Commission, *Feedback from: Ryanair Holdings*; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14193-Aviation-fitness-check-of-EU-airport-legislation/F3469550_en [accessed on 29 May 2025].

taken into account when setting charges,[25] as opposed to the dual till system, where aeronautical activities are treated separately, which can lead to inflated charges.[26] This stance was also supported by the International Air Transport Association (IATA).[27]

Secondly, carriers of both types, as well as industry organisations such as Airlines for America (A4A)[28] and IATA, expressed the need to strengthen the role of independent regulatory authorities (Article 11 of the Directive). EasyJet, in its comments, pointed to the inconsistent implementation of regulations concerning these authorities, particularly regarding their powers, resources, and independence in some jurisdictions.[29]

Thirdly, concerns were raised about the lack of transparency in the charging process, linked to an ineffective consultation system between airports and their users. Under the current wording of Article 6(2) of the Directive, airports are not obliged to conduct consultations if charges remain unchanged. This provision prevents users from influencing charges in situations where traffic volume or the efficiency of the services provided changes.[30] This issue is exacerbated by the absence of precise transparency requirements within the Directive itself.

Finally, almost all airlines and industry organisations that responded to the consultation expressed support for regulating airport charges at the EU level in the form of a regulation. Such a solution would aim to eliminate the problem of inconsistent implementation caused by the current Directive format and the need for transposition into national law.

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[25] A. Jurkowska, 'Zasady wyznaczania rynków usług portów lotniczych w sprawach z zakresu ochrony konkurencji i regulacji', in: Czernicki F., Skoczny T. (eds), *Usługi portów lotniczych w Unii Europejskiej i w Polsce a prawo konkurencji i regulacje lotniskowe*, Warszawa, 2010, p. 71.

[26] York Aviation, *The Cost and Profitability of European Airports. How Effective is Regulation under the Airport Charges. Directive? Final Report*, August 2017; https://a4e.eu/wp-content/uploads/a4e-study-york-aviation-the-cost-and-profitability-of-european-airports-2017-08-04.pdf [accessed on 29 May 2025].

[27] European Commission, *Feedback from: International Air Transport Association (IATA)*; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14193-Aviation-fitness-check-of-EU-airport-legislation/F3469540_en [accessed on 29 May 2025].

[28] European Commission, *Feedback from: Airlines for America*; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14193-Aviation-fitness-check-of-EU-airport-legislation/F3469564_en [accessed on 29 May 2025].

[29] European Commission, *Feedback from: easyJet Airline*; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14193-Aviation-fitness-check-of-EU-airport-legislation/F3469509_en [accessed on 29 May 2025].

[30] European Commission, *Feedback from: European Regions Airline Association (ERA)*; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14193-Aviation-fitness-check-of-EU-airport-legislation/F3469536_en [accessed on 29 May 2025].

POSITION OF AIRPORTS

In its position,[31] Airports Council International Europe (ACI Europe) – an organisation representing European airports – pointed to the divergence between the interests of airports and those of airlines. Unlike the airlines, ACI Europe maintains that the Directive fulfils its functions and provides sufficient flexibility in various situations, such as the COVID-19 pandemic. The regulations also encompass the modulation of environmental charges, which is significant in the context of current challenges in the aviation sector, including the implementation of the 'Fit for 55' package and the European Green Deal, both of which require substantial airport investment. Moreover, the Directive ensures an appropriate balance between consultations with users and the provision of information on new infrastructure. ACI Europe also emphasises that lower airport charges do not necessarily translate into lower ticket prices, whereas a lack of investment in increasing airport capacity may lead to higher prices.

Another important issue is that the financial situation of airports and their commercial activities are often treated as secondary to the interests and costs of airlines. According to ACI Europe, airport charges constitute a key part of airport revenues, enabling them to cover operational costs and finance long-term investments necessary to meet future demand and improve service quality.

POSITION OF NATIONAL AUTHORITIES

In assessing the adequacy of EU regulations, individual national authorities also expressed their views, including the French authorities and the authorities of the German federal states of Bavaria and Hesse.

While all three positions expressed approval of the existing regulations and considered that the current legal framework sufficiently addresses the needs related to the regulation of airport charges, the French authorities declared their openness to potential changes aimed at improving the harmonisation of the European market, particularly regarding the powers of supervisory bodies and the transparency of the charging process.[32] In contrast, the federal states of Bavaria and Hesse opposed extending the current requirements and introducing a regulation format, arguing that there are significant differences between existing German airports in terms of competition and their market position.[33]

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[31] European Commission, *Feedback from: ACI EUROPE*; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14193-Aviation-fitness-check-of-EU-airport-legislation/F3468805_en/ [accessed on 29 May 2025].

[32] European Commission, *Feedback from: Autorités françaises*; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14193-Aviation-fitness-check-of-EU-airport-legislation/F3469547_en [accessed on 29 May 2025].

[33] European Commission, *Feedback from: Bayerisches Staatsministerium für Wohnen, Bau und Verkehr*; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14193-Aviation-fitness-check-of-EU-airport-legislation/F3466355_en [accessed on 29 May 2025]; European Commission, *Feedback from: Hessisches Ministerium für Wirtschaft, Energie, Verkehr und ländlichen Raum*; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14193-Aviation-fitness-check-of-EU-airport-legislation/F3468668_en [accessed on 29 May 2025].

THE THESSALONIKI FORUM OF AIRPORT CHARGES REGULATORS

As mentioned above, in 2014 an informal expert group called the Thessaloniki Forum was established, with which DG MOVE (the Directorate-General for Mobility and Transport of the European Commission) may consult on matters relating to airport charges.[34] The Forum's tasks include assisting the European Commission with the implementation of existing regulations, programmes, and EU policies, as well as supporting the preparation of legislative proposals and political initiatives, and coordinating with Member States. The group is chaired by a DG MOVE representative, and its members are divided into categories C, D, and E.

Category C includes five observers, such as ACI Europe and IATA; category D consists of national authorities from the Member States; and category E comprises other entities – currently only the Swiss Federal Department of the Environment, Transport, Energy and Communications (DETEC) / Federal Office of Civil Aviation (FOCA).[35] According to the Forum's terms of reference, opinions, recommendations, and reports are adopted by consensus (Article 5). Additionally, the creation of working subgroups is provided for (Article 6). In 2023, the document was expanded to include provisions concerning the participation of experts (Article 7) and observers (Article 8).

One of the recommendations adopted by the group is the document titled 'Concession Agreements and ISAs Supervisory Powers',[36] which highlights the lack of uniform regulations concerning supervisory authorities across Member States, noting that their competencies vary considerably (point 2.7). Some have the authority to request additional information (point 2.8). The document also proposes changes to the consultation process on airport charges with airport users, as well as an expansion of the supervisory authorities' duties, including monitoring the conduct of these consultations (point 3.13).

Another significant document is 'Airport Charges in Times of Crisis',[37] which points out that the current Directive lacks detailed regulations concerning crises such as the COVID-19 pandemic. It highlights the absence of definitions for terms such as 'crisis' or 'exceptional circumstances,' which may cause interpretative difficulties. Attention was also drawn to the lack of rules addressing situations where airports that previously exceeded the threshold of five million passengers per year cease to meet this criterion. The Forum recommended regulating this issue.

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[34] European Commission, *Register of Commission Expert Groups and Other Similar Entities: Thessaloniki Forum of Airport Charges Regulators (E03084)*; https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupId=3084&fromMeetings=true&meetingId=46276 [accessed on 29 May 2025].

[35] Ibidem.

[36] Thessaloniki Forum, *Concession agreements and ISAs supervisory powers*, 27 January 2022; https://www.iaa.ie/docs/default-source/1c-economic-regulation/concession-agreements-and-isas-supervisory-powers.pdf?sfvrsn=627a10f3_1 [accessed on 29 May 2025].

[37] Thessaloniki Forum, *Airport charges in times of crisis*, 27 January 2022; https://www.iaa.ie/docs/default-source/1c-economic-regulation/airport-charges-in-times-of-crisis.pdf?sfvrsn=7b7a10f3_1 [accessed on 29 May 2025].

INTERNATIONAL AND NATIONAL CASE LAW

Before analysing the effectiveness of Directive 2009/12/EC in the context of achieving its objectives – such as ensuring transparency, balancing interests, and guaranteeing non-discriminatory access to airport infrastructure – it is worth reviewing the available international and national case law concerning airport charges. Building on the earlier analysis of the legal framework, this part presents judgments of the Court of Justice of the European Union (CJEU) as well as national courts in Poland and Germany. As of the date of this article's publication, only four rulings are known from the perspective of the practical application of the regulations, which indicates a limited body of case law in this area

JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION OF 21 NOVEMBER 2019

Regarding airport charges, the Court of Justice of the European Union (CJEU) has so far issued only one ruling – the judgment of 21 November 2019 in Case C-379/18 between Deutsche Lufthansa AG and the Federal State of Berlin.[38] In November 2014, Deutsche Lufthansa challenged the decision of the Federal State of Berlin dated 13 October 2014, which approved a new system of airport charges for Berlin-Tegel Airport (TXL), developed by the airport managing body (Berliner Flughafen GmbH), effective from 1 January 2015, seeking its annulment. The Higher Administrative Court for Berlin-Brandenburg (de. *Oberverwaltungsgericht Berlin-Brandenburg*) dismissed the complaint on the grounds of lack of standing under § 42(2) of the German Code of Administrative Procedure (de. *Verwaltungsgerichtsordnung*).[39]

According to the court, the approval of charges had no legal effect on third parties, since § 19b LuftVG 'does not offer any protection for third parties on which Deutsche Lufthansa could rely as an airport user'[40] and concerns only 'the relationship between the independent supervisory authority and the airport managing body.'[41] Furthermore, the charges had thus far been subject to review by civil courts on the basis of equity (*ex aequo et bono*), pursuant to § 315 of the German Civil Code (de. *Bürgerliches Gesetzbuch*, BGB), which was deemed sufficient in light of constitutional requirements.

Lufthansa appealed the decision to the referring court, arguing that it had standing because the decision of Berliner Flughafen violated its rights as an airport user. The referring court observed that the carrier would have standing to request the annulment of the relevant act under German law if the contested approval had the effect of shaping private-law relations,[42] which would allow the parties

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[38] Judgment of the Court (Fourth Chamber) of 21 November 2019, *Deutsche Lufthansa AG v Land Berlin*, EU:C:2019:1000.

[39] Ibidem, paras. 13–15.

[40] Ibidem, para. 17.

[41] Ibidem, para. 16.

[42] Ibidem, para. 22.

to invoke a breach of freedom of contract under Article 2(1) of the German Basic Law (*Grundgesetz*), and the civil route would give way to the administrative one.[43] The court also noted that § 19b LuftVG is silent as to whether the approval requirement carries the effect of shaping private-law relations, which, according to the court, cannot be accidental, since earlier laws, including those on postal and telecommunications services, contained such a mechanism.[44]

However, the referring court found that, irrespective of national law, Directive 2009/12/EC might require granting Lufthansa standing – particularly in light of its Articles 3 (non-discrimination), 6 (requirements for transparency and approval of charges) and 11 (status of 'interested parties').[45] Consequently, the Federal Administrative Court (*Bundesverwaltungsgericht*) stayed the proceedings and referred two preliminary questions to the CJEU concerning the interpretation of Articles 3, 6(3)–(5), and 11(1) and (7) of the Directive, namely:

– is national law compatible with the Directive if it allows parties (the airport managing body and airport user) to agree on charges other than those approved by the independent supervisory authority?
– is national law compatible with the Directive if it excludes the possibility for an airport user to challenge the approval of charges, limiting them only to civil law remedies based on equity?

In response to the first question, the CJEU held that

> 'when a national provision such as Paragraph 19b(1) and (3) of the LuftVG provides for a mandatory procedure by virtue of which the system of airport charges is to be approved by an independent supervisory authority, that system must also be mandatory for all users, without it being possible to set, together with a particular airport user, charges different from those previously approved,'

which aligns with the systemic interpretation of the Directive.[46]

Allowing deviations from approved charges would undermine the authority of the independent supervisory authority as the guarantor of compliance with the principle of non-discrimination, as well as the principles of consultation, transparency, and non-discrimination of users that form the basis of the Directive.[47] In summary, 'a modulation of the airport charges cannot be made within the confidential framework of contractual negotiations between the airport managing body and an individual airport user',[48] so such a national provision would be incompatible with the Directive.

Regarding the second question, the CJEU noted that although national law determines issues related to standing and legal interest, under Article 19(1), second subparagraph, of the Treaty on European Union (TEU), national provisions cannot undermine the right to effective judicial protection and 'must not, in particular,

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43 Ibidem, para. 25.
44 Ibidem, paras. 23–24.
45 Ibidem, paras. 26, 28, 32.
46 Ibidem, paras. 39–40.
47 Ibidem, paras. 41–43.
48 Ibidem, para. 51.

render practically impossible or excessively difficult the exercise of rights conferred by EU law',[49] in accordance with the principle of effectiveness.[50]

Moreover, it was observed that control of charges based on equity and decisions made *ex aequo et bono* are contrary to the principle of non-discrimination of users, especially as national court judgments would be effective only between the disputing parties, not all users of the airport. Consequently,

> '§ 315(3) of the BGB, according to which airport users are unable to obtain a judicial review that is carried out on the basis of objective elements and is capable of ensuring full compliance with the conditions set by Directive 2009/12, does not allow the German civil courts to ensure effective judicial protection for those users.'[51]

In conclusion, such an interpretation of national law is incompatible with the Directive and does not guarantee the effective judicial protection foreseen in EU law. The CJEU judgment in Case C-379/18 is significant for the application of Directive 2009/12/EC in Member States. The Court unequivocally confirmed that national provisions allowing individual agreements between airport managing bodies and users, bypassing rates approved by the independent authority, are incompatible with the Directive. Furthermore, the CJEU emphasised that airport users must have a real and effective possibility to challenge decisions approving the airport charges system.

NATIONAL CASE LAW – EXAMPLE OF POLAND

The judgment of the Supreme Administrative Court (*Naczelny Sąd Administracyjny*, NSA) of 7 July 2017 concerned the refusal by the President of the Civil Aviation Authority (*Urząd Lotnicywa Cywilnego*, ULC) to amend the provisions of the airport charges tariff for Katowice Airport.[52] The case was examined following a complaint by an airline company that challenged the decision of the President of the ULC dated 14 July 2014.

On 4 April 2014, the President of the ULC received a letter from M., informing him of the airport charges tariff for Katowice Airport. This tariff included amendments to the provisions of points 7.1 and 7.2, and the introduction of a new point 7.5. The airline submitted a request to amend these provisions, which was rejected by the President of the ULC. After examining the facts of the case, the NSA annulled the judgment of the Regional Administrative Court (*Wojewódzki Sąd Administracyjny*, WSA) in Warsaw and the decision of the President of the ULC, finding them to be unfounded.

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[49] Ibidem, para. 62.

[50] See Judgment of the Court (Grand Chamber) of 13 March 2007, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, EU:C:2007:163, paras. 39, 43, and the case-law cited therein.

[51] Case C-379/18, paras. 69–70.

[52] Judgment of the Supreme Administrative Court of 7 July 2017, I OSK 2646/15, LEX No. 2345583.

The Court held that differentiating the level of discounts from identical charges based on the number of operations performed does not automatically constitute discrimination. It emphasised that there is no normative basis for assuming *a priori* that such discounts are discriminatory in nature. It was further indicated that whether a discount is discriminatory must be assessed individually, taking into account the specific facts of the case and the impact of the discounts in those circumstances.

Consequently, the NSA indicated that administrative decisions regarding airport charges tariffs should be based on detailed analysis rather than on abstract assumptions. Authorities should first assess how changes to the tariff affect actual and potential beneficiaries, rather than focusing solely on existing discounts which were not subject to amendment and remained at their previous level.

NATIONAL CASE LAW – EXAMPLE OF GERMANY

As in the case of Poland, the case law of German courts concerning airport charges is very limited and essentially confined to two cases, both relating to Berlin airports. In the previously discussed case of *Deutsche Lufthansa v. Land Berlin*, following the judgment of the CJEU, the Federal Administrative Court revisited the dispute in its ruling of 3 June 2020 (BVerwG 3 C 21.19).[53] It found that it could not decide on the merits of the case, as the necessary findings of fact had not been established by the Higher Administrative Court. Consequently, the contested judgment was set aside, and the case was remitted to the lower court for reconsideration in accordance with § 144(3), sentence 1, point 2 of the German Code of Administrative Procedure.[54] At the time of writing (May 2025), this remains the most recent decision in the matter,[55] and the TXL airport itself was definitively closed on 4 May 2021[56] following the commencement of operations at the newly constructed Berlin-Brandenburg Airport (BER).

The second case concerning airport charges before the German courts relates to charges at the new BER airport. In judgments delivered on 28 February 2024 (OVG 6 A 6/22, OVG 6 A 7/22, and OVG 6 A 8/22),[57] the Higher Administrative Court for Berlin-Brandenburg dismissed the applications of four airlines that had challenged the airport charges in force from 1 September 2022 to 31 December 2023 at BER. Unlike the previous system, which calculated charges based on aircraft type, the new model was based on noise emission levels, which were measured in detail at

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[53] Judgment of 3 June 2020, Federal Administrative Court (BVerwG), 3 C 21.19, ECLI:DE:BVerwG:2020:030620U3C21.19.0.

[54] Ibidem, para. 13.

[55] Dejure.org, Case law: BVerwG, 3 June 2020 – 3 C 21.19 (3 C 20.16); https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerwG&Datum=03.06.2020&Aktenzeichen=3%20C%2021.19 [accessed on 29 May 2025].

[56] Flughafen Berlin Brandenburg, *Berlin Tegel Airport*; https://corporate.berlin-airport.de/en/company-media/history/berlin-tegel-airport.html [accessed on 29 May 2025].

[57] Higher Administrative Court of Berlin-Brandenburg (*Oberverwaltungsgericht Berlin-Brandenburg*), judgment of 28 February 2024, OVG 6 A 6/22, ECLI:DE:OVGBEBB:2024:0228.OVG6A6.22.00; Oberverwaltungsgericht Berlin-Brandenburg, judgment of 28 February 2024, OVG 6 A 7/22, ECLI:DE:OVGBEBB:2024:0228.OVG6A7.22.00; Oberverwaltungsgericht Berlin-Brandenburg, judgment of 28 February 2024, OVG 6 A 8/22, ECLI:DE:OVGBEBB:2024:0228.OVG6A8.22.00.

several monitoring points during each take-off and landing. This new system aimed to encourage airlines to adopt noise-reduction measures.

Two of the applications were deemed inadmissible because the airlines had not conducted any operations at the airport during the period in which the disputed tariff was in effect. The remaining applications were dismissed as unfounded. The court, however, noted that the BER noise-based charging system was grounded in objective and transparent criteria and did not result in discrimination against airport users. This may serve as an important precedent and an incentive for introducing similar mechanisms at other airports.[58]

CONCLUSIONS

The conducted research allowed for the positive verification of the research hypothesis, according to which the current model of airport charge regulation effectively achieves the objectives of transparency, balance of interests, and non-discriminatory access to infrastructure.

Several significant findings observed during the research support the above hypothesis. First and foremost, it should be noted that airport managing bodies, under the applicable EU and national law, are obliged to comply with the principles of non-discrimination and transparency. As a result, they are required to conduct consultations with airport users, disclose financial data, and justify the adopted fee structures. In this context, the principle of transparency functions as a control mechanism, enabling carriers to influence the tariff-setting process and to prevent unilateral decisions by airport managing bodies. Meanwhile, the principle of non-discrimination plays a key role in ensuring equal access to airport infrastructure and in preventing the preferential treatment of selected users.

Based on the analysis conducted in the fourth part, it can be concluded that there are significant differences between the interests of public-use airport managing bodies and airline carriers. According to EU law, airport managing bodies hold broad powers in setting airport charges; however, their discretion is significantly limited by the provisions of the Directive and national regulations, which safeguard the position of airlines. Moreover, the analysis of the regulations in force in Poland and Germany indicates that the provisions implementing Directive 2009/12/EC reflect the administrative systems of both countries (unitary and federal in nature) and consequently differ in their approach to organising the tariff-setting system.

In Poland, the President of the Civil Aviation Authority plays a central role, whereas in Germany, part of the responsibility for approving charges lies with the regional administrative authorities overseeing civil aviation in the respective federal states. This divergence results in different models for conducting consultations, approving tariffs, and determining the degree of state intervention in the activities

[58] Oberverwaltungsgericht Berlin-Brandenburg, *Einzelereignisbezogene Lärmentgelte am BER sind rechtmäßig – 8/24*, 29 February 2024; https://www.berlin.de/gerichte/oberverwaltungsgericht/presse/pressemitteilungen/2024/pressemitteilung.1422662.php [accessed on 29 May 2025].

of airport managing bodies. In both countries, one of the main challenges remains striking a balance between ensuring the operational efficiency of airports and protecting the interests of users. Excessive autonomy may lead to abuses, particularly in conditions of limited competition, while overly strict regulation can hinder investment and infrastructure development.

In summary, airport charges play a very important role in the EU aviation market, significantly shaping the relationship between airports and airlines. However, it is worth noting that the dynamic development of aviation in the region – including the modernisation of airport infrastructure and growing passenger traffic – will be a key factor influencing future changes in regulations concerning airport charges. Their overriding goal will remain the pursuit of maintaining a balance between the interests of airport managing bodies and airlines.

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DIGITAL PROCESSES IN EU COMPANY REGULATIONS AND THEIR IMPLICATIONS FOR REGISTRY PRACTICES

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Abstract

This paper examines the impact of European Union law on digitalisation, considering both its foundations and effects. Some of these aspects are addressed in Directive (EU) 2017/1132 of the European Parliament and of the Council on certain aspects of company law, as well as in the Directive of the European Parliament and of the Council amending Directives 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law. As a consequence of these legislative developments, several issues have since emerged. Examples include difficulties related to the online registration of companies introduced by Member States following the implementation of the Directive, and discrepancies between the information contained in national central business registers interconnected within the Business Registers Interconnection System (BRIS). In this context, the paper analyses the implications of the Court of Justice of the European Union's judgment in the *Manni* case and explains why the 'right to be forgotten' may not apply in this area. Another issue arising from digitalisation concerns trust services, including the work of notaries and their relationship with Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market (the eIDAS Regulation), as well as Regulation (EU) 2024/1183 of the European Parliament and of the Council of 11 April 2024 amending Regulation (EU) No 910/2014 as regards establishing the European Digital Identity Framework. On this occasion, the paper also discusses why the eIDAS Regulation may not necessarily have a harmonising effect across

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the various legal systems within the EU. Finally, in light of the Fifth Anti-Money Laundering Directive of the European Union, the paper considers the concept of beneficial ownership, its notarial determination, and its relevance to the prevention of money laundering.

Keywords: registration of companies; digitalisation; EU; EU law; CJEU; business; company law; company registers; BRIS; interconnection of business registers; *Manni* case; right to be forgotten; data protection; disclosure; notary; eIDAS; beneficial owner

INTRODUCTION

Digitalisation is an unstoppable process that directly affects all business operations.[1] The global pandemic has accelerated these developments in an unprecedented manner. As a result, part of companies' commercial activities is now supported or even replaced by digital technologies. Digitalisation in law is an area of transformation that has been relatively broadly conceptualised in the literature.[2] The main subject of this paper is the examination of developments in European Union company law, which has recently undergone instrumental changes. These changes refer, inter alia, to Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 and 29 March 2023 relating to certain aspects of company law (codification, text with EEA relevance, hereinafter referred to as 'the Directive'). The rationale underlying this Directive lies in the fact that, until its adoption, the preceding directives concerning related matters had often been amended and revised. Work on the codification began in 2012 and eventually led to the harmonisation of several practical aspects related to the digitalisation of company law processes. The Directive entered into force on 20 July 2017.[3] Hence, the Directive incorporates the essence of several earlier directives:

1. Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of companies governed by the law of another State;[4]
2. Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies (codification) (Text with EEA relevance);[5]

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[1] See also the definition of digitalisation provided by Ž. Bregeš, T. Jakupak, 'Digitalization of business register', *InterEULawEast*, 2017, Vol. IV, Issue 2, p. 5: 'The term "digitalization" is the representation of communication in writing or sound by electronic means, and the concept thus concerns electronic communication, including the transmission of information and the storage of such communication electronically, as well as electronic access to and retrieval from such storage.'

[2] J.C. Llopis Benlloch, 'Notaries and digitalisation of company law', *ERA Forum*, 2018, Vol. 19, p. 52.

[3] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) (Text with EEA relevance) (OJ L 169, 30.6.2017); and Directive of the European Parliament and of the Council amending Directives 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law (COM(2023) 177 final, 2023/0089(COD)).

[4] OJ L 395, 30.12.1989.

[5] OJ L 110, 29.4.2011.

3. Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent (codified version) (Text with EEA relevance);[6]
4. Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (recast) (Text with EEA relevance);[7]
5. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (Text with EEA relevance);[8]
6. Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies.[9]

Consequently, the Directive replaced all six of these directives. The rationale for its implementation is regarded as, to some extent, political, being closely linked to the Digital Single Market Strategy.[10] Extensive explanations were provided in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, as well as in the 2016 e-Government Action Plan and subsequent documents.[11] The Commission was encouraged by the Parliament to pursue digitalisation.[12] This particularly concerns the registration of companies and, thus, the life cycle of a company, which is closely connected with the realisation of rights deriving from the fundamental freedoms upon which the EU is founded.[13]

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[6] OJ L 258, 1.10.2009.

[7] OJ L 315, 14.11.2012.

[8] OJ L 310, 25.11.2005.

[9] OJ L 378, 31.12.1982.

[10] See S. Omlor, 'Digitalization and EU Company Law, Innovation and Tradition in Tandem', *European Company Law*, 2018, p. 3; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3258980 [accessed on 29 December 2022].

[11] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Digital Single Market Strategy for Europe*, COM(2015) 192 final; and European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU eGovernment Action Plan 2016–2020*, COM(2016) 179 final.

[12] See European Parliament, Resolution of 16 May 2017 on the EU eGovernment Action Plan 2016–2020 (2016/2273(INI)), OJ C307/2 and the Council Conclusions on Single Market Policy, 6197/15, 2–3 March 2015.

[13] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Commission Work Programme 2017. Delivering a Europe that protects, empowers and defends*, COM(2016) 710 final, p. 9. However, the idea was closely connected with the Commission's FinTech Action Plan.

ONLINE REGISTRATION OF COMPANIES AND THE INTERCONNECTION OF BUSINESS REGISTERS (BRIS)

Pursuant to the provisions of the Directive, each Member State enables the online registration of companies. Directive (EU) 2017/1132 formally applies to both single-member and multi-member companies.[14] However, it also refers to natural persons and legal entities.[15] Such registration is intended to provide a simplified form of company incorporation and does not require a notarial deed, as is normally the case in some Member States. The process of company registration consists of entering the relevant information on a dedicated website. Business registers are administered by public authorities: for instance, in Denmark by the Danish Business Authority (Virk); in Poland by the Ministry of Justice; and in the United Kingdom (despite Brexit) by Companies House, the government's official register of companies. Online registration procedures have indeed proved to be both time- and cost-efficient,[16] responding effectively to the needs of a rapidly changing and increasingly digital business environment. When registering a company online, it is required to provide:[17]

- a shareholders' agreement (charter) establishing the company,
- information on the required minimum share capital,
- the registered name,
- contact details,
- the relevant registry court at the company's seat, and
- a list of shareholders, members of the company's management bodies, and its branches.

Directive (EU) 2017/1132 provides for the creation of a system interconnecting company registers.[18] This system serves as a universal European central platform[19] composed of the Member States' registers, functioning as an electronic access point.[20] Member States are obliged to ensure the compatibility and interoperability of their

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[14] Nevertheless, in doctrine, it is also suggested that multi-member companies could be excluded from the Directive applicability (see S. Omlor, 'Digitalization…', op. cit., p. 6; and T. Wachter, 'Neues zum Europäischen Gesellschaftsrecht: Digitalisierung im GmbH-Recht (I)', *GmbH-StB*, 2018, No. 7, pp. 218–219.

[15] Pursuant to Article 13 of the Directive, with regard to company registers, the Directive is applicable to companies listed in Annex II of the Directive. For instance, in Germany this would be *die Gesellschaft mit beschränkter Haftung*; in France *société à responsabilité limitée*; and in Poland *spółka z ograniczoną odpowiedzialnością*.

[16] S. Omlor, 'Digitalization…', op. cit., p. 4.

[17] Such requirements are present in the company law of particular Member States jurisdictions. For example: *Handelsgesetzbuch* in Germany; *Kodeks spółek handlowych* in Poland; and *Code De Commerce* in France.

[18] Article 22 of the Directive: 'A European central platform ("the platform") shall be established. The system of interconnection of registers shall be composed of: the registers of Member States; the platform; the portal serving as the European electronic access point. Member States shall ensure the interoperability of their registers within the system of interconnection of registers via the platform. Member States may establish optional access points to the system of interconnection of registers. They shall notify the Commission without undue delay of the establishment of such access points and of any significant changes to their operation.'

[19] The European Central Platform (ECP).

[20] Ibidem. BRIS functions as the European Access Point (EAP).

registers within the interconnection system through this platform. The interconnection of business registers (known as 'BRIS') operates by linking the business registers of all Member States. BRIS aims to enhance the transparency of EU company law by providing access to official and up-to-date information on companies across Member States.[21] However, there are instances of potential inconsistency between EU law and national legislation. In German law, for example, simplified online company registration may conflict with binding domestic company law, as it omits several obligations imposed on companies and notaries.[22]

At this point, it is also necessary to refer to notarial determination regarding beneficial ownership. Beneficial ownership is defined in Directive (EU) 2015/849 of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ('4AMLD'), and in Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.[23] These instruments require Member States to ensure that corporate and other legal entities incorporated within their territories obtain and hold adequate, accurate, and up-to-date information concerning their beneficial ownership, including details of the beneficial interests held.[24] Such information must be registered and entered into central registers maintained by the Member States. These may be commercial, company, or public registers. Accordingly, Member State must provide unrestricted access to beneficial ownership information to competent authorities and financial intelligence units.[25] Certain obliged entities, such as banks or investment funds, are entitled to access to these registers within the framework of customer due diligence. Furthermore, and any person or organisation able to demonstrate a legitimate interest is also entitled to such access.[26]

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[21] BRIS has been available since 8 June 2017 at https://e-justice.europa.eu/content_business_registers-104-en.do [accessed on 20 October 2025].

[22] Pursuant to Section 2(1) of the *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* ('GmbHG'), the articles of association must be executed in notarial form and signed by all shareholders. Accordingly, pursuant to Section 10 of the *Beurkundungsgesetz* ('BeurkG'), the notary must establish the identity of the participants with certainty and resolve any doubts or ambiguities. Section 11 provides that the notary verifies the legal capacity of the participants, while Section 12 stipulates that the notary is responsible for verifying the authority to represent. Pursuant to Section 16, the notary is obliged to ensure that the contract is correctly understood by all parties with regard to the language in which the contract is drawn up. Finally, under Section 17, the notary reads the contract to the parties and ensures that the will of the parties is duly notarised. These provisions are related to the *Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten* ('GwG'), as notarial verification serves solely as a safeguard in cases of money laundering.

[23] Directive (EU) 2015/849 of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, came into force on 15 June 2016 (hereinafter referred to as 'the 4AMLD').

[24] See Article 30 of the 4AMLD.

[25] See Article 30(3) of the 4AMLD.

[26] In relation to these actors, they shall additionally have access to the name, date of birth, nationality, residential address, and a statement of the nature and extent of the interest held by the beneficial owner, for example, 30% of the ordinary shares of the company.

A beneficial owner is defined as any natural person who ultimately owns or controls a corporate or other legal entity. Accordingly, in the Glossary to the Financial Action Task Force (FATF) Recommendations, the beneficial owner refers to the natural person or persons who ultimately own or control a customer, or the natural person on whose behalf a transaction is being conducted.[27] It also includes those persons who exercise ultimate effective control over a legal person or arrangement. However, references to 'ultimately owns or controls' and 'ultimate effective control' concern situations in which ownership or control is exercised through a chain of ownership or by means of control other than direct control.[28] A shareholding of 25% plus one share, or an ownership interest of more than 25% in the customer held by a natural person, is regarded as an indication of direct ownership. A shareholding of 25% plus one share, or an ownership interest of more than 25% in the customer held by a corporate entity under the control of a natural person or persons, or by multiple corporate entities under the control of the same natural person or persons, is regarded as an indication of indirect ownership. However, Member States retain the right to determine that a lower percentage may also indicate ownership or control.[29]

As illustrated by German law and the distinct prerogatives of notaries, their role in the process of ownership determination is instrumental. They provide legal advice regarding the documents required to establish a company (the articles of association, the application for registration with the commercial register, and the list of shareholders), as well as notarising and verifying the legal validity of the aforementioned documents. Notaries also verify proof that the required minimum share capital has been paid. Finally, they generate authentic electronic copies of all documents, seal them electronically, and securely transmit them, together with machine-readable data, to the commercial register. In Spain, similarly to Germany, the notary's role arises in the process of company formation. The information and documents prepared during this process are verified by the notary in accordance with the relevant provisions of national law. The notary issues a deed, which is subsequently registered in the Company Register and then within the EU system of interconnected registers. Once the deed has been registered, the company is officially established in accordance with both national and EU law.

Registers are obliged to make all pertinent information about companies available to the public. This includes details such as the company's legal form, registered seat, capital, and legal representatives. By disclosing this information, companies facilitate the identification of their legal representatives and other relevant data. Such identification is crucial for establishing and maintaining business relationships, as it enables the formation of obligations with and through the company. Individuals are entitled to access the information and documents available in BRIS. The Member States'

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[27] The Financial Action Task Force (FATF) is an international policy-making and standard-setting body dedicated to combating money laundering and terrorist financing. It was established by the G7 in 1989 in response to growing concerns about money laundering.

[28] J. Hatchard, 'Money Laundering, Public Beneficial Ownership Registers and the British Overseas Territories: the impact of the Sanctions and Money Laundering Act 2018 (UK)', *Denning Law Journal*, 2018, Vol. 30, p. 188.

[29] See Article 3(6)(i) of the 4AMLD.

registers may also contain information on foreign branches and cross-border mergers of companies.[30] However, the Directive provisions relating to the interconnection of registers do not apply to branches opened in a Member State by a company that is not governed by the law of a Member State.[31] The Directive permits Member States to charge fees for access to information from the system of interconnected registers. Directive (EU) 2017/1132 does not impose any restrictions concerning the collection of fees for the use of information from this system. Therefore, Member States may impose such charges in accordance with their respective national laws. The system of interconnected registers should not present any technical barriers to the collection of such fees.[32] Importantly, the Commission is required to publish a report on the functioning of the system of interconnected registers.[33] It is essential that these reports include the technical and financial complexities inherent in the operation of this system.[34]

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[30] See https://www.e-justice.europa.eu [accessed on 20 December 2018].

[31] Recital 25 of Directive 2017/1132: 'Cross-border access to business information on companies and their branches opened in other Member States can only be improved if all Member States engage in enabling electronic communication to take place between registers and transmitting information to individual users in a standardised way, by means of identical content and interoperable technologies, throughout the Union. This interoperability of registers should be ensured by the registers of Member States ("domestic registers") providing services, which should constitute interfaces with the European central platform ("the platform"). The platform should be a centralised set of information technology tools integrating services and should form a common interface. That interface should be used by all domestic registers. The platform should also provide services constituting an interface with the portal serving as the European electronic access point, and to the optional access points established by Member States. The platform should be conceived only as an instrument for the interconnection of registers and not as a distinct entity possessing legal personality. On the basis of unique identifiers, the platform should be capable of distributing information from each of the Member States' registers to the competent registers of other Member States in a standard message format (an electronic form of messages exchanged between information technology systems, such as, for example, xml) and in the relevant language version.'

[32] Pursuant to recital 37 of Directive 2017/1132, the Directive 'should not prejudge any specific technical solution as the payment modalities should be determined at the stage of adoption of the implementing acts, taking into account widely available online payment facilities'.

[33] Article 162 of Directive 2017/1132: '1. The Commission shall, not later than 8 June 2022, publish a report concerning the functioning of the system of interconnection of registers, in particular examining its technical operation and its financial aspects. 2. That report shall be accompanied, if appropriate, by proposals for amending provisions of this Directive relating to the system of interconnection of registers. 3. The Commission and the representatives of the Member States shall regularly convene to discuss matters covered by this Directive relating to the system of interconnection of registers in any appropriate forum. 4. By 30 June 2016, the Commission shall review the functioning of those provisions which concern the reporting and documentation requirements in the case of mergers and divisions and which have been amended or added by Directive 2009/109/EC of the European Parliament and of the Council, and in particular their effects on the reduction of administrative burdens on companies, in the light of experience acquired in their application, and shall present a report to the European Parliament and the Council, accompanied if necessary by proposals to amend those provisions.'

[34] Ibidem.

THE IMPLICATIONS OF THE CJEU JUDGMENT IN THE *MANNI* CASE

Company registers contain a vast amount of data protected under EU law, the inclusion of which in such registers has significant consequences. Hence, it is necessary to mention a landmark judgment concerning EU data protection law, arising from a factual background associated with what is now referred to as 'the right to be forgotten'.[35] Signore Salvatore Manni was the sole director of an Italian company, *Immobiliare e Finanziaria Salentina Srl*. He declared insolvency in 1992, and the company was removed from the Italian Companies Register in 2005. However, Signore Manni remained identifiable as the administrator of that company in the register. In December 2007, Mr Manni, as director of another company that had been awarded a contract to build a tourist complex in Italy, brought an action against the Lecce Chamber of Commerce. He alleged that the Chamber had acted in a manner detrimental to his new construction company, making it unable to continue its operations or enter into transactions. Furthermore, he sought the deletion of his personal data from the records relating to *Immobiliare e Finanziaria Salentina Srl*. The Court of Lecce upheld his claims and ordered the Lecce Chamber of Commerce to anonymise, though not to remove, the data concerning Signore Manni, and to pay him compensation for the damage suffered. The Italian Supreme Court, referring to the 'right to be forgotten' as a fundamental instrument for the protection of personal identity, requested a preliminary ruling from the Court of Justice of the European Union (CJEU). It asked CJEU whether the protection of personal data grants the data subject the right to obtain the deletion or anonymisation of their data published in the companies register after a certain period of time; whether the requirement that personal data be kept in a form permitting the identification of data subjects for no longer than is necessary for the purposes for which they were collected applies in such a context; and finally, whether

> 'Member States may, and indeed must, allow individuals (…) to request the authority responsible for maintaining the companies register to limit, after a certain period has elapsed from the dissolution of the company concerned and on the basis of a case-by-case assessment, access to personal data concerning them and entered in that register.'[36]

First of all, the judgment was delivered on the basis of the no longer valid[37] Directive 95/46/EC (Data Protection Directive), which was repealed by 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 (hereinafter referred to as 'the GDPR'). Nevertheless, the judgment may be regarded as having a universal application, since, even in the light of the changes introduced by the GDPR, the substance of the CJEU's reasoning remains relevant.[38] This analysis, in fact, concerns the obligations

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[35] *Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*, Case C-398/15, judgment of the Court (Second Chamber), 9 March 2017; ECLI:EU:C:2017:197 (hereinafter referred to as 'the *Manni* case').

[36] Para. 30 of the CJEU judgment in the *Manni* case.

[37] From 24 May 2018, when the GDPR was implemented.

[38] Article 17 of Regulation (EU) 2016/679 of the European Parliament and of the Council

of public authorities responsible for maintaining company registers.[39] The data concerning Signore Manni recorded in the register fall within the category of personal data, since 'the fact that information was provided as part of a professional activity does not mean that it cannot be characterised as personal data.'[40] Moreover, the authority maintaining the register is a 'controller' that carries out the 'processing of personal data' by 'transcribing and keeping that information in the register and communicating it, where appropriate, on request to third parties'.[41] The CJEU judgment emphasised the obligation of disclosure, noting that it arises from the purpose of the provisions of Directive 95/46/EC.[42] In general, the objective of disclosing information in company registers is to protect, in particular, the interests of third parties in relation to joint-stock companies and limited liability companies, since the only safeguards such companies offer to third parties are their assets. Consequently, the key documents of the company concerned must be disclosed. This is necessary to enable third parties to become acquainted with their contents and with other relevant information concerning the company. This includes detailed information concerning the individuals authorised to make binding decisions on behalf of the company. Additionally, the CJEU ruled that Article 54(3)(g) of the EEC Treaty refers to the need to protect the interests of third parties generally,

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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 (GDPR): '1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies: (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed; (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing; (c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2); (d) the personal data have been unlawfully processed; (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject; (f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1). 2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data. 3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary: (a) for exercising the right of freedom of expression and information; (b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3); (d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or (e) for the establishment, exercise or defence of legal claims.' See also recitals 65 and 66 of the GDPR.

39 Para. 31 of the CJEU judgment in the *Manni* case.

40 Ibidem, para. 34.

41 Ibidem, para. 35.

42 See ibidem, para. 49.

without distinguishing or excluding any categories falling within the scope of that term.[43] Consequently, the third parties referred to in that article cannot be limited solely to the creditors of the company concerned.[44] Hence, the CJEU judgment also established that the purpose of disclosure is 'to protect, in particular, the interests of third parties in relation to joint-stock companies and limited liability companies, since the only safeguards they offer to third parties are their assets', and 'to guarantee legal certainty in relation to dealings between companies and third parties in view of the intensification of trade between Member States'.[45]

In concluding the relevance of the *Manni* case, the CJEU explained that a person who seeks to restrict access to his or her personal data published in company registers has no right to request the deletion of such data, even after the company concerned has ceased to exist. Nonetheless, the individual retains the right to object to the processing of their data, a right that depends on the particular circumstances of the case and the existence of legitimate reasons. Finally, the CJEU underlined the importance of considering the purpose of data processing when assessing whether a data subject can obtain deletion or blocking of data. In this context, the Court ruled that, even though such data consist of information relating to professional activity, they still constitute personal data.

THE IDENTIFICATION OF THE NOTARY'S OBLIGATIONS AND ITS RELATION TO THE EIDAS REGULATION

Another example of the significant impact of digitalisation on European company law is 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 (hereinafter referred to as 'the eIDAS Regulation'), which repealed, as of 1 July 2016, the Electronic Signatures Directive 1999/93/EC[46] (hereinafter referred to as 'the eSignature Directive').[47]

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[43] See ibidem, para. 51.

[44] See also judgment of the CJEU in Case C-97/96, *Verband Deutscher Daihatsu-Händler eV v. Daihatsu Deutschland GmbH*, ECLI:EU:C:1997:581; order of the CJEU in Cases C-435/02 and C-103/03, *Axel Springer AG v. Zeitungsverlag Niederrhein GmbH & Co. Essen KG*, ECLI:EU:C:2004:552; judgment of the CJEU in Case C-138/11, *Compass-Datenbanken GmbH v. Republik Österreich*, ECLI:EU:C:2012:449; judgment of the CJEU in Case C-615/13 P, *ClientEarth and PAN Europe v. EFSA*, ECLI:EU:C:2015:489; and judgment of the CJEU in Case C-362/14, *Maximillian Schrems v. Data Protection Commissioner and Digital Rights Ireland Ltd*, ECLI:EU:C:2015:650. Each of the above-mentioned cases was decided at a different time; nevertheless, they all convey a single, concrete principle – the right to be forgotten – consistent with the protection of personal data through company registers and the temporal availability of such data.

[45] Based on the provisions of Directive 68/151. See also paras. 49 and 50 of the CJEU judgment in the *Manni* case.

[46] See recital 73 of the Regulation (EU) No 910/2014 of the European Parliament and of the Council 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) (hereinafter referred to as the 'eIDAS Regulation').

[47] See the eIDAS Regulation; Regulation (EU) 2024/1183 of the European Parliament and of the Council of 11 April 2024 amending Regulation (EU) No 910/2014 as regards establishing

The eIDAS Regulation governs electronic identification and trust services for electronic transactions within the internal market of the European Union. It ensures that various actors and businesses can use their national electronic identification schemes ('eIDs') to access public e-services in other EU Member States where such eIDs are recognised. It also establishes a European internal market for electronic signatures, electronic seals, time stamps, electronic delivery services, and website authentication. The eIDAS Regulation addresses two main issues. Firstly, citizens were previously able to use their eIDs only in the Member State of their habitual residence. This limitation created difficulties regarding cross-border trusted identification and online authentication required in everyday activities (e.g. cross-border healthcare).[48]

The Regulation addresses two main issues. The primary concern is that citizens are unable to use their electronic identification to verify their identity in another Member State if the national electronic identification schemes of the respective Member States are not recognised in others. This creates difficulties for all cross-border online services that require a higher level of trusted identification and authentication, such as cross-border healthcare or online public procurement. The second issue concerns the legal validity of trust services. These consist of the creation, verification, and validation of electronic signatures, electronic seals or electronic time stamps, electronic registered delivery services, and certificates related to these services, as well as the creation, verification and validation of certificates for website authentication or the preservation of electronic signatures, seals or certificates related to these services.[49] *A contrario*, the eSignature Directive was criticised for focusing solely on electronic signatures, while neglecting other trust services. For this reason, the eIDAS Regulation also applies to other forms of digital certification, such as electronic seals, electronic time stamps, electronic documents, electronic registered delivery services, and certificate services for website authentication. This is a closed list; however, Member States are free to recognise at the national level other types of qualified trust services and to maintain or introduce national provisions relating to non-harmonised trust services.[50] Each type of trust service may be used in legal proceedings as evidence.[51] Unless otherwise provided by the eIDAS Regulation, Member States may determine the legal effect of trust services.[52] Pursuant to Article 22 of the eIDAS Regulation, Member States are required to establish, maintain and publish lists containing information on

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the European Digital Identity Framework (OJ L, 2024/1183, 30.4.2024); and Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ L 169, 30.6.2017).

48 See C. Cuijpers, J. Schroers, 'eIDAS as guideline for the development of a pan-European eID framework in FutureID', *Radboud Repository of the Radboud University, Nijmegen*, 2014; https://dl.gi.de/handle/20.500.12116/2636 [accessed on 29 December 2022], para. 3.2.

49 See Article 3(16) of the eIDAS Regulation. The cited wording of this Article reflects the text of the basic regulation as originally adopted. This provision was subsequently amended by Regulation (EU) 2024/1183, and the cited version is therefore no longer the wording currently in force.

50 Recitals 25 and 24 of the eIDAS Regulation.

51 See recital 22, and Articles 25, 35, 41, 43 and 46 of the eIDAS Regulation.

52 See recital 22 of the eIDAS Regulation.

qualified trust service providers. Trust service providers that meet the necessary criteria are designated as 'qualified' and are authorised to use the EU trust mark, which serves to indicate the provision of qualified trust services in a clear and easily identifiable manner.[53] Qualified trust service providers are supervised by an authority designated by each Member State.[54] A supervisory authority may be established within national territory and designated by the respective Member State; however, upon mutual agreement, another authority established in a different Member State may be designated to supervise qualified trust service providers in the designating Member State.[55] The principal role of the supervisory authority is to ensure, through *ex ante* and *ex post* supervisory reviews, that qualified trust service providers and the qualified trust services they offer meet the requirements set out in the Regulation, and to supervise non-qualified trust service providers established within the territory of the designating Member State.[56]

Both individuals and companies may use their own electronic identification systems. This enables access to electronic services across EU countries where electronic identity confirmation is required. Liability for failure to comply with the relevant obligations, such as notifying the Member State, rests with the entity issuing the electronic identification measures and processing the authentication.[57] The general rules of liability apply to the eIDAS Regulation, and it therefore does not affect the definitions of compensation or applicable procedural norms, including national rules on the burden of proof.

The impact of the eIDAS Regulation on the work of notaries is straightforward and concerns the confirmation of the identity of the person submitting the signature, which must be verified with the notary's seal.[58] According to the eIDAS Regulation, an electronic signature must be accompanied by a qualified certificate.[59] The qualified certificate must meet the following requirements:[60]

- indication, at least in a form suitable for automated processing, that the certificate has been issued as a qualified certificate for electronic signature;
- a set of data unambiguously representing the qualified trust service provider issuing the qualified certificates, including at least the Member State in which that provider is established and, for a legal person, the name and, where applicable, registration number as stated in the official records; for a natural person, the person's name;
- at least the name of the signatory or a pseudonym;

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53 Article 23 of the eIDAS Regulation.
54 Article 17 of the eIDAS Regulation.
55 Ibidem.
56 Article 17(3) of the eIDAS Regulation.
57 Article 13 and recital 18 of the eIDAS Regulation.
58 See Article 28 of the eIDAS Regulation.
59 The entity that subscribes to or owns a certificate is identified as the Certification Authority (CA), and the document containing the necessary data relating to the certificate is known as the Certification Practice Statement (CPS). However, the substance of certification is closely related to IT matters.
60 See Annex I to the eIDAS Regulation.

- electronic signature validation data that corresponds to the electronic signature creation data;
- details of the beginning and end of the certificate's period of validity;
- a certificate identity code, which must be unique for the qualified trust service provider;
- an advanced electronic signature or advanced electronic seal of the issuing qualified trust service provider;
- the location where the certificate supporting the advanced electronic signature or advanced electronic seal referred to in the foregoing requirement is available free of charge;
- the location of the services that can be used to verify the validity status of the qualified certificate;
- appropriate indication of a qualified electronic signature creation device.

In the legislation of several Member States, the issuance of certificates by notaries, authentication of signatures, and verification of copies with original documents, extracts or duplicates may be formalised through the use of a qualified electronic signature, provided that the specific form of certification requires such authentication. The validity of a notarial electronic document or its certification is equivalent to that of a notarial deed.

Electronic signatures are issued through qualified devices.[61] These qualified devices must comply with the following requirements:[62]

- they must ensure, by appropriate technical and procedural means, that at least the confidentiality of the electronic signature creation data used for signature creation is reasonably secured; that the electronic signature creation data used for signature creation can occur only once; that such data cannot, with reasonable assurance, be derived; and that the electronic signature is reliably protected against forgery using currently available technology. The electronic signature creation data used for signature creation must be reliably protected by the legitimate signatory against use by others;
- they must not alter the data to be signed or prevent such data from being presented to the signatory prior to signing;
- the generation or management of electronic signature creation data on behalf of the signatory may be carried out exclusively by a qualified trust service provider;
- qualified trust service providers managing electronic signature creation data on behalf of the signatory may duplicate such data only for back-up purposes, provided specific requirements are met.[63]

The qualified device must have a certificate issued by the relevant public or private entities designated by the Member States, confirming compliance with the requirements of Annex II to the Regulation. Certification must involve a security

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[61] See Article 30 of the eIDAS Regulation.

[62] See Annex II to the eIDAS Regulation

[63] Ibidem: the security of the duplicated datasets must be equivalent to that of the original datasets, and the number of duplicated datasets shall not exceed the minimum necessary to ensure continuity of the service.

assessment procedure carried out in accordance with one of the recognised standards for the security assessment of IT products.[64] Alternatively, the devices may comply with other procedures that ensure comparable levels of safety and are applied by the designated public or private entity.[65] Without undue delay, pursuant to Article 31 of the eIDAS Regulation,[66] the Commission shall prepare, publish, and maintain a list of certified qualified devices for electronic signature. Within one month of the completion of certification, Member States must provide the Commission with information concerning qualified devices.

Apart from electronic signatures, seals have also been transformed into their digital form. The eIDAS Regulation recognises two types of electronic seal: the basic electronic seal and the advanced electronic seal. Pursuant to Article 3(25) of the eIDAS Regulation, an electronic seal consists solely of data in electronic form, attached to or logically associated with other data in electronic form to ensure the originality and integrity of the document. The advanced electronic seal is uniquely linked to its creator and allows for their identification. The creator of the advanced electronic seal can, with a high level of confidence, use the electronic seal and the data to which it relates in such a way that any subsequent alteration of the data is detectable.[67]

The electronic seal may replace the notarial seal. However, the legal effects of the use of an electronic seal are limited to certain legal proceedings only, as it does not meet the requirements of a qualified electronic seal. It enjoys the presumption of the integrity of the data and the correctness of the origin of that data to which the qualified electronic seal is linked. Furthermore, a qualified electronic seal based on a qualified certificate issued in one Member State is recognised as a qualified electronic seal in all other Member States.[68]

CONCLUSION

Digitalisation is an unavoidable phenomenon. Sooner or later, most daily activities will be transformed into digital form. This process will undoubtedly streamline many procedures as a result of the legal provisions described in this article. BRIS undoubtedly constitutes a set of useful solutions; however, as can be observed from the German example, it remains imperfect and is not equally adapted to the specificities of each Member State. Moreover, in the context of GDPR, data protection in registers does not fully ensure the effectiveness of the 'right to be forgotten', since personal data stored in registers cannot be permanently deleted. A step in the right direction is certainly the adoption of the eIDAS Regulation, which contains provisions covering a wide range of trust services. This stands in contrast to the eSignature Directive, which related solely to electronic signatures and was therefore insufficient, given the multitude of other types of trust services now available. As a consequence of digitalisation, the nature of

64 See Article 30 of the eIDAS Regulation.
65 See Article 30(1) of the eIDAS Regulation.
66 See Article 31 of the eIDAS Regulation.
67 See Article 36 of the eIDAS Regulation.
68 See Article 35 of the eIDAS Regulation.

notarial work is changing rapidly. This is due to the fact that the physical presence of a notary may no longer be necessary when incorporating a company. Nonetheless, in some Member States, the notary's presence remains obligatory for certain acts, such as the notarisation of wills, verifying a person's identity, or confirming the legal capacity of documents required for company incorporation. Furthermore, with regard to beneficial ownership, and pursuant to 5AMLD, the work of legal practitioners, including notaries, serves as an additional and important layer in the prevention of money laundering. It is certain that further regulations will follow in the near future in response to the continuing development of digital technologies.

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