ISSN 1897-5577

Ius Novum

Vol. 11
Numer 4
2017

październik–grudzień

kwartalnik wydziału prawa i administracji
uczelni łazarskiego

Warszawa 2017

Pełne teksty artykułów w języku polskim wraz ze spisem treści i streszczeniami w językach polskim i angielskim są zamieszczone na stronie internetowej:
http://www.lazarski.pl/pl/badania-i-rozwoj/oficyna-wydawnicza/Czasopisma-online/Ius-Novum/
oraz w serwisie The Central European Journal of Social Sciences and Humanities: http://cejsh.icm.edu.pl/

Full texts of articles in the Polish language with the given issue contents and abstracts in Polish and English are available on:
http://www.lazarski.pl/pl/badania-i-rozwoj/oficyna-wydawnicza/Czasopisma-online/Ius-Novum/
and the service of the Central European Journal of Social Sciences and Humanities: http://cejsh.icm.edu.pl/

ISSN 1897-5577

Tłumaczenie opublikowanych materiałów oraz redakcja anglojęzyczna czasopisma w 2017 roku zostały sfinansowane z grantu przyznanego przez Ministerstwo Nauki i Szkolnictwa Wyższego.

The translation of the publications and linguistic editing of the English version of this journal in 2017 were financed from the grant awarded by the Polish Ministry of Science and Higher Education.

DOM WYDAWNICZY ELIPSA

Opracowanie komputerowe, druk i oprawa:
Dom Wydawniczy ELIPSA
ul. Inflancka 15/198, 00-189 Warszawa
tel./fax 22 635 03 01, 22 635 17 85
e-mail: elipsa@elipsa.pl, www.elipsa.pl

OFICYNA WYDAWNICZA UCZELNI ŁAZARSKIEGO
02-662 Warszawa, ul. Świeradowska 43
tel. 22 54-35-450
www.lazarski.pl
wydawnictwo@lazarski.edu.pl

CONTENTS

ARTICLES

SPIS TREŚCI

ARTYKUŁY

CRIME OF JOINING IN THE PROCESS OF CIRCULATION OF PORNOGRAPHIC IMAGES OF MINORS UNDER THE AGE OF FOURTEEN FROM THE CANON LAW PERSPECTIVE

FLORIAN LEMPA*

The fact that mass media, especially the Internet, apart from the access to knowledge, which is an obvious advantage of it, are used for criminal purposes, inter alia the dissemination of child pornography, is the painful truth nowadays. With the rise in the phenomenon of paedophilia, which has not left the Catholic clergy out, the Holy See, like state legislators, decided it was necessary to extend the canon protection of the image of minors below the age of fourteen against the potential misuse by Catholic priests.

The article aims to present the essence of a criminal act of joining in the process of circulation of pornographic images of minors under the age of fourteen laid down in the canon criminal law, its social harmfulness and penalisation. It discusses the specificity of actions undertaken by the Church legislator on behalf of the Catholic Church, and their compatibility with governmental legal solutions.

1. HISTORICAL OUTLINE OF THE CRIME

The Catholic Church unambiguously condemned pornography in #2354 Catechism of the Catholic Church (CCC) stating that: "It offends against chastity because it prevents the conjugal act, the intimate giving of spouses to each other. It does grave injury to the dignity of its participants (actors, vendors, the public), since each one becomes an object of base pleasure and illicit profit for others. It immerses all who are involved in the illusion of a fantasy world. It is a grave offence. Civil authorities should prevent the production and distribution of pornographic materials".

* Professor, PhD hab., Head of the Department of Roman Law, Logic and Theory and History of Law, Faculty of Law and Administration of Łazarski University in Warsaw; florian.lempa@lazarski.pl

Pope John Paul II, in one of his catecheses concerning the theology of the body given on 29 April 1981, explained that the issue of the Church's negative attitude towards pornovision and pornography is not the effect of a puritanical mentality or of a narrow moralism, just as it is not the product of a thought imbued with Manichaeism, either. It is a question of an extremely important, fundamental sphere of values. Before it, man cannot remain indifferent because of the dignity of humanity, the personal character and the eloquence of the human body.[1] In the apostolic exhortation *Familiaris consortio*, he emphasises that one of the political community duties is to ensure the protection against pornography.[2] Being aware of the fact that in the era of global sexual revolution almost everyone is exposed to the destructive influence of easily accessible pornovision and pornography, the Congregation for the Doctrine of the Faith, authorised by Pope Benedict XVI, held it was absolutely necessary, following the example of contemporary states, to introduce the offence into the system of canon law, which would safeguard the dignity and respect for good image of children and youth, and protect them against abuse by paedophilia and ephebophilia in the event they entered the circles of Catholic clergy. It took place with the entry into force of the promulgated Norms concerning grave delicts reserved to the Congregation for the Doctrine of the Faith (hence CDF) (*Normae de delictis Congregationi pro Doctrina Fidei reservatis seu Normae de delictis contra Fidem necnon de gravioribus delictis*), presented by the Holy See Press Office on 15 July 2010. Article 6 §1(2°) of the Norms stipulates that one of the more grave delicts against morals is "the acquisition, possession, or distribution by clerics of pornographic images of minors under the age of fourteen, for purposes of sexual gratification, by whatever means or using whatever technology".[3] Taking into account all three forms of the crime, one can call them "the crimes of joining in the process of circulation of pornographic images of minors under the age of fourteen".

2. ACTIVE AND PASSIVE SUBJECT OF THE CRIME

On the one hand, an individually determined active subject, and, on the other hand, the specificity of the passive subject designate the scope of the crime of joining in the process of circulation of pornographic images of minors under the age of fourteen, which the features of the subject adequate to them indicate.

2.1. ACTIVE SUBJECT

An active subject, in other words a perpetrator referred to in Article 6 §1(2°) of the Norms concerning the more grave delicts reserved to the Congregation for the Doctrine of the Faith consisting in the acquisition, possession and distribution by

[1] See, *Jan Paweł II o małżeństwie i rodzinie* [John Paul II on marriage and family], Warsaw 1983, p. 363.

[2] Compare, John Paul II, Apostolic exhortation *Familiaris consortio*, #46.

[3] *Acta Apostolicae Sedis* 102 (2010), p. 424.

clerics of pornographic images of minors under the age of fourteen, for purposes of sexual gratification, by whatever means or using whatever technology, in the light of the feature of the subject: *clericus*, may only be a clergyman. It does not matter whether he has been incardinated, i.e. included in a particular diocese (eparchy), or a religious institute, monastery or society of apostolic life.

2.2. PASSIVE SUBJECT

In the light of the feature of *minorum infra aetatem quattuordecim annorum*, used in the description of the prohibited act in Article 6 §1(2°) of the Norms concerning the more grave delicts reserved to the CDF, a passive subject, i.e. the aggrieved, is a minor under the age of fourteen who by whatever means was shown in the pornographic image acquired, possessed or distributed for purposes of sexual gratification provided that its content is adequate to what took place in reality. The age of the subjects of visualisation is assessed based on the physical features, e.g. the body build, and mainly facial features and the appearance of genitals. It may happen that in some cases, especially when the aggrieved minor is on the borderline between fourteen and fifteen years of age, appropriate assessment of his age will cause some problems.[4] Therefore, if a perpetrator manages to prove that a person presented in a pornographic image was older than fourteen, e.g. if expert witnesses analysing the anatomic features confirm that or the Internet site presenting the image that the perpetrator used provide a declaration that presented people are adult, there will be a lack of features of a passive subject of crime and the perpetrator's act cannot be recognised as crime and, as a result, he cannot be punished. However, from the religious point of view, the act is a cardinal sin.

Introducing the feature of the aggrieved subject's age, the legislator indicates the will to protect children and younger teenagers against the use of their image for sexual purposes, thus against their instrumental use again. In comparison to other legal solutions adopted in other legal systems, this solution cannot be recognised as well balanced. For example, Article 600-bis of the Italian penal code stipulates that whoever acquires or possesses pornographic images produced as a result of sexual abuse of minors under the age of eighteen is subject to penalty of deprivation of liberty for a period of up to three years or a minimum fine of EUR 1,549. The Polish legislator also lays down that the crime of possession and distribution of pornography requires the participation of a minor whose age is under eighteen (Article 202 §§ 3 & 4a Criminal Code).

---

[4] *C. Papale, Il processo penale canonico. Commento al Codice di Diritto Canonico*. Libro VII, Parte IV, Vaticano 2007, p. 236: "Si tratta di un giudizio non sempre di facile effecttuazione: se, infatti, in alcuni casi e difficile che possa dubitarsi che si tratti di bambini o, comunque, di soggetti giovanissimi, non cosi in altri casi, come quando l'eta delminore e 'al confine' dei 14 anni e, conseguentemente, arduo risulta essere l'emissione di un giudizio sicuro al riguardo".

3. OBJECTIVE SIDE OF THE CRIME

The criminal act consists in joining in the process of circulation of pornographic images of minors under the age of fourteen (*imaginum pornographicarum minorum infra aetatem quatordecim annorum*). The term images means photographs, e.g. put in an album, films, Internet presentations containing pornographic content, i.e. ones that their producers intended to evoke sexual elation because they present minors under the age of fourteen in the course of sexual activities, being subject to sexual activities or in lascivious poses. It is necessary to differentiate pornographic materials from materials containing erotic content, a sexual subtext, but not showing the image of genitals even if they present minors under the age of fourteen, e.g. a poster presenting a few-year old boy following his mother and pulling her skirt in the way that uncovers her buttock with a slogan: "What do men think about?" can be treated as erotic but not pornographic. Not every image of a minor's nudity is pornographic in nature, e.g. a photograph of a naked child bathing that his parents sent to their relative who is a cleric does not match the feature of "pornographic images". Similarly, not every pornographic image constitutes an element of an act prohibited by a sanctioned norm of Article 6 §1(2°) of the Norms concerning the more grave delicts reserved to the CDF. In accordance with Can. 18 Code of Canon Law (CCL/1983) and Can. 1500 of the Code of Canons of Oriental Churches (CCOC), pornographic material matches the features of the objective side of a prohibited act only when it contains the registration of real situations in which a minor found himself. Thus, virtual paedophile pornography is not subject to the sanctioning norm discussed because it results from advanced graphic processing, which creates an impression of a real situation with minors' participation, although the fact of using it for the purpose of sexual gratification is morally blameworthy and constitutes a cardinal sin against the Sixth Commandment of the Decalogue.

The Church legislator lays down three alternative forms of the crime of joining in the process of circulation of pornographic images of photographed or filmed minors under the age of fourteen, depending on the features of action concerned laid down in the sanctioned norm: *comparatio* (acquisition) or *detentio* (possession), or *divulgatio* (distribution).

Acquisition of this kind of pornographic materials means their purchase, exchange in order to obtain them, or receipt as a gift, as a result of which a perpetrator becomes their owner. It is not important who the vendor is. It may occur in the form of online purchase and payment by credit card or free downloading of files available online and saving them on a computer or memory carriers (floppy discs, compact discs or pen drives).

Possession means retaining the materials, in spite of a legal ban, in whatever place, e.g. on a shelf at home, in a safe, on the hard disc of one's own computer, on a floppy disc or a pen drive. It does not matter what the purpose of retention is: whether they are kept for one's own use, for other people's needs or for the purpose of distribution.

Distribution of pornographic images of minors under the age of fourteen means undertaking activities that make them available to other definite or indefinite

persons, i.e. passing them to other persons by means of e.g. selling, sending by post, lending, spreading cassettes or photographs in a busy place or any other way making them easily accessible. The latest method of distribution consists in enabling an indefinite number of people to have access to them, e.g. giving access to them on an easily accessible website that an unlimited number of people can visit and freely download files from it.

The fact that the sanctioning norm of §6(2°) of the Norms concerning the more grave delicts reserved to the CDF lays down the features of the way of committing a prohibited act: "by whatever means" (*quovis modo*) or "using whatever technology" (*quolibet instrumento*) indicates that all possible forms of acquisition, possession and distribution of child pornography are subject to the sanctioning norm.

4. SUBJECTIVE SIDE OF THE CRIME

The crime of joining in the process of circulation of pornographic images of minors under the age of fourteen in all its forms assumes a perpetrator's intentional guilt in the form of direct intent to gratify sexual desire, which is indicated by the purpose--related feature of a prohibited act *turpe patrata*. A perpetrator purchasing them as well as the one who possesses or distributes them wants to do what he does, i.e. he wants to fulfil lascivious aims. In such a case, intentional guilt is annulled neither by the fact that a perpetrator has not achieved the intended aim nor by the lack of sufficient knowledge of the criminal act specifying this crime. It can influence the gravity of penalty at the most.

The use of virtual child pornography in particular requires a series of conscious attempts from searching for Internet sites with pornographic content, through the decision to buy them, to downloading the files onto the hard disc of one's own computer.[5] If someone does not want it, he has no other possibility of receiving virtual pornography and he cannot justify himself by the broad accessibility of the Internet or accidental coming into possession of pornographic materials. Striving to come into possession of specific pornographic content, a user of the peer to peer or point to point programmes have to use specific keywords to get access to them, to make the programme give access to all the files in accordance with the search criteria selected. It can happen, however, that the material looked for does not match the material actually downloaded. Let us imagine, for example, a person searching for all possible films of *Bolek i Lolek* series on the Internet, who finds a title *Bolek and Lolek on holiday X*, which he does not have in his collection. Having downloaded it, he opens the file and realises that he has come into possession of pornographic images of minors under the age of fourteen, which somebody gave an innocent title in order to increase its dissemination. The example clearly shows the difference between the Internet user's intention and the result of his action. There is no doubt that he did not commit a crime and, as a result, is not subject to penalty because

[5] See, G. Pica, *Internet*, [in:] *Digesto delle discipline pubblistiche*. Aggiornamento, Utet-Torino 2004, p. 472.

his action was not accompanied by direct intent to acquire pornographic content presenting minors under the age of fourteen. Such unintentional acquisition of pornographic materials may, however, become an opportunity to commit an offence in the form of child pornography retention. If, learning what the content of the material is, the Internet user does not delete it from his computer but retains it with intention to perform lascivious acts or to distribute it in any way, his behaviour will indicate his criminal intent and he will become subject to an adequate canon penalty. It should be emphasised that what indicates the illegal intention of the person retaining pornographic materials is not just the fact of their retention on a computer hard disc or another data carrier (e.g. the retention of pornographic images of minors under the age of fourteen by the church officials in order to ensure a fair trial is not an offence because its purpose is not lascivious) but the use of them by the person involved for lascivious purposes at least a few times. The fact that a perpetrator deleted the materials after some time does not exempt him from a penalty if he had used them before. However, the fact that a perpetrator destroyed the materials before the detection of the crime or after the detection as a sign of repentance can constitute a circumstance prone to affect the mitigation of canon punishment, although it does not decrease the seriousness of the prohibited act.

In the event of distribution of pornographic images of minors under the age of fourteen, the direct intention to commit a lascivious act decides on the criminal liability of a perpetrator, provided that a particular person is a receiver of the material. However, the distribution may result from oblique intent, which takes place when a perpetrator gives his consent to indefinite and unknown number of people to obtain pornographic content.

5. DAMAGE RESULTING FROM THE CRIME

A perpetrator's activities to join in the process of circulation of pornographic images of minors under the age of fourteen result in the continuation of their abuse. This causes that they keep being deprived of their dignity and the right to privacy. It contributes to the development and consolidation of the pornographic market, which preys on perverted sexual needs of paedophiles and ephebophiles looking for new stimuli. To obtain them, the producers of such materials often take advantage of a difficult financial situation of minors and a lack of sufficient parental care. Moreover, they act deceitfully, use violence and blackmail, and sometimes even get them addicted to drugs. Thus, a perpetrator of such a crime promotes behaviour that makes every ordinary man embarrassed as it degrades him and makes him even more dependent on this degenerate inclination, which is a perpetrator's sexual drive to children and juveniles. Because of the emotional immaturity and egoism of a perpetrator (a diocesan or monastic cleric), the image of the Good Shepherd suffers. The Church uses it to present the positive didactic role of playing auxiliary functions to a family and the community. Moreover, a perpetrator flagrantly destroys the authority of the Church in the field of morality, which he represents, even if he does not act publicly.

6. PENAL SANCTION

Penal sanctions for this type of crime are laid down in Article 6 §1(3°) of the Norms concerning the more grave delicts reserved to the CDF. They are the same as in case of an offence against the Sixth Commandment of the Decalogue committed against a minor under the age of eighteen referred to in Article 6 §1(2°) of the Norms. The sanctions are obligatory and partially indefinite. The Church judge authorised to impose a penalty should apply a penalty adequate to the gravity of a given crime, including dismissal or deposing. The use of the phrase *dimissio vel depositio* in the sanctioning norm indicated that that the Church legislator envisages every potential form of dismissal or deposing. Therefore, clerics who are subject to the provisions of CCL/1983 may be dismissed from the institute of consecrated life (Can. 695 §1) or a society of apostolic life (Can. 746) or from the clerical state (Can. 1336 §1(5°)). On the other hand, in accordance with CCOC, the most severe penalties for the commission of this type of crime that can be imposed on a cleric who is a member of an Oriental Catholic Church are: dismissal from a monastery (Can. 495), from the Order or Congregation (Can. 547 §3), from the Society of Common Life to the Manner of Religious (Can. 562 §3) or deposing from an office or position of administration (Can. 762 §1(7°)) or from a clerical state (Can. 1433 §2).

***

The crime of joining in the process of circulation of pornographic images of minors under the age of fourteen by their intentional acquisition, possession or distribution was introduced to the catalogue of canon crimes, which constitutes the expression of the Catholic Church co-responsibility for the fight against any forms of paedophilia among the Catholic clergy. However, this protection cannot be recognised as sufficient because the sanctioned norm applies only to clerics. In the canon law in force, there is no analogous sanctioned norm that would safeguard children and youth's dignity against abuse by monks who are not clerics, nuns and secular staff, especially religion teachers and persons playing other didactic roles within the authorisation given by the Church or within a canon mission. Although, in case of those persons, one can use the general norm of Can. 1399 CCL/1983 and strive to punish the perpetrators of a grave violation of the Divine laws and a scandal caused, does not change the fact that the Catholic Church formally does not penalise them and refers the problem of criminal liability for their acts to public authorities. This lack of consistency undoubtedly weakens the role and importance of the Catholic Church as a guardian of morality.

BIBLIOGRAPHY

Acta Apostolicae Sedis 102 (2010).

C. Papale, Il processo penale canonico. Commento al Codice di Diritto Canonico. Libro VII, Parte IV, Vaticano 2007.

John Paul II, Apostolic exhortation *Familiaris consortio*, 1981.
Jan Paweł II o małżeństwie i rodzinie [John Paul II on marriage and family], Warsaw 1983, p. 363.
Pica G., *Internet*, [in:] *Digesto delle discipline pubblistiche*. Aggiornamento, Utet–Torino 2004.

THE CRIME OF JOINING IN THE PROCESS OF CIRCULATION OF PORNOGRAPHIC IMAGES OF MINORS UNDER THE AGE OF FOURTEEN FROM THE CANON LAW PERSPECTIVE

Summary

The article discusses the decision of the Congregation of the Doctrine of the Faith of 2010 to introduce the crime consisting in a Catholic Church cleric's participation in the process of circulation of pornographic images of minors under the age of fourteen by their intentional acquisition, possession and distribution. The author draws attention to the compatibility of the subjective side of such a crime with state legislations and, at the same time, critically assesses the scope of its sanctioned norm, which applies only to clerics. He believes that any violation of the dignity of children and youth by their sexual abuse aggravated by the distribution of photographs or films presenting them requires that a common norm should substitute for the special sanctioned norm in canon law.

Keywords: pornographic images, cleric, minor, canon sanctions

PRZESTĘPSTWO WŁĄCZENIA SIĘ W OBIEG MATERIAŁÓW PORNOGRAFICZNYCH PRZEDSTAWIAJĄCYCH MAŁOLETNICH PONIŻEJ CZTERNASTEGO ROKU ŻYCIA W PRAWIE KANONICZNYM

Streszczenie

Przedmiotem artykułu jest wprowadzone w 2010 roku do kanonicznego prawa karnego decyzją Kongregacji Nauki Wiary przestępstwo polegające na włączeniu się przez duchownego Kościoła Katolickiego w obieg materiałów pornograficznych z udziałem małoletnich poniżej czternastego roku życia poprzez umyślne ich nabywanie, przechowywanie lub rozpowszechnianie. Autor zwraca w nim uwagę na kompatybilność przedmiotowej strony tak określonego przestępstwa z ustawodawstwami państwowymi i jednocześnie krytycznie ocenia zakres jego normy sankcjonowanej, która odnosi się wyłącznie do duchownych. Uważa, że wszelkie naruszanie godności dzieci i młodzieży poprzez ich seksualne wykorzystywanie, zwielokrotnione rozpowszechnianiem zdjęć lub filmów pornograficznych z ich udziałem, domaga się wprowadzenia do prawa kanonicznego w miejsce szczególnej normy sankcjonowanej normy powszechnej.

Słowa kluczowe: materiały pornograficzne, duchowny, małoletni, sankcje kanoniczne

OBLIGATION TO PRESENT THE LAST WILL IN THE LAW OF JUSTINIAN

SŁAWOMIR KURSA*

Roman law, like contemporary legal systems, recognised the priority of testamentary inheritance over non-testamentary inheritance.[1] The acquisition of an inheritance based on a last will required its official opening. It took place in the course of a verbal process, the elements of which are described in legal sources and opening reports preserved.[2] The implementation of the official procedure of a will opening was preceded by two actions: the submission of a will and convening the witnesses to it or trustworthy people in case of witnesses' absence. Their task was to confirm authenticity of the submitted document.[3] The fastest possible submission and opening of the document was in the interest of all who expected or were sure to be the beneficiaries of the testator's testamentary decisions.

The article aims to explain who, in accordance with the law of Justinian, was obliged to submit the will developed and left by the testator to a competent official in order to open it and reveal its content as well as make copies. The other issue discussed concerns the application of an interdict *de tabulis exhibendis* in case of difficulties occurring on the part of a will holder, both before its official opening and in the course of its execution.

* PhD, Assistant Professor, Faculty of Law of SWPS University of Social Sciences and Humanities in Warsaw; skursa@swps.edu.pl

1 Tab. 5,3; D. 50,16,120 (*Pomponius libro 5 ad Quintum Mucium*); Nov. 22,2 pr.; P.F. Girard, *Manuel elementaire de droit romain*, Paris 2003, p. 842; B. Albanese, *Osservazioni su XII Tab. 5,3 (Uti legassit..., ita ius esto)*, Annali del Seminario Giuridico dell'Università di Palermo 1(45)/1998, pp. 35–66; M. and J. Zabłoccy, *Ustawa XII tablic. Tekst – tłumaczenie – objaśnienia* [Statute of 12 tables. Text – translation – explanation], Warsaw 2000, pp. 30–33; S. Kursa, *Vigor reguły nemo pro parte testatus pro parte intestatus decedere potest w prawie rzymskim* [The effect of the rule of *memo pro parte intestatus decedere potest* in the Roman law], Studia Prawnoustrojowe 27/2015, pp. 34–36.

2 First of all, PS. 4,6 (*De vicesima*); D. 29,3 (*Testamenta quemadmodum aperiuntur inspiciantur et describantur*); C. 6,32 (*Quemadmodum aperiantur testamenta et inspiciantur et describantur*); P. Ital. I 5 (B VI 12–VII 11); P. Ital. I 6.

3 D. 29,3,4 (*Ulpianus libro 50 ad edictum*); D. 29,3,5 (*Paulus libro 8 ad Plautium*); D. 29,3,7 (*Gaius libro 7 ad edictum provinciale*); R. Martini, *Sulla presenza dei "signatores" all'apertura del testamento*, [in:] *Studi in onore di Giuseppe Grosso*, Vol. 1, Torino 1968, pp. 485–495.

1. THE WILL HOLDER

The law of Justinian did not lay down an obligation to deposit a will with a particular person or a specific authority. It was left to a testator's discretion and he could deposit a will with a chosen most trusted person. However, the law recommended applying the principle expressed by Ulpian in the fiftieth book of the commentary *ad edictum*:

D. 22,4,6 (*Ulpianus libro 50 ad edictum*): *Si de tabulis testamenti deponendis agatur et dubitetur, cui eas deponi oportet, semper seniorem iuniori et amplioris honoris inferiori et marem feminae et ingenuum libertino praeferemus.*

Ulpian recommended that, in case of a dilemma who a testator should deposit his will with, he should choose an older person rather than a younger one, a person holding a higher position rather than one of a lower social status, a man rather than a woman, and a freeborn citizen rather than a freedman. Such preference resulted from classical criteria applied also in relation to other documents retention.

In the next fragment of the sixty-eighth book of the commentary *ad edictum*, also preserved in the Digest of Justinian, Ulpian presents a case in which a man called Titus gave a will deposited with him to the custody of another person.

D. 43,5,3,2 (*Ulpianus libro 68 ad edictum*): *Si tabulae testamenti apud aliquem depositae sunt a Titio, hoc interdicto agendum est et cum eo qui detinet et cum eo qui deposuit.*

The text does not explain, however, who Titus was: an heir, a beneficiary or a third person. Next, Ulpian mentions that a temple guard or a *tabularius* (an archivist) might be a holder of a deposited will, or it might even be held in the custody of a slave.

D. 43,5,3,3–4 (*Ulpianus libro 68 ad edictum*): 3. *Proinde et si custodiam tabularum aedituus vel tabularius suscepit, dicendum est teneri eum interdicto.* 4. *Si penes servum tabulae fuerint, dominus interdicto tenebitur.*

Thus, a testator's will, before its opening, might be kept by different people, those interested in the inheritance, third parties as well as those whose job was to hold custody of documents, i.e. temple guards[4] and archivists. It is necessary to remember that wills developed at official witnesses' presence were kept in imperial, curial or court archives.[5]

2. PREMISES OF AN INTERDICT *DE TABULIS EXHIBENDIS*

The release of a will to people who had a legal interest to get to know its content was the holder's moral and legal duty. Usually, right after the testator's death, a holder appeared before an official and presented the document held. The fragment

[4] H. Vidal, *Le dépôt in aede*, Revue Historique de Droit Français et Étranger, 43/1965, pp. 573–574.

[5] C. 6,23,18 (*Arcadius, Honorius*); C. 6,23,19,1 (*Honorius, Theodosius*); S. Kursa, *Testator i formy testamentu w rzymskim prawie justyniańskim* [Testator and forms of the last will in the Roman law of Justinian], Warsaw 2017, pp. 288 and 297.

of the Digest of Justinian, the sixty-eighth book of comments *ad edictum* by Ulpian, indicate how he should behave:

D. 43,5,1,1 (*Ulpianus libro 68 ad edictum*): *Si quis forte confiteatur penes se esse testamentum, iubendus est exhibere, et tempus ei dandum est, ut exhibeat, si non potest in praesentiarum exhibere. Sed si neget se exhibere posse vel oportere, interdictum hoc competit.*

According to this description, the holder who admitted that he had a will should show it *quam primum*. In case he could not do this because of objective reasons, the official set a deadline for its provision.[6] In the event the holder claimed he could not or should not reveal it, the official was entitled to apply an interdict *de tabulis exhibendis*.[7]

Not only an heir but also other persons mentioned in a will had the right to get acquainted with it and make copies.

D. 43,5,3,10 (*Ulpianus libro 68 ad edictum*): *Solent autem exhiberi tabulas desiderare omnes omnino, qui quid in testamento adscriptum habent.*

Ulpian made comments on it also in the fiftieth book of commentaries on the edict.

D. 29,3,2 pr. (*Ulpianus libro 50 ad edictum*): *Tabularum testamenti instrumentum non est unius hominis, hoc est heredis, sed universorum, quibus quid illic adscriptum est: quin potius publicum est instrumentum.*

According to the last words of this fragment, added by the compilers,[8] a will was a public document rather than a private one. Luigi De Sarlo notices that the adjective *publicum* refers to the nature of the document and he states that there was no distinction between public and private documents in the classical law. In his opinion, the change introduced by Justinian's compilers aimed to emphasise that will tables referred to all beneficiaries and not only to heirs,[9] and their opening was in the public interest, which was to fulfil the entire will of the testator.[10] Moreover, the author believes that the quoted fragment in the Justinian's compilation as well as in Lenel's *Palingenesia* was placed under the title *Testamenta quemadmodum aperiuntur inspiciantur et describantur*, and based on that, he holds that Ulpian, in a more precise

---

[6] Also see D. 29,3,2,7 (*Ulpianus libro 50 ad edictum*): *Utrum autem in continenti potestatem inspiciendi vel describendi iubet an desideranti tempus dabit ad exhibitionem? Et magis est, ut dari debeat secundum locorum angustias seu prolixitates*. There was a suspicion that the text was interpolated with the words *debeat secundum locorum angustias seu prolixitates*; see, *Index interpolationum…*, Vol. 2, col. 217. However, such an addition is not in conflict with Ulpian's original statement and was to make it more precise.

[7] G. Gandolfi, *Contributo allo studio del processo interdittale romano*, Milano 1955, p. 13; A. Biscardi, *La tutela interdittale ed il relativo processo. Corso di lezioni 1955–1956*, Rivista di diritto romano. Periodico di storia del diritto romano di diritti antichi e della tradizione romanistica medioevale e moderna, 2/2002, p. 35. Also see, D. 29,3,2,8 (*Ulpianus libro 50 ad edictum*): *Si quis non negans apud se tabulas esse non patiatur inspici et describi, omnimodo ad hoc compelletur: si tamen neget penes se tabulas esse, dicendum est ad interdictum rem mitti quod est de tabulis exhibendis*; P. Fuenteseca, *Investigaciones de derecho procesal romano*, Salamanca 1969, pp. 148–149. On the issue of this text interpolation, see B. Biondi, *Appunti intorno alla sentenza nel diritto civile romano*, [in:] *Studi in onore di Pietro Bonfante nel XL anno d'insegnamento*, Vol. 4, Milano 1930, pp. 85–86.

[8] S. Perozzi, *Istituzioni di diritto romano*, Vol. 2, Firenze 1908, p. 578, footnote 2.

[9] D. 43,5,3,12-15 (*Ulpianus libro 68 ad edictum*).

[10] D. 29,3,5 (*Paulus libro octavo ad Plautium*): *(…) publice enim expedit suprema hominum iudicia exitum habere*; L. Palumbo, *Testamento romano e testamento longobardo*, Lanciano 1892, p. 150.

way than compilers, indicated who had a legal interest to get to know the content of a will. The establishment of the legal interest was essential because it made grounds for filing a motion of *interdictum de tabulis exhibendis* in the event of difficulties created by the testament holder.[11]

Also a pupil's substitute had the right to file this motion in case the pupil died before reaching maturity.[12] This indicates that different categories of people were entitled to file this motion, including heirs, substitutes and beneficiaries. Also the interested person's procedural substitute (*procurator*) could file such a motion on their behalf.[13]

However, an interdict *de tabulis exhibendis* could not be issued when the testator was still alive,[14] even if he himself requested the *praetor*. The testator, as the owner of the will, was entitled to *actio ad exhibendum*.[15]

3. IMPLEMENTATION OF AN INTERDICT *DE TABULIS EXHIBENDIS*

An interdict *de tabulis exhibendis* was one of exhibitory interdicts[16] addressed to a will holder or one who passed it to another person.[17] In the event someone passed a will to another person with malice aforethought,[18] an interdict was addressed to the person who disposed of it and the one who was its new holder.

D. 43,5,3,6 (*Ulpianus libro 68 ad edictum*): *Si quis dolo malo fecerit, quo minus penes eum tabulae essent, nihilo minus hoc interdicto tenebitur, nec praeiudicatur aliquid legi Corneliae testamentariae, quasi dolo malo testamentum suppresserit. Nemo enim ideo impune retinet tabulas, quod maius facinus admisit, cum exhibitis tabulis admissum eius magis manifestetur. Et posse aliquem dolo malo facere, ut in eam legem non incidat, ut puta si neque amoverit neque celaverit tabulas, sed idcirco alii tradiderit, ne eas interdicenti exhiberet, hoc est si non supprimendi animo vel consilio fecit, sed ne huic exhiberet*.[19]

However, in the event a pupil disposed of the will tables as a result of his guardian's deceit, an interdict was addressed to this dishonest guardian.[20] On the

---

[11] L. De Sarlo, *Il documento oggetto di rapporti giuridici privati*, Firenze 1935, pp. 124–125.

[12] C. 8,7,1 (*Valerianus, Gallienus*).

[13] D. 3,3,62 (*Pomponius libro secundo ex Plautio*).

[14] D. 43,5,1,10 (*Ulpianus libro 68 ad edictum*): *Hoc interdictum ad vivi tabulas non pertinet, quia verba praetoris 'reliqueri' fecerunt mentionem.*

[15] D. 43,5,3,5 (*Ulpianus libro 68 ad edictum*): *Si ipse testator, dum vivit, tabulas suas esse dicat et exhiberi desideret, interdictum hoc locum non habebit, sed ad exhibendum erit agendum, ut exhibitas vindicet. Quod in omnibus, qui corpora sua esse dicunt instrumentorum, probandum est*; A. Fernandez Barreiro, *La previa informacion del adversario en el proceso privado romano*, Pampolna 1969, pp. 372–373.

[16] D. 43,5,3,7–8 (*Ulpianus libro 68 ad edictum*).

[17] D. 43,5,3,2 (*Ulpianus libro 68 ad edictum*); F.P. Maglioca, *Per la formula dell' 'interdictum utrubi'*, SDHI 32/1967, p. 238.

[18] For broad discussion of the issue, see M. Marrone, *A proposito di perdita dolosa del possesso*, [in:] *Studi in onore di Arnaldo Biscardi*, Vol. 6, Milano 1987, pp. 180–190.

[19] Interpolation which this statement by Ulpian underwent did not change its essence; compare, *Index interpol.*, Vol. 3, col. 280.

[20] D. 43,5,4 (*Paulus libro 69 ad edictum*): *Si sint tabulae apud pupillum et dolo tutoris desierint esse, in ipsum tutorem competit interdictum: aequum enim est ipsum ex delicto suo teneri, non pupillum.*

other hand, when a will was in the possession of a slave, an interdict was addressed to the slave's owner.

D. 43,5,3,4 (*Ulpianus libro 68 ad edictum*): *Si penes servum tabulae fuerint, dominus interdicto tenebitur.*

The person concerned filed a motion to a *praetor* and applied for the issue of an interdict ordering the presentation of a will. According to a fragment of the Digests from the fifth book of Ulpian's commentary *ad edictum*, a motion was given priority and a *praeto*r was obliged to deal with it even on holidays.

D. 2,12,2 (*Ulpianus libro 5 ad edictum*): *Eadem oratione divus Marcus in senatu recitata effecit de aliis speciebus praetorem adiri etiam diebus feriaticis (…) item de testamentis exhibendis (…).*

According to the text in D. 43,5,3,16 attributed to Ulpian, a motion to issue an interdict *de tabulis exhibendis* could be filed even a year after a testator's death.

D. 43,5,3,16 (*Ulpianus libro 68 ad edictum*): *Interdictum hoc et post annum competere constat. Sed et heredi ceterisque successoribus competit*.[21]

Not only a *praetor* but also the province governor (*praeses provinciae*, *rector provinciae*) was entitled to issue an interdict.[22] In addition, it cannot be excluded that the jurisdiction concerning an interdict *de tabulis exhibendis* could be delegated to other officials or judges.[23]

D. 43,5,1,3–11, D. 43,5,2 and D. 43,5,3,1 set the subjective scope of an interdict *de tabulis exhibendis*. In accordance with a fragment from the sixty-eighth book of Ulpian's commentary *ad edictum*, an interdict was applicable to all testamentary wills of the deceased: valid and invalid ones, genuine and falsified ones,[24] former and later,[25] developed in compliance with all or only some formal legal requirements[26]. It was to be applied also when particular testamentary wills were developed in a different time because revealing them might have importance for the validity of the will.[27] Also testamentary wills developed by a son under the authority of a father or by a slave, even if their ability to develop a will were doubtful (*testamenti*

---

[21] M. Amelotti, *La prescrizione delle azioni in diritto romano*, Milano 1958, pp. 41 and 92.

[22] W. Rozwadowski, *s.v. Interdictum*, [in:] *Prawo rzymskie. Słownik encyklopedyczny* [Roman law. Encyclopaedic dictionary], W. Wołodkiewicz (ed.), Warsaw 1986, p. 75.

[23] D. 2,1,16 (*Ulpianus libro 3 de omnibus tribunalibus*); C. 3,3,5 (*Iulianus*).

[24] D. 43,5,1,3 (*Ulpianus libro 68 ad edictum*): *Sive autem valet testamentum sive non, vel quod ab initio inutiliter factum est, sive ruptum sit vel in quo alio vitio, sed etiam si falsum esse dicatur vel ab eo factum qui testamenti factionem non habuerit: dicendum est interdictum valere.*

[25] D. 43,5,1,4 (*Ulpianus libro 68 ad edictum*): *Sive supremae tabulae sint sive non sint, sed priores, dicendum interdictum hoc locum habere.*

[26] D. 43,5,1,5 (*Ulpianus libro 68 ad edictum*): *Itaque dicendum est ad omnem omnino scripturam testamenti, sive perfectam sive imperfectam, interdictum hoc pertinere*; L. Aru, *Studi sul "negotium imperfectum". I. La terminologia "imperfectum" e l'efficacia del "negotium imperfectum"*, Archivio Giuridico 'Filippo Serafini', 1(124)/1940, pp. 27–30; S. Kursa, *Testator i formy testamentu…* [Testator and forms...], pp. 137–138.

[27] D. 43,5,1,6 (*Ulpianus libro 68 ad edictum*): *Proinde et si plures tabulae sint testamenti, quia saepius fecerat, dicendum est interdicto locum fore: est enim quod ad causam testamenti pertineat, quidquid quoquo tempore factum exhiberi debeat.*

factio activa),[28] and by a son who decided on behalf of his *peculium castrense*,[29] as well as by a testator who died in captivity during a war[30] were subject to revealing. An interdict was also applicable in a situation when the content of a will was *sine dolo* blurred.[31]

Moreover, in the sixty-eighth book of the commentary *ad edictum*, Ulpian held that the above-mentioned interdict was applicable to all the tables collected in codes because the decisions contained in them constituted one will[32] as well as to all other documents related to the will,[33] in particular to codicils[34].

4. OBLIGATION TO SHOW A WILL AFTER ITS OFFICIAL OPENING

The obligation to show the contents of a will to persons concerned did not cease even after opening and sealing it again. That is why, an interdict *de tabulis exhibendis* was applicable not only to testamentary wills that were not opened but also to those that were officially opened and then, after sealing, were in the possession of an heir or in temple deposit (*in aede*).[35] Also at this stage, persons having a legal interest in getting to know the content of a will could, in case of difficulties with access to it, request a competent official to apply the above-mentioned interdict. This practice is confirmed in a report by Pomponius, included in the Digest of Justinian, where an interdict on a motion filed by a legatee was addressed to an heir.

D. 3,3,62 (*Pomponius libro 2 ex Plautio*): *Ad legatum petendum procurator datus si interdicto utatur adversus heredem de tabulis exhibendis, procuratoria exceptio, quasi non et hoc esset ei mandatum non obstat.*

---

[28] D. 43,5,1,7 (*Ulpianus libro 68 ad edictum*): *Sed et si de statu disceptetur, si testator filius familias vel servus hoc fecisse dicatur, et hoc exhibebitur.*

[29] D. 43,5,1,8 (*Ulpianus libro 68 ad edictum*): *Item si filius familias fecerit testamentum, qui de castrensi peculio testabatur, habet locum interdictum.*

[30] D. 43,5,1,9 (*Ulpianus libro 68 ad edictum*): *Idem est et si is, qui testamentum fecit, apud hostes decessit.*

[31] D. 43,5,1,11 (*Ulpianus libro 68 ad edictum*): *Sed et si deletum sine dolo sit testamentum.* Compilers supplemented this statement adding in D. 43,5,2 (*Paulus libro 64 ad edictum*) the words: *vel totum vel pars eius* originating from the sixty-fourth book of Paulus's commentary *ad edictum*, which indicates that an interdict *de tabulis exhibendis* was applied in case of complete as well as partial deletion of a testament content.

[32] D. 43,5,3,1 (*Ulpianus libro 68 ad edictum*): *Si tabulae in pluribus codicibus scriptae sint, omnes interdicto isto continentur, quia unum testamentum est.*

[33] D. 43,5,1 pr. (*Ulpianus libro 68 ad edictum*): *Praetor ait: 'Quas tabulas Lucius Titius ad causam testamenti sui pertinentes reliquisse dicetur, si hae penes te sunt aut dolo malo tuo factum est, ut desinerent esse, ita eas illi exhibeas. Item si libellus aliudve quid relictum esse dicetur, decreto comprehendam'*; G. Scherillo, *Corso di diritto romano. Il testamento. Parte prima*, Milano 1966, p. 44.

[34] D. 43,5,1,2 (*Ulpianus libro 68 ad edictum*): *Hoc interdictum pertinet non tantum ad testamenti tabulas, verum ad omnia, quae ad causam testamenti pertinent: ut puta et ad codicillos pertinent*; also see, U. Robbe, *La "hereditas iacet" e il significato della "hereditas" in diritto romano. I*, Milano 1975, pp. 184–187.

[35] D. 10,2,4,3 (*Ulpianus libro 19 ad edictum*); H. Vidal, *Le dépôt in aede…*, p. 569.

On the other hand, in the event another person than an heir held a will, an heir was entitled to an interdict *de tabulis exhibendis* as well as to a claim for its display (*actio ad exhibendum*).

D. 10,4,3,8 (*Ulpianus libro 24 ad edictum*): *Si quis extra heredem tabulas testamenti vel codicillos vel quid aliud ad testamentum pertinens exhiberi velit, dicendum est per hanc actionem agendum non esse, cum sufficiunt sibi interdicta in hanc rem competentia: et ita Pomponius*.[36]

An heir was entitled to a claim for a will display because, like a testator when still alive, he was its owner. A fragment from the seventeenth book of Gaius's commentaries *ad edictum provincial* indicates that he had that ownership right to a will mentioning that he could file a vindication complaint (*rei vindicatio*).[37]

D. 29,3,3 (*Gaius libro 17 ad edictum provinciale*): *Ipsi tamen heredi vindicatio tabularum sicut ceterarum hereditariarum rerum competit et ob id ad exhibendum quoque agere potest*.[38]

***

Summing up, it is necessary to state that the analysis of the sources of law, fragments of Ulpian's commentaries *ad edictum* mainly preserved in the Digest of Justinian (partly interpolated), indicates that a testamentary will could be in possession of different people who were not always chosen by a testator. When he died, they were obliged to show the will to an official in order to open it and let persons concerned learn about their rights or obligations resulting from its content and obtain copies of the document.

In the event of difficulties caused by a will holder, the parties concerned could apply for the application of an interdict *de tabulis exhibendis*. An interdict was applicable to all testamentary wills of the deceased, regardless of their validity and state of preservation. It was addressed to will holders as well as those who illegally disposed of it.

The testamentary beneficiaries could apply to have the will displayed via an interdict issue even after its official opening when there were difficulties in getting access to its content. In addition, an heir was entitled to *actio ad exhibendum*.

---

[36] M. Marrone, *Actio ad exhibendum*, Palermo 1958, pp. 190–191, 254; O.E. Tellegen-Couperus, *Testamentary succession in the constitutions of Diocletian*, Zutphen 1982, pp. 49–50. For more on interpolation of this text and its consequences, see J. Burillo, *Contribuciones al studio de la 'actio ad exhibendum' en derecho clasico*, Studia et documenta historiae et iuris, 26/1960, pp. 236–237.

[37] For the issue of the specificity of those complaints and interdependencies between them, see F. Bossowski, *Actio ad exhibendum w prawie klasycznem i justynjańskiem* [*Actio ad exhibendum* in classical law and the law of Justinian], Kraków 1929, pp. 15–18; for more on the Justinian epoch, see pp. 75–82.

[38] G. Klingenberg, *Das Beweisproblem beim Urkundendiebstahl. Die These der quidam und die Klassiker*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung, 96/1979, pp. 242–243; G.G. Archi, *Interesse privato e interesse pubblico nell'apertura e pubblicazione del testament romano (Storia di una vicenda)*, Iura. Rivista internazionale di diritto romano e antico, 20.1/1969, p. 344 footnote 13.

BIBLIOGRAPHY

Albanese B., *Osservazioni su XII Tab. 5,3 (Uti legassit..., ita ius esto)*, Annali del Seminario Giuridico dell'Università di Palermo, 1(45)/1998.

Amelotti M., *La prescrizione delle azioni in diritto romano*, Milano 1958.

Archi G.G., *Interesse privato e interesse pubblico nell'apertura e pubblicazione del testament romano (Storia di una vicenda)*, Iura. Rivista internazionale di diritto romano e antico, 20.1/1969.

Aru L., *Studi sul "negotium imperfectum". I. La terminologia "imperfectum" e l'efficacia del "negotium imperfectum"*, Archivio Giuridico 'Filippo Serafini', 1(124)/1940.

Biondi B., *Appunti intorno alla sentenza nel diritto civile romano*, [in:] *Studi in onore di Pietro Bonfante nel XL anno d'insegnamento*, Vol. 4, Milano 1930.

Biscardi A., *La tutela interdittale ed il relativo processo. Corso di lezioni 1955–1956*, Rivista di diritto romano. Periodico di storia del diritto romano di diritti antichi e della tradizione romanistica medioevale e moderna, 2/2002.

Bossowski F., *Actio ad exhibendum w prawie klasycznem i justynjańskiem* [*Actio ad exhibendum* in classical law and the law of Justinian], Kraków 1929.

Burillo J., *Contribuciones al studio de la 'actio ad exhibendum' en derecho clasico*, "Studia et documenta historiae et iuris" 26/1960.

De Sarlo L., *Il documento oggetto di rapporti giuridici privati*, Firenze 1935.

Fernandez Barreiro A., *La previa informacion del adversario en el proceso privado romano*, Pampolna 1969.

Fuenteseca P., *Investigaciones de derecho procesal romano*, Salamanca 1969.

Gandolfi G., *Contributo allo studio del processo interdittale romano*, Milano 1955.

Girard P.F., *Manuel elementaire de droit romain*, Paris 2003.

Klingenberg G., *Das Beweisproblem beim Urkundendiebstahl. Die These der quidam und die Klassiker*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung, 96/1979.

Kursa S., *Vigor reguły nemo pro parte testatus pro parte intestatus decedere potest w prawie rzymskim* [The effect of the rule of *memo pro parte intestatus decedere potest* in the Roman law], Studia Prawnoustrojowe, 27/2015.

Kursa S., *Testator i formy testamentu w rzymskim prawie justyniańskim* [Testator and forms of the last will in the Roman law of Justinian], Warsaw 2017.

Levy E., Rabel E. (eds.), *Index interpolationum quae in Iustiniani Digestis inesse dicuntur*, Vol. 1–3, Weimar 1928–1935.

Maglioca F.P., *Per la formula dell' 'interdictum utrubi'*, SDHI 32/1967.

Marrone M., *Actio ad exhibendum*, Palermo 1958.

Marrone M., *A proposito di perdita dolosa del possesso*, [in:] *Studi in onore di Arnaldo Biscardi*, Vol. 6, Milano 1987.

Martini R., *Sulla presenza dei "signatores" all'apertura del testamento*, [in:] *Studi in onore di Giuseppe Grosso*, Vol. 1, Torino 1968.

Palumbo L., *Testamento romano e testamento longobardo*, Lanciano 1892.

Perozzi S., *Istituzioni di diritto romano*, Vol. 2, Firenze 1908.

Robbe U., *La "hereditas iacet" e il significato della "hereditas" in diritto romano. I*, Milano 1975.

Scherillo G., *Corso di diritto romano. Il testamento. Parte prima*, Milano 1966.

Tellegen-Couperus O.E., *Testamentary succession in the constitutions of Diocletian*, Zutphen 1982.

Vidal H., *Le dépôt in aede*, Revue Historique de Droit Français et Étranger, 43/1965.

Wołodkiewicz W. (ed.), *Prawo rzymskie. Słownik encyklopedyczny* [Roman law. Encyclopaedic dictionary], Warsaw 1986.

Zabłoccy M. and J., *Ustawa XII tablic. Tekst – tłumaczenie – objaśnienia* [Statute of 12 tables. Text – translation – explanation], Warsaw 2000.

OBLIGATION TO PRESENT THE LAST WILL IN THE LAW OF JUSTINIAN

Summary

The article deals with the obligation to present the last will in order to officially read the will, to acquaint the beneficiaries with its content and to enable them to obtain a copy. This action was, apart from convening witnesses, one of the two actions preceding the formal opening of the inheritance. The obligation to do so rested with holders elected by the testator or actual ones, after establishing the fact of the testator's death. Their unjustified resistance led to the application of an interdict *de tabulis exhibendis*. It applied to the testamentary beneficiaries, both before and after the official opening of the inheritance.

Keywords: last will, presentation of a will, opening of a will, interdict, testator, will holder, witness, Roman law, Justinian, Ulpian

OBOWIĄZEK OKAZANIA TESTAMENTU W PRAWIE JUSTYNIAŃSKIM

Streszczenie

Artykuł dotyczy obowiązku prezentacji testamentu w celu dokonania jego urzędowego otwarcia, zapoznania się z treścią i umożliwienia uzyskania kopii jego beneficjentom. Czynność ta była, obok zwołania świadków, jedną z dwóch, które poprzedzały formalną procedurę otwarcia testamentu. Obowiązek jej dokonania spoczywał na wybranych przez testatora lub faktycznych dzierżycielach testamentu, po ustaleniu faktu śmierci testatora. Nieuzasadniony opór z ich strony pociągał za sobą zastosowanie interdyktu *de tabulis exhibendis*. Przysługiwał on beneficjentom testamentowym zarówno przed urzędowym otwarciem testamentu, jak i po nim.

Słowa kluczowe: testament, okazanie testamentu, otwarcie testamentu, interdykt, testator, detentor, świadek, prawo rzymskie, Justynian, Ulpian

Ius Novum
4/2017

PRECEDENT AS THE TRANSPOSITION OF A NORMATIVE ACT*

ARTUR KOTOWSKI**

1. INTRODUCTION

The interest in the concept of a precedent in the continental legal culture, as well as in Polish jurisprudence, is at least considerable.[1] It can be assumed that this results from the process of legal cultures convergence. It occurs not only in the form of the transformation of particular legal systems of a given western civilisation culture, which have become similar to each other in some aspects, but also as a result of theoretical solutions proposed in jurisprudence based on the observation of mechanisms functioning in the sister culture. In some sense, the development of codified law took place in the *common law* culture under the influence of observations of the advantages of the system of sources of law in continental states. On the other hand, the process called empowerment of judicial authority in the *civil law* culture is referred to the status of a judge in the *common law* order.[2] The concept of a precedent is a significant element on which the position of a judge depends. Thus, this results in the interest in this mechanism in the codified law systems. It is not possible to define the position of the judiciary power in the Anglo-Saxon countries and the deontology of the job of a judge in this culture without the explanation of a "precedent" as an entire instrument of common law, which is compo-

* The article is an extended version of a paper presented at a conference at the Faculty of Law and Administration of Maria Curie-Skłodowska University in Lublin on 20 March 2017 under the same title as the article. The participation in the conference was financed from the grant from the National Science Centre (decision No. DEC-2014/15/D/HS5/01131) paid by Kozminski University in Warsaw.

** PhD, Assistant Professor, the European University of Law and Administration in Warsaw, Assistant-Specialist of the Supreme Court Research and Analysis Office; arturkotowski@gazeta.pl

1 A broad discussion of the jurisprudence approach towards the concept of a precedent can be found in T. Stawecki. Compare, T. Stawecki, *Precedens w polskim porządku prawnym. Pojęcie i wnioski de lege ferenda*, [Precedent in the Polish legal order. A concept and *de lege ferenda* conclusions], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim systemie prawa* [Precedent in the Polish legal system], Warsaw 2010, pp. 74–98.

2 For the needs of this article, the terms legal "culture" and "order" are used interchangeably for stylistic reasons. It must be remembered, however, that the two terms are sometimes assigned a different or partially corresponding meaning.

sed of such elements as, first of all, the principles of *stare decisis*,[3] or rules determining a different construction of a judgment in the Anglo-Saxon tradition expressed, inter alia, by elements of *ratio decidendi* and *obiter dictum*. Therefore, it should be indicated that the present article is an attempt at analysing the concept of a precedent through the prism of the entire "precedent-based system", which means looking for mechanisms different in nature in the continental legal culture, which are characterised by similar features as the "original" of the Anglo-Saxon law.

It is worth noticing that not only lawyers are interested in the concept of a "precedent", and in the era of highly hermetic nature and specialisation of the legal language, it is typical[4] that the term has also found its place in general discourse and is one of the most common terms associated with law. The interest in a precedent results from a certain intuitive need reflected in the development of the statutory law culture in the light of the interaction with its younger sister in the form of the Anglo-Saxon legal order as well as from conceptual transformations of the position of the judiciary in the civil law system. The institution of a precedent, adequately transformed and with the specificity of the continental system considered, may constitute a significant impulse for this power to search for a new identity because of the challenges resulting from the transformations of the modern legal systems into developed information systems.[5] What is very important is to maintain its own cultural identity. Apart from that, a precedent, as a mechanism of shaping the adjudication policy and judgment in difficult cases, may be a part of a broader phenomenon sometimes called a new formula of legitimisation of the judicial power, which continually looks for its own identity and wants to keep balance between the paradigms of activeness and moderation in decision-making at the different stages of law application.

The article is an attempt to develop an outline of an "intermediate" concept of a precedent in the system of statutory law.[6] Thus, it does not concern designing of normative solutions, formulating recommendations *de lege ferenda*, but reconstructing such interpretational behaviour of judicial bodies that even now can be indicated as those matching some features of a precedent in the statutory law culture, although it maintains an obvious distinction between the Anglo-Saxon precedent and the one of the statutory law culture. This way, it has been assumed that there are some aspects of judicial bodies' behaviour that may be recognised as corresponding to the mechanisms of a precedent-based system, as an instrument mainly connected with the process of adjudication. However, this does not involve indicating the basis of the conceptions in the existing theoretical constructions but explanation of precedent-related conditions in the context of judicial operational interpretation.

---

[3] Compare, M. Koszkowski, *Anglosaska doktryna precedensu. Porównanie z polską praktyką orzeczniczą* [Anglo-Saxon theory of precedent. A comparison with the Polish judicature], Warsaw 2009, p. 21.

[4] Compare, S. Grabias, *Język w zachowaniach społecznych* [Language in social relations], Lublin 2003, p. 83, and J. Pieńkos, *Podstawy juryslingwistyki. Język w prawie – prawo w języku* [Foundations of jurilinguistics. Language in law – law in language], Warsaw 1999, pp. 71 and 139.

[5] Compare, L. Morawski, *Argumentacje, racjonalność prawa i postępowanie dowodowe* [Argumentation, rationality of law and evidence-taking procedure], Toruń 1988, p. 171 ff.

[6] "Intermediate" understood as placed between some extreme approaches presented in the literature, which will be discussed further on.

2. *DE IURE* VERSUS *DE FACTO* PRECEDENT

The basis for differentiating a *de iure* precedent from the *de facto* one is assigning to the former a validating status.[7] In other words, the specific rule included in the motives behind the judgment has a status of a binding legal norm in the same way as in codified law. However, it is a kind of ellipsis leading to many distortions of the meaning of the essence of a precedent.[8] A precedent is treated in the same way as the system of the sources of law in the statutory law system, obviously following the example of one catalogue of "ready-made" meanings coded in legal norms taken from a given catalogue. However, a precedent is not an instrument of the theory of exegesis *sensu stricto*. It seems that there is the lack of differentiation between the elements in the process of law application responsible for finding the sense of law, fact assessment and final adjudication that results from the chaos in concepts indicated in literature.[9] Considering the specificity of the civil law culture, we think about law as of certain meanings of patterns of appropriate behaviour. We conceptualise norms in the same way as signs – symbols, mainly because of praxeology connected with the adequacy of the aim of a regulation to its object (of course, it concerns the semantics of particular phrases used in the normative construction; the elements of an addressee, the subject of the regulation and circumstances of the use of a rule and a pattern of appropriate behaviour). Thus, as it seems, this is how intuitive perception of a precedent occurs. However, it is a considerable distortion of the sense, which does not take place in the Anglo-Saxon culture, where a rule is interpreted equally intuitively but the mechanism of its creation in the formula of a precedent is differentiated from a ready-made "meaning", which is its result. It can be concluded that a precedent in a court law order substitutes for a political act of law enactment from the statutory law order.[10] Conversely, a general norm, following the pattern of a legal norm as the meaning of appropriate behaviour,[11] is an effect;

---

[7] In the Polish literature, the introduction of a semantic difference between *de iure* and *de facto* precedents is attributed to L. Morawski; compare, L. Morawski, *Precedens a wykładnia* [Precedent and the interpretation of law], Państwo i Prawo No. 10, 1996, passim. However, in the article, the author refers to the work by J. Wróblewski, who also indicates such elements of the phenomenon of a precedent, which normatively and actually bind a decision-making body. Compare, J. Wróblewski, *Precedens i jednolitość sądowego stosowania prawa* [Precedent and uniformity of judicial application of law], Państwo i Prawo No. 10, 1971, passim.

[8] T. Stawecki directly indicates the erroneous interpretation of the instrument of a precedent in the Polish literature. Compare, T. Stawecki, *Precedens jako zadanie dla nauk prawnych* [Precedent as a task for legal sciences], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim...* [Precedent in the Polish...], pp. 229–230.

[9] Compare, T. Stawecki, *Precedens w polskim porządku…* [Precedent in the Polish legal order...], p. 60.

[10] The status of development of a decision concerning semantics in a precedential judgment from the perspective of politics is an issue that needs separate consideration. The issue seems to be fascinating and requires a separate discussion.

[11] For the needs of this article, I use a legal norm as a meaning of behaviour. It is not possible to present all concepts of a legal norm in the article. It is only possible to point out that in the literature the concept of "legal norm" is most often explained in the context of its semantic relation to the term of "the provision of law". It is necessary to mention the academic work by J. Nowacki and Z. Tobor; compare, J. Nowacki, Z. Tobor, *Wstęp do prawoznawstwa* [Introduction to

it results from a precedential judgment. A precedent in the Anglo-Saxon culture is defined as: "something that has happened or that was done in the past, and that serves as a model for future conduct."[12] In the Anglo-Saxon literature, a precedent is also defined as a *legal decision* but its synonyms are also a *pattern* and a *standard* of behaviour. This way, the behaviour of the legal body is emphasised rather than a general norm itself, which results from it. It is of course determined by the specificity of law application in the Anglo-Saxon culture and the course of reasoning from a fact to a rule, and not from law to a fact as it is in the culture of codified law. The essence of precedent is a specific way of a court action, which becomes a type of "procedural" binding norm. The semantics of a rule, duplicated in similar judgments, is its result. This is a very important sequence, which must be taken into consideration, because in the culture of statutory law, a precedent is associated, based on that ellipsis, with specifically duplicated semantics shaped as a result of operational interpretation. However, the essence of a precedent is the requirement of identical (interpretational) behaviour of a court, even with some differences in the field of decoding the meaning of law based on every individual adjudicated case. This provides a minimum of flexibility also in the judicial law system.

In the culture of statutory law, it is assumed, based on the observation of judicial practice, that there are the *de facto* precedents, i.e. court's judgments shaping the way of interpreting the content of a normative act, which is assigned a feature of "soft" law. The binding power is informal and refers not to the judgment because it can never be the source of law (in such a situation, the identity of the culture of statutory law and the sense of its differentiation from the Anglo-Saxon culture would end). The way of a court interpretational behaviour in case of a precedent is not an object of reference, either, because it is not an instrument of interpretation treated pragmatically.[13] However, the meaning of law is an object of reference in a dual way:

– concerning the issue of validation (compatibility of a normative basis of the decision on law application);
– concerning the way in which it is understood.

Therefore, it concerns compatibility within the scope of semantics: the identical way of selecting a basis from a normative act. The point of reference is not a judgment but semantics of the same "fragment" of a normative acts system, duplicated in relation to similar cases.

This theoretical explanation of a precedent can be, in fact, recognised as adequate, although characterised by too general theoretical constructions used to its

---

jurisprudence], Warsaw 1993, pp. 47–62 and typology presented by K. Opałek and J. Wróblewski. Compare, K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa* [Problems of the theory of law], Warsaw 1969, p. 62.

[12] Compare, http://legal-dictionary.thefreedictionary.com/precedent [accessed on 04.04.2017].

[13] A set of methods known in the theory of law interpretation serving to describe the way of reconstructing the meaning from a legal text. See, M. Zieliński, *Wykładnia prawa, zasady, reguły, wskazówki* [Interpretation of law, principles, rules, guidelines], Warsaw 2002, p. 45.

description. However, as I will try to demonstrate, it requires detailed specification because such a definition of a precedent has a low explanatory force as it creates a blurred definition that can indicate various mechanisms and phenomena in the field of duplicating meanings in the process of judicial operational interpretation, mainly judgment policies, judicial "legislation", rough interpretation,[14] or an interpreter's schematic acting. The last concept is so unclear that it is not known whether it makes reference only to the theory of exegesis or also to the requirements of cognitive interpretation. In my opinion, associating a precedent in the culture of statutory law with the phenomena presented above is inappropriate. Does every type of judgment policy certainly create a precedent? Because of obvious reasons, it seems it does not and, although the phenomenon exists in the culture of statutory law, maintaining adequate constructive differences resulting from the specificity of this culture, it is rare, for the aim of the conception presented here, and limited to the phenomenon indicated in the title as the transposition of semantics.

L. Morawski, in one of the fundamental articles on this issue, indicates that what influenced the continental understanding of a precedent was the French doctrine, based on the post-revolutionary ban on creating law by courts, laid down in the Napoleonic Code.[15] Article 5 of this regulation stipulates that:

"The judges are forbidden to pronounce, by way of general and legislative determination, on the causes submitted to them."

What is very important, the rule did not only mean a ban on making legislative decisions by courts but also a ban on introducing binding interpretational directives (rules of law interpretation) that might result in the creation of law by "getting in through the back door". The mechanism may be compared to the ban on creating soft law in the form of binding interpretational canons, which would substantially bind courts subordinate to those introducing such basic rules of exegesis.[16] This conception of judicial moderation is also the basis of the French political system, which gives the legislative branch the superior position. On the other hand, the authors of the Napoleonic Code introduced Article 4, which is often disregarded in the discussion of the present issue, which stipulates:

"The judge who shall refuse to determine under pretext of the silence, obscurity, or insufficiency of the law, shall be liable to be proceeded against as guilty of a refusal of justice."

---

[14] Directed at searching for meanings with dialectic grounds in the given communication community. Compare, S. Frydman, *Dogmatyka prawa w świetle socjologii. Studjum pierwsze: o wykładni ustaw* [Dogmatics of law from the sociological perspective. Preliminary studies: on interpretation of statutes], Vilnius 1936, p. 85.

[15] Compare, L. Morawski, *Precedens*… [Precedent...], pp. 3–4.

[16] The ban resulted from the post-revolutionary France's "fear" that the judiciary apparatus without a social mandate may interpret the new law based on revolutionary axiology by introducing meanings contrary to the will of the nation. The phenomenon is well known and described in specialist literature and journalistic writings. Compare, E. Łętowska, *Pozaprocesowe znaczenie uzasadnienia* [Extrajudicial significance of justification for a judgment], Państwo i Prawo No. 5, 1997, p. 4 and A. Kotowski, *Polski test na ontologię prawa* [Polish test for ontology of law], Dziennik Gazeta Prawna, "Prawnik" of 31 May 2016, pp. 4–5.

The most important aspect of the rule interpreted based on this Article is not the fact that a judge cannot refuse to adjudicate because of unclear law but that he cannot state that the law is "obscure or insufficient". Thus, even in the most extreme situations, where the text of a normative act has not been formulated in an understandable way and has substantial syntactic or semantic defects, a court must take an interpretational decision, even if it is in fact constructive in nature.[17] From the point of view of the philosophy of politics, however, it is important that a body designed to apply legal acts in the paradigm of declarative interpretation, i.e. decodes the meaning of an unclear text and does not create a rule based on the illegitimate source of law. Thus, in some sense, Article 4 of the Napoleonic Code narrows the rule of Article 5. Such a mechanism constitutes the basis of the fact that also in the continental culture the creation of semantics by courts takes place and resembles, to some extent, its counterpart in the form of a precedent in the Anglo-Saxon culture.

3. PRECEDENT OR "PRECEDENT"?

It is necessary to be censorious of too broad interpretation of the concept of a precedent in the statutory law culture. Indicating that every judgment that influences the judgment in similar or related cases, or the "argument from a precedent", which appears in judicial justifications, is an example of giving up the positive core of the meaning of a "precedent" and of diluting its essence. Thus, it is necessary to assume that the term: a *de facto* precedent possesses the broadest meaning and covers all cases of influence of some judgments on other judgments of a different nature: institutional, argumentative, related to the theory of exegesis, etc. What they have in common is the assumption that such a precedent, which should not be called a real precedent but a precedent *sensu largo*,[18] has normative significance but not in a validating sense. In other words, it is assumed that indication of or reference to a judgment of another court made in the justification to another judgment is an example of a "precedential" action. This approach adopts an element of the pattern of behaviour from the Anglo-Saxon construction of a precedent but without formulating a condition that for a precedent to be included in the statutory law order, it

[17] The lack of a body in the legal system responsible for commonly binding interpretation of law puts an end to phenomenological concept of legal texts interpretation, which assumes the necessity to refer to superiors for interpretation in case "the direct understanding" is disturbed. The conception originates from St. Augustine's philosophy of *ius naturale*. Compare, A. Kozak, *Dylematy prawniczej dyskrecjonalności. Między ideologią polityki a teorią prawa* [The dilemmas of legal discretion. Between political ideology and the theory of law], [in:] W. Staśkiewicz, T. Stawecki (eds.), *Dyskrecjonalność w prawie* [Discretion in law], Warsaw 2010, p. 60.

[18] The present article has not been influenced by the broad and narrow understanding of the term "precedent" suggested by J. Wróblewski. Also the concept of a precedent *sensu largo* is defined in the article differently than in the works of that author, although, because of obvious reasons, it is based on the aspect of being bound by interpretation. However, the understanding of the concept of a precedent *sensu stricto* is identical, limited only to its construction as it happens in the common law system. Compare, J. Wróblewski, *Wartości a decyzja sądowa* [Values vs. court decision], Wrocław 1973, p. 133.

is enough to assume that the originally worked out meaning of a norm is binding (obliging) in the formal sphere. This means that every argument indicated in the justification to a judgment that refers to the interpretation of law developed by courts is quasi normative, although this "normative feature" does not have the status of formal or material binding. That is why, there is a term of a *de facto* precedent and, if we take into account the scope of judgments matching this sense, a precedent *sensu largo*. This approach is, even intuitively, exposed to criticism because of a too broad scope of the meaning and a shift of stress from a precedent as an instrument of judicial power to "the principle of precedent" as a form of argumentation.

The concept of precedent *sensu stricto* (*de iure*) is the opposite, which assumes a transfer of all main features of the instrument into the culture of statutory law. This means that in some circumstances the justification of the adopted meaning of law has a validating status[19]. This means that it constitutes an independent source of a legal norm reconstruction equal to sources of law. In other words, a court's justification as a source of law cognition has a formal binding status (i.e. a court must take it into account when adjudicating) and a substantive one (the court adopts the interpretation of law established in original judgments).[20]

In the Polish legal order, there is no room for precedents classified in this way, and if there are opinions in the literature that precedents *sensu stricto* exist, these are statements *de lege ferenda*.[21] Essentially, such an opinion is supported not only by the closed constitutional conception of sources of law based on legal acts developed by the legislative branch but also the lack of common binding power of law interpretation provided by whatever body involved in law application.[22] Moreover, the above results

---

[19] This group of opinions include works devoted to the concept of judicial legislation. The literature on this issue and the concept of precedent quotes the publications by: R. Hauser, J. Trzciński, *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego* [Significance for law-making of the Constitutional Tribunal rulings in the judgments of the Supreme Administrative Court], Warsaw 2008, passim, and A. Stelmachowski, *Prawotwórcza rola sądów (w świetle orzecznictwa cywilnego)* [Legislative role of the courts (in the light of civil law judgments)], Państwo i Prawo No. 4–5, 1967, passim, following T. Stawecki, *Precedens w polskim porządku…* [Precedent in the Polish legal order...], pp. 59 and 83.

[20] Compare, *ibid*., p. 61.

[21] Compare, L. Morawski, *Precedens…* [Precedent...], pp. 11–12 and by the same author, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian* [Key issues in the contemporary philosophy of law. Law in the course of changes], Warsaw 2003, p. 284.

[22] This opinion is also supported by the comment that the Supreme Court rulings are not "applied" but what is applicable is the legal state developed by those rulings concerning compatibility or incompatibility of the reviewed act with the normative pattern reviewed. Compare, E. Łętowska, *Sądy nie mają styku z wyrokami TK. Stosują jedynie ukształtowane prawo* [Courts' verdicts do not coincide with the Constitutional Tribunal judgments. They apply only statutory law], at: http://prawo.gazetaprawna.pl/artykuly/1030492,sady-nie-maja-styku-z-wyrokami-tk.html [accessed on 31.03.2017].

On the other hand, the opinion is in conflict with the stand concerning judicial "crypto-legislative" role, mainly, of course, "quasi-legislative" role of the Constitutional Tribunal rulings, presented over many years both in theory and legal dogmatisms. Similar arguments can be applied to the process of adopting justification of judgments of supreme courts: the Supreme Court and the Supreme Administrative Court by various law application bodies. "Application" of judgments does not take place in the continental culture of course because it would be an example of a precedent, but the "application" understood as the "use" of argumentation

from the necessity of separating the acts of enacting and applying law in order to maintain legal, cultural and historical identity. Moreover, the transfer of so strictly understood precedent directly from the culture of common law to the area of statutory law would have to be done without the consent of the legislator who introduces to the system specific instruments which, coincidentally, already resemble the instrument of a precedent *sensu stricto* or at least considerably gets closer to it.[23]

Summing up this thread of thought, it is worth reminding that although a precedent in the Anglo-Saxon culture is associated with strong autonomy of judicial power, from the point of view of the process of law application, it is an instrument narrowing the judicial discretion to adjudicate. The role of a precedent is to organise and standardise case law. From the point of view of a representative of the Anglo-Saxon culture, a precedent may be assigned a more important role in narrowing the possibility of free development of law and its significance in validating sense than in granting competence to freely develop new general rules in relation to similar cases. Thus, what the representatives of the civil law culture are "impressed" by does not seem to be the essence of a precedent from the point of view of the common law culture.

4. PRECEDENT AS INTERPRETATIONAL HEURISTICS

The concept of heuristics is useful for the analysis of interpretational processes from the perspective of an interpreter's action. The concept focuses on all aspects conditioning an exegete's activity aimed at searching for the meaning of law. On the other hand, the limitation of the field of research only to strictly juridical threads analysing which theoretical conceptions and in what form are used within the specific decision-making processes in the field of exegesis (e.g. within the action of the legal doctrine, legal practice, etc.) becomes a subject matter of the approach analysing the interpretation in terms of a pattern of an interpreter's action that becomes a secondary term in relation to interpretational heuristics. Therefore, such an approach is only normative and limits the field of analysis to the theory of exegesis.[24]

By the same token, a precedent in the statutory law culture must be analysed through the prism of interpretational heuristics because the continental theory of exegesis does not know the instrument of a precedent "as such", as it is limited to the interpretation of sources of law in the form of statutory legal acts. One cannot confuse a source of law with the sources of its cognition, which indirectly influence the content of the decision made concerning the meaning of law. The situation when the decision-

presented by the supreme judicial bodies is a common phenomenon. Compare, L. Morawski, *Precedens*… [Precedent...], pp. 8–11, the concept of "crypto-legislation" on p. 10.

[23] The instruments of positive law that are closest to a precedent are resolutions issued by enlarged benches of the Supreme Court and the Supreme Administrative Court, and the Supreme administrative Court resolutions have a stronger binding power than the Supreme Court ones. Compare, Article 269 para. 1 Law on the procedure before administrative courts.

[24] Here, I mainly mean research activity and concepts presented by P. Chmielnicki. Compare, P. Chmielnicki, *Identyfikacja celów i funkcji w ramach wykładni prawa* [Identification of aims and functions for the interpretation of law], Przegląd Prawa Publicznego No. 3, 2015, passim.

making body also takes into consideration other sources influencing the final decision such as morality, opinions of science (not only jurisprudence) or any other factors that, even in an exegete's opinion, are responsible for the reconstruction of the meaning of law, does not change the fact that only positive law, namely the validated editorial components of a normative act, is an initial factor responsible for taking a decision in a normative sense, as the basis for every decision on law application. All the other sources of reconstruction of a decision have the power to weigh reasons within the scope of the choice of the meaning alternative or the direct reconstruction of semantics.[25]

All the statements indicating a possibility of transferring the construction of a *de iure* precedent to the statutory law order should be treated either as a *de lege ferenda* category (and in such a formula they have been presented so far[26]), or directly in opposition to the construction of statutory law culture. On the other hand, the formula of a *de facto* precedent has a very low explanatory power. The term lacks the positive meaning core,[27] and it neither expresses what a precedent would be in the civil law order nor what its characteristic features would be.

---

[25] As a curiosity, it can be pointed out that the presented stand differentiates the conceptions of law interpretation. It is closer to J. Wróblewski's concept of clarification and not fully compatible with the classic ("narrow") derivative concept, and different from validating-derivative theory of interpretation treated as another theory of the derivative type. In this conception, the validating basis is not only composed of the content of a normative act but also basic moral principles in accordance with R. Dworkin's integration concept. However, this causes adaptation difficulties on the basis of statutory law because it requires, for methodological coherence, operating a non-linguistic concept of a legal norm, which as such may be treated as an interpreter's behaviour of the interpretation of *contra legem* type. In such an approach, a precedent may be an element of the reconstruction of the decision (adjudication) but it is highly controversial whether it should be an element of reconstruction of a validating basis. L. Leszczyński presents such an opinion in the literature. Compare, L. Leszczyński, *Precedens jako źródło rekonstrukcji normatywnej podstawy decyzji stosowania prawa* [Precedent as a source of normative reconstruction of the basis of a decision on applying the law], [in:] I. Bogucka, Z. Tobor (ed.), *Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego* [Law and values. Professor Józef Nowacki jubilee book], Kraków 2003, passim.

The statutory law orders only use a linguistic concept of a norm and bind an interpreter with the type of sources of law determined by the legislator. That is why, the opinion on admissibility of creative interpretation as a tool of a justice institution is highly controversial. Compare, T. Flemming-Kulesza, *Czy w Polsce możemy mówić o prawie precedensowym?* [Can we speak of precedent law in Poland?], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim* [Precedent in the Polish...], p. 15. Also M. Zirk-Sadowski drew attention to this issue. Compare, M. Zirk-Sadowski, *Precedens a tzw. wykładnia prawotwórcza* [Precedent and the legislative interpretation], Państwo i Prawo No. 6, 1980, p. 71.

On the other hand, according to J. Wróblewski, "creating" meanings through a specific intermediate stage, in addition realised by an interpreter, is always an example of constructive interpretation *sensu largo*. Compare, J. Wróblewski, *Sądowe stosowanie prawa* [Application of law by courts], Warsaw 1973, p. 115 and by the same author, *Precedens i jednolitość…* [Precedent and uniformity...], passim. According to other opinions, the transgression of the literal border of interpretation, understood as the linguistic meaning of a given statement, is simply an analogy. Compare, L. Morawski, *Wykładnia w orzecznictwie sądów* [Interpretation of law in the court judgments], Toruń 2002, pp. 292–293.

[26] "Because of that I think that the interpretational decisions that are clearly creative in nature and are unpredictable to the addressees of legal norms should be binding in the future". Compare, L. Morawski, *Precedens…* [Precedent...], p. 12.

[27] Compare, J. Wróblewski, *Rozumienie prawa i jego wykładnia* [Understanding of law and its interpretation], Warsaw 1990, pp. 55–56.

5. TRANSPOSITION OF SEMANTICS AS A LINGUISTIC PHENOMENON

Since a precedent is explained as the replication of the interpretation of law in two formulas: the "transposition" of semantics and an interpretational mechanism consisting in exegetic activity in this way, there have been attempts to find out which linguistic mechanisms are most similar to such a definition of a precedent.[28] Also in the Anglo-Saxon culture, "the use of modern philosophy of language and the philosophy of interpretation (hermeneutics), and the formulation of argumentation and communication theories applied to law changed the modern vision of law and the concept of a precedent".[29] Therefore, referring to the output of the linguistics sciences is in a way "at the root" of an instrument of a precedent treated as appropriate.

W. Quine, who does not use the concept of transposition of semantics alone, writes about similar linguistic mechanisms. However, he formulates a series of comments concerning the methods of constructing interpretations describing cognitive mechanisms responsible for the production of meanings in an interpreter's mind, following a scheme resembling "precedential" action. It must be indicated that the conception of a precedent as transposition of semantics meets both above criteria giving up only the aspect of institutional binding. The concept of transposition includes an element of transferring not only the "ready-made" semantics but also duplication of the process leading to its production.

W. Quine's basic statement consists in an observation that language is a socially established disposition to react to specific impulses (by means of learnt habits).[30] Thus, the use of language follows the principle of re-cognition: comparison of the relation "name – name" rather than "designate – name", i.e. it consists in duplicating identical pragma-linguistic behaviour of other language users.[31] It is important to mention that such use of language is a certain natural mechanism, which takes place independently as an inborn disposition to react to some stimuli. Thus, naming objects and acquiring meaning takes place in the form of reconstruction of a pattern of another language user's action, which leads to the creation of an identical name. Therefore, identical semantics come to existence following the duplication of language users' mechanisms of action and not the other way round. This comment is especially important in the statutory law culture for the search of such law application bodies' interpretational behaviour that would have the semantics duplicating features in the course of their transposition.

It is also worth indicating here that such an interpreter's action would result, as it has been mentioned above, from cognitive features of reconstructing any meanings. Thus, the mechanism would be responsible for their development also

---

[28] "Precedent" within the philosophy of language was also analysed by M. Matczak. Compare, M. Matczak, *Teoria precedensu czy teoria cytowań*, [Theory of precedent or theory of quotations], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim…* [Precedent in the Polish...], passim.

[29] Citation, T. Stawecki, *Precedens jako zadanie…* [Precedent as a task...], pp. 230–231.

[30] Compare, W.O. Quine, *Słowo i przedmiot* [Word and Object], Polish translation by C. Cieśliński, Warsaw 1999, p. 1.

[31] Compare, *ibid*., pp. 13–15.

in legal discourse, including the discourse on law application. This might explain the intuitive mechanism known to everybody who experienced the specificity of operational interpretation of law: searching first of all interpretational patterns from the judicature and the doctrine. This way, a precedent would be a natural basis of reconstructing meanings, and only the lack of possibility of their duplication would result in the necessity of implementing any known methods of law interpretation. This type of features, resulting e.g. in the development of the adjudication policies by means of the worked out standards of interpretation, are based on the mechanism of duplicating similarities. This means that a certain number of cases are adjudicated similarly and do not only introduce a given rule but also standardise the method of its introduction both pragmatically (methods of working with a text) and non-pragmatically, both negatively and positively (to what meanings the interpretation may lead or which meanings are obtained). W. Quine lists the following conditions for such a mechanism:[32]

1) Striving for objectiveness because we want to solve interpretational problems in the same way, which results from a natural dislike for the production of meanings other than those produced by other members of the community taking part in communication;
2) Social "legitimisation" of the meaning because both the "entry" system in the process of perception (the object perceived) and the "exit" system (final "adjudication" on semantics) create "the same stimuli system"; we all want to achieve the same or as similar as possible final result.

The above indicates that W. Quine unambiguously assumes that, although we "produce" meanings independently, we duplicate patterns of their reconstruction based on other people's behaviour and that this is a mechanism naturally conditioned and socially strengthened. It plays an important role in the reduction of antagonisms at the level of inborn behavioural reactions in the field of language use. It also ensures the possibility of standardisation of methods of language use.[33]

Reference of the observations to the issue of law interpretation and the adoption of an assumption that it also takes place at the level of cognitively conditioned mechanisms of language use create a specific situation of original conformism in the process of interpretation, which results in the continental formula of a precedent. If we assume that the search for identical or similar interpretational patterns, leading to the same or similar semantics, has a strong psychological foundation, the mechanism of something that in law can be called "precedential thinking"[34] will take place as an initial phase of every type of interpretational behaviour, also in the continental culture. On the other hand, final situations consisting in the decision whether transposition of semantics would really take place and adjudication would be issued based on the "precedential" mechanism are a completely different matter.

---

[32] Compare, *ibid*., p. 20.

[33] Compare, *ibid*., p. 34.

[34] Following the pattern of multicentric thinking. Compare, E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje* [Multicentricity of the contemporary legal system and its consequences], Państwo i Prawo No. 4, 2005, p. 3.

First of all, it should be noticed that such a definition covers judgments commonly recognised as "precedential", although they do not possess such features at all. It concerns in particular such cases that have not been adjudicated on based on a specific validating basis because of the unusualness of an actual state. As a result, a subject to a norm has never been the subject of a court's judgment before due to the lack of judgments in this scope.[35] The judgment might have been precedential if, in order to issue it, the mechanism of duplicating a pattern of reconstruction of semantics had been used and a judgment had been made based on another case recognised as "similar". However, the conception of "multiple consolidation"[36] presented in the literature as the formula of a real precedent ("non-binding judicial precedent") has nothing in common with the exposed mechanism of transposition of semantics. In short, it consists in indicating cases of real precedents in the form of their intuitive recognition in legal circles, i.e. "reference made to other judgments", which "makes it possible to explain that, in the system of law that is not based on a binding precedent, reference to judicial judgments is an element of an analysis of the meaning of a legal text (…) because they are other uses of the terms by the members of the given communication community".[37] The conception of transposition of semantics presented here is a much narrower approach. Firstly, it does not admit speaking directly about a precedent in the statutory law culture, and secondly, it focuses on the phenomenon of a precedent placing it in the linguistic mechanism of reproduction of a pattern of an action of an interpreter, who causes the development of semantics, which can, although does not have to, become "multiply consolidated".

The attractiveness of the proposed precedent formula in the statutory law culture makes it possible to explain many mechanisms governing the specificity of an operational interpretation. It should be indicated straight away that cases of issuing judgments in such a "precedential" way are not numerous and difficult to "detect" in the analyses of judgment justifications. The fact that exegesis, first of all, cognitively looks for a possibility of applying transposition of semantics does not result in the fact that the process will take place and will be exclusively responsible for an interpretational decision constituting the basis of a given judgment.

Factors determining the mechanism of transposition of semantics within the operational interpretation include:

1) Legitimacy (legitimization before the community, sometimes called an internal aspect of justification, i.e. arguments concerning the meaning of law before the closest communication community, mainly judges of the same court, chamber, etc.[38]).

---

[35] It is absolutely worth indicating that a "precedent" of a case is also defined this way in legal language. Compare, Article 47 §4 CPC: "The president of a court may rule adjudication of a case by a three-judge professional bench if he recognises it advisable because of special complexity and precedential character of a case."

[36] Compare, M. Matczak, *Semantyka Kripkiego-Putnama a język prawny* [Kripke-Putnam semantics and the language of law], p. 21, at: http://pts.edu.pl/teksty/marmat.pdf [accessed on 02.04.2017], passim.

[37] Citation, *ibid*., p. 21.

[38] Compare, E. Łętowska, *Czy w Polsce możemy mówić o prawie precedensowym* [Can we speak of precedent law in Poland?], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens*… [Precedent...], p. 9.

In general, it concerns duplicating meanings adopted by other members of the communication community. The mechanisms that W. Quine indicates show that we do not really want to legitimise the meaning in relation to an addressee of a statement but in relation to those who, in the opinion of the interpreter, have power over the imposition of the rules of constructing the meaning.[39] The author indicates that assigning meanings is based on the same stimulus meanings,[40] which means that a stimulus is the same for a given system of signs, and a language user chooses a similar (or identical) meaning. Thus, the production of identical semantics takes place based on the fact that we observe how other language users call objects, but the mechanism responsible for that is not copying a name but copying the procedure of assigning names, although in case of specific names of empirical objects, the problem is trivial. What is important is the issue of abstract names, which plays a special role. The observation of a context in which a name occurs is of key importance because it determines its use in a particular way, sometimes based on the principle of transposition of semantics, where the component of transposition (duplicating) of the naming procedure is most important. Such a mechanism plays a special role in law interpretation, in particular within operational interpretation because identical validating bases of interpretational activities are a synonymous stimulus, in the formula of pragmatic interpretation (implementation of identical methods of interpretation) or non-pragmatic one (performance of designating operations).[41] The legitimising aspect of performing interpretational operations seems of key importance in the realities of the continental culture and similarly to the common law order is determined by an adopted habit.

2) Unification is responsible for the already mentioned possibility of explaining various issues with the use of standardisation of the methods of acting and interpretational judgments. It is a social phenomenon reducing antagonisms. In such an approach, in case of approval of the conception presented, the principle of uniformity of judgments would come into being "on its own", as a social phenomenon in a given communication group, in this particular case: judges.[42]
3) Conservatism is responsible for evolutionary and not revolutionary changes in the adopted meanings and patterns of interpretational actions. In some sense,

---

[39] W.O. Quine presents a famous example of a "colour blind person" who was taught to react to certain physicochemical stimuli not based on an inborn skill to differentiate them but the system of bonuses and penalties funded by given persons responsible for assigning them. Compare, W.O. Quine, *Słowo i przedmiot...* [Word and Object...], p. 21.

[40] Concept of "synonymity of a stimulus", compare, *ibid*., p. 62.

[41] The conjunction "or" was used on purpose because the analysis of the operational interpretation indicates that the meaning is rarely obtained only by the use of interpretation methods exclusively.

[42] It is worth noticing that the claim to standardise meanings addressed to all bodies applying law does not only originate from the society but is an independent directive on the behaviour of people playing social roles in those bodies. Compare, L. Leszczyński, *Jednolitość orzecznictwa jako wartość stosowania prawa* [Uniformity of judicature as a value of application of law], [in:] *Studia i Analizy Sądu Najwyższego* [Studies and Analyses of the Supreme Court], Vol. I: M. Grochowski, M. Raczkowski, S. Żółtek (eds.), *Jednolitość orzecznictwa. Standard – instrumenty – praktyka* [Uniformity of judicature. Standard – instruments – practice], Warsaw 2015, pp. 9–11 and 13–14.

in the specificity of law interpretation, it consists in the minimum consent of the decision-making body to "impose a solution concerning the approved interpretational actions. In this meaning, it is very important to notice that law interpretation theories created (developed) in general jurisprudence (e.g. clarification- or derivation-related ones) are more eagerly adopted in practice, provided that they are closer to natural language use and adequate to the specificity of this "use" in order to obtain a meaning within the given communication community. Even if a "competitive" theory has specific cognitive or methodological features, it faces difficulties concerning the establishment of adopted interpretational patterns.[43] It can be described as unwillingness to change in interpretational practice.[44]

4) Conformism consisting in cognitive conditions and social inclinations strengthening the tendency to implement the existing (known) patterns of interpretational procedure because non-conformism requires that an interpreting body should show stronger tendencies to take non-standard interpretational decisions and stronger inclination to decision-making in order to get out of the typical "feeling of the legitimisation state" concerning the meaning of law. It must be highlighted that the above features of the body's interpretational action should not be pejoratively assessed and that judicial moderation that is the basis of conformist behaviour must also result in moderate and conformist judgments.[45]

6. PRECEDENT AS THE TRANSPOSITION OF SEMANTICS – THEORETICAL CONDITIONS

The basic difference concerning the reference of an instrument of a precedent to the statutory law culture is the issue of different conditions of the process of law application. Attention is also drawn to that in the literature.[46] In case of judicial law order, the premise of actual state similarity, originally responsible for implementation of the same norm with the use of the principle of *stare decisis*, is an entry premise responsible for W. Quine's stimulus synonymity. A judge's (and every other lawyer's) reasoning sequence in the Anglo-Saxon culture is totally different from a pattern in the civil law order. Mechanisms responsible for a precedent are based

---

[43] E. Łętowska indicates the phenomenon of "learnt" precedential thinking. Compare, E. Łętowska, *Czy w Polsce możemy...* [Can we speak...], p. 10.

[44] The concept of established meanings, which were quoted, may be also referred to the factor of conditioned interpretational patterns (e.g. with regard to the use of the concept of direct understanding (the paradigm of *clara non sunt interpretanda*, etc.). Such an approach to "establishment" seems to be even more adequate than one referred to the issue of duplicating semantics. Indeed, it is difficult to distinguish when it would be repeatedly established and when it would only play the role of an argument from justification or an authority. Compare, M. Matczak, *Semantyka Kripkiego-Putnama…* [Kripke-Putnam semantics...], p. 4 ff.

[45] The issue of decision-taking conformism is referred to law interpretation and not decisions concerning the essence of the case, especially in the regime of exploratory proceedings, basically dependent on the conditions resulting from evidence collected in the case and assessed based on the directives for the assessment of facts.

[46] Compare, T. Stawecki, *Precedens w polskim porządku…* [Precedent in the Polish legal order...], pp. 62–63.

on the assessment of facts and only then lead to recognition that a case requires or not an identical normative statement. This pattern of procedure applies mainly to facts and not to exegesis.

On the other hand, in the statutory law culture, the model of law application is completely different and the system of assessment consisting in duplication of a pattern of a body's action refers to facts but of positive law in the form of a normative act. A precedent in the statutory law culture does not consist in duplicating the same validating basis and the meaning of law in relation to two similar cases. This way of defining a precedent in the specificity of statutory law results in a conceptual trap signalled a few times already, because it too extensively extends the concept of a real precedent by "first" issues, i.e. adjudication based on the norm that have never been used before from the validating perspective, as well as an act of duplicating the decision by reference to it in arguments. What determines this precedential thinking is a court's conscious use of the formula of a precedent because an interpreter's feeling that the original meaning of law is binding is so strong that there is duplication of the pattern of acquiring its meaning together with meeting the specific requirement of identity (similarly to the pattern of stimulus synonymity described above).

The condition does not concern the real aspect of a case but a court's recognition that there is identity in two spheres: (1) the choice of a validating basis of the judgment, i.e. which normative act and which fragments of it will be necessary to issue a decision on the specific type of law application; (2) the transfer of the method of acquiring the meaning of law in the formula of identical interpretational actions, i.e. the implementation of the same system of methods, directives or arguments justifying the interpretational decision from another judgment, maybe issued in a case concerning a different actual state.[47] This is why, the concept of transposition of semantics is useful, because transposition refers to the course of action and not an individual body's activity. What is also necessary is an interpreter's self-conscience that he duplicates the method of acquiring the meaning of law from another court's judgment for the case he adjudicates on. Such cases are rare because they do not concern the transfer of the meaning of law alone.[48]

It must be highlighted that a precedent defined this way differs from its common understanding,[49] especially presented in public discourse, where it is understood as a judgment issued based on law "unused" so far, i.e. regulations that have not

---

[47] It is the broadest approach to the term "law interpretation". As a rule, the stand of the theory of law is presented as one separating the sphere of interpretation from justification of (arguments for) an interpretational decision but in the practice of law application, the concepts are very often, if not most often, treated as synonyms. Compare, M. Zieliński, Z. Ziembiński, *Uzasadnianie twierdzeń, ocen i norm w prawoznawstwie* [Justification of statements, assessments and norms in jurisprudence], Warsaw 1988, p. 6.

[48] These are cases of those established meanings or uses of arguments of an authority (the judgment and a body issuing it are responsible for an "authority", e.g. a higher instance court) characterised by the fact that they are easy to support an interpretational opinion.

[49] In particular, it differs from the practice of "collecting" "random judgments from Lex" in a procedural document or justification. Such construction of justification of a judgment has nothing in common with the instrument of a precedent. Compare, E. Łętowska, *Czy w Polsce możemy...* [Can we speak...], p. 11.

been a basis of court decisions before. What is important in a "common" precedent is the validating issue, regardless of the method of acquiring semantics because in analyses it focuses on how this "unused" law shapes the judgment (concerning the essence of the case), while the transposition of semantics concerns focusing on the mechanisms of duplicating a judge's interpretational action. The issue of judgment remains insignificant from the point of view of transposition of semantics.

This way, a precedential judgment, as defined by the mechanism of transposition of semantics, may be only one that was issued after an interpretational decision taken in specific conditions, within an interpreter's specific action. The conditions include:

1) A lack of intuition about the meaning of law. It concerns cases where there is no possibility that a judge makes use of the state of "direct interpretation" of a legal text or can make use of a legal maxim: "clear phrases are not interpreted" (*clara non sunt interpretanda*).[50] Thus, it concerns cases when the meaning of law is either not conceptualised at all and a judge draws a conclusion that he must interpret it by looking for "ready-made" meanings worked out by only one judicature (this is very important and only based on that we can speak about a precedent), or transfer a determined system of interpretational methods and establish the sense (meaning) of selected fragments of a legal text, i.e. transfer a system of reasoning from the area of linguistic-logical, purpose-related or systemic methods. This condition is very important and makes it possible to differentiate, in the conditions of the continental culture, between a court's use of a "precedent" and the use of arguments of the existing judgments or the doctrine (which most often takes place jointly in the form of reference to output, if it exists, from both sources);
2) Evoking a state of synonymity of a stimulus by establishing that there is another judgment the reasoning pattern of which is suitable for transposition to an adjudicated case. There is no requirement for the identity of a factual state of a case, which is irrelevant. A court adopts the establishment that there is a judgment issued in a specific factual state the interpretational pattern of which may be transposed to the adjudicated case. The stage can have in two variants.

   The first one consists in duplicating the pragmatics of interpretation, i.e. undertaking identical interpretational actions, application of the same approach to specific interpretational methods, reasoning included in them, the sequence of their use, etc. It concerns a situation when, expressing it colloquially, "I will do the same as another court" but, what is very important, without the knowledge of or a possibility of transposing the semantics. In the literature, similar situations are sometimes described as "rules of adjudicating on a certain category of cases".[51] It is very important to acknowledge that only then, and totally externally (as it were from a position of an observer), it can be established that:

---

[50] There is no room in the present article for a discussion of theoretical conceptual differences between the two institutions of exegesis.

[51] M. Matczak uses the concept, although in a little different context. Compare, M. Matczak, *Summa iniuria. O błędzie formalizmu w stosowaniu prawa* [*Summa iniuria*. On the error of formalism in applying the law], Warsaw 2007, p. 79.

– in the "original" case, the source of synonymity of a meaning stimulus, is a precedential judgment because it will result in the possibility of semantic transposition in the future;
– in a case in which there is duplication of the pattern of an interpreter's action, the proper semantic transposition is the above-mentioned formula of a precedent which, in the specificity of the continental culture, consists in duplicating an interpreter's action.

This element would be responsible for the equivalent of the components of a precedent looked for in the statutory law in the form of the principles of *ratio decidendi* and *stare decisis*. The former results from motives behind a court's choice of the state of synonymity of a stimulus, and the latter was responsible for the feeling of the state of binding, however, by maintaining interpretational sovereignty of a judge.

The second variant consists in the transposition of the meaning of law alone and it is, in principle, an analogy to which a court does not confess because of some reasons. It is worth indicating that such assessment is not unknown in the Polish literature, and a precedent in the continental culture is sometimes associated only with some forms of reasoning *per analogiam*.[52]

In order to acknowledge that the pattern of an interpreter's action is possible to be transferred to a case adjudicated, one can also, for descriptive purposes, use a concept of equivalent facts. In the statutory law culture, they are not related to the issue of factual establishment but to facts established by a court concerning the circumstances of the course of interpretation in a "similar" case and an assumption that it is possible to use the identical interpretational pattern.

3) The third stage is the development of semantics, or the meaning of law. Regardless of the form: the pattern of an interpreter's action or that "hidden" analogy, the meaning alone always results from transposition and is not an independent effect, even if the decision-making body is not aware of it or the decision-making process was not complex. This last stage is very important and makes it possible to maintain the condition of continental culture identity, which means taking final interpretational decisions independently by a court without a possibility of assuming that a judgment of another court has a validating status. It is a court's sovereign decision what the shape of the semantics of a legal text is and whether it is identical or only similar as a result of transposition of patterns of interpretational action from a different judgment. Therefore, a precedent in a formula of semantic transposition is a form of a real precedent, a non-binding one but

[52] A. Korybski presented such a stand during the conference; by this author, *Precedens a rozumowanie per analogiam legis* [Precedent and the *per analogiam legis* reasoning], conference on 20 March 2017. Everyone who had an occasion to see the practice of judicial application of law knows cases of implementation of analogous meaning of law without verbal expression of that fact in the justification of a judgment. Especially, as such operations are fully admissible in the law of the procedure and substantive law if they do not result in the deterioration of the legal interest of a party. Also compare, T. Stawecki, *Precedens jako zadanie…* [Precedent as a task...], pp. 242 and 245–246.

formulating very precise conditions of its institutional being in continental legal systems. It is not an interpretational precedent, which is sometimes distinguished in the literature.[53]

7. PROS AND CONS OF THE TRANSPOSITION OF SEMANTICS AS A PRECEDENT FORMULA

The considerations in this section have the features of an auto-reflexive research basis with an aim to indicate strengths and weaknesses of the presented concept of a precedent. It seems that the arguments for linking transposition of semantics with the continental formula of a precedent are as follows:

1) Strong explicating power because the presented formula allows one to easily reject the null hypothesis stating that there are no precedential judgments in the population of judgments in the statutory law system of an X state and, as a result, prove the alternative hypothesis, i.e. one stating that a precedential judgment can be found in such a system. This observation and the assessment results from the simple constatation that judgments described by the formula of the semantic transposition are just issued even if it is a rare phenomenon[54] because it is limited by strict requirements.
2) The conception presented is compatible with the canons of the continental exegetic thought – a legal body performs transposition; it is its sovereign decision.[55] It does not make it exempt from responsibility for:
   a. undertaking the procedure of semantic transposition (of a precedent);
   b. a judgment, which is extremely important for meeting a requirement to maintain the features of the subsumptive model of law application (including the decision-making model) and its derivatives, including taking into account the principle of jurisdictional independence.

   It is worth adding that it does not aim to indicate that the strong cognitive power of the theory presented originates from the fact that specific mechanisms occurring in the practice of adjudicating have been artificially included in

---

[53] L. Morawski registers such a concept but does not associate the essence of a precedent with it. Compare, L. Morawski, *Precedens*… [Precedent...], p. 4. Regardless of the indefinite scope of the term, it seems that such a type of precedent concerns the first application of given arguments justifying an interpretational decision and does not concern the process of interpretation as a pattern of an interpreter's action, and especially the term is not involved in cognitive mechanisms of obtaining semantics. It seems it is based on joint treatment of interpretation and justification processes, which is inappropriate because these are two different cognitive processes and rightly, mainly within the term, the "mixture" of research ("descriptive and normative") perspectives takes place. Compare, T. Stawecki, *Precedens w polskim porządku*… [Precedent in the Polish legal order...], pp. 62 and 66–67.

[54] Practitioners share the opinion about the insignificant role of a precedent, although they define a precedent differently. Compare, T. Flemming-Kulesza, *Czy w Polsce możemy mówić*... [Can we speak of precedent...], p. 16.

[55] Regardless of how it is understood, the significance of this aspect of "precedent" in statutory law is indicated in the literature. Compare, R. Hauser, J. Trzciński, *Prawotwórcze znaczenie*… [Significance for law-making...], pp. 40–41.

the concept of a precedent in a certain formula. It would not make sense and such assessment might be made in relation to the broad definition of a *de facto* precedent. Indeed, the requirement number 2 presented here makes the strong explanatory power of the theory result from the fact that the proposed depiction of a precedent contains necessary components of this instrument of the case law order, because it focuses on searching for and describing the mechanisms of the statutory law culture that meet the requirements of a precedent in the conceptual sense. It avoids a specific error of a categorical shift, not to say that a precedent in the statutory law takes place only based on the observation of argumentative reference to judgments,[56] which as such does not contain components responsible for the essence of the mechanism in the common law culture.[57]

3) The third requirement concerns the already mentioned maintenance of the basic feature of a "precedent", which means basing on the former semantics but indicating that it is a secondary feature as the primary one consists in duplicating an interpretational pattern of behaviour (interpretational heuristics). It is worth adding that such a mechanism seems to fully correspond to the reasoning in the "original" Anglo-Saxon precedent, where "precedential" procedure occurs based on a pattern of inductive thinking and the analysis "of many former decisions".[58] Thus, the semantic transposition is a decision-making process and not an individual act of reference to pure semantics from a specific source. At the same time, the presented conception does not stand in opposition to "precedent" as it is understood in terms of legal language[59] and as commonly understood first interpretation of a specific validating basis, although only when another court duplicates the interpretational pattern, i.e. performs transposition of semantics interpreted in the "first" judgment.

Factors that show drawbacks of the conception of semantic transposition include the following:

1) A broad explicatory scope, which is an advantage, may also seem to be a drawback. Theories developed in too broad areas usually pose methodological problems because, as a rule, this multiplies research questions and theoretical disputes. The process of knowledge standardisation alone is a delicate one in accordance with the opinion that "you can't play 20 questions with nature and win".[60]

---

[56] The term "free stream of associations" is especially accurate here. Compare, E. Łętowska, *Czy w Polsce możemy...* [Can we speak...], p. 12.

[57] T. Stawecki presents a similar methodological stand. Also compare, a comment by the author: "It is often stated that in the *common law* system there are no precedents *de facto*, however, in statutory law countries precedents *de iure* are not recognised". Compare, T. Stawecki, *Precedens w polskim porządku …* [Precedent in the Polish legal order...], p. 61.

[58] Compare, T. Stawecki, *Precedens jako zadanie…* [Precedent as a task...], pp. 243–245.

[59] Article 47 §4 CPC quoted above.

[60] It is the title of the famous work by A. Newella of 1973 in the field of cognitive science, in which many fascinating experiments, mainly psychology-related ones, are reported. The author makes a conclusion that there is no sense and possibility of developing a coherent theory based on them aimed at the evolution of research as a whole. The work is often referred to as criticism of science integration (at different levels and in different disciplines) implemented without

2) Although the theoretical assumptions presented are in fact compatible with intuitive understanding of what a precedent is, the conclusions have been drawn without conducting formal studies, especially empiric ones. The problem seems to be a disruptive factor but it is necessary to indicate that in science there is no greater "enemy" than auto-suggestion and theories believed to be self-adaptative are usually not such, which results from the fact that phenomena are determined by many factors.
3) The conception presented is characterised by hermetic language used in this paper with some necessary simplifications. Thus, it may meet with criticism of an attempt to describe a strictly legal instrument with the use of unnecessary complicated conceptual apparatus. However, such an opinion would have to be based on a narrow positivist approach to jurisprudence and an assumption that the specificity of legal interpretation does not force its deeper linguistic analysis. However, this way law and jurisprudence concerning this phenomenon are deprived of the necessary cognitive apparatus based on other sciences as well as are led to a possibility of formulating inappropriate conclusions because they may be drawn from an incomplete picture of the actual state.

The article totally ignores the issue of assessment whether the practice of semantic transposition, as a continental mechanism of a precedent, if defined in the proposed way, is positive to some extent or not, especially if we take into consideration aspects of auto-reflection of a court, heterogenic structure of the pattern of decision reconstruction, etc.[61] The aim of the presented conception was to describe the actual state without the assessment, especially through the prism of axiology, within the area of philosophy or ethics.[62]

BIBLIOGRAPHY

Chmielnicki P., *Identyfikacja celów i funkcji w ramach wykładni prawa* [Identification of aims and functions for the interpretation of law], Przegląd Prawa Publicznego No. 3, 2015.

Flemming-Kulesza T., *Czy w Polsce możemy mówić o prawie precedensowym?* [Can we speak of precedent law in Poland?], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim systemie prawa* [Precedent in the Polish legal system], Warsaw 2010.

Frydman S., *Dogmatyka prawa w świetle socjologii. Studjum pierwsze: o wykładni ustaw* [Dogmatics of law from the sociological perspective. Preliminary studies: on interpretation of statutes], Vilnius 1936.

Grabias S., *Język w zachowaniach społecznych* [Language in social relations], Lublin 2003.

---

reflection. Compare, A. Newell, *You can't play 20 questions with nature and win: projective comments on the papers of this symposium*, Pittsburgh, 1973, passim; at: https://pdfs.semanticscholar.org/85a0/96908670cd83cacfdede9e11f2df2dc41c9b.pdf [accessed on 03.04.2017].

[61] A precedent defined this way sometimes meets with considerable criticism in the literature. Compare, E. Łętowska, *Czy w Polsce możemy...* [Can we speak...], p. 11.

[62] Compare, A. Grabowski, *Prawnicze pojęcie obowiązywania prawa stanowionego* [Legal understanding of binding statutory law], Kraków 2009, p. 4.

Grabowski A., *Prawnicze pojęcie obowiązywania prawa stanowionego* [Legal understanding of binding statutory law], Kraków 2009.

Hauser R., Trzciński J., *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego* [Significance for law-making of the Constitutional Tribunal rulings in the judgments of the Supreme Administrative Court], Warsaw 2008.

Koszkowski M., *Anglosaska doktryna precedensu. Porównanie z polską praktyką orzeczniczą* [Anglo-Saxon theory of precedent. A comparison with the Polish judicature], Warsaw 2009.

Kotowski A., *Polski test na ontologię prawa* [Polish test for ontology of law], Dziennik Gazeta Prawna, "Prawnik" of 31 May 2016.

Kozak A., *Dylematy prawniczej dyskrecjonalności. Między ideologią polityki a teorią prawa* [The dilemmas of legal discretion. Between political ideology and the theory of law], [in:] W. Staśkiewicz, T. Stawecki (eds.), *Dyskrecjonalność w prawie* [Discretion in law], Warsaw 2010.

Leszczyński L., *Precedens jako źródło rekonstrukcji normatywnej podstawy decyzji stosowania prawa* [Precedent as a source of normative reconstruction of the basis of a decision on applying the law], [in:] I. Bogucka, Z. Tobor (ed.), *Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego* [Law and values. Professor Józef Nowacki jubilee book], Kraków 2003.

Leszczyński L., *Jednolitość orzecznictwa jako wartość stosowania prawa* [Uniformity of judicature as a value of application of law], [in:] *Studia i Analizy Sądu Najwyższego* [Studies and Analyses of the Supreme Court], Vol. I: M. Grochowski, M. Raczkowski, S. Żółtek (eds.), *Jednolitość orzecznictwa. Standard – instrumenty – praktyka* [Uniformity of judicature. Standard – instruments – practice], Warsaw 2015.

Łętowska E., *Pozaprocesowe znaczenie uzasadnienia* [Extrajudicial significance of justification for a judgment], Państwo i Prawo No. 5, 1997.

Łętowska E., *Multicentryczność współczesnego systemu prawa i jej konsekwencje* [Multicentricity of the contemporary legal system and its consequences], Państwo i Prawo No. 4, 2005.

Łętowska E., *Czy w Polsce możemy mówić o prawie precedensowym* [Can we speak of precedent law in Poland?], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim systemie prawa* [Precedent in the Polish legal system], Warsaw 2010.

Łętowska E., *Sądy nie mają styku z wyrokami TK. Stosują jedynie ukształtowane prawo* [Courts' verdicts do not coincide with the Constitutional Tribunal judgments. They apply only statutory law], available at: http://prawo.gazetaprawna.pl/artykuly/1030492,sady-nie-maja-styku-z-wyrokami-tk.html [accessed on 31.03.2017].

Matczak M., *Summa iniuria. O błędzie formalizmu w stosowaniu prawa* [*Summa iniuria*. On the error of formalism in applying the law], Warsaw 2007.

Matczak M., *Teoria precedensu czy teoria cytowań* [Theory of precedent or theory of quotations], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim systemie prawa* [Precedent in the Polish legal system], Warsaw 2010.

Matczak M., *Semantyka Kripkiego-Putnama a język prawny* [Kripke-Putnam semantics and the language of law], at: http://pts.edu.pl/teksty/marmat.pdf [accessed on 02.04.2017].

Morawski L., *Argumentacje, racjonalność prawa i postępowanie dowodowe* [Argumentation, rationality of law and evidence-taking procedure], Toruń 1988.

Morawski L., *Precedens a wykładnia* [Precedent and the interpretation of law], Państwo i Prawo No. 10, 1996.

Morawski L., *Wykładnia w orzecznictwie sądów* [Interpretation of law in the court judgments], Toruń 2002.

Morawski L., *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian* [Key issues in the contemporary philosophy of law. Law in the course of changes], Warsaw 2003.

Newell A., *You can't play 20 questions with nature and win: projective comments on the papers of this symposium*, Pittsburgh, 1973.

Nowacki J., Tobor Z., *Wstęp do prawoznawstwa* [Introduction to jurisprudence], Warsaw 1993.
Opałek K., Wróblewski J., *Zagadnienia teorii prawa* [Problems of the theory of law], Warsaw 1969.
Pieńkos J., *Podstawy juryslingwistyki. Język w prawie – prawo w języku* [Foundations of jurilinguistics. Language in law – law in language], Warsaw 1999.
Quine W.Q., *Słowo i przedmiot* [Word and Object], Polish translation by C. Cieśliński, Warsaw 1999.
Stawecki T., *Precedens w polskim porządku prawnym. Pojęcie i wnioski de lege ferenda* [Precedent in the Polish legal order. A concept and *de lege ferenda* conclusions], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim systemie prawa* [Precedent in the Polish legal system], Warsaw 2010.
Stawecki T., *Precedens jako zadanie dla nauk prawnych* [Precedent as a task for legal sciences], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim systemie prawa* [Precedent in the Polish legal system], Warsaw 2010.
Stelmachowski A., *Prawotwórcza rola sądów (w świetle orzecznictwa cywilnego)* [Legislative role of the courts (in the light of civil law judgments)], Państwo i Prawo No. 4–5, 1967.
Wróblewski J., *Precedens i jednolitość sądowego stosowania prawa* [Precedent and uniformity of judicial application of law], Państwo i Prawo No. 10, 1971.
Wróblewski J., *Sądowe stosowanie prawa* [Application of law by courts], Warsaw 1973.
Wróblewski J., *Wartości a decyzja sądowa* [Values vs. court decision], Wrocław 1973.
Wróblewski J., *Rozumienie prawa i jego wykładnia* [Understanding of law and its interpretation], Warsaw 1990.
Zieliński M., *Wykładnia prawa, zasady, reguły, wskazówki* [Interpretation of law, principles, rules, guidelines], Warsaw 2002.
Zieliński M., Ziembiński Z., *Uzasadnianie twierdzeń, ocen i norm w prawoznawstwie* [Justification of statements, assessments and norms in jurisprudence], Warsaw 1988.
Zirk-Sadowski M., *Precedens a tzw. wykładnia prawotwórcza* [Precedent and the legislative interpretation], Państwo i Prawo No. 6, 1980.

PRECEDENT AS THE TRANSPOSITION OF A NORMATIVE ACT

Summary

This paper deals with precedents in civil law. The author's assumption is that the specificity and constructs of the legal culture developed in continental Europe do not give grounds for claiming that precedents in the civil law systems occur in the same way as they do in the Anglo-Saxon system. In the civil law systems, a court decision is intrinsically not a source of law. Following a brief summary of relevant views of legal academics and commentators, this paper reflects upon certain mechanisms of a judicial authority's action, which fulfils the criteria of a precedent. Parallels are sought between the semantic transposition mechanisms and the precedent formula modelled on research in linguistics is presented. Thus, the article outlines preliminary assumptions for the concept of a "precedent", which builds on the courts' practice to duplicate the meaning of law based on specific criteria set forth in this paper. Finally, pros and cons of the concept are summarized.

Keywords: precedent, language/linguistics, law interpretation, theory of law

PRECEDENS JAKO TRANSPOZYCJA AKTU NORMATYWNEGO

Streszczenie

Artykuł porusza problematykę orzeczeń precedensowych w porządku prawa stanowionego. Autor wychodzi z założenia, że z istoty specyfiki i przyjętych rozwiązań konstrukcyjnych kontynentalnej kultury prawnej nie można twierdzić, że w systemach prawa stanowionego występują orzeczenia typu precedensowego w tożsamy sposób względem tej instytucji znanej prawu anglosaskiemu. Z istoty rzeczy, w porządku prawa stanowionego orzeczenie sądu nie przynależy do katalogu źródeł prawa. W artykule podjęto natomiast refleksję, poprzedzoną syntetycznym sprawozdaniem z dotychczasowego dorobku doktryny w tym zakresie, nad pewnymi mechanizmami działania organu sądowego, które odpowiadają cechom precedensu. Autor poszukuje w tej kwestii analogii do mechanizmu transpozycji semantyki i przedstawia formułę precedensu wzorowaną na badaniach z dziedziny nauk o języku. W tym znaczeniu tekst stanowi przedstawienie zarysu, wstępnych założeń koncepcji precedensu odwołującej się do powielania przez sądy znaczenia prawa pod określonymi kryteriami, które przedstawione zostają w tym opracowaniu. W ramach podsumowania, autor dokonuje zestawienia zalet i wad proponowanej koncepcji.

Słowa kluczowe: precedens, język/lingwistyka, wykładnia prawa, teoria prawa

SEMANTIC REDUPLICATION AND CUMULATIVE CONCURRENCE OF PROVISIONS OF CRIMINAL LAW IN THE FIELD OF FORGERY OF A DOCUMENT AND ELECTION AND REFERENDUM DOCUMENTS

IZABELA JANKOWSKA-PROCHOT*

1. INTRODUCTION

The crime of forgery of a document is regulated not only in Article 270 §1 of Chapter XXXIV of the Criminal Code (CC) entitled Offences against Credibility of Documents. Also Article 248(3) CC of Chapter XXXI dealing with offences against elections and referenda stipulates liability for forgery of documents, although these are strictly determined types.

Due to the fundamental significance of elections, the issue of the protection of universal suffrage cannot be overestimated. Although, according to the data provided by the General Headquarters of the Police, an act classified in Article 248 CC constitutes a marginal phenomenon in the penal policy, it is not a scarce number of proceedings but their nature[1] that is important because it infringes the principle of free elections and referenda and thus, the freedom to choose representatives of the society (authorities), to conduct an electoral campaign and to express opinions and preferences in the course of voting.[2]

* PhD, lecturer at the Cardinal Wyszyński University in Warsaw and the Academy of Computer Science, Management and Administration in Warsaw, employee of the General Police Headquarters in Warsaw; izabela.maria@op.pl

1 For more, see: http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-12/63596,Falszowanie-dokumentow-wyborczych-art-248.html [accessed on 21.07.2017].

2 A. Hess, *Społeczni uczestnicy medialnego dyskursu politycznego w Polsce. Mediatyzacja i strategie komunikacyjne organizacji pozarządowych* [Social actors of political discourse in the Polish media. Mediatisation and communicative strategies of non-governmental organizations], Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2013, p. 18; M.A. Nowicki, *Wokół Konwencji Europejskiej.*

The article aims to draw attention to a dual nature of the offence of forgery of elections and referenda-related documents. The author strives to present the relationship and establish the logical link between criminal acts laid down in Article 248(3) CC and Article 270 §1 CC. She also analyses the features of such acts and the opinions in the doctrine. Due to the fact that the construction of Article 248(3) CC raises some interpretational problems connected with the object of an act, the article is an answer to the question whether it is necessary to differentiate between documents and election-related documents, and whether there are normative reasons to do so.

Moreover, in order to select the legislator's message, some separate comments are devoted to the useful, though partial, semantic reduplication. In other words, the author analyses the repetition of normative content in the two discussed provisions.

In this research context, the article also discusses the provisions of the Act of 10 February 2017, which introduces new types of offences against credibility of documents. The extended scope of criminalisation concerned the acts of physical and intellectual forgery of an invoice. The amendment covered not only the content of Articles 270a CC and 271a CC but also introduced Article 115 §14a CC, in which there is a legal definition of this business document.

The article adopts an interpretation *ratio legis* making it possible to verify the legislator's real intention and a linguistic interpretation allowing the analysis of linguistic redundancies. To some extent, the author also makes use of the method of analysing the function and aim of a legal provision.

1.1. MUTUAL RELATION BETWEEN ARTICLES 248(3) CC AND 270 §1 CC

Although there is no explicitly expressed definition of document forgery in Polish legal regulations, the analysis of interpretational conceptions leads to a conclusion that there are three types of it. Material forgery consists in a perpetrator's influence on the substance of a document in order to give it the features of authenticity. Intellectual forgery is also called certifying an untruth and it consists in an authorised entity's interference in the content of a document that has legal significance. Indirect forgery is based on obtaining attestation of an untruth under false pretences. It is important, however, that it must be performed by deceitfully misleading an authorised entity and it constitutes a type of intellectual forgery.[3]

Due to the limits of the issues under examination, only a perpetrator's conduct laid down in Article 248(3) CC and Article 270 §1 CC is analysed. Thus, the objective features of intellectual forgery of documents remain outside the scope of this paper.

Komentarz do Europejskiej Konwencji Praw Człowieka [On the European Convention. A commentary on the European Convention on Human Rights], Wolters Kluwer Business, Warsaw 2013, p. 903.

[3] J. Błachut, *Prawne konsekwencje tworzenia prac dyplomowych na zlecenie* [Legal consequences of preparing diploma theses on order], Prokuratur i Prawo No. 5, 2005, p. 109 and *ibid.*, *Dokument jako przedmiot ochrony prawnokarnej* [A document as an object of protection under criminal law], Wolters Kluwer Polska, Warsaw 2011, p. 97.

The authenticity of a document meaning its originality is an interest protected in the provisions penalising this type of a prohibited act. Prohibited acts of this category are regulated in Article 270 §1 CC, which classifies the offence of counterfeiting, altering or using a document referred to in Article 115 §14 CC. The motive of the practice is most often financial profit and a perpetrator commits the offence to use the document as authentic. Making comments on legal grounds for forgery prosecution, it is worth mentioning that counterfeiting is the development of a fake document and creating some semblance of its authenticity. Altering means the introduction of changes in the text of an already existing document by an unauthorised person, with some semblance of authenticity and with the use of which its content changes its legal significance. The last term shall be understood as "submission of a document to another person or a public entity in order to affect them legally".[4]

At the same time, it should be emphasised that, as a result of the amendment of 10 February 2017 to the Criminal Code, the catalogue of offences against credibility of documents was extended.[5] The aim was to improve the fight against the practice of forging business documents, especially groundless claiming VAT return, i.e. appropriation of taxes that should be paid to the Treasury.

The amendment consisted in the introduction of a special type of material forgery of invoices (Article 270a CC) and aggravating penalties for such offences. Another issue, however going beyond the scope of this article, was the introduction of the concept of intellectual forgery of invoices (Article 271a CC).[6] Moreover, in order to characterise prohibited acts, beside the legal definition of a document in Article 115 §14 CC, the legislator distinguished a concept of an invoice (Article 115 §14a) as a tool used to curtail the state income.[7]

The offence characterised in Article 270a CC, like standard material forgery of documents, covers three activities undertaken in order to "use an invoice as an authentic one with regard to circumstances that may have significance for determination of tax liabilities".[8] It includes counterfeiting, altering and using. There is also an aggravated type "due to great value of goods or services, or the commission of the crime to obtain a permanent source of income".[9] The legislator also laid down different sanctions to be applied in cases of lesser significance.[10]

---

[4] Citation from: Appellate Court judgement of 12 March 2015, II AKa 199/14 http://orzeczenia.lodz.sa.gov.pl/content/$N/152500000001006_II_AKa_000199_2014_Uz_2015-03-12_001 [accessed on 21.07.2017].

[5] See, Journal of Laws [Dz.U.] of 2017, item 244.

[6] Apart from those changes, the Criminal Code amendment also influenced the content of Article 237 of the Criminal Procedure Code and Act on the Police, Central Anticorruption Bureau, Border Guard, Military Police and fiscal control entities. As a result, the institutions were given a possibility of conducting operational and surveillance activities as well as tapping and recording telephone conversations in case of most serious types of prohibited acts.

[7] In accordance with it, the concept should be interpreted as a document referred to in Article 2(31) of the Act of 11 March 2004 on VAT (Journal of Laws [Dz.U.] of 2016, item 710, as amended).

[8] Citation from Article 270a CC.

[9] Citation from *ibid*.

[10] See, Article 270a §3 CC.

The introduction of separate characteristics for unlawful conduct consisting in counterfeiting, altering and using forged or altered invoices makes this prohibited act type penalised more strictly than before. It is worth adding that legal regulations concerning the features of the action of counterfeiting or altering are included not only in Article 270 CC, Article 270a CC or Article 248(3) CC, but also in Article 310 §1 CC. In accordance with its content, the legislator penalises counterfeiting money, media of exchange, documents entitling to obtain a sum of money or obliging to pay capital, interest, share in profits or recognising participation in a partnership, as well as erasing signs from money or another legal tender.[11]

In accordance with Article 248(3) CC, the legislator penalises crimes consisting in altering or counterfeiting reports or other election- or referendum-related documents. What is worth noticing is the fact that a perpetrator commits the offence in connection with presidential, parliamentary and local self-government elections as well as election to the European Parliament.

There is no relation of exclusion, also called a relation of generality-speciality, between Article 248(3) CC and Article 270 §1 CC. As S. Kowalski rightly indicates, Article 248(3) CC is a more precise regulation of "the limits of the subjective side and taking into consideration both aspects of intention". Although the type of intent does not occur explicitly, it can be assumed that both forms are possible, i.e. direct and oblique intent. In the former case, a perpetrator has a purposeful intent to infringe a legal interest in the form of legality of proper performance of elections. In the latter case, a perpetrator allows individuals to infringe normative regulations and unlawfully influence the implementation of elections, and gives his consent. On the other hand, Article 270 §1 CC, because of the way in which the motive behind a perpetrator's action is formulated ("whoever in order to use as authentic"), the legislator takes into account only direct intent with a specific purpose.[12] However, the use of forged documents remains outside the scope of features laid down in Article 248(3) CC.

Despite the similarity of regulations, it is not possible to state that activities of one type are included in the other. Unlawfulness of conduct in the field of material forgery of documents laid down in Article 270 §1 CC was determined in an alternative way and consists in counterfeiting, altering or using them. On the other hand, the penalised conduct laid down in Article 248(3) CC is limited "only" to counterfeiting or altering election-related documents. In other words, there is no exclusion of assessment quantity resulting from the principle of being special.

In the case analysed, the consumption rule does not apply, either, because, in Article 248(3) CC, the legislator extends the individual object of protection to other legal interests than those resulting from Article 270 §1 CC. In case of the former, "the appropriate, in compliance with the election laws, course of elections

---

[11] See, Article 310 §1 CC.

[12] Citation after S. Kowalski, *Karnoprawna ochrona wykazu podpisów wyborców w wyborach samorządowych* [Criminal law protection of a voters' list in local self-government elections], Prokuratura i Prawo No. 9, 2014, p. 75. Also see, A. Spotowski, *Pomijalny (pozorny) zbieg przepisów ustawy i przestępstw*, Wydawnictwo Prawnicze [Eliminable (apparent) concurrence of the statutory provisions and offences], Warsaw 1976, p. 66 ff.

to the Sejm, Senate, the European Parliament, of the President of the Republic of Poland, local self-government entities and the course of a referendum" constitutes a protected interest. In case of the latter, "credibility of a document and certainty of legal transactions" do.[13] Moreover, statutory penalties laid down in Article 270 §1 CC are evidently higher.[14]

As it has already been said, the typical object of protection is different, too. In case of the former, it safeguards "electoral rights of citizens and social interest expressed in elections and referenda carried out in compliance with the principles of democracy", and in case of the latter, "credibility of documents meaning their genuineness and authenticity".[15] This excludes implied (also called silent) subsidiarity.

It can be assumed that there is a concurrence of the two types of offences, i.e. material forgery of documents under Article 115 §14 CC and material forgery of "reports or other documents related to elections or referenda". Thus, while it may and should be assumed that every counterfeiting or altering of "reports or documents related to elections or referenda" will also match the features of counterfeiting or altering a document, a reverse relationship does not take place.

Therefore, we deal with a cumulative concurrence of statutory provisions because one act matches the features of two or more crimes. A. Spotowski's opinion correlates with this stand. He notices that "a concurrence of statutory provisions results from the fact that a few provisions describe the same aspect of human conduct from a different perspective, and, consequently, they compete with one another when this conduct is assessed. In some sense, it is a concurrence of assessments of the same event".[16]

Article 11 §1 CC is a normative basis of the concurrence of the statutory provisions. In accordance with it, the same act may constitute only one crime. As a result, in accordance with cumulative classification of an act, a perpetrator committing forgery of election- or referendum-related documents should be convicted for this crime but the classification of the act should include both infringed provisions, i.e. Article 270 §1 CC and Article 248(3) CC. At the same time, pursuant to Article 11 §3 CC, a court shall impose a penalty based on the provision envisaging the most severe punishment, i.e. Article 270 §1 CC.

---

[13] First citation after R.A. Stefański, *Art. 248 Kodeks karny. Komentarz* [Article 248 of the Criminal Code. Commentary], 3rd edition, 2017, System Informacji Prawnej Legalis, second citation after L. Gardocki, *Art. 248 k.k.* [Article 248 CC], [in:] *Przestępstwo przeciwko państwu i dobrom zbiorowym, System prawa karnego* [Crime against the state and collective interests. Criminal law sytsem], Vol. 8, 2013, System Informacji Prawnej Legalis (b/n/s).

[14] S. Kowalski, *Karnoprawna ochrona…* [Criminal law protection...], pp. 75–77 and A. Grześkowiak, K. Wiak, *Kodeks karny. Komentarz* [Criminal Code. Commentary], 4th edition, 2017, System Informacji Prawnej Legalis (b/n/s), attention should be drawn to that, too.

[15] Citation after L. Gardocki, *Art. 248 k.k.…* [Article 248 CC...] (b/n/s).

[16] A. Spotowski, *Pomijalny (pozorny) zbieg…* [Eliminable (apparent) concurrence...], p. 42.

1.2. ARTICLE 248(3) CC AS AN EXAMPLE OF A PARTIAL STATUTORY *SUPERFLUUM*

The legislator laid down a requirement in Article 11 §2 CC, according to which the placement of the same description of a perpetrator's conduct in two sanctioning norms is a constitutive feature of the construction of a cumulative concurrence of statutory provisions.[17] Due to the fact that, in the system of legal acts, there is a lack of a rule prohibiting the repetition of fragments of provisions, the situation should not be treated as carelessness but "legal assessment of an act from the perspective of a few normative patterns" in order to avoid the legal vacuum.[18]

One can notice the justification for such a solution mainly in penal legislative tradition expressed in the principle *nullum crimen sine lege certa*. It is accompanied by intent to "explicate, strengthen or precisely determine significant events in a given communication situation".[19] Semantic reduplication of a legal text at the descriptive and directive level may be the reflection of this intent.[20]

In alia verba, the regulation resulting from Article 248(3) CC copying the content of Article 270 §1 CC constitutes an example of a statutory *superfluum*. It must be noticed, however, that this *superfluum* is partial because the provision of Article 248(3) CC constitutes a repetition of only a fragment of Article 270 §1 CC.[21]

In order to prove the existence of this excessiveness, it is worth conducting a semantic analysis of doubling phrases as well as their closest surrounding sentence context. Both types of offences are classified as common crimes (*delicta communiae*), which is indicated by the legislator's use of a pronoun "whoever" without further determination of the subject of criminal liability. However, due to "the narrowed range of perpetrators" who can commit an offence under Article 248(3) CC, there are opinions in the discussion that it is an individual perpetrator's crime.[22] Most often, it will be one who is interested in a particular result of an election or a referendum. Also M. Jachimowicz draws attention to this fact and he includes in this category, inter alia: "a candidate running in the election, his/her party colleague, a relation or his party or electoral committee supporter, an electoral or financial representative

---

[17] These elements are also typical of the construction of an ideal or eliminable concurrence although in case of the former, also other premises must be met. For more, see: G.J. Artymiak, *O konstrukcji zbiegu idealnego – uwagi na tle uchwały siedmiu sędziów Sądu Najwyższego z dnia 24 stycznia 2013 r. (I KZP 19/12)* [On the construct of an ideal concurrence – comments with reference to the resolution of seven judges bench of the Supreme Court of 24 January 2013 (I KZP 19/12)], LEX No. 1252697, OSNKW 2013/2/13, OSP 2013, No. 7–8/84.

[18] Citation after: *ibid.*, p. 9.

[19] Citation after M. Kłodawski, *Superfluum i nadwyżki znaczeniowe jako przykłady redundancji tekstu prawnego* [Superfluum and semantic excessiveness as examples of redundancy in the legal text], Archiwum Filozofii Prawa i Filozofii Społecznej, 2013/2, p. 119.

[20] *Ibid.*, p. 48.

[21] *Ibid.*, p. 47.

[22] *For* more, see: L. Pilarczyk, *Istota przestępstw indywidualnych* [Essence of individual crimes], Ruch Prawniczy, Ekonomiczny i Socjologiczny, Year LXXVI Book 4, 2014, p. 190 and W. Kozielewicz, *Rozdział IX. Przestępstwa przeciwko wyborom i referendum* [Chapter IX. Crimes against elections and referenda], System Informacji Prawnej Legalis 2015 (b/n/s).

of the electoral committee, a member of an election or referendum commission and a returning officer".[23]

Having mentioned those objections, it is necessary to state that both regulations do not enact any limitations concerning natural persons who may commit prohibited acts.

In Article 270 §1 CC, the legislator indicates a crime with the "special motive", i.e. an act with direct intent and a specific purpose ("with the purpose of using it as authentic").[24] On the other hand, in Article 248(3) CC, the legislator does not indicate intent accompanying forgery of election or referendum documents but circumstances of the act ("in connection with elections/referendum"). Then, the legislator enumerates all possible types of elections ("to the Sejm, Senate, election of the President of the Republic of Poland, local elections or referendum").

Based on the two provisions, it is clearly seen that those offences are multi-variant in nature. In Article 270 §1 CC, apart from material forgery, i.e. counterfeiting and altering documents, the legislator also penalises "using as authentic", and in Article 248(3) CC, the legislator also takes into consideration "destroying, damaging, hiding". Material forgery of documents in the criminal law meaning carries an alternative penalty, i.e. a fine, restriction of liberty or deprivation of liberty for a period from three months up to five years. On the other hand, forgery of material election or referendum documents carries a penalty of deprivation of liberty for up to three years.

As it has been claimed above, Article 248(3) CC constitutes an example of a partial *superfluum*. The phrases that are repeated are: "whoever", "counterfeits or alters", "a document", i.e. fragments concerning a perpetrator, an act and the object of that act. However, if, apart from the descriptive analysis of the legal text, one looks at "the broader context than the one determined by morphological and semantic criteria", thus the directive analysis, assuming axiomatic rationality of the legislator, it becomes obvious that those repetitions, and even multiplicity of their uses and meaning, make it possible to implement some essential objectives determined in the typical object of protection. In other words, the linguistic and systemic (directive) redundancy plays an important role in Article 248(3) CC. Due to considerable distinctiveness of the object and nature of this crime, it seems unjustified to associate this form of forgery with the crime of common forgery of documents laid down in Article 270 §1 CC.[25] Repetition does not lead to a conflict between norms but to strengthening one norm before the other and to safeguarding stability and clarity of law.

---

[23] Citation after M. Jachimowicz, *Przestępstwo przeszkadzania wyborom (art. 249 k.k.)* [Crime of interfering with elections (Article 249 CC)], Wojskowy Przegląd Prawniczy No. 1–2, 2012, p. 89.

[24] For more on crimes with specific purpose *sensu stricto*, i.e. committed "with the purpose of" or "for the purpose of", see S. Frankowski, *Przestępstwo kierunkowe w teorii i praktyce* [Crime with specific purpose: theory and practice], Wydawnictwo Prawnicze, Warsaw 1970, p. 29.

[25] See, G. Pieszko, *Społeczno-prawne aspekty penalizacji fałszowania dokumentów* [Social and legal aspects of penalisation of document forgery], Studia Prawnoustrojowe No. 29, 2015, p. 174.

1.3. DISPUTE OVER A DOCUMENT IN THE CRIMINAL LAW MEANING AND AN ELECTION OR REFERENDUM DOCUMENT

To consider the issue, it is necessary to point out doubts that occur in connection with determination of the object of an act under Article 248(3) CC, i.e. an election document. Due to the prohibition of using extended interpretation in criminal law to a perpetrator's disadvantage and based on a linguistic interpretation, which constitutes one of the most important interpretational methods, it can be assumed that the concept of an election document has a narrower meaning than a document. In other words, an election document is a term within the scope of the concept of a document but does not exhaust it.

A document in the meaning of criminal law is a very broad term, which covers any object or recorded information carrier, in connection with which there is a given law, or which, because of its content, constitutes legal evidence, legal relationship or the circumstance that is legally significant.[26] As a result, it carries obligations as well as rights concerning social relations regulated in various fields of law.[27]

The legislator has underestimated the issue of election or referendum documents because both the Criminal Code and the Election Code do not contain their definition. The term "other election or referendum documents" is very general and in correlation with the lack of definition may generate interpretational differences in the doctrine and in the judicature.[28]

However, what R.A. Stefański and M. Królikowski point out, it is usually assumed that the object of an act will refer to all documents "connected with elections or referenda" and in "some forms of acts specified as a list of candidates or voters, reports, ballots, lists of citizens nominating a candidate or initiating a referendum with their signatures".[29] Also A. Wąsek draws attention to that and argues that reports include mainly "reports concerning registration of candidates (lists of candidates), reports on voting and reports on election".[30]

It is necessary to approve of the above list, although it needs to be defined more precisely. It should be assumed that the category also includes electronic data carriers containing voting results, lists of voting results in a constituency, auxiliary sheets

---

[26] Article 115 §14 of the Act of 6 June 1997: Criminal Code (Journal of Laws [Dz.U.] of 1997 No. 88 item 553).

[27] For more, see: J. Piórkowska-Flieger, *Prawne i społeczne uzasadnienie karalności fałszu dokumentu* [Legal and social justification for punishability of document forgery], Studia Iuridica Lublinensia No. 1, 2003, p. 146.

[28] For more, see S. Kowalski, *Karnoprawna ochrona…* [Criminal law protection...], pp. 75–77.

[29] Both citations after: R.A. Stefański, *Art. 248 Kodeks karny…* [Article 248 of the Criminal Code...] (b/n/s) and M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część szczególna. Tom II. Komentarz do artykułów 222–316* [Criminal Code. General part. Vol. II: Commentary on Articles 222–316], 1st edition, 2013, System Informacji Prawnej Legalis (b/n/s).

[30] A. Wąsek, R. Zawłocki, *Art. 248*, [in:] *Kodeks karny. Część szczególna. Komentarz do artykułów 222–316* [Criminal Code. Specific part. Commentary on Articles 222–316], 4th edition, 2010, System Informacji Prawnej Legalis (b/n/s).

that the Electoral Committee members use to calculate the results in a constituency, resolutions, announcements and regulations issued by the Committee.[31]

The conception that an election and referendum document is included in the catalogue of documents in the criminal law meaning and referred to in Article 115 §14 CC, which is established in the doctrine and case law, should be recognised as right and convincing.

2. CONCLUSIONS

An electoral act is not only a constitutional right to exercise active electoral rights but also a mechanism necessary for appropriate functioning of the state governed by law and its representative bodies. Election-related offences often influence voting results and contribute to disorganisation of public life. Thus, due to that, although actual forms of criminal conduct may be different, the protection of electoral documents is a fundamental issue.

By introducing the regulation laid down in Article 248(3) CC, the legislator normatively emphasised another object of protection. In Article 270 §1 CC, it is truthfulness and authenticity of documents directly translating into efficiency of functioning and safety of legal transactions, and on the other hand, in Article 248(3) CC, it is reliability and authenticity of elections.

A criminal act committed under Article 248(3) CC may be considered a partial statutory *superfluum* because matching one of the features of material forgery is also regarded as the type of conduct exhausting the features of other offences, and there is a possibility of a cumulative concurrence with offences against documents and election- and referendum-related documents.

BIBLIOGRAPHY

Monographs

Błachut J., *Dokument jako przedmiot ochrony prawnokarnej* [A document as an object of protection under criminal law], Wolters Kluwer Polska, Warsaw 2011.

Frankowski S., *Przestępstwo kierunkowe w teorii i praktyce* [Crime with specific purpose: theory and practice], Wydawnictwo Prawnicze, Warsaw 1970.

Hess A., *Społeczni uczestnicy medialnego dyskursu politycznego w Polsce. Mediatyzacja i strategie komunikacyjne organizacji pozarządowych* [Social actors of political discourse in the Polish media. Mediatisation and communicative strategies of non-governmental organizations], Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2013.

Nowicki M.N., *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka* [On the European Convention. A commentary on the European Convention on Human Rights], Wolters Kluwer Business, Warsaw 2013.

[31] Cited after: A. Sokala, B. Michalak, P. Uziębło, *Leksykon prawa wyborczego i referendalnego oraz systemów wyborczy*ch [Lexicon of election and referendum law and electoral systems], Wolters Kluwer Business, Warsaw 2013, p. 41.

Sokala A, Michalak M., Uziębło P., *Leksykon prawa wyborczego i referendalnego oraz systemów wyborczyc*h [Lexicon of election and referendum law and electoral systems], Wolters Kluwer Business, Warsaw 2013.

Spotowski A., *Pomijalny (pozorny) zbieg przepisów ustawy i przestępstw* [Eliminable (apparent) concurrence of the statutory provisions and offences], Wydawnictwo Prawnicze, Warsaw 1976.

Articles

Artymiak J., *O konstrukcji zbiegu idealnego – uwagi na tle uchwały siedmiu sędziów Sądu Najwyższego z dnia 24 stycznia 2013 r. (I KZP 19/12)* [On the construct of an ideal concurrence – comments with reference to the resolution of seven judges bench of the Supreme Court of 24 January 2013 (I KZP 19/12)], LEX No. 1252697, OSNKW 2013/2/13, OSP 2013, No. 7–8/84.

Błachut J., *Prawne konsekwencje tworzenia prac dyplomowych na zlecenie* [Legal consequences of preparing diploma theses on order], Prokuratur i Prawo No. 5, 2005.

Jachimowicz M., *Przestępstwo przeszkadzania wyborom (art. 249 k.k.)* [Crime of interfering with elections (Article 249 CC)], Wojskowy Przegląd Prawniczy No.1–2, 2012.

Kłodawski M., *Superfluum i nadwyżki znaczeniowe jako przykłady redundancji tekstu prawnego* [Superfluum and semantic excessiveness as examples of redundancy in the legal text], Archiwum Filozofii Prawa i Filozofii Społecznej, 2013/2.

Kowalski S., *Karnoprawna ochrona wykazu podpisów wyborców w wyborach samorządowych* [Criminal law protection of a voters' list in local self-government elections], Prokuratura i Prawo No. 9, 2014.

Kozielewicz W., *Rozdział IX. Przestępstwa przeciwko wyborom i referendum* [Chapter IX. Crime against elections and referenda], System Informacji Prawnej Legalis 2015.

Pieszko G., *Społeczno-prawne aspekty penalizacji fałszowania dokumentów* [Social and legal aspects of penalisation of document forgery], Studia Prawnoustrojowe No. 29, 2015.

Pilarczyk L., *Istota przestępstw indywidualnych* [Essence of individual crimes], Ruch Prawniczy, Ekonomiczny i Socjologiczny, Year LXXVI, Book 4, 2014.

Piórkowska-Flieger J., *Prawne i społeczne uzasadnienie karalności fałszu dokumentu* [Legal and social justification for punishability of document forgery], Studia Iuridica Lublinensia No. 1, 2003.

Legal acts, commentaries and judicial decisions

Ustawa z dnia 6 czerwca 1997 r. *Kodeks karny* [Act of 6 June 1997: Criminal Code], Journal of Laws [Dz.U.] of 1997, No. 88, item 553.

Ustawa z dnia 5 stycznia 2011 r. *Kodeks wyborczy* [Act of 5 January 2011: Election Code], Journal of Laws [Dz.U.] of 2011, No. 21, item 112.

Judgement of the Court of Appeals of 12 March 2015 (II AKa 199/14).

Gardocki L., *Art. 248 k.k.*, [Article 248 CC], [in:] *Przestępstwo przeciwko państwu i dobrom zbiorowym. System prawa karnego* [Crime against the state and collective interests. Criminal law system], Vol. 8, 2013, System Informacji Prawnej Legalis.

Grześkowiak A., Wiak K., *Kodeks karny. Komentarz* [Criminal Code. Commentary], 4th edition, 2017, System Informacji Prawnej Legalis.

Królikowski M., Zawłocki R. (ed.), *Kodeks karny. Część szczególna. Tom II. Komentarz do artykułów 222–316* [Criminal Code. General part. Vol. II: Commentary on Articles 222–316], 1st edition, 2013, System Informacji Prawnej Legalis.

Stefański R.A., *Art. 248 Kodeks karny. Komentarz* [Article 248 of the Criminal Code. Commentary], 3rd edition, 2017, System Informacji Prawnej Legalis.

Wąsek A., Zawłocki R., *Art. 248*, [in:] *Kodeks karny. Część szczególna. Komentarz do artykułów 222–316* [Criminal Code. Specific part. Commentary on Articles 222–316], 4th edition, 2010, System Informacji Prawnej Legalis.

Websites
http://statystyka.policja.pl.

SEMANTIC REDUPLICATION AND CUMULATIVE CONCURRENCE OF PROVISIONS OF CRIMINAL LAW IN THE FIELD OF FORGERY OF A DOCUMENT AND ELECTION AND REFERENDUM DOCUMENTS

Summary

The article is an attempt to address some controversial issues in the doctrine and in case law, and occurring in the context of the relationship and logical relation between material forgery of documents laid down in Article 270 §1 CC and material forgery of election and referendum-related documents under Article 248(3) CC. As a result, the major part of the article constitutes a discussion of the legal nature of both criminal acts, the typical and individual object of protection of each of them and the scope of the concepts of a document, and an election and referendum document. Special attention is drawn to a cumulative concurrence of statutory provisions and a partial and useful statutory *superfluum*.

Keywords: semantic reduplication, description, redundancy, statutory provisions concurrence

REDUPLIKACJA SEMANTYCZNA I KUMULATYWNY ZBIEG PRZEPISÓW USTAWY KARNEJ W ZAKRESIE FAŁSZERSTWA MATERIALNEGO DOKUMENTU ORAZ DOKUMENTÓW WYBORCZYCH I REFERENDALNYCH

Streszczenie

Niniejszy artykuł stanowi próbę znalezienia odpowiedzi na sporne kwestie obecne zarówno w doktrynie, jak i w orzecznictwie, a wyłaniające się na tle relacji oraz stosunku logicznego między materialnym fałszerstwem dokumentów stypizowanym w art. 270 §1 k.k. oraz materialnym fałszerstwem dokumentów wyborczych i referendalnych z art. 248 pkt. 3 k.k. W konsekwencji istotną część opracowania tworzą rozważania nad charakterem prawnym obu czynów przestępnych, rodzajowym i indywidualnym przedmiotem ochrony każdego z nich oraz zakresem pojęciowym terminu dokument oraz dokument wyborczy *item* referendalny. Szczególną uwagę poświęcono też kumulatywnemu zbiegowi przepisów ustawy oraz częściowemu, użytecznemu *superfluum* ustawowemu.

Słowa kluczowe: reduplikacja semantyczna, opis deskryptywny, redundancja, zbieg przepisów ustawy

Ius Novum
4/2017

CRIME OF TRAFFICKING IN GAMETES OR EMBRYOS

KATARZYNA NAZAR*

The Act of 25 June 2015 on treating infertility came into force on 1 November 2015.[1] The necessity of statutory regulation of in vitro fertilisation procedures resulted from the fact that Poland signed the Convention of 4 April 1997 for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine.[2]

Chapter 12 of the Act lays down penal provisions (Articles 76–89 ATI) and administrative pecuniary penalties (Article 90 ATI).[3] In the indicated provisions,[4]

* PhD, Assistant Professor, Department of Criminal Law and Criminology, Faculty of Law and Administration of Maria Curie-Skłodowska University in Lublin; katarzyna.nazar@poczta.umcs.lublin.pl

1 Journal of Laws [Dz.U.] of 2017, item 865, uniform text (hereinafter: ATI).

2 http://www.coe.int/t/dg3/healthbioethic/texts_and_documents/ETS164Polish.pdf [accessed on 09.11.2017].

3 The provision of Article 90 ATI determines a pecuniary administrative penalty in case of: (1) failure to submit data necessary for the registry of medically-assisted reproduction institutions and banks of gametes and embryos to the Minister of Health; (2) failure to submit information about every case of occurrence or suspicion of occurrence of a significant undesired event or a significant undesired reaction to the Minister of Health.

4 Article 76 – publicising advertisements of sale, purchase or acting as a go-between in sale or purchase of a gamete or an embryo; Article 77 – disposal or acquisition of a gamete, acting as a go-between in this disposal or acquisition, or use of a gamete obtained in the way violating the provisions of the Act in order to obtain financial or personal benefits; Article 78 – dealing with gametes or embryos in the way violating Articles 18, 20–22 and 23(1) ATI; Article 79 – acquisition or disposal of an embryo, acting as a go-between in its acquisition or disposal, participation in the use of an embryo obtained in the way violating the provisions of the Act in order to obtain financial or personal benefits; Article 80 – performing an activity exclusively reserved for an institution of medically-assisted reproduction or a bank of gametes and embryos without the required permission or in the way violating the requirements determined in the permission; Article 81 – failure to submit information and data concerning donors and recipients of gametes provided by non-partners as well as donors and recipients of embryos to the registry of donors and recipients of gametes or embryos; Article 82 – application of pre-implantation genetic diagnosis in the medically-assisted reproduction procedure because of an indication other than medical, including e.g. such aims as the choice of gender of the future child, except a situation when the choice is made in order to avoid a serious incurable hereditary disease connected with gender; Article 83 – destruction of an embryo able to appropriately develop;

the legislator penalised acts consisting in the acquisition or disposal, acting as a go-between in acquisition or disposal, or taking part in the use of gametes or embryos obtained with the violation of the provisions of this Act (Article 77 and Article 79) and a crime consisting in export of gametes or embryos from the territory of the Republic of Poland to the territory of a country that is not the EU Member State and import of gametes and embryos to the territory of the Republic of Poland from the territory of a country that is not the European Union Member State without permission to do that (Article 88 ATI), which are especially important in the context of this article.

The provision of Article 77(1) ATI stipulates: "Whoever, in order to obtain financial or personal benefits, purchases or sells a gamete or acts as a go-between in its purchase or sale, or participates in the use of a gamete obtained with the violation of the provisions of the Act shall be subject to the penalty of deprivation of liberty for a period of up to three years". According to Article 77(2), if a perpetrator commits the offence referred to in Article 77(1) in order to have a permanent source of income, he shall be subject to the penalty of deprivation of liberty for a period of six months to five years. Pursuant to Article 79(1), whoever, in order to obtain financial or personal benefits, purchases or sells an embryo, acts as a go-between in its purchase or sale, or participates in the use of an embryo obtained with the violation of the provisions of the Act, shall be subject to the penalty of deprivation of liberty for a period of three months to five years. The treatment of the offence referred to in Article 79(1) as a permanent source of income is an aggravating circumstance. In such a case, a perpetrator is subject to the penalty of deprivation of liberty for a period of one to ten years (Article 79(2) ATI).

The statutory features of both crimes are almost identical. The difference consists in the object of an act. In case of an offence under Article 77 ATI, the object of the act is a gamete,[5] and in case of Article 79 ATI, it is an embryo.[6] The penalty is also different in case of purchase, sale, acting as a go-between in purchase or sale, or participating in the use of an embryo from the same acts concerning a gamete. Due to this approach, it can be assumed that the provision of Article 79 ATI constitutes

---

Article 84 – extraction of gametes from human corpses in order to use them in medically-assisted reproduction; Article 85 – creation of an embryo for purposes other than medically-assisted reproduction; Article 86 – creation of chimaeras and hybrids with the use of the medically-assisted reproduction techniques and interference aimed at introducing hereditary changes in the human genome that may be transferred to future generations; Article 87 – creation of an embryo the genetic information of which in the cell nucleus is identical to the genetic information in the cell nucleus of another human embryo, foetus, being, corpse or remains; Article 88 – export of genomes or embryos from the territory of the Republic of Poland to the territory of a country that is not the EU Member State without the permission to do that; Article 89 – use of gametes or embryos in the medically-assisted reproduction procedure without the approval of the programme of using gametes or embryos or in the way violating the requirements determined in that programme.

[5] In accordance with Article 2(1(14)) ATI, a gamete is a human male cell (a sperm) or a human female cell (an ovum) intended for use in the medically-assisted reproduction procedure.

[6] An embryo is a group of cells created as a result of in vitro fusion of female and male gametes, from the moment of the final step in the process of fusing together two nuclei (karyogamy) until implantation of a fertilised ovum (Article 2(1(28)) ATI).

an aggravated form of Article 77 ATI. The legislator did not determine in a clear way what the legal status of an embryo is but assigns it a higher value in comparison to a gamete. As I mentioned earlier, the penalties for purchase and sale of a gamete and the same acts concerning an embryo as well as other provisions of the Act providing for its protection confirm this. One can indicate, inter alia, Article 83 ATI, which imposes a ban on destroying an embryo that came into being in the course of the medically-assisted reproduction procedure and that is capable of developing properly, or Article 85 ATI, which bans creating an embryo for purposes other than the procedure of medically-assisted reproduction. One cannot lose sight of Article 23 ATI, which determines the rules of conduct in relation to embryos that have not been implanted. In accordance with Article 23(1), embryos created with the use of gametes extracted in order to be donated to partners or non-partners, able to develop properly, which were not implanted in the medically-assisted reproduction procedure, are preserved in conditions ensuring their protection until they are implanted in a recipient's body. The content of Article 23(3) stipulates that it is inadmissible to destroy embryos created in the medically-assisted reproduction procedure that are capable of developing properly but have not been implanted. In accordance with Article 19 ATI, a donor of gametes that have not been used in the medically-assisted reproduction procedures may at any time demand that they be destroyed or used in medical research.

Coming back to the analysis of crimes, it is necessary to draw the attention to Article 28(1) ATI, which stipulates that it is inadmissible to sell, purchase or act as a go-between in purchasing or selling a gamete or an embryo. Therefore, the Act, similarly to Act of 1 July 2005 on extracting, preserving and implanting cells, tissues and organs,[7] adopts the same assumption, i.e. the principle of complimentary donation and a ban on trading in gametes and embryos. Statutory features of the analysed crimes (Article 77, Article 79 and Article 88 ATI) correspond to some acts penalised in the Act on extracting, preserving and implanting cells, tissues and organs (AEPI).[8]

In the context of discussed offences, Article 76 ATI is also significant. It lays down a ban (under a penalty of a fine, limitation of liberty or deprivation of liberty) on publicising advertisements of the sale, purchase or acting as a go-between in

---

[7] Journal of Laws [Dz.U.] of 2017, item 1000, uniform text, Article 3(1) stipulates: "No charge either payment, or any type of financial or personal benefit can be demanded or accepted for extracting a cell, tissues or an organ".

[8] The provision of Article 77 ATI classifies a crime constituting an equivalent of an offence under Article 44 AEPI, in accordance with which, whoever acquires, disposes or acts as a go-between in acquisition or disposal of a cell, tissues or an organ, or takes part in extraction, implantation of cells, tissues or organs, use of cells or tissues for people, or the provision of cells, tissues or organs obtained in the way violating the provisions of the Act and originating from live donors or corpses is subject to a penalty of deprivation of liberty for a period of six months to five years. On the other hand, the equivalent of Article 88 ATI is Article 46 AEPI, which penalises export from the territory of the Republic of Poland or import to the territory of Poland of cells, tissues or organs without the required permission. For more, see V. Konarska-Wrzosek, [in:] M. Bojarski (ed.), *System prawa karnego. Szczególne dziedziny prawa karnego. Prawo karne wojskowe, skarbowe i pozakodeksowe* [Criminal law system. Special branches of criminal law. Military criminal law, fiscal penal law, and non-coded law], Vol. 11, Warsaw 2014, pp. 509–514.

selling or purchasing a gamete or an embryo.[9] The provision aims to prevent activities assisting in trafficking in gametes or embryos and publicising adverts would lead to the sale, purchase or acting as a go-between in selling and purchasing gametes or embryos. As J. Kapelańska-Pręgowska and P. Chrzczonowicz rightly argue, in the context of illegal "trade in human organs", the concept covers more than just a given organ sale-purchase transaction, that is also activities assisting in and supporting it,[10] e.g. in relation to the offence under Article 76 ATI, also publicising advertisements of the sale, purchase or acting as a go-between in selling or purchasing of gametes or embryos.

Some doubts may arise in relation to the interpretation of the feature of "publicising advertisements". According to the dictionary definition, "publicising" means: "making something known to the public",[11] "making published material commonly available".[12] On the other hand, "advertisement" means "information about something provided in a public place in the form of a written text or disseminated by mass media".[13] Thus, an advertisement may be an oral statement or a written massage in which an advertiser provides information. In the judgement of 16 February 1987, the Supreme Court held that publicising means making some information commonly available, enabling an indefinite number of people to get acquainted with it.[14] "Publicising advertisements" referred to in Article 76 ATI should be interpreted as providing information about the sale, purchase or acting as a go-between in selling or purchasing a gamete or an embryo to an indefinite number of people. The information may be publicised in any way, in writing or orally, e.g. on billboards, leaflets, in the press, on the Internet, on the radio or on television and even, according to E. Guzik-Makaruk, in a private conversation.[15] The provision of Article 76 ATI literally indicates that to recognise liability, it is not enough to recognise an act of publicising one advertisement because the legislator uses a phrase "publicises advertisements" and not "publicises an advertisement". According to J. Haberko, the linguistic interpretation inspires an assumption that publicising advertisements covers a few multiple or repeated activities consisting in their publishing. In that author's opinion, however, it is hard to approve of such

---

[9] The content of the provision is similar to Article 43 AEPI, which prohibits publicising advertisements of sale, purchase or acting as a go-between in sale or purchase of a cell, a tissue or an organ under the threat of a penalty of a fine, limitation of liberty or deprivation of liberty for up to one year. See, V. Konarska-Wrzosek, [in:] M. Bojarski (ed.), *System prawa*… [Criminal law system…], pp. 508–509.

[10] J. Kapelańska-Pręgowska, P. Chrzczonowicz, *Handel organami z perspektywy prawa międzynarodowego oraz polskiego prawa karnego* [Trade in human organs from the perspective of the international law and the Polish criminal law], Przegląd Sejmowy No. 6, 2015, p. 95.

[11] http://sjp.pwn.pl/slowniki/rozpowszechnia%C4%87.html [accessed on 09.11.2017].

[12] https://sjp.pl/rozpowszechnia%C4%87 [accessed on 09.11.2017].

[13] http://sjp.pwn.pl/sjp/og%C5%82oszenie;2494306 [accessed on 09.11.2017].

[14] Supreme Court judgement of 16 February 1987, WR 28/87, OSNKW 1987, No. 9–10, item 85. Also see the Supreme Court ruling of 1 September 2011, V KK 43/11, Lex No. 1099298.

[15] E.M. Guzik-Makaruk, *Transplantacja organów, tkanek i komórek w ujęciu prawnym i kryminologicznym* [Organ, tissue and cell transplants from the legal and criminological point of view], Białystok 2008, p. 307; J. Kapelańska-Pręgowska and P. Chrzczonowicz also indicate that information may be publicised in a conversation. See, J. Kapelańska-Pręgowska, P. Chrzczonowicz, *Handel organami*… [Trade in human organs…], p. 96.

interpretation because, as she notes, even one advertisement on the Internet may be received by a large number of people.[16] One cannot exclude a situation in which one advertisement placed in a public place (e.g. at a bus stop) will reach a wide audience. Therefore, it seems that it is necessary to assume that whoever publicises advertisements and does it repeatedly as well as publicises one advertisement many times, repeatedly, should face criminal liability.

Penalisation covers only the activity consisting in publicising advertisements of chargeable provision of gametes and embryos. "Chargeable" means "one that must be paid for".[17] Thus, publicising advertisements of free provision, acquisition or acting as a go-between in the provision or acquisition of gametes or embryos does not result in criminal liability. J. Haberko questions this solution and says: "One can obviously understand the intention of the legislator, who aims to eliminate a temptation to trade in gametes and embryos and assumes inadmissibility of a chargeable activity. Nonetheless, analysing the issue in the context (…) of human dignity, respect for family life and privacy, it seems purposeful to emphasise that the legislator does not approve of those activities performed free of charge, either".[18]

The provisions of Article 77 and Article 79 ATI aim to prevent uncontrolled disposal, acquisition and acting as a go-between in the disposal or acquisition of gametes or embryos, or use of a gamete or an embryo obtained with the violation of the provisions of the Act, i.e. to prevent the creation of a black market[19] and, as a result, organised crime connected with trading in gametes and embryos. Taking into consideration the dictionary definition of "trade", i.e. a transaction that is an organised exchange of goods or services consisting in the purchase or sale,[20] illegal trading (trafficking) in gametes or embryos (in accordance with Article 77(1) and (2) and Article 79(1) and (2) ATI) is the conduct in order to obtain financial or personal benefits consisting in the purchase or sale of a gamete or an embryo, acting as a go-between in selling or purchasing or use of a gamete or an embryo obtained with the violation of the provisions of the Act, as well as making these activities a permanent source of income.

The main object of protection in the discussed provisions is the appropriateness of medical procedures. The secondary object of protection, on the other hand, is human dignity (bodily integrity) of a donor or a person whose cells created an embryo and which may be the object of trafficking.

---

[16] J. Haberko, *Ustawa o leczeniu niepłodności. Komentarz* [Act on treating infertility], Warsaw 2016, p. 378.

[17] http://sjp.pwn.pl/sjp/odplatny;2493476.html [accessed on 09.11.2017].

[18] J. Haberko, *Ustawa o leczeniu*… [Act on treating…], pp. 172 and 378.

[19] There is also a term "red market" used in the literature to refer to the market of human organs. See, S. Carney, C*zerwony rynek. Na tropie handlarzy organów, złodziei kości, producentów krwi i porywaczy dzieci* [The red market: On the trail of the world's organ brokers, bone thieves, blood farmers, and child traffickers], Wołowiec 2014; the author, in Chapter 5 Niepokalane poczęcie [Immaculate conception], writes about illegal trade in human egg cells. For more, *ibid*.

[20] E. Sobol (ed.), *Nowy słownik języka polskiego* [New dictionary of the Polish language], Warsaw 2003, p. 252.

The acts within the category of discussed crimes are enlisted alternatively and may consist in:

1) acquisition or disposal of a gamete or an embryo,
2) acting as a go-between in acquisition or disposal of a gamete or an embryo, or
3) taking part in the use of a gamete or an embryo obtained with the violation of the provisions of the Act.

However, a perpetrator of each of the above-listed acts must act in order to obtain a financial or personal benefit. Although, in case of the last act, the legislator used an alternative conjunction "or", a different interpretation might result in the lack of liability of a person who takes part in the use of a gamete or an embryo but not in order to obtain the benefit indicated.[21]

The features of financial or personal benefit should be interpreted in accordance with the definition laid down in Article 115 §4 CC, i.e. as a benefit for oneself as well as for someone else. The feature of any benefits is the possibility of satisfying needs with their use. A financial benefit means an increase in assets or a decrease in liabilities, but all rights that have value in terms of money constitute property.[22] Financial benefits make it possible to satisfy material needs.[23] On the other hand, the characteristic feature of a personal benefit is the lack of economic value, i.e. the fact that it does not constitute a pecuniary value.[24] As M. Kulik rightly states, it is necessary to agree with the opinion that the criterion of economic value is not sufficiently justified for the division into financial and personal benefits. The criterion should consist in the ability to satisfy material and non-material needs.[25] Recognition of a financial or personal benefit should be based on which need is satisfied to a greater extent. If it satisfies mainly a material need, it is a financial benefit, if the need is non-material, it is a personal benefit.[26] According to a different opinion, every benefit that can be expressed in terms of money is material and a benefit that cannot be expressed in terms of money is non-material.[27]

Interpreting the features of the disposal and acquisition, it is useful to adopt their interpretation established in the criminal law doctrine in relation to the crime of dealing with stolen property (Article 291 §1 CC). Disposal means an activity undertaken by an owner of a thing in order to transfer this ownership to another person or other persons for a charge or free of charge.[28] Acquisition, on the other

[21] See, J. Haberko, *Ustawa o leczeniu…* [Act on treating…], p. 380.

[22] Compare, the Supreme Court resolution of 30 January 1980, VII KZP 41/78, OSNKW 1980, No. 3, item 24.

[23] Thus, T. Oczkowski, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2016, p. 579.

[24] M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2017, p. 361.

[25] *Ibid*. Also see, P. Daniluk, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2015, p. 676.

[26] A. Spotowski, [in:] I. Andrejew, L. Kubicki, J. Waszczyński (ed.), *System prawa karnego, T. 4, cz. 2, O przestępstwach w szczególności* [Criminal Law system. Vol. 4, Part 2: On crime in detail], Wrocław 1989, p. 594.

[27] M. Gałązka, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2015, p. 734.

[28] M. Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny…* [Criminal…], p. 894.

hand, consists in taking a thing in order to become its owner.[29] It does not matter whether acquisition is paid for or not.

In case of acting as a go-between in disposal or acquisition of a gamete or an embryo, it must be emphasised, it cannot be identified with acting as an intermediary (mediation). Acting as an intermediary (linguistically) means an activity of a given entity consisting in the performance of some activities (usually performed professionally and regularly).[30] On the other hand, acting as a go-between (in the meaning of Article 77 and Article 79 ATI) may be a single act performed by anybody, regardless of the fact whether he does it as a professional or only once. The person undertakes some activities (acts) to arrange contact and an agreement between the interested parties, i.e. someone who wants to acquire a gamete or an embryo with someone who wants to dispose of it (or vice versa) with the violation of the provisions of the Act. Acting as a go-between may consist, e.g. in looking for persons interested in, collecting enquiries and next contacting them with an entity involved in acquisition and disposal of gametes or embryos, of course illegally. Collecting enquiries or offers without referring them to another party may only be treated as an attempt to commit a crime under Article 77 or Article 79 ATI.

As far as the feature "takes part" is concerned, it is necessary to refer to the common meaning of the phrase first. According to the dictionary of the Polish language, "take part" means to participate, be actively involved, cooperate in an activity,[31] and "part" means participation in something together with others.[32] The term is used in a few cases in the Criminal Code (Article 159 CC: "whoever takes part in a fight or battery (…)"; Article 254 CC: "Whoever takes active part in a gathering (…)"; Article 258 CC: "Whoever takes part in an organised group or association intended to commit crime or fiscal crime (…)"), but its interpretation based on the provisions indicated may be helpful in the analysis of the features of offences under Article 77 and Article 79 ATI to a limited extent. The concept of taking part in the meaning of these provisions should be interpreted as participation in the use of an illegally obtained (with the violation of the provisions of the Act) gamete or

---

[29] E. Guzik-Makaruk, E. Pływaczewski, [in:] R. Zawłocki (ed.), *Przestępstwa przeciwko mieniu i gospodarcze* [Crimes against property and economic offences], Vol. 9, Warsaw 2011, p. 257

[30] The concept of an intermediary is used, inter alia, in the Civil Code (agency agreement – Article 758 Civil Code), or Act of 22 May 2003 on mediation in insurance (Article 2(1): "Acting as an intermediary in insurance consists in performing factual or legal transactions connected with conclusion or performance of insurance contracts"). In accordance with Article 2(3) Directive 2002/92/EC of 9 December 2002 on insurance mediation, "insurance mediation" means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim. With the exception of Chapter III of the Directive, these activities when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking are not considered insurance mediation. The provision of information on an incidental basis in the context of another professional activity provided that the purpose of that activity is not to assist the customer in concluding or performing an insurance contract, the management of claims of an insurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims are not considered insurance mediation, either.

[31] http://sjp.pwn.pl/slowniki/uczestniczy%C4%87.html [accessed on 09.11.2017].

[32] http://sjp.pwn.pl/slowniki/udzia%C5%82.html [accessed on 09.11.2017].

embryo. In the broad meaning, it does not only refer to the active participation (e.g. a physician or a nurse) but also to the passive participation (a recipient). In case of a recipient who takes passive part in the use of a gamete or an embryo, in order to prove that she committed an act under Article 77 or Article 79 ATI, it is necessary to prove that she was aware of the fact that she takes part (participates) in the use of a gamete or an embryo obtained illegally. If a recipient taking part in the procedure is not aware of the fact that a gamete or an embryo was obtained illegally, she is in error as to a circumstance constituting the statutory feature of a prohibited act (in the meaning of Article 28 CC).

The analysed crimes can only be committed by acting. All the already mentioned types of conduct are active forms of an act. No one can acquire, dispose of, be a go-between or take part in the form of omission. However, one can consider the issue of liability for assistance in an offence by omission. Depending on an act, an offence can sometimes be consecutive, and sometimes non-consecutive in nature. In case an act consists in the acquisition of a gamete or an embryo, it is material in nature. As a result, a perpetrator becomes an owner of a thing. In other cases, i.e. disposal, acting as a go-between in disposal or acquisition, taking part in the use of illegally obtained gamete or an embryo, the offence is formal in nature.

As far as the subject of the crime is concerned, there is no doubt that acquiring, disposing of or acting as a go-between in the transactions are common crimes. However, taking part in the use of a gamete or an embryo obtained illegally, at first sight, seems to be an individual crime the subject of which may be a physician or other members of medical personnel, e.g. nurses, taking part in the application of a gamete or an embryo, thus persons competent (authorised) to perform such activities. One cannot exclude a situation, however, in which a person who is not a physician or a nurse performs an activity (e.g. a physician deprived of the right to perform the job). This interpretation is strengthened by the linguistic interpretation of the provision, in which the legislator uses a pronoun "whoever" and does not individualise it anywhere further in the Act by indicating its features or character. Therefore, it should be assumed that any person who takes part in the application of a gamete or an embryo obtained with the violation of the provisions of the Act can be the subject of the offence under Article 77(1) and Article 79(1) ATI.

Of course, one cannot forget that the subject taking part in the application of a gamete or an embryo obtained illegally is also the recipient because she takes part in the operation. Her participation is necessary to perform the act (application). In case of a recipient, the benefit referred to in the provisions must be treated as personal. A donor must be excluded from the circle of subjects because the present act is connected with the application of a gamete or an embryo obtained formerly. In some cases, it can be taken into consideration that a donor may be treated as a facilitator in the meaning of Article 18 §3 CC.

The subjective aspect of the discussed crimes is always connected with direct intent with a specific purpose (*dolus directus coloratus*). The purpose is to obtain financial or personal benefits.

It seems that the provisions of Article 77(1) and Article 79(1) ATI may be in cumulative concurrence with the provisions of Article 156 §1 CC, Article 157 §1

and §2 CC and Article 160 §1 CC. The possibility exists in the event of taking part in the application of a gamete or an embryo obtained illegally. Taking part means participation in an operation in an active way (a physician, a nurse) as well as in a passive way as a recipient. There may be a situation when, due to the failure to comply with the basic rules concerning, e.g. sterility during an operation, a person performing it causes jaundice infection or another infectious disease of the recipient.

The aggravating feature resulting in a more severe penal liability of perpetrators of offences referred to in Article 77(1) and Article 79(1) is the commission of a crime in order to have a permanent source of income (Article 77(2) and Article 79(2) ATI). In accordance with the already established interpretation in literature and case law (based on Article 65 §1 CC and Article 37 §1(2) FPC), the term of permanent source of income means a situation when a criminal activity is the only source of a perpetrator's income as well as when it is an additional but a regular source of income.[33] It concerns obtaining income continually but it does not have to be the only way of earning a living by a perpetrator.[34] In the judgement of 7 May 1976, the Supreme Court rightly held that "the permanent source of income should not be identified with the only source of income." It may be co-existing income but must be permanent in nature.[35] In another judgement, the Supreme Court assumed that: "Permanent source of income (…) must be connected with multiplicity, regularity of illegal activity aimed at obtaining income. Thus, it cannot 'materialise' in a perpetrator's single act".[36]

It is also necessary to refer to another problem occurring in the context of making an offence a permanent source of income as a feature of aggravated crime laid down in the criminal law (as e.g. in Article 77(2) ATI or Article 79(2) ATI). It concerns the possibility of imposing a more severe penalty on such perpetrators in accordance with Article 65 §1 CC ("The provisions regarding the level of the penalty, penal measures and the measures connected with placing a perpetrator under probation envisaged with respect to a perpetrator referred to in Article 64 §2, shall also be applied to a perpetrator who made the commission of offences his permanent source of income (…)"). Despite diverse opinions in this matter, it is necessary to agree with J. Majewski, who says that it is inadmissible to apply a stricter penalty envisaged in Article 65 §1 in conjunction with Article 64 §2 CC towards a perpetrator of such an offence because it carries a statutory stricter penalty connected with this type

---

[33] M. Budyn-Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2017, p. 238.

[34] E.M. Guzik-Makaruk, *Transplantacja…* [Organ, tissue and cell transplants…], p. 314. Also see, the Supreme Court judgement of 12 February 1974, I KR 329/73, OSNPG 1974, No. 11, item 137; the Supreme Court judgement of 7 May 1976, II KR 69/76, OSNPG 1976, No. 11, item 95. Also compare, inter alia, the Supreme Court ruling of 8 January 2015, V KK 165/14,OSNKW 2015, No. 6, item 49; the judgement of the Appellate Court in Gdańsk of 25 October 2016, II AKa 140/16, LEX No. 2201316; the judgement of the Appellate Court in Łódź of 10 April 2014, II AKa 45/14, LEX No. 1461100 ("The permanent source of income (…) is illegal practice performed by a perpetrator regularly and providing a perpetrator with permanent income, similar to income obtained for work and ensuring that a perpetrator has main or additional but constant income").

[35] Supreme Court judgement of 7 May 1976, II KR 69/76, OSNPG 1976, No. 11, item 95.

[36] Supreme Court judgement of 20 April 2005, III K 27/05, Lex No. 149637.

of aggravated classification.[37] A different interpretation would lead to a conclusion that the same circumstance might constitute grounds for twofold stricter liability.[38]

Aggravation of a penalty in case of Article 79 ATI in comparison to Article 77 ATI will translate into a possibility of modifying its size. And thus, taking into account the statutory penalty under Article 77(1) ATI, which is deprivation of liberty for a period of up to three years, and Article 77(2), which is deprivation of liberty for a period of six months to five years, the two types of offences are crimes. There is a possibility of applying the "substitute sanction" in accordance with Article 37a CC (i.e. a penalty of limitation of liberty or a fine instead of a penalty of deprivation of liberty of up to eight years) and the "mixed penalty" under Article 37b CC, i.e. a penalty of short-term deprivation of liberty and a penalty of limitation of liberty of up to two years. In case of the commission of a basic type of crime, it is possible to renounce from inflicting the punishment in accordance with Article 59 §1 CC because the statutory sanction does not exceed three years of deprivation of liberty, of course provided that social harmfulness of an act is not high. In such a case, a court shall rule a penal measure, forfeiture or a compensatory measure (provided that the aims of punishment are met this way). Due to maximum limits on the penalty of deprivation of liberty envisaged in Article 77(1) and (2) ATI (not exceeding five years), in both cases it is possible to conditionally discontinue criminal proceedings (in accordance with Article 66 § CC), of course provided that all indicated requirements are met, as well as to conditionally suspend the penalty execution if the sentence does not exceed one year and the requirements referred to in Article 69 §1 CC are fulfilled. However, taking into consideration the statutory penalty in case of Article 79(1), the penalty of deprivation of liberty for a period of three months to five years, and in case of Article 79(2), the penalty of deprivation of liberty for a period of one year to ten years, there is a possibility of applying the substitute penalty in accordance with Article 37a CC and a mixed penalty under Article 37b CC. Unlike in case of Article 77(1) ATI, the commission of a basic type of crime under Article 79(1) ATI eliminates the possibility of renouncing from inflicting the punishment in accordance with Article 59 §1 CC. Moreover, only in case of the basic type under Article 79(1) ATI, it is possible to apply the conditional discontinuance of proceedings (Article 66 CC). On the other hand, in case of both types, there is a possibility of conditional suspension of punishment execution if a sentence does not exceed one year and other requirements indicated in Article 69 §1 CC are fulfilled.

In case of conviction for any of the crimes referred to in Article 77 ATI or Article 79 ATI, a court may rule such penal measures as a prohibition of holding a particular type of post or practicing a given profession (Article 41 CC), pecuniary compensation

---

[37] J. Majewski, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz. T. I. Komentarz do art. 1–116 k.k.* [Criminal Code. General part. Commentary on Articles 1–116 CC], Warsaw 2007, p. 819.

[38] Compare, G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz* [Criminal Code. General part. Commentary], Warsaw 2012, p. 465. The author holds that "(…) aggravation of a penalty in statute based on the fact that a perpetrator makes an activity a permanent source of income does not constitute an obstacle to aggravating the penalty under Article 65 §1 CC", *ibid*.

(Article 43a §1 CC), or publishing the sentence (Article 43b CC). It is also possible to rule forfeiture of items (Article 4 CC) or forfeiture of material gains (Article 45 §1 CC).[39]

The last type of the offence determined in the Act on treating infertility, which consists in illegal trade in gametes and embryos, is laid down in Article 88 ATI, which protects proper organisational procedures serving medically-assisted reproduction conducted in a legally determined scope concerning export of gametes or embryos from the territory of the Republic of Poland to the territory of a country other than the EU Member State or import of gametes or embryos to the territory of the Republic of Poland from the territory of a country other than the EU Member State without a permission to perform those activities.

The features of the objective aspect: export or import of gametes or embryos from/to the territory of the Republic of Poland without the necessary permission require, in the process of proper interpretation, taking into consideration the content of Article 57 ATI, which determines the rules of obtaining permission to perform the activities. The provision results from the adoption of the solutions proposed in the EU directives.[40]

In accordance with Article 57(1) ATI, only a bank of gametes and embryos that has the permission to perform these activities can export gametes or embryos from the territory of the Republic of Poland to the territory of a country other than the EU Member State or import gametes or embryos to the territory of the Republic of Poland from the territory of a country other than the EU Member State. The lack of the permission referred to in Article 57 ATI does not limit the bank in other activities referred to in Article 45 ATI, of course also after obtaining the adequate permission to perform them (Article 48 ATI).

The Minister of Health, on the motion filed by the bank of gametes and embryos, grants the permission referred to in para. (1) of the provision, provided that the following requirements are met:

1) safeguarding monitoring of the state of exported and imported gametes or embryos on the way from a donor to a recipient;
2) guaranteeing the quality and safety of exported and imported gametes or embryos that are to be used in the medically-assisted reproduction procedure (Article 57(2) ATI).

---

[39] If it is a company, provided that the requirements laid down in Article 44a CC are met, forfeiture of it may be considered.

[40] The justification of the Bill indicates that: "Export and import of human tissues and cells, thus also gametes and embryos, was regulated at the EU level in Article 9 Directive 2004/23/EC. In accordance with the provision, Member States shall take all necessary measures to ensure that all imports of tissues and cells from third countries are undertaken by tissue establishments accredited, designated, authorised or licensed for the purpose of those activities, and that imported tissues and cells can be traced from the donor to the recipient and vice versa in accordance with the procedures referred to in Article 8. Member States and tissue establishments that receive such imports from third countries shall ensure that they meet standards of quality and safety equivalent to the ones laid down in this Directive. Member States shall take all necessary measures to ensure that all exports of tissues and cells to third countries are undertaken by tissue establishments accredited, designated, authorised or licensed for the purpose of those activities. Those Member States that send such exports to third countries shall ensure that the exports comply with the requirements of this Directive". Justification for the Bill, p. 22. https://legislacja.rcl.gov.pl/docs//2/230033/230067/230068/dokument147770.pdf [accessed on 09.11.2017].

The permission is granted for a fixed period (for not longer than the expiry date referred to in Article 48(1) ATI). It concerns the permission granted to a bank of gametes and embryos in accordance with Article 45 ATI authorising to use gametes and embryos for the needs of medically-assisted reproduction consisting in the retention, preservation and distribution of gametes and embryos that are to be used in the medically-assisted reproduction of people. The permission is granted for a period of five years (Article 48(3) ATI).

A solution that deserves approval is the withdrawal of the permission to export and import gametes and embryos by the Minister of Health, based on Article 57(5) ATI, in case a bank of gametes and embryos fails to meet the requirements of the permission referred to in Article 48(1) ATI granted in conjunction with Article 45 ATI.

The Minister of Health may grant the permission referred to in Article 57(1) ATI, may refuse to grant it or withdraw it in the course of an administrative decision. The decision to withdraw the permission is subject to immediate execution *ex officio* on the day of its serving (Article 57(6) ATI).

The crime discussed is formal in nature and may be committed only in action. The subject may be anybody who exports gametes or embryos from the territory of the Republic of Poland to the territory of a country other than the EU Member State or imports gametes or embryos to the territory of the Republic of Poland from the territory of a country other than the EU Member State. Due to the fact that the provision stipulates that permission of the Minister of Health is obligatory to perform the activities and only a bank of gametes and embryos can perform those activities, most often, because of the specificity and the nature of the activities, the perpetrators are persons working for a bank of gametes and embryos but not having the necessary permission. It cannot be excluded, however, that a person that is not involved in the activity regulated by statute and working for a bank of gametes and embryos will be a perpetrator of this crime.

The crime discussed may be committed only intentionally,[41] with both types of intent. Most often, it is direct intent but oblique intent cannot be excluded, e.g. when the activities determined in the provision are performed in the period when the permission expired and the perpetrator predicting such a situation agrees to it.

Penalisation of crimes under Article 88 ATI is reflected in the alternatively constructed sanction allowing adjudication of a fine, a penalty of limitation of liberty or a penalty of deprivation of liberty for up to three years. A fine, in accordance with Article 33 §1 CC, may account for 10-540 daily rates (the amount of one daily rate is PLN 10 to 2,000 – Article 33 §3 CC). Thus, the lowest amount of a fine for a crime under Article 88 ATI may be PLN 100, and the highest: PLN 1,080,000. A court may impose a penalty of limitation of liberty on a perpetrator (from one month to two years). If a court decides that non-custodial penalties (i.e. a fine or a penalty of limitation of liberty) will not fulfil the aim of punishment, it may sentence a perpetrator to imprisonment (a penalty of deprivation of liberty for a period of one month to one year) in accordance with Article 58 §1 CC. The execution of the penalty of deprivation of liberty (for one year) may be conditionally

[41] Compare, J. Haberko, *Ustawa o leczeniu…* [Act on treating…], p. 399.

suspended. Due to the maximum limit of the penalty of deprivation of liberty in accordance with Article 88 ATI (not exceeding five years), it possible to conditionally discontinue criminal proceedings in accordance with Article 66 §1 CC, of course provided that all requirements indicated are met (guilt and social harmfulness of an act are not significant, circumstances of an act commission do not raise any doubts, a perpetrator has never been convicted for an intended offence and criminological prospects are positive). It is also possible to refrain from imposing a penalty based on Article 59 CC due to the fact that an offence does not carry a penalty exceeding three years of deprivation of liberty, of course provided that social harmfulness of an act is not significant. In such an event, a court rules a penal measure, forfeiture or a compensatory measure (provided the aims of punishment are met this way).

As far as penal measures are concerned, they can include: the prohibition of holding given posts or exercising a given profession (Article 41 CC), ruling pecuniary compensation (Article 43a §1 CC) and publishing a sentence (Article 43b CC). It is also possible to rule forfeiture of items (Article 44 CC).

Finally, it must be pointed out that, penalising acquisition, disposal and other activities connected with illegal trade in gametes or embryos, the legislator leaves theft or appropriation of a gamete or an embryo outside the scope of penalties. While in case of a gamete it cannot be assumed that it is a thing, in case of an embryo it is not so unambiguous. In this context, it should be pointed out that in German literature it was assumed that preserved human sperm constitutes a thing, although preservation lets it maintain the features of live matter.[42] In the Polish doctrine of civil law, the classification of a human body part as a thing remains a disputable issue. Neither a man nor any part of a live human being is a thing.[43] However, human organs (parts of body) after extraction from the body become things, they are *res extra commercium*, but are not tradable and do not have the value of property. It is assumed in the doctrine that they are a special sort of things and can be neither owned nor traded in.[44] Applying the opinion to the field of the discussed Act, one can approve of it only partially. If we recognise that a gamete is a special type of thing, we cannot agree with the statement that it is not tradable (because of the content of Article 77 ATI). The legislator intended to exclude gametes from trade by criminalising disposal or acquisition of them. However, the legislator also acknowledges that they can become the object of such trade. Thus, it seems that if it is possible to dispose of or acquire a gamete, it is also possible to steal or appropriate it. *De lege ferenda*, it would be necessary to consider penalisation of such acts. Such behaviour may occur in practice and in the light of the present legal state, the theft or appropriation of a gamete remains unpunished. The same situation will take place in case of the theft or appropriation of an embryo, although in such a case it cannot be treated as such offences because an embryo is not a thing (even this special type of thing).

---

42 W. Küper, *Strafrecht. Besonderer Teil. Definitionen mit Erläuterungen*, Heidelberg 2000, p. 237; quoted after M. Kulik, *Przestępstwo i wykroczenie niszczenia rzeczy* [Crime and misdemeanour of destroying things], Lublin 2005, p. 102.

43 *Ibid.* and literature referred to therein.

44 *Ibid*.

BIBLIOGRAPHY

Budyn-Kulik M., [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2017.

Carney S., *Czerwony rynek. Na tropie handlarzy organów, złodziei kości, producentów krwi i porywaczy dzieci* [The red market: On the trail of the world's organ brokers, bone thieves, blood farmers, and child traffickers], Wołowiec 2014.

Daniluk P., [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2015.

Gałązka M., [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2015.

Guzik-Makaruk E.M., *Transplantacja organów, tkanek i komórek w ujęciu prawnym i kryminologicznym* [Organ, tissue and cell transplants from the legal and criminological point of view], Białystok 2008.

Guzik-Makaruk E.M., Pływaczewski E., [in:] R. Zawłocki (ed.), *Przestępstwa przeciwko mieniu i gospodarcze* [Crimes against property and economic offences], Vol. 9, Warsaw 2011.

Haberko J., *Ustawa o leczeniu niepłodności. Komentarz* [Act on treating infertility], Warsaw 2016.

Kapelańska-Pręgowska J., Chrzczonowicz P., *Handel organami z perspektywy prawa międzynarodowego oraz polskiego prawa karnego* [Trade in human organs from the perspective of the international law and the Polish criminal law], Przegląd Sejmowy No. 6, 2015.

Konarska-Wrzosek V., [in:] M. Bojarski (ed.), *System prawa karnego. Szczególne dziedziny prawa karnego. Prawo karne wojskowe, skarbowe i pozakodeksowe* [Criminal law system. Special branches of criminal law. Military criminal law, fiscal penal law, and non-coded law], Vol. 11, Warsaw 2014.

Kulik M., *Przestępstwo i wykroczenie niszczenia rzeczy* [Crime and misdemeanour of destroying things], Lublin 2005.

Kulik M., [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2017.

Küper W., *Strafrecht. Besonderer Teil. Definitionen mit Erläuterungen*, Heidelberg 2000.

Łabuda G., [in:] J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz* [Criminal Code. General part. Commentary], Warsaw 2012.

Majewski J., [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz. T. I. Komentarz do art. 1–116 k.k.* [Criminal Code. General part. Commentary on Articles 1–116 CC], Warsaw 2007.

Oczkowski T., [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warsaw 2016.

Sobol E. (ed.), *Nowy słownik języka polskiego* [New dictionary of the Polish language], Warsaw 2003.

Spotowski A., [in:], I. Andrejew, L. Kubicki, J. Waszczyński (ed.), *System prawa karnego, T. 4, cz. 2, O przestępstwach w szczególności* [Criminal Law system. Vol. 4, Part 2: On crime in detail], Wrocław 1989.

Legal regulations

Convention of 4 April 1997 for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention).

Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, Official Journal L 009, 15/01/2003 P. 0003–0010.

Act of 1 July 2005 on extracting, preserving and implanting cells, tissues and organs, Journal of Laws [Dz.U.] of 2017, item 1000, uniform text.
Act of 25 June 2015 on treating infertility, in force on 1 November 2015, Journal of Laws [Dz.U.] of 2017, item 865, uniform text.

Court rulings

Supreme Court judgement of 12 February 1974, I KR 329/73, OSNPG 1974, No. 11, item 137.
Supreme Court judgement of 7 May 1976, II KR 69/76, OSNPG 1976, No. 11, item 95.
Supreme Court resolution of 30 January 1980, VII KZP 41/78, OSNKW 1980, No. 3, item 24.
Supreme Court judgement of 16 February 1987, WR 28/87, OSNKW 1987, No. 9–10, item 85.
Supreme Court judgement of 20 April 2005, III K 27/05, Lex No. 149637.
Supreme Court ruling of 1 September 2011, V KK 43/11, Lex No. 1099298.
Judgement of the Appellate Court in Łódź of 10 April 2014, II AKa 45/14, LEX No. 1461100.
Supreme Court ruling of 8 January 2015, V KK 165/14,OSNKW 2015, No. 6, item 49
Judgement of the Appellate Court in Gdańsk of 25 October 2016, II AKa 140/16, LEX No. 2201316.

CRIME OF TRAFFICKING IN GAMETES OR EMBRYOS

Summary

The Act of 25 June 2015 on treating infertility came into force on 1 November 2015. The necessity of statutory regulation of in vitro fertilisation procedures resulted from the fact that Poland signed the Convention of 4 April 1997 for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. In fourteen provisions (Articles 76–89 ATI), the legislator penalised acts consisting in such significant offences as acquisition or disposal of, acting as a go-between in acquisition or disposal of and taking part in the application of a gamete or an embryo obtained in an illegal way (Article 77 and Article 79) as well as an offence of export of gametes or embryos from the territory of the Republic of Poland to the territory of a country that is not the EU Member State and import of gametes of embryos to the territory of the Republic of Poland from the territory of a country that is not the EU Member State without permission to perform those activities (Article 88 ATI). The paper presents an analysis of the statutory features of offences under Article 77 and Article 79, which are almost identical. The difference lies only in the object of an act (Article 77 – a gamete, Article 79 – an embryo) and the envisaged penalty. Attention is also drawn to Article 28(1) ATI, which stipulates that it is inadmissible to sell, purchase or act as a go-between in chargeable acquisition or disposal of a gamete or an embryo, and Article 76 ATI, which is significant in the context of the crimes discussed. This provision aims to prevent activities facilitating trade in gametes or embryos, which (publicising advertisements) will lead to chargeable disposal or acquisition, or acting as a go-between in sale or purchase of a gamete or an embryo. The author also discusses the problem that can occur in connection with the lack of penalisation of theft of appropriation of a gamete or an embryo. It seems that if it is possible to sell or purchase a gamete or an embryo, theft or appropriation of them is also possible. *De lege ferenda* penalisation of this type of acts should be considered. There is also an analysis of an offence under Article 88 ATI.

Keywords: illegal trading, gamete, embryo, financial or personal benefit, disposal, acquisition

PRZESTĘPSTWA ZWIĄZANE Z NIELEGALNYM OBROTEM KOMÓRKAMI ROZRODCZYMI LUB ZARODKAMI

Streszczenie

1 listopada 2015 r. weszła w życie ustawa z dnia 25 czerwca 2015 r. o leczeniu niepłodności. Konieczność ustawowego uregulowania procedury zapłodnienia in vitro wynikała z podpisania przez Polskę Konwencji z dnia 4 kwietnia 1997 r. o ochronie praw człowieka i godności istoty ludzkiej w dziedzinie zastosowania biologii i medycyny. Ustawodawca, w czternastu przepisach (art. 76–89 u.l.n.), spenalizował czyny wśród których istotne znaczenie mają przestępstwa polegające na nabyciu lub zbyciu, pośredniczeniu w nabyciu lub zbyciu bądź braniu udziału w zastosowaniu pozyskanej wbrew przepisom ustawy komórki rozrodczej lub zarodka (art. 77 i art. 79) oraz przestępstwo polegające na dokonywaniu wywozu komórek rozrodczych lub zarodków z terytorium Rzeczpospolitej Polskiej na terytorium państwa innego niż państwo członkowskie Unii Europejskiej i przywozu komórek rozrodczych i zarodków na terytorium Rzeczpospolitej Polskiej z terytorium państwa innego niż państwo członkowskie Unii Europejskiej bez pozwolenia na wykonywanie tych czynności (art. 88 u.l.n.). W opracowaniu dokonano analizy ustawowych znamion przestępstw z art. 77 i art. 79, które są niemal identyczne, a różnica dotyczy jedynie przedmiotu czynności wykonawczej (art. 77 – komórka rozrodcza, art. 79 – zarodek) i zagrożenia karnego. Zwrócono też uwagę na art. 28 ust. 1 u.l.n., który stanowi, że niedopuszczalne jest odpłatne zbycie, nabycie lub pośredniczenie w odpłatnym zbyciu lub nabyciu komórki rozrodczej lub zarodka oraz na art. 76 u.l.n., który ma istotne znaczenie w kontekście omawianych przestępstw. Przepis ten ma na celu zabezpieczenie przed czynnościami umożliwiającymi (wspomagającymi) handel komórkami rozrodczymi lub zarodkami, które to czynności (rozpowszechnianie ogłoszeń) będą prowadziły do odpłatnego zbycia, nabycia lub pośredniczenia w zbyciu lub nabyciu komórki rozrodczej lub zarodka. Odniesiono się także do problemu, jaki może pojawić się w związku z brakiem penalizacji takich zachowań jak kradzież czy przywłaszczenie komórki rozrodczej lub zarodka. Wydaje się, że skoro możliwe jest zbycie czy nabycie komórki rozrodczej lub zarodka, możliwa jest również ich kradzież lub przywłaszczenie. *De lege ferenda* należałoby się zastanowić nad penalizacją tego rodzaju czynów. Analizie poddano także przestępstwo określone w art. 88 u.l.n.

Słowa kluczowe: nielegalny obrót, komórka rozrodcza, zarodek, korzyść majątkowa lub osobista, zbycie, nabycie

Ius Novum
4/2017

MEDIATOR IN CRIMINAL AND CIVIL PROCEEDINGS

ANNA CYBULKO*

1. INTRODUCTION

In the Polish legal system, the issue of mediation is separately regulated in different branches of law. The regulations of mediation in criminal and civil matters have their own history and the two different regulatory systems result in differences in the development of a mediator's status. The article is an analysis of a mediator in criminal and civil proceedings.[1] The comparison of the existing similarities and differences makes it possible to answer the question whether the legal regulations analysed distinguish two specific professions: mediators in criminal matters and mediators in civil matters or whether we deal with one mediator's profession defined in different ways. It is also an attempt to answer the question whether it is purposeful to regulate a mediator's status separately in criminal and civil law.

2. MEDIATOR'S STATUS IN CIVIL PROCEEDINGS

After the amendment to the Code of Civil Procedure based on Act of 10 September 2015 amending some acts in conjunction with the support for conciliatory resolution of disputes,[2] civil mediation may be conducted by three groups of mediators: standing mediators listed in the registry of the president of a district court, non-standing mediators registered by social organisations and universities, and ad hoc

* MA, doctoral fellow at the School of Social Sciences at the Institute of Philosophy and Sociology of the Polish Academy of Science, Ombudsman at the University of Warsaw; annacybulko@wp.pl

1 Due to the limited size of the publication, the comparison does not include the discussion of mediation in matters concerning minors, administrative and judicial administrative proceedings and the status of mediators conducting such cases.

2 Journal of Laws [Dz.U.] of 2015, item 1595.

mediators.[3] All the three groups of mediators must meet the general requirements laid down in in the Code of Civil Procedure, which stipulates that a mediator may be a natural person who has capacity to enter into legal transactions and exercises all public rights (Article 183^2 §1 CCP). Standing mediators are accredited by being entered to the registry of the president of a district court. To that end, they have to meet the requirements laid down in Act of 27 July 2001: Law on the common courts system[4] and the Regulation of the Minister of Justice of 20 January 2016 on the registry of standing mediators[5]. The reliability of non-standing mediators is confirmed by the registries kept by social organisations and universities as part of their statutory activities. Being entered to the list means a mediator meets the requirements determined by an organisation or a university. Information about the lists is submitted to the president of a district court (Article 183^2 CCP).[6] Ad hoc mediators, appointed when necessary, do not have to meet any additional requirements. What is important, a mediator may be a standing mediator and at the same time registered as a mediator in a list kept by an organisation or a university.[7]

Parties may choose any mediator: a standing or a non-standing one (including an ad hoc one). However, if they do not choose a mediator, a court, referring them to mediation, appoints a mediator who has knowledge and skills in the particular type of cases after taking into consideration standing mediators first (Article 183^9 §1 CCP).[8] Thus, the differences between the various types of mediators consist in the fact that a standing mediator is assumed to be a mediation addressee indicated by a court (in practice, courts refer most mediation cases to this group of mediators). Moreover, a standing mediator can refuse to mediate only for important reasons about which he must inform parties and a court without delay (Article 183^2 §4 CCP), while the two other types of mediators may refuse to mediate because of any reasons.[9]

---

[3] W. Głodowski uses different terms and distinguishes standing court mediators, standing non-court mediators and ad hoc mediators. W. Głodowski, *Stały mediator w sprawach cywilnych po nowelizacji Kodeksu postępowania cywilnego – wybrane zagadnienia* [Standing mediator in civil matters after the Amendment to the Code of Civil Procedure – selected issues], Kwartalnik ADR, No. 1, 2016, p. 20. K. Antolak-Szymanski and O.M. Piaskowska distinguish ad hoc mediators, standing mediators and mediators from lists of non-governmental organisations and universities. K. Antolak-Szymanski, O.M. Piaskowska, *Mediacja w postępowaniu cywilnym. Komentarz* [Mediation in civil proceedings. Commentary], Wolters Kluwer, Warsaw 2016, p. 113.

[4] Journal of Laws [Dz.U.] of 2016, item 2062, as amended.

[5] Journal of Laws [Dz.U.] of 2016, item 122.

[6] Before the amendment of 10 September 2015 entered into force, the lists of social and professional organisations submitted to the presidents of district courts (who did not have any rights to interfere in the lists content) were the only form of authentication of mediators. Persons entered in the lists were called "court mediators".

[7] The aspect of lists overlapping is emphasised, inter alia, in K. Antolak-Szymanski, O.M. Piaskowska, *Mediacja w postępowaniu...* [Mediation in civil proceedings...], p. 113.

[8] The appointment of a mediator in family matters, divorces or separation, or parental guardianship is a little different. If parties do not choose a mediator, a court refers the case to a standing mediator who has theoretical knowledge, especially education in the field of psychology, pedagogy, sociology or law and practical skills in mediation in family matters (Article 436 §4 CCP).

[9] More on this issue: W. Głodowski, *Stały mediator...* [Standing mediator...], p. 22.

2.1. RULES OF ENTRY INTO THE LIST OF STANDING MEDIATORS IN CIVIL MATTERS

The formal and substantive requirements that a standing mediator in civil proceedings must meet are laid down in Act: Law on the common courts system. In accordance with Article 157 of the Act, a standing mediator may be a person who:
1) has full capacity to enter into legal transactions and exercises all public rights;
2) has knowledge and skills in the field of mediation;
3) is 26 years old;
4) speaks the Polish language;
5) has not been convicted for the commission of intentional crime or intentional fiscal crime;
6) has been entered into the registry of the president of a district court.

A judge, except retired judges, cannot be a mediator (Article 183^2 §2 CCP).

The rules of entry to the registry are laid down in the Regulation of the Minister of Justice of 20 January 2016 on the registry of standing mediators.[10] In accordance with the Regulation, the president of a district court keeps the registry of standing mediators. A person applying to be entered to the list confirms that he meets the requirements by submitting relevant declarations and documents. The moment a mediator is entered in the list, not only formal issues but also his substantive qualifications, i.e. his knowledge and skills, are verified. The applicant is expected to submit the following documents: information about the number of mediation cases he has conducted so far, a list of publications about mediation, references from mediation centres or natural persons confirming a mediator's knowledge and skills, documents confirming education, certificates of training in mediation and specialisation (§4 and §5 Regulation on the registry of standing mediators). After positive verification of the documents, the president of a district court issues an administrative decision to enter an applicant in the registry of standing mediators.[11] This valid decision constitutes grounds for entering a mediator in the list of standing mediators in another district court (on a motion filed by the president of this court). An entry contains the following data: a mediator's given name and surname, date of birth, correspondence address, information about education and training, specialisation, and on a mediator's request also his telephone number, email address and information about the entry in a list of mediators kept by a social organisation or a university (Article 157d §1 Act: Law on the common courts system). In enumerated cases, such as a mediator's death, a motion to strike off, failure to meet any of the requirements and inappropriate fulfilment of duties, the president of a district court deletes a mediator from the registry (Article 157c §1 Act: Law on the common courts system). In accordance with Regulation on the registry of standing mediators, the action may be initiated *ex officio* (§10).

---

[10] Journal of Laws [Dz.U.] of 2016, item 122.

[11] As W. Głodowski emphasises, a standing mediator plays the role of a standing mediator in a given court and does not have this status in the entire territory of Poland. W. Głodowski, *Stały mediator...* [Standing mediator...], p. 21.

2.2. MEDIATOR'S RIGHTS AND OBLIGATIONS IN CIVIL MATTERS

The Code of Civil Procedure indicates tasks that a mediator should fulfil in the course of mediation and regulates his basic entitlements. They are applicable to all groups of mediators regardless of their authorisation.

In accordance with the Code of Civil Procedure, having received a decision to refer a case to mediation, a mediator immediately schedules a meeting (Article 183^{11}). However, in case parties do not see such a need, a meeting may be dropped. Mediation may also be in the form of shuttle diplomacy. A mediator uses various methods aimed at conciliatory resolution of a dispute, including supporting parties in formulating their resolution proposals. If parties express such a will, a mediator may make suggestions for settlement of a problem but they are not binding for the parties (Article 183^{3a}). At the end of mediation, a mediator develops an official record in which he indicates the venue and time of mediation, the names and addresses of the parties, the mediator's name and address and the mediation outcome. The official record, signed by the mediator, is submitted to a court and parties involved (Article 183^{12}).

In the course of mediation, a mediator should be impartial and is obliged to immediately inform the parties about circumstances that might challenge this impartiality (Article 183^{3} §1). However, these are the parties who take the final decision whether, regardless of the premises indicating the lack of a mediator's neutrality, they want him to mediate or not. A mediator has the right to get acquainted with the case files, provided that none of the parties refuses their consent to that (Article 183^{9} §2). The Code of Civil Procedure introduces a guarantee of mediation proceedings confidentiality by stipulating that a mediator cannot be called a witness to facts that he learnt about in the course of mediation, unless the parties make him exempt of the obligation to keep the mediation secret (Article 259^{1}).

The rules of remuneration for a mediator are an important element of his legal status. The cost of mediation ruled by a court is included in the necessary costs of a trial (Article 98^{1} CCP). A mediator has the right to remuneration and refund of expenditures incurred in connection with his mediation, unless he declared doing the job without remuneration. The Regulation of the Minister of Justice of 20 June 2016 on remuneration and expenditures subject to refund in civil proceedings[12] regulates a mediator's remuneration in two ways, depending on the type of a case. In case of property rights, the remuneration accounts for 1% of the property value in dispute, with the minimum of PLN 150 and the maximum of PLN 2,000 for the whole mediation process. In cases where it is not possible to establish the value of property and in non-property related cases, a mediator is paid PLN 150 for the first meeting and PLN 100 for successive meetings, but the total amount cannot exceed PLN 450. In case of VAT payers, the amount is proportionally increased. Moreover, all documented necessary expenditures incurred by a mediator for travel (in accordance with the regulations concerning civil servants' travel), rent (up to PLN 70 per meeting) and correspondence (maximum PLN 30) are subject to refund.

[12] Journal of Laws [Dz.U.] of 2016, item 921.

In the event the parties do not take part in mediation, a mediator is entitled to a refund of costs of up to PLN 70 (§4 Regulation of 20 June 2016). The parties cover the cost of remuneration and expenditures refund (Article 183^5 CCP).

3. MEDIATOR'S STATUS IN CRIMINAL PROCEEDINGS

The main difference between a mediator's status in criminal and civil proceedings consists in the fact that not only a natural person but also an authorised institution may be appointed to mediate in criminal matters. The list of persons and institutions authorised to mediate is kept by a district court (§2 Regulation of the Minister of Justice of 7 May 2015 on mediation procedure in criminal matters[13]).

In accordance with the Criminal Procedure Code, a court or a judicial officer, and in preparatory proceedings a prosecutor or another entity conducting the proceedings may, on the initiative or with the consent of the accused and the aggrieved, refer the case to mediation to a selected authorised person or institution (Article 23a §1). In extraordinary situations justified by the need to mediate, a person or institution from outside the list may be appointed provided, however, that he/it meets the requirements indicated in the Regulation (§8 Regulation on mediation procedure in criminal matters). Thus, in fact, meeting the requirements laid down in the Regulation is a condition for being a mediator.

3.1. RULES OF ENTRY INTO THE REGISTRY OF INSTITUTIONS AND PERSONS AUTHORISED TO MEDIATE IN CRIMINAL PROCEEDINGS

The Regulation on mediation procedure in criminal matters determines the conditions that institutions and persons must fulfil in order to be authorised to conduct mediation in criminal proceedings. An institution applying for entry must prove that mediation is in compliance with its statutory objectives (inter alia, performing tasks in the field of mediation, social rehabilitation, protection of social interests, protection of important individual interests or protection of human rights and freedoms); it safeguards proper organisational conditions and the course of mediation proceedings by persons meeting the requirements laid down in the regulations. A person applying for entry into the registry, in accordance with §4 Regulation on mediation procedure in criminal matters, must prove that he meets the following requirements:

1) is the citizen of Poland, another European Union Member State, the EFTA Member State or another state provided that this citizenship gives him the right to employment or self-employment in the territory of the Republic of Poland in accordance with the EU regulations;
2) has good command of the Polish language in speech and writing;
3) is 26 years old;

[13] Journal of Laws [Dz.U.] of 2015, item 716.

4) has full capacity to enter into legal transactions and exercises all public rights;
5) has not been convicted for the commission of an intentional offence or intentional fiscal offence;
6) has knowledge and skills in the field of mediation procedure, dispute resolution and entering into interpersonal contacts;
7) guarantees proper fulfilment of duties;
8) has been entered in the appropriate registry of mediators.

Active judges, prosecutors, prosecutor's assessors or apprentices to those professional groups as well as lay judges, judge's or prosecutor's assistants, judicial officers and law enforcement officers cannot be involved in mediation (Article 23a §3 CPC). The Criminal Procedure Code also lays down strict requirements for a mediator's impartiality. A person whose impartiality is doubtful cannot conduct mediation proceedings (Article 41 §1). A mediator who is directly involved in a case, or is or was a spouse of a party, is or was in cohabitation with a party (or their attorney or statutory representative), is a close or distant relative of a party (or their attorney or statutory representative), was a witness to an act and gave evidence as a witness or an expert is excluded from mediation (Article 40 §1 CPC).

Similarly to civil cases, an entry into the registry is based on an administrative decision issued by the president of a district court on request of an institution or an organisation concerned, which has to submit relevant declarations and documents. The president of a district court, having recognised that an applicant has met the requirements laid down in the Regulation, issues a decision to enter him into the registry. The entry includes the name or given name and surname, the date of birth, correspondence address, telephone number and email address of an authorised person or institution (§6 Regulation on mediation procedure in criminal matters). The president of a district court strikes off an institution or a person on their request, in case of dissolution or death or having learnt that they fail to meet the requirements laid down in the statute. The president of a district court may also strike them off in case they do not perform or inappropriately fulfil obligations connected with mediation proceedings (§7 Regulation on mediation procedure in criminal matters).

3.2. MEDIATOR'S RIGHTS AND OBLIGATIONS IN CRIMINAL MATTERS

In accordance with §14 Regulation on mediation procedure in criminal matters, having received the decision on referring a case to mediation, a mediator immediately contacts the parties and schedule a preliminary meeting to explain the aims and rules of mediation, obtain the parties' consent for mediation and to inform them about the possibility to withdraw from it. Next, the mediation between parties takes place at meetings with the participation of both parties or, if it is not possible, at separate meetings with each party in the mode of shuttle diplomacy (§15 Regulation on mediation procedure in criminal matters). A mediator helps to formulate the content of a settlement, informs the parties about the rules of developing the text of a settlement and endorsing an enforcement clause. Having finished

the mediation, a mediator (an institution or a person appointed) develops a report including: the case file number, the mediator's given name and surname or the institution's name and information about the mediation results, and the mediator's signature (Article 23a §6 CPC). Pursuant to §15 Regulation on mediation procedure in criminal matters, a mediator is also obliged to check the implementation of the obligations resulting from the settlement.

In accordance with Article 23a §5 CPC, a mediator has access to the case files to the extent that is necessary to mediate. §12 Regulation on mediation procedure in criminal matters limits a mediator's access to sensitive material concerning the state of health of the accused, opinions about him, data concerning his record as well as data making it possible to identify an incognito witness and those that, if revealed to the aggrieved, might have influence on the criminal liability of the other accused who do not participate in the mediation. A mediator cannot be interrogated as a witness to facts he has learnt about from the accused or the aggrieved in the course of mediation proceedings, with the exception of information about crimes referred to in Article 240 §1 CC (Article 178a CPC).

The State Treasury covers the costs of mediation in criminal proceedings that include a mediator's remuneration and a refund of expenditures incurred in connection with the mediation. A mediator's remuneration for the whole mediation proceedings accounts for PLN 120, and in case of VAT payers, it is raised by the VAT amount. In addition, a mediator is entitled to a lump sum of PLN 20 for serving procedural documents (§4(2) and (3) Regulation of the Minister of Justice of 18 June 2003 on the amount and the system of calculating spending by the State Treasury in criminal proceedings[14]).

4. SIMILARITIES AND DIFFERENCES IN A MEDIATOR'S RIGHTS AND OBLIGATIONS IN CRIMINAL AND CIVIL PROCEEDINGS

At first sight, the regulations of criminal and civil law are totally different, at least in two basic formal and organisational aspects. In civil proceedings, only a natural person may conduct mediation. On the other hand, in mediation in criminal proceedings, it can be a person or an institution authorised. In mediation in civil matters, there are three groups of mediators: standing, non-standing and ad hoc ones. In criminal proceedings, as a rule, apart from institutions, there is only one group of persons in the registry of authorised mediators and, possibly, mediators meeting the requirements for entry into the registry. To tell the truth, in criminal proceedings, it is envisaged that authorised institutions mediate, but in practice these are natural persons meeting the requirements for mediators and acting within those institutions. From a court's perspective, only one category of mediators is important: those who were entered to the registry kept by the president of a district court. In criminal cases as well as in civil cases, a court refers a mediation case to a listed/registered mediator (or an institution). However, in some justified situations, it can

[14] Journal of Laws [Dz.U.] of 2013, item 663.

refer mediation to a person who has not been entered into the registry. Parties to the civil proceedings may choose such a mediator on their own. That is why, the comparison below concerns only "listed" mediators, i.e. standing mediators in civil proceedings, and "registered" mediators, i.e. persons authorised to mediate in criminal proceedings. For the purpose of the article, both groups are classified as "court mediators".

4.1. FORMAL AND SUBSTANTIVE REQUIREMENTS

A standing mediator conducting court mediation in civil proceedings (a court mediator in civil proceedings) as well as a person authorised to conduct mediation within criminal proceedings (a court mediator in criminal proceedings), in order to be entered into the registry (i.e. to be listed as a mediator in civil proceedings or to be registered as a mediator in criminal proceedings) must meet similar requirements such as full capacity to enter into legal transactions and all public rights, 26 years of age, knowledge of the Polish language (in case of a mediator in criminal matters – good speaking and writing skills), knowledge and skills in the field of mediation (in case of a mediator in criminal matters – competence in conflict resolution and entering into interpersonal relations). Persons convicted of intentional crimes and intentional fiscal crimes as well as active judges cannot be mediators. The differences between regulations determining the status of a mediator in civil proceedings and one in criminal proceedings occur with respect to three criteria: citizenship (the citizenship requirement applies to mediators in criminal proceedings),[15] guarantee of proper fulfilment of duties (which also a mediator in criminal matters should give) and exclusion of some professions (people representing legal professions, holding posts in the justice system or officers of law enforcement institutions) from mediation in criminal proceedings (the limitation does not apply to mediators in civil matters).

The requirements concerning mediators' substantive qualifications seem to be another important area of comparison. The provisions in the area are different because mediators in criminal proceedings, apart from knowledge and skills in the field of mediation, must also have skills in conflict resolution and entering into interpersonal relations, which is not a requirement for mediators in civil matters. The linguistic and logical interpretation, however, leads to a conclusion that the real content of the norms is actually the same as the skills in conflict resolution and entering into interpersonal relations are included in the concept of skills in the field of mediation. Another question that must be asked is whether the two similar wordings concerning mediators' substantive competences mean other expectations of courts that verify them. The truth is that an application of a mediator in civil matters and in criminal proceedings must include documents confirming that an

[15] However, the criterion is not significant in practice. It does not seem there are many foreigners eager to become a Polish mediator meeting the linguistic competence criterion and not meeting the (broad) citizenship criterion at the same time.

applicant meets the qualification requirements, but the regulations do not determine substantive requirements such as training programmes, issues covered during classes, field and level of education, etc. that a mediator in civil or criminal matters should confirm.

The process of court mediators' competences authentication was organised in both proceedings in a very similar way. One can become a court mediator in civil and criminal matters by entry into the adequate registry kept in a district court. In case of mediators in civil proceedings, it is the "List" (*Lista*) kept by the president of a district court; in case of a mediator in criminal proceedings, it is the "Register (*Rejestr*) of institutions and persons authorised to mediate kept in a district court". In both cases, the president of a district court takes the decision to enter a mediator or strike him off. The entry is an administrative decision made on the request of an applicant. Both registries contain the following data: an authorised person's given name and surname, date of birth, correspondence address, telephone number and email address (in case of mediators in civil matters, the two latest pieces of information are entered on their request). In addition, an entry to the civil list contains information about education and training, specialisation and (on a mediator's request) information about being a mediator registered by a social organisation or a university. Grounds for striking a mediator off are the same for both categories. It takes place on a mediator's request, in case of his death, failure to meet the requirements indicated in the statute or inappropriate fulfilment of duties.[16]

4.2. OBLIGATIONS AND RIGHTS

Obligations and rights of both groups of mediators are in general similar. However, obligations and tasks of mediators in criminal proceedings are determined in a more detailed way. A mediator in criminal proceedings must spend more time and put more effort in initiating mediation (an obligation to organise a preliminary meeting to explain aims and rules of mediation and obtain the parties' consent to mediation) and has more informative obligations, e.g. with regard to the construction of a settlement or the possibility of its execution. In mediation in both civil and criminal proceedings, a mediator finishes mediation with a document for a court: in civil matters – an official record (*protokół*), and in criminal matters – a report (*sprawozdanie*). The content of the documents is similar. Both include: a mediator's given name and surname (or a name of the institution appointed to mediate), information about the results of mediation proceedings and a mediator's signature. The official record also contains information about the venue and time of mediation, first names and surnames of the parties and their addresses; the report must have the case files number. One more obligation of a mediator in criminal proceedings, which a mediator in civil proceedings does not have, is to check whether the terms of a settlement have been implemented.

[16] In case of mediation in criminal matters, also failure to fulfil duties is indicated. However, it seems that such conduct is enclosed in inappropriate fulfilment of duties.

The rights of mediators in civil and criminal proceedings connected with their access to files and confidentiality of the proceedings conducted are regulated in a similar way. However, there are some differences resulting from the specifics of the proceedings. A mediator in civil proceedings as well as a mediator in criminal proceedings have the right to get acquainted with the case files. However, in civil proceedings, parties to it may refuse to give consent to that and in criminal proceedings, there is a limitation of access to some classified materials, which a mediator does not have to know and might have negative impact on the proceedings. The principle of confidentiality applies to both types of mediation: neither a mediator in criminal proceedings nor a mediator in civil proceedings can be interrogated as a witness to facts that he has learned about in the course of mediation. However, in civil matters, parties may exempt a mediator from the obligation of confidentiality and in criminal proceedings, the principle does not apply to one type of crimes.

Clear differences appear in connection with impartiality and remuneration. A mediator in criminal proceedings whose impartiality is questioned is excluded from given mediation *ex officio*. In mediation in civil matters, a mediator is obliged to reveal any potential limitations to his impartiality but the parties to the proceedings (or a mediator himself) take the decision if they want him to mediate. As it is emphasised in the literature: "this way, a court is not involved in taking a decision to exclude a mediator and it is assumed that in case of justified doubts about a mediator's impartiality, he refuses to mediate or a party to the proceeding does not give consent to mediation conducted by that mediator."[17] Thus, the principle of autonomy of parties' is invoked again.

Mediators' remuneration is regulated in a different way, too. The remuneration of mediators in criminal proceedings is considerably lower than that of mediators in civil proceedings. The difference may be nearly 17-fold (PLN 120 for the whole criminal proceedings mediation and PLN 2,000 for the whole civil proceedings mediation concerning property cases). The source of funding is also different: the State Treasury pays for mediation in criminal proceedings, and parties to the proceedings pay for mediation in civil matters (with the exception of a situation when a party is exempt from court proceedings costs).

4.3. SUMMARY OF SIMILARITIES AND DIFFERENCES BETWEEN MEDIATORS IN CRIMINAL AND CIVIL PROCEEDINGS

The conducted analysis leads to a conclusion that, in fact, the legal status of mediators in civil and criminal proceedings is similar. The basis of the regulation in civil and criminal proceedings is the principle that a court appoints a mediator from among the persons whose competence is confirmed by an entry in the registry kept

[17] A. Kościółek, *Cechy i zadania dobrego mediatora* [Characteristics and tasks of a good mediator], [in:] A.M. Arkuszewska, J. Pils, *Zarys metodyki pracy mediatora w sprawach cywilnych* [Outline of methodology of the mediator's work in civil matters], Lex a Wolters Kluwer business, Warsaw, 2014, p. 92.

by a district court. The requirements for court mediators are similar and the differences are not significant in practice also with regard to substantive competences. The only considerable difference between the regulations concerning mediation in civil and criminal matters consists in the fact that only natural persons can mediate in civil proceedings,[18] and in case of mediation in criminal proceedings, also authorised institutions can mediate.

The differences between the two groups of mediators start occurring at the stage of their competences, i.e. obligations and rights arising in the course of mediation proceedings and with respect to remuneration. The differences in a mediator's tasks, although noticeable, do not seem to be significant. A mediator in criminal proceedings has a few more duties but it does not mean that a mediator in civil proceedings does not perform them in practice.

The documents developed by mediators also have a little different form. The important difference consists in the mediator's duty to check the implementation of decisions laid down in a settlement agreement. However, the norm laid down in §14(5) Regulation on mediation procedure in criminal matters is a dead letter in practice because a mediator does not have legal measures to exercise it. Because of that, the provision was criticised in the doctrine and there is hope that in the future the rational legislator will decide to amend or delete it.[19] The issue of access to files and exemption from confidentiality is also regulated in a different way. Mediators in civil proceedings to a greater extent than mediators in criminal proceedings may adjust their activities to the parties' will. It seems that the above-described differences in the shape of the analysed legal regulations may result from a different formulation of needs and features of parties to criminal and civil proceedings. Axiological bases of the criminal law and its typical feature consisting in the use of coercive measures and asymmetric relations between the state and a citizen as well as of civil law based on the principle of equality of entities, parties' autonomy of will and the freedom of contract may be significant. However, the differences presented do not give grounds to state that mediators in criminal and civil proceedings form two different professional groups with different qualifications or competences.

5. PURPOSEFULNESS OF A SEPARATE REGULATION OF A MEDIATOR'S STATUS

The answer to the question about purposefulness of a separate regulation of a mediator's status in criminal and civil law requires that reference be made not only to axiological differences between those branches of law but also that one should take into consideration the aims and assumptions of criminal and civil mediation indicated in international law and literature.

---

[18] K. Antolak-Szymanski, O.M. Piaskowska, *Mediacja w postępowaniu*... [Mediation in civil proceedings...], p. 108.

[19] Thus, inter alia, I. Pączek, *Postępowanie mediacyjne jako konsensualne zakończenie postępowania karnego* [Mediation procedure as a conciliatory resolution of a criminal proceeding], Ius Novum No. 4, 2016, p. 114.

5.1. SPECIFICS OF PARTICULAR TYPES OF MEDIATION

The Recommendation N° R (99) 19 of the Committee of Ministers (of the Council of Europe) to Member States concerning mediation in penal matters to be used as mediation in criminal proceedings[20] aims to: enhance active personal participation of the parties, recognise the rights and interests of victims better, encourage the offenders' sense of responsibility for their acts and increase their reintegration and rehabilitation and the preventive role of law. Mediation in penal matters is defined as "a process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime". The Recommendation N° R (99) 19 emphasises that mediation in penal matters requires that mediators should have special skills, inter alia, in working with victims and offenders and basic knowledge of the criminal justice system (para. 24).

The Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters adopted on 18 September 2002 defines the aims of mediation in a different way and indicates that the key objective is to reduce the number of conflicts and the workload of courts. Similarly, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters[21] specifies the aims of mediation in civil proceedings and states that mediation should simplify and improve access to justice and provide a cost-effective and quick resolution of disputes. Mediation in family matters occupies a separate place in international documents. In accordance with the Recommendation N° R (98)1 of the Committee of Ministers to Member States on family mediation and Explanatory Memorandum, this type of mediation aims to be applied to reduce conflict between family members, protect the interests of children, lower economic and social costs of separation and divorce, reduce the length of time otherwise required to settle conflict and simplify and shorten the legal procedures following. The Recommendation N° (98)1 emphasises the special characteristics of family disputes such as interdependent and continued relations between the people involved, the emotional nature of personal relations between parties and influence of the settlement on third parties, especially children. These specifics generate the need for mediators' special competences. In all the above-mentioned documents, it is emphasised there is a need to develop standards of mediators' selection, responsibility, training and qualifications. It seems that in this context these should be understood as standards taking into consideration potential differences in qualifications and competences of particular types of mediators.

The documents of international law clearly indicate that mediation in criminal, civil and family matters are proceedings with different specifics, which play different functions in the system of law. The special nature of mediation in criminal, civil and family matters translates into a different character of mediators' work and defines special qualifications (knowledge and skills) necessary to mediate professionally and

[20] Recommendation N° R (99) 19 adopted on 15 September 1999, translation into Polish by E. Bieńkowska, *Archiwum Kryminologii*, Warsaw 1999–2000, Vol. XXV, pp. 228–243.

[21] The Directive, as a rule, applies only to cross-border disputes. However, extension of the adopted solutions to the area of domestic disputes is encouraged.

efficiently. There are proposals in the literature to determine special qualifications of mediators.[22] It is emphasised that a mediator in criminal proceedings "must (…) have adequate knowledge of the essence and significance of some consequences of crime as well as about ways of overcoming them".[23] He should also have knowledge of the importance of mediation for adjudication in criminal cases and its role in weakening the consequences of crime and preventing secondary victimisation.[24] Attention is drawn to the special nature of family mediation and it is indicated that the significant skills of a mediator include diagnosis of violence and addictions, the knowledge of basic child development psychology and a skill in dealing with the parties' and a mediator's own emotions.[25] It is also emphasised that: "it is necessary to have professional preparation to mediation in a particular field such as family dispute to achieve an agreement that is stable, high quality and meeting formal requirements".[26]

5.2. PROPOSAL TO DEVELOP SEPARATE REGULATIONS ON MEDIATORS' QUALIFICATIONS, RIGHTS AND OBLIGATIONS

The analysis of a mediator's status in the context of the specifics of functions and aims of particular types of mediation leads to the conclusion that at least to some extent it is purposeful to maintain separate regulations on a mediator's status in criminal and civil proceedings. The differentiation might be even broadened by taking into account the category of mediators dealing with family dispute. It is especially purposeful to maintain the separate regulations in the field of substantive qualifications, rights and obligations, i.e. broadly understood mediators' competences. It is necessary to conduct a critical analysis of the presently binding legal regulations. While in case of competences, the legislator to some extent differentiated mediators' tasks, taking into consideration inter alia the principle of the parties' equality and self-determination, on which civil law is based, and the need to additionally take care of the parties, especially the aggrieved in mediation in criminal proceedings; in case of mediators' qualifications, the proposed separate regulations have not been considered and introduced. The legislator did not determine any specific qualifica-

---

[22] Support for the opinion that there is a need to have specific knowledge and skills in various civil matters (family, employment, consumer or economic ones) can be found in K. Antolak-Szymanski, O.M. Piaskowska, *Mediacja w postępowaniu*... [Mediation in civil proceedings...], pp. 189–190.

[23] E. Bieńkowska, *Mediacja w projekcie nowelizacji kodeksu postępowania karnego* [Mediation in the Bill on amendment to the Code of Civil Procedure], Prokuratura i Prawo, No. 11, 2012, p. 61.

[24] E. Bieńkowska, *O unormowaniu mediacji w sprawach karnych* [On regulation of mediation in civil matters], Prokuratura i Prawo, No. 1, 2012, p. 28.

[25] K. Czayka-Chełmińska, M. Glegoła-Szczap, *O specyfice mediacji rodzinnej. Kilka refleksji na marginesie rozwiązań prawnych regulujących w Polsce stosowanie mediacji* [On specific features of family mediation. Several comments on the legal solutions regulating mediation in Poland], [in:] L. Mazowiecka (ed.), *Mediacja* [Mediation], Wyd. Oficyna a Wolters Kluwer business, Warsaw 2009, pp. 278 and 279.

[26] A. Gójska, *Mediacje w sprawach rodzinnych* [Mediator in family matters], Informator Ministerstwa Sprawiedliwości, Warsaw 2011, p. 8.

tions in the field of knowledge, skills or education, which a mediator in criminal proceedings should prove (e.g. knowledge of victimology or victim psychology) or in family matters (e.g. dealing with parties' emotions, child psychology). Despite the recommendations in the international law documents, there is also a lack of regulations determining the content of mediation training or developing the basis of accreditation system.[27] Summing up, although the solution assuming separate regulation of mediators' qualifications and competences as well as sources of financing mediation should be recognised as purposeful, the present regulations support this proposal insufficiently. In fact, it seems appropriate to treat the issue in the way that would extend the existent regulations by adding specific solutions in the field of qualifications of mediators in criminal and family matters and would thoughtfully and consistently lead to making the existent regulations concerning mediators' competences and tasks coherent in order to maintain their differentiation where necessary and give it up where possible.[28]

5.3. PROPOSAL TO UNIFY FORMAL REQUIREMENTS FOR COURT MEDIATORS

It seems purposeful to unify the existent regulations on formal requirements for mediators as well as some solutions concerning the appointment of mediators and their remuneration.[29] It is difficult to point out arguments that would rationally substantiate maintaining differentiation in this field in the present legal state. It is especially difficult to find grounds for the existent differentiation in the field of citizenship or guarantees. The differences in this area do not seem to result from the legislator's purposeful and thought-out activities but rather from some kind of inertia or the lack of effort to integrate regulations in the different branches of law. It seems that if we recognise the above premises as important, they should apply to mediators in criminal as well as civil proceedings. However, if we think their usefulness is low, we should give them up in both cases.

---

[27] Thus, inter alia, L. Mazowiecka, who indicates that: "In the current legal state (…) there is no obligation of preliminary training for candidates for mediators and constant retraining for active mediators", *Prawa człowieka i praworządność: mediacja, a prokurator prokurator* [Human rights and lawfulness: mediation vs. prosecutor], [in:] L. Mazowiecka (ed.), *Mediacja* [Mediation], Wyd. Oficyna a Wolters Kluwer business, Warsaw 2009, p.163. Similarly, M. Białecki, *Mediacja w postępowaniu cywilnym* [Mediation in civil proceedings], Wolters Kluwer Polska, Warsaw 2012, p. 95, who treats the lack of requirements concerning training of mediators and a generally liberal approach to requirements from mediators as the reflection of civil law principle of the parties' autonomy of will.

[28] The proposal to raise the requirements for qualifications of people working as mediators is put forward, inter alia, by E. Gmurzyńska, R. Morek, *Poland*, [in:] G. De Palo, M.B. Trevor, *EU Mediation Law and Practice*, Oxford University Press, 2012, p. 264 and K. Antolak-Szymanski, O.M. Piaskowska, *Mediacja w postępowaniu...* [Mediation in civil proceedings...], p. 107.

[29] Doubts about sense of differentiation of formal requirements from mediators in civil, criminal and minors-related proceedings are raised, inter alia, by M. Białecki, *Mediacja...* [Mediation...], p. 106.

Thus, in the literature, it is proposed to unify mediation in criminal and civil matters in the field of independent choice or change of a mediator by parties (current CPC regulations do not provide such a possibility) and in the field of disqualification from mediation. It is emphasised in the doctrine that: "The fact that there is no solution similar to that laid down in Article 183^9 CCP, which stipulates that parties can choose a different mediator than the one recommended by an entity referring a case to mediation, should be deemed defective".[30] The approach to the issue of exclusion of a broad range of legal professions and employees of justice institutions from mediation in criminal proceedings also raises doubts in the literature. It is necessary to agree with the opinion that the limitations introduced in Article 23a §3 CPC are too extensive and it would be absolutely sufficient to exclude a mediator matching the features laid down in Articles 40 and 41 CPC. The provision automatically disqualifies law enforcement officers who have been involved in the former proceedings in the case in any way. At the same time, the regulation would take into account the specifics of criminal law and a stronger need, probably existing there, to guarantee the parties impartiality of a mediator conducting their case.[31] Inter alia, L. Mazowiecka emphasises the advantages of the regulation adopted in civil law, in accordance with which a mediator can be an active lawyer (including an employee of law enforcement and justice system), and indicates that: "it is this group of people who have the appropriate knowledge of law and, therefore, the settlements they will help parties to reach will be approved of by a court without any problems".[32]

The last issue that needs unification is mediators' remuneration and the refund of expenses. The current differentiation between mediators in criminal and civil proceedings seems to be totally groundless. It results in depreciation of the position of mediators in criminal proceedings[33] and may cause the outflow of professional mediators in criminal matters to more profitable mediation in civil matters. One of the possible solutions in this area would be to unify the provisions regulating mediators' remuneration for participation in mediation in criminal proceedings and mediation in civil proceedings in non-property matters. However, the differentiation in the field of financing mediation should be assessed as purposeful and understandable. If mediation is to become an instrument of remedial justice that parties will be ready to use, the State Treasury must incur its cost. On the other hand, it is hard to find reasons for the State Treasury to finance mediation in

---

[30] E. Bieńkowska, *Mediacja w projekcie...* [Mediation in the Bill...], p. 61.

[31] P. Karlik, *Potrzeba zmian mediacji w sprawach karnych* [The need of changes in mediation in criminal matters], Prokuratura i Prawo No. 6, 2013, p. 137.

[32] L. Mazowiecka, *Mediacja...* [Mediation...], p. 163. By the way, it is worth mentioning that in some European Union Member States, there are solutions allowing only trained judges and solicitors to be mediators. These are, inter alia, Denmark and Finland. For more, see: M. Flagstad, T. Monberg, C.K. Pedersen, *Denmark*, [in:] G. De Palo, M.B. Trevor, *EU Mediation Law and Practice*, Oxford University Press, 2012 p. 79 ff; P. Taivalkoski, *Finland*, [in:] G. De Palo, M. B. Trevor, *EU Mediation...*, p. 106 ff.

[33] The problem is raised, inter alia, by: P. Karlik, *Potrzeba zmian...* [The need of changes...], p. 137 and G.A. Skrobotowicz, *Mediacja w zmienionym modelu postępowania karnego. Zagadnienia wybrane* [Mediation in the changed model of criminal proceedings. Selected issues], Roczniki Nauk Prawnych, Vol. XXVI, No. 1, 2016, pp. 65–66.

civil matters. At the same time, it is necessary to approve of the solution that the State Treasury covers the costs of mediation in case parties are made exempt from court proceeding costs. The regulation really safeguards equal access to mediation of parties to civil proceedings.

5.4. PROPOSAL TO UNIFY RULES OF AUTHENTICATION OF MEDIATORS AND TO REORGANISE THE EXISTENT REGULATIONS

It seems that neither the differences between axiological bases for civil proceedings and criminal proceedings nor the differences between the aims and assumptions of mediation in civil and criminal proceedings justify separate regulations concerning authentication of mediators. There are many available methods of authentication of mediators: the system of licensing or accrediting, accreditation of mediation centres or other organisations (governmental, non-governmental, local self-governmental ones), letting mediators' self-government to look after their professionalism, etc.[34] One of the methods is that adopted in our legal system, i.e. the method of authentication of mediators by entry into a registry kept by the president of a district court. If we assume that the legislator decided to choose this method of authentication in a thought-out way, it is surprising that there are different regulations concerning mediators in criminal and civil matters. The decision does not find grounds in the different content of the regulations in force because, as it was indicated above, the differences concerning formal and substantive requirements for both groups of mediators are insignificant. Moreover, the introduction of one system of mediators' authentication by entry into the registry is not an obstacle to the potential introduction of the differentiation of the expectations that mediators will declare readiness to conduct certain types of proceedings (e.g. in the field of substantive qualifications, the content of expected training, etc.).

The existence of two separate registries, especially in a situation in which many mediators are entered to both the Register of persons authorised to mediate in criminal proceedings and the List of mediators in civil proceedings (and often also one or more lists kept by organisations and universities), is not transparent for potential parties to mediation. Moreover, two separate registries generate bureaucratic and

---

[34] M. Białecki, *Mediacja* ... [Mediation...], pp. 88–90, describes an approach applied abroad: a model of accrediting used in Australia and Hungary (entry into the official registry as the confirmation of admission to mediation activities), an encouraging model applied, inter alia, in Austria and Japan (anyone can mediate but mediation has legal effects only when a mediator is registered) and a market model, which was used in Great Britain (a mediator may be any person chosen by the parties). The issue of authentication of mediators has also been discussed by American authors who focus on advantages and disadvantages of such categories as: regulated credentials, degree-related credentials, "substitute" credentials and rosters of mediators. B.M. Harges, *Mediator Qualifications: The Trend Toward Professionalization*, BYU L. Rev. 687, 1997; K.K. Kovach, *Mediation. Principle and Practice,* Thomson West, St. Paul 2000; M.L. Moffitt, *The four ways to assure mediator quality (and why none of them work),* Ohio State Journal of Dispute Resolution, Vol. 24, No. 2, 2009; Ch. Pou, *Summary of consultant's report on mediator quality assurance to MACRO and the Maryland mediator quality assurance oversight committee*, 2002; F.E.A. Sander, *Introduction*, Ohio State Journal on Dispute Resolution, Vol. 13, 1998.

organisational problems. Potential mediators in criminal and civil proceedings must submit the same documents twice and the presidents of district courts must analyse applications and take decisions concerning the same applicants twice. In addition, a question arises whether there is any type of link between the two registries. For example, whether, if somebody does not fulfil his obligations in criminal proceedings, which is a reason for deleting him from the Register of persons authorised to mediate in criminal proceedings, it also means that it should be the reason for deleting him from the List of mediators in civil proceedings. And if so, does it mean that the president of a district court is obliged to unify the Register and the List, i.e. in case of learning that a mediator does not meet the requirements for one registry, is the president of a district court obliged to verify if a mediator meets the requirements for the other registry?[35] Besides, there are other doubts that are legislative in nature. While one can understand the reasons why the status of a court mediator is regulated in the Act: Law on common courts system, which regulates such professions as expert witnesses or probation officers, it is not clear why the Act regulates only the status of mediators in civil matters; the more so as there is no differentiation between lists of expert witnesses and probation officers in criminal and civil proceedings.

It seems that it would be advantageous, also from the perspective of the rules of the legislative technique, to unify the regulations concerning the registry of mediators of all types (probably with special consideration of the specifics of mediators in criminal and family matters).[36] Such a regulation would increase the transparency of the provisions and would make their application easier.[37] In the present legal state, in order to determine the legal status of a mediator, it is necessary to take into account the provisions laid down in four different legal acts and four regulations.

In general, the status of a mediator in civil matters is laid down in the Code of Civil Procedure, the Act: Law on the common courts system (in the field of standing court mediators), the Act on court proceeding costs in civil cases (in the field of financing mediation) and the Regulation of the Minister of Justice of 20 January 2016

---

[35] An additional question arises: what the procedure should look like in a situation when a mediator enlisted in a few different registries in a few district courts is struck off in one court because of inappropriate fulfilment of duties. There is a provision in civil law, which can be interpreted as a step aimed at connecting the registries in different district courts. In accordance with Article 157d §4 of the Act: Law on the common courts system: "Valid decision to enter a standing mediator into the registry constitutes grounds for entering him into the registry of standing mediators in another district court on the mediator's request submitted to the president of this court" (there is no similar solution in criminal procedure). In the context of this solution, it seems even more purposeful to assume that information about striking a mediator off should be passed to the presidents of other district courts.

[36] Doubts about regulating substantive qualifications of mediators in civil matters in the statute and mediators in criminal matters in a regulation are raised, inter alia, by R. Uliasz, *Kwalifikacje podmiotowe arbitrów i mediatorów* [Subjective qualifications of arbiters and mediators], Kwartalnik ADR No. 4, 2014, p. 84.

[37] The lack of coherent regulation of a mediator's status is criticised, inter alia, by R. Morek, *Jaki powinien być mediator? Przekładanie nieprzekładalnego: o wymaganiach wobec mediatorów w ustawie* [What should the mediator be like? Translating the untranslatable: on requirements from mediators in the statute], [in:] L. Mazowiecka (ed.), *Mediacja* [Mediation], p. 255. The criticism concerns the legal state of civil mediation in 2009. However, it remains up-to-date after the amendment.

on the registry of standing mediators (based on the delegation laid down in the Act: Law on the common courts system), and the Regulation of the Minister of Justice of 20 June 2016 on mediator's remuneration and expenditures that are subject to refund in civil proceedings (based on the delegation laid down in CCP). The status of a mediator in criminal proceedings is regulated in the Criminal Procedure Code and two regulations issued based on the delegation laid down in CPC: the Regulation of the Minster of Justice of 7 May 2015 on mediation procedure in criminal matters and the Regulation of the Minister of Justice of 18 June 2003 on the amount and method of calculating expenditures of the State Treasury in criminal proceedings. Therefore, it seems absolutely desirable to reorganise and unify the regulations. The form of regulating the status of a mediator seems to be of secondary importance, however, it would certainly increase the transparency and understanding of provisions if they were developed consistently. For example, tasks and rules of mediators' activities might be regulated in the Codes of Civil and Criminal Procedure, the procedure of entering a registry and formal requirements might be laid down in one document, e.g. the Act: Law on the common courts system or a regulation, and a detailed scope of mediators' substantive qualifications and details concerning remuneration might be regulated in secondary legal regulations.[38]

Also uniform norms for all mediators developed by mediators themselves and organisations involved in mediation support the idea of enacting one regulation in the field of authentication. The ethical codes that are in force, e.g. the European Code of Conduct for Mediators, the Code of Ethics of Polish Mediators, are not addressed to special groups. Similarly, the Standards for ADR Mediation or the Standards for Mediators' Training adopted by the ADR Civil Council are addressed to all mediators, regardless of their specialisation. Also the officially approved assumption that a court mediator is a profession is an argument for one regulation. This conviction is also expressed by enlisting a court mediator in the Classification of Professions and Specialisations (number 263507) kept by the Ministry of Labour, Family and Social Policy. In this case, a mediator is broadly defined as a person who "with the use of mediation techniques helps parties to reach an agreement in family, civil, employment, economic and criminal matters outside a courtroom".

Summing up, in the light of the existent differences between the branches of law and particular types of mediation, it seems justified to maintain regulatory differentiation in the area of mediators' competences and tasks. However, it is necessary to assess differentiation in authentication of mediators differently because it seems purposeful to fully unify the regulations in criminal and civil matters. At the same time, unification of the existent regulations should not be an obstacle to distinguishing specific qualifications (knowledge and skills) that are crucial for various groups of mediators, with special consideration of mediation in criminal and family matters.

---

[38] Uniform regulation of mediators' qualifications is supported, inter alia, by A. Bieliński, who emphasises that: "it seems a reasonable solution to directly lay down the required qualifications of a mediator in civil matters in a legal act, e.g. a regulation", A. Bieliński, *Mediator w sprawach cywilnych – wybrane zagadnienia* [Mediator in civil matters – selected issues], Kwartalnik ADR No. 3, 2008, p. 33.

BIBLIOGRAPHY

Antolak-Szymanski K., Piaskowska O.M., *Mediacja w postępowaniu cywilnym. Komentarz* [Mediation in civil proceedings. Commentary], Wolters Kluwer, Warsaw 2016.

Białecki M., *Mediacja w postępowaniu cywilnym* [Mediation in civil proceedings], Wolters Kluwer Polska, Warsaw 2012.

Bieliński A., *Mediator w sprawach cywilnych – wybrane zagadnienia* [Mediator in civil matters – selected issues], Kwartalnik ADR No. 3, 2008.

Bieńkowska E., *O unormowaniu mediacji w sprawach karnych* [On regulation of mediation in civil matters], Prokuratura i Prawo, No. 1, 2012.

Bieńkowska E., *Mediacja w projekcie nowelizacji kodeksu postępowania karnego* [Mediation in the Bill on amendment to the Code of Civil Procedure], Prokuratura i Prawo No. 11, 2012.

Choromańska A., *Mediacja w zmienionym modelu postępowania karnego* [Mediation in the changed model of civil proceedings], Prokuratura i Prawo, No. 4, 2016.

Czayka-Chełmińska K., Glegoła-Szczap M., *O specyfice mediacji rodzinnej. Kilka refleksji na marginesie rozwiązań prawnych regulujących w Polsce stosowanie mediacji* [On specific features of family mediation. Several comments on the legal solutions regulating mediation in Poland], [in:] L. Mazowiecka (ed.), *Mediacja* [Mediation], Wyd. Oficyna a Wolters Kluwer business, Warsaw 2009.

Flagstad M., Monberg T., Pedersen C.K, *Denmark*, [in:] G. De Palo, M.B.Trevor, *EU Mediation Law and Practice*, Oxford University Press, 2012.

Głodowski W., *Stały mediator w sprawach cywilnych po nowelizacji Kodeksu postępowania cywilnego – wybrane zagadnienia* [Standing mediator in civil matters after the Amendment to the Code of Civil Procedure – selected issues], Kwartalnik ADR, No. 1, 2016.

Gmurzyńska E., Morek R., *Poland*, [in:] G. De Palo, M.B., Trevor, *EU Mediation Law and Practice*, Oxford University Press, 2012.

Gójska A., *Mediacje w sprawach rodzinnych* [Mediator in family matters], Informator Ministerstwa Sprawiedliwości, Warsaw 2011.

Harges B.M., *Mediator Qualifications: The Trend Toward Professionalization*, BYU L. Rev. 687, 1997.

Karlik P., *Potrzeba zmian mediacji w sprawach karnych* [The need of changes in mediation in criminal matters], Prokuratura i Prawo No. 6, 2013.

Kościółek A., *Cechy i zadania dobrego mediatora* [Characteristics and tasks of a good mediator], [in:] A.M. Arkuszewska, J. Pils, *Zarys metodyki pracy mediatora w sprawach cywilnych* [Outline of methodology of the mediator's work in civil matters], Lex a Wolters Kluwer business, Warsaw 2014.

Kovach K.K., *Mediation. Principle and Practice,* Thomson West, St. Paul 2000.

Mazowiecka L., *Prawa człowieka i praworządność: mediacja a prokurator* [Human rights and lawfulness: mediation vs. prosecutor], [in:] L. Mazowiecka (ed.), *Mediacja* [Mediation], Wyd. Oficyna a Wolters Kluwer business, Warsaw 2009.

Moffitt, M.L., *The four ways to assure mediator quality (and why none of them work)*, Ohio State Journal of Dispute Resolution, Vol. 24, No. 2, 2009.

Morek R., *Jaki powinien być mediator? Przekładanie nieprzekładalnego: o wymaganiach wobec mediatorów w ustawie* [What should the mediator be like? Translating the untranslatable: on requirements from mediators in the statute], [in:] L. Mazowiecka (ed.), *Mediacja* [Mediation], Wyd. Oficyna a Wolters Kluwer business, Warsaw 2009.

Pączek I., *Postępowanie mediacyjne jako konsensualne zakończenie postępowania karnego* [Mediation procedure as a conciliatory resolution of a criminal proceeding], Ius Novum No. 4, 2016.

Pou Ch., *Summary of consultant's report on mediator quality assurance to MACRO and the Maryland mediator quality assurance oversight committee*, 2002.

Sander F.E.A., *Introduction*, Ohio State Journal on Dispute Resolution, Vol. 13, 1998.
Skrobotowicz G.A., *Mediacja w zmienionym modelu postępowania karnego. Zagadnienia wybrane* [Mediation in the changed model of criminal proceedings. Selected issues], Roczniki Nauk Prawnych, Vol. XXVI, No. 1, 2016.
Taivalkoski P., *Finland*, [in:] G. De Palo, M.B. Trevor, *EU Mediation Law and Practice*, Oxford University Press, 2012.
Uliasz R., *Kwalifikacje podmiotowe arbitrów i mediatorów* [Subjective qualifications of arbiters and mediators], Kwartalnik ADR, No. 4, 2014.
Wójcik D., *Poglądy sędziów na temat mediacji w sprawach karnych* [Opinions of judges on mediation in criminal matters], [in:] L. Mazowiecka (ed.), *Mediacja* [Mediation], Wyd. Oficyna a Wolters Kluwer business, Warsaw 2009.

Legal regulations and other sources of law

Act of 17 November 1964 – Code of Civil Procedure, uniform text, Journal of Laws [Dz.U.] of 2016, item 1822, as amended.
Act of 6 June 1997 – Criminal Procedure Code, uniform text, Journal of Laws [Dz.U.] of 2017, item 1904.
Act of 27 July 2001: Law on the common courts system, Journal of Laws [Dz.U.] of 2016, item 2062, as amended.
Act of 10 September 2015 amending some acts in conjunction with the support for conciliatory resolution of disputes, Journal of Laws [Dz.U.] of 2015, item 1595.
Regulation of the Minister of Justice of 18 June 2003 on the amount and the system of calculating spending by the State Treasury in criminal proceedings, Journal of Laws [Dz.U.] of 2013, item 663.
Regulation of the Minister of Justice of 7 May 2015 on mediation procedure in criminal matters, Journal of Laws [Dz.U.] of 2015, item 716.
Regulation of the Minister of Justice of 20 January 2016 on the registry of standing mediators, Journal of Laws [Dz.U.] of 2016, item 122.
Regulation of the Minister of Justice of 20 June 2016 on remuneration and expenditures subject to refund in civil proceedings, Journal of Laws [Dz.U.] of 2016, item 921.

Recommendation N° R (99) 19 of the Committee of Ministers (of the Council of Europe) to Member States concerning mediation in penal matters to be used as mediation in criminal proceedings adopted on 15 September 1999.
Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters adopted on 18 September 2002.
Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

MEDIATOR IN CRIMINAL AND CIVIL PROCEEDINGS

Summary

The article presents the comparison of the professional status of mediators in civil and criminal matters. It analyses such issues as: the way the legal status of mediators is regulated, formal and substantive requirements for the candidates for mediators as well as the rights and obligations of mediators. The comparison of similarities and differences between existing regulations

with respect to goals and functions of the respective types of mediation serves as a starting point for answering the question whether a separate regulation of the legal status of mediators in the area of civil and criminal law is indeed purposeful and practical. The analysis leads to the conclusion that it is in general purposeful to maintain separate regulations with respect to qualifications, competences and obligations of mediators. At the same time, there are considerable arguments in favour of further clarification of the legal situation and the unification of the rules for authentication of mediators and establishing formal requirements for their activity.

Keywords: mediator, court mediator, register of accredited mediators, mediator's qualifications, criminal procedure, civil procedure

MEDIATOR W POSTĘPOWANIU KARNYM I CYWILNYM

Streszczenie

Tematem artykułu jest porównanie statusu zawodowego mediatorów karnych i cywilnych. Analizie poddane zostały takie zagadnienia, jak: sposób uregulowania statusu mediatora, wymogi formalne i merytoryczne wobec kandydatów na mediatorów oraz przypisane mediatorom uprawnienia i obowiązki. Porównanie podobieństw i różnic między istniejącymi regulacjami w kontekście specyfiki funkcji i celów poszczególnych typów mediacji było punktem wyjścia do odpowiedzi na pytanie o celowość i użyteczność odrębnego regulowania statusu mediatora w obszarze prawa cywilnego i karnego. Prowadzone rozważania doprowadziły do wniosku o celowości zachowania odrębności regulacyjnej w obszarze kwalifikacji, kompetencji i zadań mediatorów, przy jednoczesnej potrzebie uporządkowania sytuacji prawnej i ujednolicenia obowiązujących regulacji w obszarze uwierzytelniania mediatorów oraz stawianych im wymogów formalnych.

Słowa kluczowe: mediator, mediator sądowy, lista stałych mediatorów, kwalifikacje mediatorów, postępowanie karne, postępowanie cywilne

DAMAGES FOR RESTRAINTS ON COMPETITION – A CASE OF PRIVATE ENFORCEMENT IN THE PHARMACEUTICAL SECTOR*

MONIKA WAŁACHOWSKA**

1. INTRODUCTION

The purpose of this paper is to present the most important issues arising from a specific "junction" of intellectual property rights, competition law and compensation law (conflicts of law issues are discussed separately) in the pharmaceutical sector. For several years now, the European Commission has been monitoring patent settlements[1] aimed at delaying the commercialization of generic medicines, which may raise questions not only from the perspective of competition law but also from other areas of law. Such settlements can be one of the forms of patent abuse, but also a dominant position, and at the same time give rise to questions about the consequences in the field of law of damages. It is discussed that such market practices not only distort competition[2] but

* The article was written as part of the research project No. 2014/15/B/HS5/03183, finansed by the National Science Centre.

** PhD hab., Assistant Professor, Faculty of Law and Administration of Nicolaus Copernicus University in Toruń; walachowska@umk.pl

1 See M. Siragusa, *The EU pharmaceutical sector inquiry. New forms of abuse and Article 102 TFEU*, [in:] G. Caggiano, G. Muscolo, M. Tavassi (eds.), *Competition law and intellectual property: A European perspective,* Alphen aan den Rijn 2012, p. 177 ff; H. Ullrich, *Strategic patenting by the pharmaceutical industry: towards a concept of abusive practices of protection*, [in:] J. Drexl, N.R. Lee (eds.), *Pharmaceutical, innovation, competition and patent law – a trilateral perspective,* Cheltenham (Elgar Publishing) 2013, p. 244 ff; D. Schnichels, S. Sule, *The pharmaceutical sector inquiry and its impact on competition law enforcement*, Journal of European Competition Law & Practice Vol. 1, No. 2, 2010, p. 93 ff. See also, M.K. Kolasiński, *Odpowiedzialność odszkodowawcza za uszczerbek powstały w Unii Europejskiej w wyniku zawarcia sprzecznych z prawem antymonopolowym ugód patentowych o odwróconej płatności* [Liability for damage arisen in the European Union as a result of concluding reverse payment patent settlements against the antitrust law], Przegląd Prawa Handlowego No. 6, 2016, p. 5 ff.

2 However, if one looks at the agreements which do not contain a remuneration, the anti-competitive effect might be difficult to prove.

also affect the position of consumers[3] and others who are interested in the lower price of generic medicines. Moreover, the practices restraining the competition in the pharmaceutical sector may also affect the health policy of the state. Apart from the consumer, who is the "last link" in the "chain of supply" of generic drugs (substitutes for original medicines that may be marketed after the expiry of patent protection of original medicines), the economic interest of the public or private bodies co-financing patients' access to medicines should also be considered. In Poland, introducing the generic medicines to the market undoubtedly remains in the interest of the National Health Fund (hereinafter NHF) and the state budget (entities responsible for reimbursement of medicines [in Polish *refundacja*] and financing drugs within the health system financed by the state). Moreover, it is also insurance companies which might be (economically) interested in placing the generics to the market (if, for example, the insurer participates in costs of providing medicines within the life insurance coverage). On the other hand, another generic manufacturer may be able to gain a specific "competitive advantage", which may eventually lead to a price war[4] (though this effect may be actually beneficial to the consumer). It seems that, above all, the protection of the public interest requires the assessment of the legal instruments set out below in terms of competition law and its enforcement.

The reason for the use of various legal instruments to delay the commercialization of generic medicines is primarily an economic consideration related not only to the patent procedure itself, but also to the costs of introducing a new drug to the market. In addition to the hundreds of millions of euros or dollars, the drug's release takes up to 10 to 15 years,[5] and therefore, before the cost of the drug is "repaid", patent protection may expire. In the case of market success, it is in the interest of both the original and the generic manufacturer that the product is still commercially viable and profitable (which could serve as a basis for further innovative research). In the meantime, the introduction of generics naturally leads to significant price reductions (by up to several dozen percent[6]) and changes in the market position of the interested parties. The assessment of these types of behaviour is complicated by the fact that the consumer is not the deciding entity in choosing the product: it is the doctor who prescribes the medicine without any costs involved for himself (the costs are borne by the patient, sometimes also by the state or the national health fund or other bodies).

In 2009 the European Commission launched an inquiry on the pharmaceutical sector, monitoring the settlements concluded by manufacturers of original (patented) and generic drugs.[7] In the announcements published also in the subsequent years,

---

[3] However, the quantification of damages can be difficult and will be probably only approximate – see, L. Prosperetti, *Estimating damages to competitors from exclusionary practices in Europe: a review of the main issues in the light of national courts' experience*, [in:] G. Caggiano, G. Muscolo, M. Tavassi (eds.), *Competition law and intellectual property…*, p. 248.

[4] See, P.L. Parcu, M.A. Rossi, *Negotiated foreclosure and IPRs: recent developments*, [in:] G. Caggiano, G. Muscolo, M. Tavassi (eds.), *Competition law and intellectual property…*, p. 171.

[5] M.A. Carrier, *Competition law and enforcement in the pharmaceutical industry*, [in:] A. Ezrachi (ed.) *Research handbook on international competition law*, Cheltenham 2012, p. 522.

[6] *Ibid*.

[7] Seven reports on this matter (2008–2015) are available at: http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html (accessed on 11.08.2017). See also,

it was clearly emphasized that such settlements could have an anticompetitive effect, thus affecting not only the functioning of the market, but also the situation of consumers (and possibly other entities, e.g. national health funds, treasury, etc.). Some of the settlements may be aimed not so much to achieve an amicable solution to the dispute but, for example, the delay of commercialization of generic medicines (for a certain remuneration).

These issues coincide simultaneously with the European Union's aspirations to provide private enforcement mechanisms, thus ensuring the injured party the right compensation.[8] Directive of the European Parliament and of the Council No. 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, adopted on 26 November 2014,[9] has just been implemented by the Polish legislator.[10] It is, therefore, necessary to discuss the private enforcement mechanisms possible to be applied in the pharmaceutical sector.

2. INTELLECTUAL PROPERTY LAW AND COMPETITION LAW – THE CASE OF GENERIC DRUGS

2.1. GENERAL REMARKS

Because intellectual property rights, including patent rights, are exclusive, the right-holder may exercise his rights personally or license them to third parties. The mere fact that these rights are exclusive does not mean that there is some contradiction or conflict between intellectual property law and competition law.[11]

L. Kjølbye, *Article 82 EC as remedy to patent system imperfections: Fighting fire with fire?*, World Competition Law and Economics Law Review Vol. 32, issue 2, 2009 p. 163 ff.

[8] See, D. Ashton, D. Henry, *Competition damages actions in the EU. Law and practice*, Elgar Publishing (Cheltenham), 2013, p. 22 ff; CJEU judgment of 13 July 2006 in *Manfredi* C-295/04; see also, H.W. Micklitz, *Consumers and competition – access and compensation under EU law*, European Business Law Review 2006, p. 3 ff; U. Bernitz, *Introduction to the Directive on Competition Damages Actions*, [in:] M. Bergström, M.C. Iacovides, M. Strand (eds.), *Harmonising EU competition litigation. The new Directive and beyond*, Swedish Studies in European Law, Vol. 8, Oxford and Portland, Oregon, 2016, p. 3 ff; J.H.J. Bourgeois, S. Stievi, *EU competition remedies in consumer cases: Thinking out of the shopping bag,* World Competition No. 2, 2010, p. 242 ff.

[9] OJ L 349, 5 December 2014, p. 1 ff, hereinafter referred to as the Directive.

[10] Act on damages claims for harm caused by infringement of competition law of 6 April 2017, Journal of Laws [Dz.U.] of 2017, item 1132 (it came into force on 26 June 2017), hereinafter referred to as the Polish Act.

[11] See, R. Sikorski, *Wyłączność korzystania z praw własności przemysłowej* [Exclusive right to exercise intellectual property rights], [in:] E. Nowińska, K. Szczepanowska-Kozłowska (eds.), *System prawa handlowego. Tom 3 – Prawo własności przemysłowej* [Commercial Law system. Vol. 3: Intellectual property law], Warsaw 2015, p. 461 and citation of D. Miąsik, *Stosunek prawa ochrony konkurencji do prawa własności intelektualnej* [Competition protection law vs. industrial property law], Warsaw 2012; see also, K. Schöller, *Patents and standards: The antitrust objection as a defense in patent infringement proceedings*, [in:] W.P. zu Waldeck und Pyrmont, M.J. Adelman, R. Brauneis, J. Drexl, R. Nack (eds.), *Patents and technological progress in a globalized world. Liber Amicorum Joseph Straus,* Springer, Berlin Heidelberg 2009, p. 178.

Both disciplines are aimed at increasing competition through innovation.[12] Nevertheless, the way intellectual property rights are exercised can be evaluated in the field of national or EU competition law[13] (especially in the context of the abuse of a dominant position[14]). Therefore, if for example a biotechnological invention patent holder demands unreasonably high royalties or even refuses to grant a licence, its action may raise questions from the point of view of competition rules and consequently, lead to a claim for damages (providing a private enforcement of public competition law). Similarly, the use of other legal instruments may give rise to this anti-competitive effect. As an example, we might recall the creation of the "patent thickets"[15] or "overlapping patents"[16]. The other practices are in fact "artificial" attempts to extend protection through "ever-greening" strategy (which is related to earlier protection: for example, due to the end of patent protection for the substance itself, the patentee applies for protection for the manufacturing method), namely "extending" protection by patenting the second use or substance itself.[17] This type of patent strategy is referred to as "defensive patenting"[18], intended to block the development of new products by competitors. The phenomenon of "continuous refreshing" of protection leads to the emergence of patent thickets around the drug (various "parts" are subject to separate protection: for example, a cluster of patents

---

[12] See, U. Petrovčič, *Competition law and standard essential patents A transatlantic perspective*, Kluwer Law International, 2014, Ch. 3, pp. 2–3 ; see also, J. Drexl, *Deceptive conduct in the patent world – A case for US Antitrust and EU competition law?*, [in:] W.P. zu Waldeck und Pyrmont, M.J. Adelman, R. Brauneis, J. Drexl, R. Nack (eds.), *Patents and technological…*, p. 152.

[13] See, *Sirena* (C-40/70); *AstraZeneca* (C-457/10); see also, I. Ottaviano, [in:] G. Caggiano, G. Muscolo, M. Tavassi (eds.), *Competition law and intellectual property…*, p. 200; G. Ghindini, *Patent ambush and reverse payments: Comments*, [in:] J. Drexl, W.S. Grimes, C.A. Jones, R.J.R. Peritz, E.T. Swaine (eds.), *More common ground for international competition law?*, Cheltenham, Elgar Publishing 2011, p. 208; J. Drexl, *Intellectual property in competition: How to promote dynamic competition as a goal*, [in:] J. Drexl et al. (eds.), *Common ground for international competition law*, Cheltenham, 2011. p. 228; M. Kort, *Intellectual property and Article 82 EC*, [in:] W.P. zu Waldeck und Pyrmont, M.J. Adelman, R. Brauneis, J. Drexl, R. Nack (eds.), *Patents and technological…*, p. 157.

[14] See, K. Szczepanowska-Kozłowska, *Naruszenie praw własności przemysłowej* [Infringement of intellectual property rights], [in:] E. Nowińska, K. Szczepanowska-Kozłowska (eds.), *System prawa handlowego…* [Commercial Law system…], pp. 714–715. See also, CJEU case *Magill* C-242/91 (abuse of IP rights as an abuse of dominant position); see also, *Competition law as a patent 'safety net' in the biopharmaceutical industry,* The Competition Law Review Vol. 1 Issue 2, 2004, p. 75; J. Temple Lang, *European competition law and intellectual property rights – a new analysis,* ERA Forum Vol. 11, 2010, pp. 413, 436.

[15] See, C. Shapiro, *Navigating the patent thicket: Cross licenses, patent pools, and standard setting*, [in:] A.B. Jaffe, J. Lerner, S. Stern (eds.), *Innovation policy and the economy*, Vol. 1, Cambridge 2001, p. 120 ff.

[16] See, A. Fuchs, *Patent ambush strategies and Article 102 TFEU*, [in:] J. Drexl, W.S. Grimes, C.A. Jones, R.J.R. Peritz, E.T. Swaine (eds.), *More common ground…*, p. 190; M.W. Haedicke, [in:] M.W. Haedicke, H. Timmann, D. Bühler, *Patent law. A handbook on European and German patent law,* München 2014, p. 47; K. Schöller, *Patents and standards…*, p. 179.

[17] See H. Ullrich, *Strategic patenting…*, p. 246; C.M. Correa, *The current system of trade and intellectual property rights*, [in:] M. Bungenberg, Ch. Herrmann, M. Krajewski, J.P. Terhechte (eds.), *European yearbook of international economic law 2016,* Springer Switzerland 2016, p. 190; B. Whitehead, S. Jackson, R. Kempner, *Managing generic competition and patent strategies in the pharmaceutical industry,* Journal of Intellectual Property Law & Practice Vol. 3, No. 4, 2008 p. 227–229.

[18] See, D. Schnichels, S. Sule, *The pharmaceutical sector…*, p. 103.

on the active substance, molecules, the dosage form of the drug, concentration of preparations, second use). As an example of these activities one may indicate the patent thicket on perindopril.[19] The above strategies are used because the patent system in general allows medicinal products to be protected either as a single chemical compound or a mixture of compounds, etc.

Since the abovementioned practices in the pharmaceutical sector can affect the functioning of the market, the application of Article 101 (restrictive competition agreements) and Article 102 (abuse of a dominant position) of the TFEU might be necessary. The same refers to Art. 2 et seq. of the Polish Act on competition and consumer protection of 16 February 2007.[20]

2.2. LEGAL INSTRUMENTS DELAYING INTRODUCTION OF GENERIC DRUGS TO THE MARKET

It is indicated in the literature that the anti-competitive practices in the pharma sector can be primarily the reverse payment settlements concluded between the manufacturer of the reference drug ("original"), i.e.the patentee, and the manufacturer of the generic drug.[21] According to such agreements, the patentee is obliged to pay a certain amount of money for non-entry (or delay in introducing the product) into the market, i.e. for non-competing or delaying the competition.[22] Payment is called as being "in the opposite direction" (referred to as "pay-for-delay"), as pointed out by the Court of Justice of the European Union (CJEU) in *Lundbeck* case (T-472/13). The Commission, imposing fines (EUR 93 million and EUR 52 million, respectively), considered such agreements to be in breach of Article 101 section 1 TFEU.[23] This was confirmed by the CJEU,[24] considering that such settlements could constitute a breach of antitrust law.

---

[19] See, K. Roox (ed.), *Bariery związane z patentami, utrudniające wprowadzenie leków generycznych na rynek Unii Europejskiej* [Barriers related to patents hampering introduction of generic drugs onto the EU market], Centrala Europejskiego Biura Patentowego, Munich 2008, pp. 32–34.

[20] Journal of Laws [Dz.U.] of 2007, No. 50, item 331, as amended.

[21] See also, M.K. Kolasiński, *Ugody o odwróconej płatności w prawie antymonopolowym USA* [Reverse payment settlements in the US antitrust law], Państwo i Prawo No. 7, 2017, p. 55 ff.

[22] See, P.L. Parcu, M.A. Rossi, *Negotiated foreclosure and IPRs…*[in:] G. Caggiano, G. Muscolo, M. Tavassi (eds.), *Competition law and intellectual property…*, p. 158. The Authors emphasize that often the manufacturer of generic drugs obtains higher sum as a "pay-for-delay" remuneration than the expected profits when introducing the drug into the market. The "worth" of the settlements reaches hundreds millions of Euro each year – *ibidem* p. 159–160. See also R.J.R. Peritz, *Three statutory regimes at impasse: Reverse payments in pay-for-delay settlement agreements between brand-name and generic drug companies*, [in:] J. Drexl, W.S. Grimes, C.A. Jones, R.J.R. Peritz, E.T. Swaine (eds.), *More common ground…*, p. 198; O. Zafar, *Lundbeck, Johnson&Johnson and Novartis: The European Commission's 2013 'pay-for-delay' decisions*, Journal of European Competition Law & Practice Vol. 5, No. 4, 2014, p. 208.

[23] Commission's press release of 19 June 2013, IP 13/563.

[24] See, CJEU ruling of 8 September 2016, T-472/13; see also, M.K. Kolasiński, *Kryteria legalności ugód patentowych o odwróconej płatności – glosa do wyroku Sądu UE z 8.09.2016 r. w sprawie H. Lundbeck A/S i Lundbeck Ltd przeciwko Komisji Europejskiej* [Legal criteria for reverse payment

Undoubtedly, the purpose of such agreements is to maintain the market position by the reference (original) medicine manufacturer. Introducing the generic drug to the market will surely reduce the profits of the first manufacturer, and above all, it leads to a significant price drop (even 80 to 90%[25]). The consequences of concluding such settlements are certainly unfavourable for consumers who are forced to pay a higher price for drugs. The public (NHF) and even the private (the insurer) bodies participating in the costs of acquiring drugs may also be injured. Moreover, it can also be a health care provider who buys medicines and then treats patients. These settlements raise doubts also because neither the patients or the NHF participate in their conclusion or negotiation, although being the most interested in introducing generic as a much cheaper equivalent to the original drug.

The European Commission is also monitoring various forms of settlements in the pharmaceutical market,[26] emphasizing in particular the role of those intended to delay the entry generics to the market. The inquiry conducted between 2000 and 2011 only confirmed the growing number of such agreements, mostly triggered by the expiry of patent protection of many widely used drugs. The study found that the largest number of settlements in the pharma sector was discovered in Portugal, Germany, Denmark, the UK, and the least in Poland, Slovakia and Malta (this data is surely influenced by the size of pharmaceutical markets in the mentioned Member States). As the Commission found in the third report, 19% of the agreements were intended to delay entry of generic medicines to the market (and 11% involved a reverse payment).

Another instrument for delaying the commercialization of generic drugs may be the creation of "patent thickets" or applying the ever-green strategy ("refreshing" protection by, for example, applying for protection for another form of medicine when primary protection ends).[27] Creation of patent thickets[28] (or patent clusters) may take the form of "over-patenting" of different solutions, substances not necessarily essential from an economic point of view. This strategy is used only to strengthen the market position of the patentee and hamper its competitors' market entry (e.g. patenting of a way, substance, individual components of a drug, which may be based on "weak" bases, etc.), or in general weaken the innovative research of the competitors. At times, even "finer" (smaller) solutions are patented, only in order to "artificially" strengthen one's market position[29] (without the intent to commercialize these inventions). The evaluation of this type of market strategy must

---

patent settlements – Gloss to the CJEU judgment of 8.09.2016 in case *H. Lundbeck A/S and Lundbeck Ltd vs. European Commission*], Europejski Przegląd Sądowy Vol. 6, 2017 p. 40 ff.

[25] See, D. Schnichels, S. Sule, *The pharmaceutical sector…*, p. 97.

[26] See, *3rd Report on the Monitoring of Patent Settlements (period: January–December 2011)* of 25 July 2012, rec. 11 ff. See also, A. Italianer, *Innovation and competition*, [in:] B.E. Hawk (ed.), *Fordham Competition Law Institute. International antitrust law & policy,* Fordham 2013, pp. 318–319.

[27] See, M. Kort, *Intellectual property and Article…*, pp. 158–159.

[28] See, M. Blakeney, *Biotechnological patenting and innovation*, [in:] W.P. zu Waldeck und Pyrmont, M.J. Adelman, R. Brauneis, J. Drexl, R. Nack (eds.), *Patents and technological…*, p. 234.

[29] See, D.L. Rubinfield, R. Maness, *The strategic use of patents: implications for antitrust*, [in:] F. Lévêque, H. Shelanski (eds.), *Antitrust, patents and copyright. EU and US perspectives,* Elgar, Northampton 2005, pp. 88–89. These actions are also called *patent flooding strategy – ibid*. See also, D. Schnichels, S. Sule, *The pharmaceutical sector…*, p. 97.

be performed on a case-by-case basis, since competition law is not always the right instrument of protection,[30] as also serving to enhance innovation.[31]

Another phenomenon of "over-patenting" is "swapping" the product "form" (i.e. the change of a form of drug delivery, let us say from capsule to tablet, also called "product hopping") associated with a slight change in composition and then applying for a "new" patent protection. The reason of such action is strongly connected to the expiry of "original" patent protection.[32] As a result, follow-on ("improved") products can effectively block the introduction of generic drugs into the market (especially, since the introduction of such generic products usually takes place at about 1.5 years before the primary product loses protection).[33]

Similar issues were investigated in *AstraZeneca* case (C-457/10). It was established that the drug manufacturer withdrew from the market in several countries a capsule drug and replaced it with a water-soluble tablet. After receiving a licence to trade of a new version of the drug, the manufacturer withdrew the original permission. In this way, it was much more difficult for generic manufacturers to market their own products (as a result, patent protection for the original drug had expired, so manufacturers could not rely on the original manufacturer's test results and clinical trials). This also prevented the parallel import of the original drug from other Member States.[34] The judgment stated that such conduct was abusive.[35] It was also alleged that a number of misleading statements were filed at the patent offices of several Member States to extend the protection (aiming to obtain a supplementary protection certificate).

Another form of behaviour that can raise doubts from the point of view of competition law is filing multiple patent applications for the same product, which is designed to block or delay the introduction of generic patents (also called patented clusters and follow-on products).[36] What is essential in this respect is

---

[30] See, T. Käseberg, *Intellectual property, antitrust and cumulative innovation in the EU and the US,* Oxford 2012, pp. 112–113.

[31] See, H. Ullrich, *Strategic patenting…*, pp. 251–252.

[32] See, M.A. Carrier, *Competition law and enforcement…*, [in:] A. Ezrachi (ed.), *Research handbook…*, p. 537; B. Domeij, *Anticompetitive marketing in the context of pharmaceutical switching in Europe*, [in:] J. Drexl, N.R. Lee (eds.), *Pharmaceutical, innovation…*, p. 274.

[33] See, B. Domeij, *Anticompetitive marketing…*, p. 275.

[34] See, D.W. Hull, *The AstraZeneca judgment: Implications for IP and regulatory strategies*, Journal of European Competition Law & Practice Vol. 1, No. 6, 2010, p. 501. The author emphasizes that the original drugs' producers having the dominant position when applying the IP strategies can be more often seen as infringing antitrust law – *ibid*., p. 504.

[35] See also, S. Vezzoso, *Towards an EU doctrine of anticompetitive IP – Related litigation,* Journal of European Competition Law & Practice Vol. 3, No. 6, 2012, p. 527; R. Subiotto, D.R. Little, *The application of Article 102 TFEU by the European Commission and the European courts,* Journal of European Competition Law & Practice Vol. 4, No. 3, 2014, p. 263; J. Drexl, *Deceptive conduct…*, [in:] W.P. zu Waldeck und Pyrmont, M.J. Adelman, R. Brauneis, J. Drexl, R. Nack (eds.), *Patents and technological…*, p. 147–149; A. Spillman, *Transparency obligation for holders of EU IP assets in the pharmaceutical industry,* Journal of Intellectual Property Law & Practice Vol. 9, No. 2, 2014, p. 127 ff.

[36] See, the Commission's decision of 9 July 2014 – C(2014) 4955 final [*Servier*], when many reverse payment settlements were discussed. See also, S. Priddis, S. Constantine, *The pharmaceutical sector, intellectual property rights, and competition law in Europe*, [in:] S. Anderman, A. Ezrahi (eds.), *Intellectual property rights and competition law. New frontiers*, Oxford 2011, p. 259; H. Ullrich, *Strategic patenting…*, p. 266.

undoubtedly the intention of the patentee (if it is violation of competition, both public and private enforcement rules can be applied). After all, applying for patent protection itself cannot be regarded as a violation of competition (as the essence of intellectual property rights is exclusivity). However, if the purpose of submitting a large number of patent applications is not to obtain protection for, for example, a particular molecule, but to prevent potential competitors from gaining knowledge of what is actually protected, one could come to a conclusion that this behaviour forms a restraint of competition.[37] Similar conclusions can be reached when trying to obtain protection for a supplementary patent. This type of patent cluster may also paradoxically lead to "fragmenting" the protection of a solution or invention ("parts" will be protected by individual patents, while the competitor would be interested to protect the invention as a whole[38]). Uncertainty about the period of patent protection of individual components can block a competitor's market strategies and own actions. Although the mere filing of patent applications is legitimate, constituting an element of a market strategy, the use of the exclusive rights already granted may of course be subject to competition law (abuse of a dominant position under Article 102 TFEU[39]; however gaining a dominant position because of having a number of patents does not itself violate this provision). Therefore, the ownership of intellectual property rights does not mean that the patentee has a dominant position.[40] It is sometimes possible to conclude that the smaller the association of patents in the thicket, the more likely it is to recognize that the creation of such "clusters" has anti-competitive effects.[41] Thus, the misuse of patent law can in fact be regarded as infringing antitrust law.[42]

3. CLAIMS FOR DAMAGES FOR BREACH OF COMPETITION RULES IN THE PHARMACEUTICAL SECTOR

The first case and somewhat a turning point in establishing a right to compensation for damage caused by the infringement of competition law was *Courage Ltd. v. Crehan* case[43]. The CJEU expressly recognized the existence of a right to claim damages in favour of individuals, emphasising the direct effect of the provisions of

---

[37] See, S. Priddis, S. Constantine, *The pharmaceutical sector…*, p. 259; H. Ullrich, *Strategic patenting…*, p. 266.

[38] See, H. Ullrich, *Strategic patenting…*, p. 257.

[39] See, P.A. van Malleghem, W. Devroe, *AstraZeneca: Court of Justice upholds first decision finding abuse of dominant position in pharmaceutical sector,* Journal of European Competition Law & Practice Vol. 4, No. 3, 2013 p. 232.

[40] See, H. Ullrich, *Strategic patenting…*, p. 262.

[41] *Ibid*., p. 268.

[42] See, J. Drexl, *AstraZeneca and the EU sector inquiry: when do patent filings violate competition law?*, [in:] J. Drexl, N.R. Lee (eds.), *Pharmaceutical innovation...*, pp. 296–297; U. Petrovčič, *Competition law and standard…*, § 3.02; D.W. Hull, *The application of EU competition law in the pharmaceutical sector,* Journal of European Competition law & Practice Vol. 4, No. 5, 2013 p. 430 ff.

[43] C-453/99, [2001] ECR I – 6297.

the EU competition law.[44] The reasoning is undoubtedly connected to the doctrine of direct effect of the EU law. If an individual's rights provided for in the EU laws are infringed, that person should be allowed to claim compensation for a damage sustained by the unlawful act.[45] This rule was more expressly affirmed in the CJEU's ruling in *Manfredi* case[46]. The Court stated that "any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited by Article 81 EC [now Article 101 TFEU]". According to the ruling, in the absence of the EU laws on this matter, it was at that time for the Member States to designate the courts having the jurisdiction and rules to establish the liability for infringements of the EU competition law causing harm. In addition, the national laws were to provide rules for compensation of not only the actual damage, but also loss of profits[47] and interest. Both the Commission's Green Paper (2005) and White Paper (2008) on damages actions for breach of the EU antitrust rules, and consequently the Directive 2014/14 followed the full compensation rule.[48] In Poland, before implementing the Directive, these were the Civil Code rules which could have been applied in the discussed matter (Articles 361, 415).[49]

When it comes to the rules on compensation, the Directive itself, however, follows the concept of compensation presented in both *Courage* and *Manfredi* cases, but also leaves many issues to be decided within the framework of national laws[50] (especially when estimating damages[51]). The potential range of claimants is of course very wide and the loss suffered also must be understood broadly, followed

---

[44] See also, F. Cengiz, *Antitrust damages actions: lessons from American indirect purchasers' litigation,* 59 International & Comparative Law Quarterly Vol. 45, 2010, p. 51.

[45] See also, I. Lianos, P. Davis, P. Nebbia, *Damages for the infringement of EU competition law,* Oxford 2015, pp. 19–21; R. Cisotta, *Some considerations on the last development on antitrust damages actions and collective redress in the European Union,* The Competition Law Review Vol. 10, issue 1, 2014, p. 90.

[46] Joined cases C-295/04 and C-298/04 *Manfredi and Others v. Lloyd Adriatico* [2006] ECR I-6619.

[47] For example, loss of profits by the generic drugs manufacturers who – as a result of a created patent: thicket – cannot put their products on the market. In this case, the loss can be sustained even already at the moment of the expected patent (or supplementary protection certificate) expiry. The practice will show how the notion of manifestation of damage will be understood in these cases.

[48] See also (on the aim pointed out in the Green Paper) Ch. Hodges, *Competition enforcement, regulation and civil justice: what is the case?*, Common Market Law Review Vol. 43, 2006, p. 1383.

[49] See also, D. Hansberry, Ch. Hummer, M. Le Berre, M. Leclerc, *Umbrella effect: damages claimed by customers on non-cartelist competitors,* Journal of European Competition Law & Practice Vol. 5, No. 4, 2014, pp. 202–203; P. Podrecki, *Civil law actions in the context of competition restricting practices under Polish law,* Yearbook of Antitrust and Regulatory Studies No. 2(2), Vol. 2009, pp. 80, 88 ff.

[50] See also, I. Nestoruk, *Projekt dyrektywy harmonizującej krajowe przepisy służące dochodzeniu roszczeń odszkodowawczych z tytułu naruszenia unijnego prawa konkurencji* [Draft directive harmonising national regulations serving to claim damages due to infringement of the EU competition law], Kwartalnik Prawa Prywatnego No. 1, 2014, pp. 215–216.

[51] The fact that the Directive leaves the assessment of damages to the national laws is important for *cross-border cases* (connected to at least two legal systems, by for example influencing at least two legal systems being also the relevant markets), which surely is a case in the pharmaceutical sector. The issues of jurisdiction and applicable law are discussed in another paper.

by the rebuttable presumption with regard to the existence of harm resulting from a cartel[52] (Article 17 of the Directive). Therefore, the presumption deals only with the cartels, and not other actions restraining the competition.[53] The presumption of course refers only to the existence of harm and not its size. As a consequence, the evaluation of harm and damages is left to the national laws. Therefore, the plaintiff must prove the damage (defined as encompassing both *damnum emergens* and *lucrum cessans*[54]), having also the right to interest from the time harm has occurred[55] until compensation is paid (rec. 12 of the Directive).[56] In other words, the Directive does not alter the national rules governing the actions for damages, not it aims at changing the standard of proof. It must be also stated that the Directive does not make any position regarding punitive damages and so it is again the Member States to decide whether in cases of private enforcement of competition law such claims will be available and on what grounds.[57] This could be a subject to criticism – of course, on one hand, one could argue that this is a subject of minimum harmonisation (so the Directive had to take account that in fact only a minority of national laws allows punitive damages in general), but this may lead to the whole system of private enforcement being ineffective. What I mean by that is even if a national court grants punitive damages to the plaintiff in one jurisdiction and according to applicable law (if it is a cross-border case, which in the pharmaceutical sector may be quite frequent), the recognition of that judgment and its enforcement in another Member State might be considered contrary to public order.

Detailed comments in this section should begin by saying that the infringement of the competition rules should be eligible for tort, and therefore not as an event

---

[52] See also, E. Truli, *Will its provisions serve its goals? Directive 2014/104/EU on certain rules governing actions for damages for competition law infringements*, Journal of European Competition Law & Practice April 2016, pp. 11–12.

[53] This wording is – in the view of the Commission – much well founded – *The Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 TFEU*, C(2013) 3440 states that 93% of cartel cases proved to be causing harm.

[54] The broad meaning of damage was also underlined in *Manfredi*. See also, M. Carpagnano, *Private enforcement of competition law arises in Italy: analysis of the judgment of the European Court of Justice in joined cases C-295/289/04 Manfredi*, The Competition Law Review Vol. 3, issue 1, 2006, p. 70.

[55] The moment when the harm occurred must be assessed on a case-by-case basis. In the pharmaceutical sector, this could be for example a moment in which the Ministry of Health paid a price for a certain amount of drugs co-founded by the state (when for example only original [more expensive] drugs were on the market because of an existing reverse payment settlement delaying the introduction of generic drugs to the market).

[56] In addition Article 8 of the Polish Act states that when the basis for assessing damages is not the price from the date on which the claim is decided (usually a date of a court's ruling), but from another date, the plaintiff has the right to interest from that date to the day when the claim is eligible to be asserted.

[57] This follows a ruling of the CJEU in the *Manfredi* case (C-295/04 to 298/04), however in this case the CJEU did not support the view that punitive damages should be always allowed in such cases (according to the Court it should be left to the national laws, having in mind the principles of equivalence and effectiveness. The argument was connected with the assumption that the plaintiff could not be overcompensated, *de lege lata* – see Art. 3(3) of the Directive).

being the source of contractual liability.[58] The purpose of the parties, including for instance the reverse payment settlements, appears to be a breach of the competition rules (therefore, the element of unlawfulness is met). Responsibility will be based on the principle of fault.[59] This is confirmed by the wording of Article 3 of the Polish Act. This provision states that the perpetrator of the infringement is obliged to redress the damage caused to anyone by infringement of competition law, unless he is not at fault (the statute introduces the presumption of fault which is undoubtedly in favour to the plaintiffs).

As regards the situation of the indirect purchaser (e.g. a consumer, a patient), it should be noted that often, due to delay of introduction of generic medicines to the market, a direct buyer (e.g. a wholesaler) may transfer a higher price to the final buyer (this person may also be the National Health Fund, the Ministry of Health, the state, as a body participating in the costs of drug purchase, in connection with the refund of drugs). Undoubtedly, the final purchaser is also harmed and in principle should have the right to compensation (provided that the condition of an adequate causal relationship is satisfied). This rule is confirmed both by the wording of the Directive (Article 3) and the Polish Act (Article 3), granting the right to compensation to "anyone",[60] thus confirming the principle of full compensation.[61] Demonstration of the damage amount is certainly easier for a direct buyer, but as a rule also other "supply chain" actors can bear it. Compensation will of course depend on demonstrating the condition of an adequate causal relationship (according to the Directive the interpretation of this condition is left to the national courts[62]). In the event of a passing-on, theoretically the latter could claim compensation only from the direct purchaser. However, since the causal relationship does not have to be direct, the consumer (and other parties) may in principle claim compensation for damages. Another issue is of course the procedural economy: often the costs[63] (and time)[64] of

---

[58] See, D. Ashton, D. Henry, *Competition damages actions…*, p. 33. Moreover, there is no need of creating a special regime for antitrust torts – see, T. Eilmansberger, *The Green Paper on damages actions for breach of the EC antitrust rules and beyond: reflections on the utility and feasibility of stimulating private enforcement through legislative action*, Common Market Law Review Vol. 44, 2007, p. 442. See also, A. Jurkowska-Gomułka, *Private enforcement and competition law in Polish courts: The story of an (almost) lost hope for development*, YARS (Yearbook of Antitrust and Regulatory Studies) Vol. 6 (8), 2013, p. 122.

[59] See, D. Ashton, D. Henry, *Competition damages actions…*, p. 34.

[60] See, A. Andreangeli, *Private enforcement of antitrust. Regulating corporate behaviour through collective claims in the EU and US,* Cheltenham 2014, p. 257. It seems that also a so-called "umbrella effect" doctrine could be applied in the discussed cases. See, *Kone* case No. C-557/12 (the CJEU stated that also the entrepreneurs who did not take part in a cartel fixing prices but fixing prices under influence of a cartel, can be also deemed to be infringing the antitrust law. The practice will show how this doctrine will be applied in the pharmaceutical sector but it seems at a first glance that it could actually be applied).

[61] See, E. Truli, *Will its provisions serve…*, p. 4; this rule was also applied in the *Manfredi* (C-295/04).

[62] See, I. Lianos, *Uncertainty and damages claims for infringement of competition law in Europe,* Yearbook of European Law 2015, p. 4; *Manfredi* (joined cases C-295/04 to C-298/04); S. La, *The private damages action of competition law in EU and China,* Hamburg 2016, pp. 56–58.

[63] See, F. Cengiz, *Antitrust damages actions…*, pp. 44–45.

[64] See, E. Eklund, *Indirect purchasers – Is there anything new in the Directive? And introductory overview of the current and future status of indirect purchasers in the EU*, [in:] M. Bergström,

the proceedings may outweigh the sustained loss. For example, if the sole difference in price paid by the original drug consumer instead of paying for a generic, but not marketed through an agreement violating competition law, might be much smaller than the costs of legal proceedings. Perhaps the solution would be to introduce the possibility of bringing a group action (in the *op-out* model), however, so far in Poland there has been no case of a class action in the field of violation of competition law, nor is the institution of class action as such popular in Poland.[65]

These problems are in some ways resolved by the legislator by assuming that infringement of competition law is causing damage (understood as *damnum emergens* and *lucrum cessans*) (Article 7 of the Polish Act) and introducing the obligation to disclose evidence (Article 5 of the Directive and Article 17 of the Polish Act[66]). As it has been said, this might help when interpreting the notion of harm itself (primarily the difference in price,[67] but also the higher costs of reimbursement (*refundacja*) of medicines or even higher insurer benefits and premiums). Therefore, when establishing the size of harm and the amount of damages, we should apply the differential theory.[68] In this matter general rules of national law apply (so in Poland Article 361 of the Civil Code[69]). Certainly, when estimating the extent of compensation, Article 322 of the Code of Civil Procedure can be of great importance,[70] given that the presumption of harm does not prejudge its alleged weight. On the one hand, the defendant will have to prove that the breach of competition law has not caused harm, and on the other, it will be the injured party (e.g. NHF) which has to prove its amount. It seems

---

M.C. Iacovides, M. Strand (eds.), *Harmonising EU competition…*, pp. 274, 278; M.C. Iacovides, *The Presumption and quantification of harm in the Directive and the practical guide*, Hart Publishing 2016, pp. 295–296.

[65] See, A. Piszcz, *Practical private enforcement: Perspectives from Poland*, [in:] M. Bergström, M.C. Iacovides, M. Strand (eds.), *Harmonising EU competition…*, p. 213.

[66] Similarly as in the Directive, the Polish Act contains rules according to which some evidence is protected fully and some has to be disclosed based on specified rules, taking into account the rule of proportionality (this also concerns the documents at the possession of the national competition authority). The general rule is that a party requesting the disclosure must present a "reasoned justification of its claim for damages", containing "reasonably available facts and evidence sufficient to support the plausibility of its claim". Apart from that, it seems that also Art. 248 of the Civil Procedure Code (disclosure of a document, on demand of the civil court, with exceptions provided) could be applied. We could argue that in case of generic drugs information obtained by the direct purchaser about ongoing proceedings in another Member State could be sufficient; the same applies when the Commission is conducting its proceedings on a possible antitrust violation (the principle of effectiveness should play a role here as well).

[67] See, M. Strand, *Beyond the Competition Damages Directive: What room for competition law restitution?*, [in:] M. Bergström, M.C. Iacovides, M. Strand (eds.), *Harmonising EU competition…*, p. 285; E. Truli, *Will its provisions serve…*, p. 11; N. Reich, *The "courage" doctrine: encouraging or discouraging compensation for antitrust injuries?*, Common Market Law Review Vol. 42, 2005, p. 46.

[68] See, F. Maier-Rigaud, U. Schwalbe, *Quantification of antitrust damages*, [in:] D. Ashton, D. Henry, *Competition damages actions…*, p. 237 ff.

[69] See, P. Podrecki, *Civil law actions…*, p. 88 ff.

[70] This provision states that if, in the case of compensation for damage, income, return of unjust enrichment or survivor's benefit, the court finds that it is impossible or excessively difficult to prove the amount of the claim, the court may award a reasonable sum according to its assessment based on consideration of all the circumstances of the case.

impossible to establish the exact amount of harm in these cases.[71] It would be possible only if the legislature had introduced regulated prices of medicines (both original and generic): then the actual loss would constitute the difference between the fixed (by law) price and the actual price. *De lege lata*, the price of the final product (except for the reimbursed drugs [*leki refundowane*] where the price is sometimes fixed by the Ministry of Health,[72] and therefore determining the amount of compensation should be less difficult) depends on many factors. Also, the price quite often is the result of negotiations[73] between the drug manufacturer and the entity providing access to drugs guaranteed by the state (therefore, the hypothetical prices in the local market, original and generic, should be taken into account when establishing the probable difference in price). In this regard, the *prima facie* evidence could be of some help.[74] However, it seems inevitable to seek the expert's opinion. It also seems that the president of national authority might provide some information, on demand of a civil court hearing the case[75] (see also Article 6 of the Directive and Article 17 of the Polish Act). The rules adopted in the European Commission's Practical Guide on estimating damage in cases of violation of Article 101 or 102 TFEU of 2013,[76] indicating that one method to be used may be a difference method (comparison of prices, inter alia, with respect to time or geographic market), might serve as some help, however, they do not provide for a binding method and are not thorough enough to be applied in all the cases described in this Article.

Difficulties in estimating harm and corresponding damages may also be difficult when we apply the prerequisite of the causal link, which, according to Article 361 of the Polish Civil Code has to be "normal" (the Polish Civil Code follows the theory of a relevant causation). Certainly, the abuse of a dominant position by a patentee or entering the reverse payment settlements, may cause injury, but it is necessary to evaluate the consequences (the causal link does not have to be direct but must be relevant). While private enforcement rules provide for liability for "harm to anyone", it is important to consider how far the potential victim may be in the supply chain. Determining an relevant causal link will, after all, require a broad economic analysis, including a vast number of data and facts,[77] but of course the mere difficulty in

---

[71] See also, A. Jones, *Private enforcement of EU competition law: A comparison with, and lessons from, the US*, [in:] M. Bergström, M.C. Iacovides, M. Strand (eds.), *Harmonising EU competition…*, p. 37.

[72] See, ustawa o refundacji leków, środków spożywczych specjalnego przeznaczenia żywieniowego oraz wyrobów medycznych [Act on reimbursement of drugs, special dietary and other medical products] of 12 May 2011, Journal of Laws [Dz.U.] of 2011, No. 122, item 696, as amended.

[73] See, D. Schnichels, S. Sule, *The pharmaceutical sector…*, p. 96.

[74] See, A.P. Komninos, *The relationship between public and private enforcement: quod Dei Deo, quod Ceasaris Caesari*, [in:] P. Lowe, M. Marquis (eds.), *European Competition Law Annual: 2011 – Integrating public and private enforcement. Implications for courts and agencies,* Oxford and Portland, Oregon 2014.

[75] M.C. Iacovides, *The presumption and quantification…,* pp. 302–303.

[76] *Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, C (2013) 3440 of 11.6.2013.

[77] See, I. Lianos, P. Davis, P. Nebbia, *Damages for the infringement…*, p. 70; Ch.H. Bovis, Ch.M. Clarke, *Private enforcement of EU competition law,* Liverpool Law Review Vol. 36, 2015, pp. 59–60; G. Niels, R. Noble, *Quantifying antitrust damages – Economics and the law*, [in:]

establishing a causal link cannot lead to the exclusion of certain groups of entities from the circle of persons entitled to compensation. In this case, even the indirect purchaser who, because of practices restraining competition leading to delay of generic drugs in entering the market, had to pay a higher price for the product (see Article 2(20) of the Directive), might not have difficulties in proving that, e.g. a reverse payment settlement (particularly when the national competition authority issued a decision in this regard) is an event which normally causes harm (a higher market price of the drug). Nevertheless, the difficulty of demonstrating this may be due to the fact that the price of a drug depends on many factors, including the marketing strategy.[78] This makes the assessment done on a case-by-case basis, in line with the principle of effectiveness of the EU law and of the Directive itself. Both *Courage* and *Manfredi* cases affirmed that the question of causality remains subject to the requirements of the domestic legal system of each Member State. This could also be subject to some criticism, however, it seems that all the national laws contain rules on causation which may lead to fulfilment of the rule of full compensation and serving the corrective justice (and not just deterrence which is in general not a function of tort law and law of damages). If we apply this to the discussed pharmaceutical sector issues of private enforcement of competition law, there can be no doubts that, for example, the reverse payment settlement meets the *sine qua non* test and its normal/relevant result can be preserving higher prices of drugs. Another example is of course the abuse of patent by creating a patent thicket, which at the same time, aims at delaying the introduction of generic (less expensive) medicines to the market. We could even argue that, in fact, when looking at different strategies aiming at delaying or blocking the generics being commercialised (so unlawfully restraining the competition), not only the loss should be presumed, but also the causal link in this matter. If the payment by the patentee takes into account the price drop and moving the income from the patentee to the generic drugs producer, it is logical and obvious that the aim of reverse payment settlements is to restrain the competition but also to pay out the "lost" income by the originator after the expiry of patent protection. Therefore, surely the normal effect of such practices can be a price difference, here the estimated loss. Certainly, difficulties may arise when establishing a causal link by indirect purchasers, however, the Directive "solves" this in a way by introducing a presumption of a causal link for the benefit of indirect purchasers (see rec. 41, Article 16(2)). However, the defendant can rebut this "when he can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser" (Article 14(3)). For example, when the Ministry of Health buys a certain amount of drugs for a negotiated price and then fixes the price, the latter buyer cannot lay on a presumption of passing on (the wholesale buyer or the pharmacy cannot sell the drugs at a higher price).

Claims for compensation for damage caused by violation of competition law are subject to the limitation periods. The Directive delivers in Article 10 a detailed

---

K. Hüschelrath, H. Schweitzer (eds.), *Public and private enforcement of competition law in Europe. Legal and economic perspectives,* Springer–Berlin–Heidelberg 2014, p. 124 ff.

[78] See, I. Lianos, *Uncertainty and damages claims…*, p. 34.

scheme of limitation periods regarding the elements that constitute the infringement of which the party should be aware, or should reasonably be expected to be aware (the behaviour, the harm and the identity of the infringer). Moreover, the time cannot begin to run before the day on which the infringement has ceased. In addition, where a competition authority opens proceedings, the limitation period to bring the damages claims is suspended (or interrupted, depending on national law; suspension is a case in the Polish Act) until at least a year after the authority's decision is final or proceedings are otherwise terminated. The limitation period should be at least five years (see also Article 5 of the Polish Act).

The notion of the day when the infringement has "ceased" should be understood separately for each of the wrongdoers, for example, when we talk about a reverse payment settlement, it is possible to leave the cartel by one of the members (e.g. a generic drugs company), therefore, in his case the limitation period can begin, and towards the others – not yet. The same applies when a generic drug company introduces the drug to the market and the other does not. Another example of a case-by-case method to be applied in the discussed matters can be a situation when the president of Polish competition authority (UOKiK) (or any other competition authority) decides finally that certain behaviour (e.g. a reverse payment settlement, patent cluster, etc.) is, in fact, infringing competition law. If a party does not comply with the decision, the violation still continues and the limitation period cannot begin (even if another party ceased the wrongful behaviour, for example, one generic company gets another payment instalment for delaying introduction of the drug to the market, and the other does not).

According to Article 9 of the Polish Act in connection with Article 442(1) of the Civil Code, the time course of the 10-year limitation period *a tempore facti* begins on the date of termination of the infringement (and not, as in the case of CC, of the day of the incident). In these cases, it seems that, the time course of the limitation period cannot commence at a time when, for example, generics are not placed on the market, due to the conclusion of a reverse payment settlement or the existence of patent protection through the creation of patent clusters (and, for example, the indirect buyer does not know this). On the other hand, if a decision by the president of the UOKiK or the European Commission or a competition authority of another Member State, alleging an infringement of competition law, was issued, it could be considered as the date on which the injured person had knowledge (or should have had the knowledge with due diligence) of at least the debtor obliged to compensate the damage. It should be also added that the commencement of the proceedings before the UOKiK – before the implementation of the Directive – did not suspend or interrupt the run of limitation periods. *De lege lata*, however, by implementing Article 10(4) of the Directive into Article 9(2) of the Polish Act, the limitation period is suspended[79] from the moment of commencement of the proceedings (both mere investigation and antitrust case) by the president of the UOKiK, or by the European

[79] This wording is different from a general rule contained in Articles 123–124 CC (interruption of limitation period, resulting in – after e.g. the termination of proceedings – the beginning *de novo* of the time limit).

Commission, as well as any other national competition authority. The suspension ceases after a year from the day when the decision of the abovementioned authorities is final or the proceedings are otherwise terminated.

The notion of "knowledge" about the infringement, harm and the identity of the wrongdoer should be understood in a way that if the infringement was caused by several parties, the knowledge about one should be sufficient and the limitation periods should be assessed separately for each of the defendants. For example, the injured party might have the knowledge about all the members of the reverse payment settlement or about the parties creating a patent thicket in the pharmaceutical sector. It seems to be sufficient if the national competition authority issues a decision on competition law infringement, even without naming all the participating companies, for establishing that the injured party should reasonably have known about the infringement of the antitrust law. The infringement of competition law has the objective character and the mere possibility of causing anticompetitive effect should be enough. This is in accordance with Article 17(2) of the Directive (presumption of harm in cartel cases) and Article 7 of the Polish Act (presumption of harm in (all) cases of infringement of competition).

When we talk about the *ever-greening* strategy or creating patent thickets, the case-by-case method must also be applied. For example, one can have knowledge about the attempts to restraint competition and delaying the price drop of generic medicines, without even patent being invalidated or before the decision refusing to grant patent protection is issued. Also in these circumstances, the limitation period might begin.

The Directive also refers to the issue of effect of decisions of national or the EU competition authorities, which must be read also in conformity with Article 16(1) of the Regulation 1/2003 [2003] on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now Articles 101 and 102 TFEU) [OJ L1/1], which provides that when national courts rule on agreements, decisions, or practice under Article 101 or 102 TFEU, which are already the subject of the Commission's decision, they cannot take decisions running counter the decision adopted by the Commission.[80] However, the decision can of course be ruled out by the CJEU (see Articles 263, 267 TFEU). Having this in mind, Article 9(3) of the Directive states that[81] final decisions of a national competition authority issued in another Member State can be presented as *prima facie* evidence of the fact that an infringement of competition law has occurred. Of course, when it comes to the binding decisions of the Commission's finding an infringement of the EU competition law, in fact, the national courts cannot reach different decisions from those established by the Commission.[82] What is

[80] What is important is that the 1/2003 Regulation did not bring a change in the possibility of private enforcement, see also, T. Eilmansberger, *The Green Paper…*, p. 434.

[81] What is interesting, the proposal of the Directive was even more far reaching: the proposed wording aimed at providing the binding effect of the national competition authorities' decisions in all the Member States.

[82] See, the 7th Amendment to the Act against restraints to competition – Gesetz gegen Wettbewerbschränkungen GWB, entered into force on 1 July 2005, see Art. 33(4)) – cited after I. Lianos, P. Davis, P. Nebbia, *Damages for the infringement…*, p. 287. This issue is important to

interesting is that only the German and Spanish[83] laws so far provide for the binding effect of final decisions of both domestic and other European authorities.[84] Article 30 of the Polish Act provides only for the binding effect of decisions of the president of the UOKiK for the civil courts.[85]

The Directive clearly states in Article 11(1) that several entities can be jointly liable for the harm caused by actions infringing the competition law. Since this behaviour can shape many kinds of actions in the pharmaceutical sector, being a source of non-contractual liability (tort), if it had not been for the Directive, Article 441 of the Polish Civil Code would apply (if of course according to private international rules Polish law were applicable[86]). What must be stressed, however, is that the Directive leaves – apart from one exception – the question of joint and several liability (and recourse actions) to the national laws. The general rule contained Article 11(1) is that each infringing company (so, for example, all the parties to the reverse patent settlement) is bound to compensate the claimant in full for any harm caused by the joint infringers. From the view of Polish law, the rule is the same as in Article 441 CC, meaning that there is a responsibility for one and whole loss, hence if one of the defendants pays damages, the obligation expires and the rules of recourse apply.

However, Article 11(2) of the Directive introduces a safeguard for small and medium enterprises: they shall be liable only to their own direct and indirect purchases, if the prerequisites provided for in Article 11(2) a–b are met. This solution can be criticised as introducing different rules for the parties at stake. On the other hand, the idea of such differentiation seems to aim at "protection" (but not in all the circumstances – see Article 11 of the Directive) of smaller entities to be eliminated from the market as a consequence of high remunerations paid to the plaintiffs. The special rules apply also to the parties of leniency programmes (see also Article 11(4)b of the Directive and Article 5(2) of the Polish Act). In the pharmaceutical sector, it seems that only the second limitation on joint and several liability could apply. The party of a leniency programme can be liable towards the injured other than, e.g. direct or indirect purchasers, only when the reimbursement from other responsible parties is impossible (it is, if fact, a *sui generis* subsidiary liability for damages).

What is also important is that both the Directive and the implementing national laws provide for the passing on defence taking into account the fact that the defendant could have passed on the overcharge onto its customers (economic mitigation of a loss sustained). For example, the wholesale buyer purchasing the

---

follow in proceedings on claims for damages (so after the competition authority has decided on an infringement. Of course the standalone claims for damages are also possible).

[83] See, A. Piszcz, D. Wolski, *Poland*, [in:] A. Piszcz (ed.), *Implementation of the EU Damages Directive in Central and Eastern European countries*, Warsaw 2017, p. 217.

[84] See, I. Lianos, P. Davis, P. Nebbia, *Damages for the infringement…*, pp. 46, 282.

[85] This binding effect was already discussed by courts in Poland: in the resolution of 28 July 2008, III CZP 52/08, the Supreme Court decided that the final decision of the president of the UOKiK (Office for Protection of Competition and Consumers, so national competition authority in the wording of the Directive), declaring an infringement of competition law, is binding for civil courts.

[86] These issues are discussed in another paper.

original drugs from the patentee can pass on part (or the whole) overcharge in the price to the pharmacy (and of course the pharmacy can pass on its overcharge to the customers). This concept, taking into account these economically grounded actions, allows the defendant to "protect" himself from the too high claim (see Article 12 of the Directive). Moreover, according to Article 13 of the Directive, the burden of proof that the overcharge was passed on lies on the defendant. In addition, Article 4 of the Polish Act provides for a rebuttable presumption that if the infringement of competition resulted in an overcharge to the direct purchaser and the indirect purchasers acquired the products, the overcharge was passed on the indirect purchasers. In the case of generic drugs, this situation in Poland can only touch upon the drugs non-refundable by the state (these are sold on a fixed price). For example, it is quite possible that the wholesale direct purchaser passes the overcharge on to the pharmacy and it passes it on further on the consumers.

4. CONCLUSIONS

The analysis indicated that the exercise of exclusive rights and the application of various legal instruments to delay placing generic medicines on the market may be assessed in terms of breach of the competition law and the law of damages. The interpretation of Articles 101 and 102 TFEU, carried out for several years both by the European Commission and the CJEU, indicates that intellectual property and competition law do not "exclude" each other. As a consequence, an infringement by the antitrust law by a wrongful act can result in the rise of the right to compensation. The practice will show how, on the Polish market, claims for damages related to practices aimed at delaying the entry of generic products into the market will be of interest to potentially injured entities (primarily the NHF and the state) and how such concepts as harm or relevant causation will be interpreted.

BIBLIOGRAPHY

Andreangeli A., *Private enforcement of antitrust. Regulating corporate behaviour through collective claims in the EU and US,* Cheltenham 2014.

Ashton D., Henry D., *Competition damages actions in the EU. Law and practice*, Elgar Publishing (Cheltenham), 2013.

Bernitz U., *Introduction to the Directive on Competition Damages Actions*, [in:] M. Bergström, M.C. Iacovides, M. Strand (eds.), *Harmonising EU competition litigation. The new Directive and beyond*, Swedish Studies in European Law, Vol. 8, Oxford and Portland, Oregon, 2016.

Blakeney M., *Biotechnological patenting and innovation*, [in:] W.P. zu Waldeck und Pyrmont, M.J. Adelman, R. Brauneis, J. Drexl, R. Nack (eds.), *Patents and technological progress in a globalized world. Liber Amicorum Joseph Straus,* Springer, Berlin Heidelberg 2009.

Bourgeois J.H.J., Stievi S., *EU competition remedies in consumer cases: Thinking out of the shopping bag*, World Competition No. 2, 2010.

Bovis Ch.H., Clarke Ch.M., *Private enforcement of EU competition law,* Liverpool Law Review Vol. 36, 2015.

Caggiano G., Muscolo G., Tavassi M. (eds.), *Competition law and intellectual property: A European perspective,* Alphen aan den Rijn 2012.

Carpagnano M., *Private enforcement of competition law arises in Italy: analysis of the judgment of the European Court of Justice in joined cases C-295/289/04 Manfredi,* The Competition Law Review Vol. 3, issue 1, 2006.

Carrier M.A., *Competition law and enforcement in the pharmaceutical industry*, [in:] A. Ezrachi (ed.) *Research handbook on international competition law*, Cheltenham 2012.

Cengiz F., *Antitrust damages actions: lessons from American indirect purchasers' litigation,* 59 International & Comparative Law Quarterly Vol. 45, 2010.

Cisotta R., *Some considerations on the last development on antitrust damages actions and collective redress in the European Union,* The Competition Law Review Vol. 10, issue 1, 2014.

Correa C.M., *The current system of trade and intellectual property rights*, [in:] M. Bungenberg, Ch. Herrmann, M. Krajewski, J.P. Terhechte (eds.), *European yearbook of international economic law 2016,* Springer Switzerland 2016.

Domeij B., *Anticompetitive marketing in the context of pharmaceutical switching in Europe*, [in:] J. Drexl, N. Lee (eds.), *Pharmaceutical, innovation, competition and patent law,* Cheltenham (Elgar Publishing) 2013.

Drexl J., *Deceptive conduct in the patent world – A case for US antitrust and EU competition law?*, [in:] W.P. zu Waldeck und Pyrmont, M.J. Adelman, R. Brauneis, J. Drexl, R. Nack (eds.), *Patents and technological progress in a globalized world. Liber Amicorum Joseph Straus,* Springer, Berlin Heidelberg 2009.

Drexl J., *Intellectual property in competition: How to promote dynamic competition as a goal*, [in:] J. Drexl et al. (eds.), *Common ground for international competition law*, Cheltenham, 2011.

Drexl J., *AstraZeneca and the EU sector inquiry: when do patent filings violate competition law?*, [in:] J. Drexl, N.R. Lee (eds.), *Pharmaceutical innovation, competition and patent law – a trilateral perspective*, 2013.

Eilmansberger T., *The Green Paper on damages actions for breach of the EC antitrust rules and beyond: reflections on the utility and feasibility of stimulating private enforcement through legislative action,* Common Market Law Review Vol. 44, 2007.

Eklund E., *Indirect purchasers – Is there anything new in the Directive? And introductory overview of the current and future status of indirect purchasers in the EU*, [in:] M. Bergström, M.C. Iacovides, M. Strand (eds.), *Harmonising EU competition litigation. The new Directive and beyond*, Swedish Studies in European Law, Vol. 8, Oxford and Portland, Oregon, 2016.

Fuchs A., *Patent ambush strategies and Article 102 TFEU*, [in:] J. Drexl, W.S. Grimes, C.A. Jones, R.J.R. Peritz, E.T. Swaine (eds.), *More common ground for international competition law?*, Cheltenham, Elgar Publishing 2011.

Ghindini G., *Patent ambush and reverse payments: Comments*, [in:] J. Drexl, W.S. Grimes, C.A. Jones, R.J.R. Peritz, E.T. Swaine (eds.), *More common ground for international competition law?*, Cheltenham, Elgar Publishing 2011.

Haedicke M.W., H. Timmann, D. Bühler, *Patent law. A handbook on European and German patent law,* München 2014.

Hansberry D., Hummer Ch., Le Berre M., Leclerc M., *Umbrella effect: damages claimed by customers on non-cartelist competitors,* Journal of European Competition Law & Practice Vol. 5, No. 4, 2014.

Hodges Ch., *Competition enforcement, regulation and civil justice: what is the case?*, Common Market Law Review Vol. 43, 2006.

Hull D.W., *The AstraZeneca judgment: Implications for IP and regulatory strategies*, Journal of European Competition Law & Practice Vol. 1, No. 6, 2010.

Hull D.W., *The application of EU competition law in the pharmaceutical sector,* Journal of European Competition law & Practice Vol. 4, No. 5, 2013.

Iacovides M.C., *The Presumption and quantification of harm in the Directive and the practical guide,* Hart Publishing, 2016.

Italianer A., *Innovation and competition*, [in:] B.E. Hawk (ed.), *Fordham Competition Law Institute. International antitrust law & policy,* Fordham 2013.

Jones A., *Private enforcement of EU competition law: A comparison with, and lessons from, the US*, [in:] M. Bergström, M.C. Iacovides, M. Strand (eds.), *Harmonising EU competition litigation. The new Directive and beyond*, Swedish Studies in European Law, Vol. 8, Oxford and Portland, Oregon, 2016.

Jurkowska-Gomułka A., *Private enforcement and competition law in Polish courts: The story of an (almost) lost hope for development*, YARS (Yearbook of Antitrust and Regulatory Studies) Vol. 6 (8), 2013.

Käseberg T., *Intellectual property, antitrust and cumulative innovation in the EU and the US,* Oxford 2012.

Kjølbye L., *Article 82 EC as remedy to patent system imperfections: Fighting fire with fire?*, World Competition Law and Economics Law Review Vol. 32, issue 2, 2009.

Kolasiński M.K., *Odpowiedzialność odszkodowawcza za uszczerbek powstały w Unii Europejskiej w wyniku zawarcia sprzecznych z prawem antymonopolowym ugód patentowych o odwróconej płatności* [Liability for damage arisen in the European Union as a result of concluding reverse payment patent settlements against the antitrust law], Przegląd Prawa Handlowego No. 6, 2016.

Kolasiński M.K., *Kryteria legalności ugód patentowych o odwróconej płatności – glosa do wyroku Sądu UE z 8.09.2016 r. w sprawie H. Lundbeck A/S i Lundbeck Ltd przeciwko Komisji Europejskiej* [Legal criteria for patent reverse payment settlements – Gloss to the CJEU judgment of 8.09.2016 in case *H. Lundbeck A/S and Lundbeck Ltd vs. European Commission*], Europejski Przegląd Sądowy Vol. 6, 2017.

Kolasiński M.K., *Ugody o odwróconej płatności w prawie antymonopolowym USA* [Reverse payment settlements in the US antitrust law], Państwo i Prawo No. 7, 2017.

Komninos A.P., *The relationship between public and private enforcement: quod Dei Deo, quod Ceasaris Caesari*, [in:] P. Lowe, M. Marquis (eds.), *European Competition Law Annual: 2011 – Integrating public and private enforcement. Implications for courts and agencies,* Oxford and Portland, Oregon 2014.

Kort M., *Intellectual property and Article 82 EC*, [in:] W.P. zu Waldeck und Pyrmont, M.J. Adelman, R. Brauneis, J. Drexl, R. Nack (eds.), *Patents and technological progress in a globalized world. Liber Amicorum Joseph Straus,* Springer, Berlin Heidelberg 2009.

La S., *The private damages action of competition law in EU and China,* Hamburg 2016.

Lianos I., *Uncertainty and damages claims for infringement of competition law in Europe,* Yearbook of European Law 2015.

Lianos I., Davis P., Nebbia P., *Damages for the infringement of EU competition law,* Oxford 2015.

Maier-Rigaud F., Schwalbe U., *Quantification of antitrust damages*, [in:] D. Ashton, D. Henry, *Competition damages actions in the EU. Law and practice*, Elgar Publishing (Cheltenham), 2013.

Malleghem P.A. van, Devroe W., *AstraZeneca: Court of Justice upholds first decision finding abuse of dominant position in pharmaceutical sector,* Journal of European Competition Law & Practice Vol. 4, No. 3, 2013.

Miąsik D., *Stosunek prawa ochrony konkurencji do prawa własności intelektualnej* [Competition protection law vs. industrial property law], Warsaw 2012.

Micklitz H.W., *Consumers and competition – access and compensation under EU law*, European Business Law Review 2006.

Nestoruk I., *Projekt dyrektywy harmonizującej krajowe przepisy służące dochodzeniu roszczeń odszkodowawczych z tytułu naruszenia unijnego prawa konkurencji* [Draft directive harmonising national regulations serving to claim damages due to infringement of the EU competition law], Kwartalnik Prawa Prywatnego No. 1, 2014.

Niels G., Noble R., *Quantifying antitrust damages – Economics and the law*, [in:] K. Hüschelrath, H. Schweitzer (eds.), *Public and private enforcement of competition law in Europe. Legal and economic perspectives*, Springer–Berlin–Heidelberg 2014.

Parcu P.L., Rossi M.A., *Negotiated foreclosure and IPRs: recent developments*, [in:] G. Caggiano, G. Muscolo, M. Tavassi (eds.), *Competition law and intellectual property: A European perspective*, Alphen aan den Rijn 2012.

Petrovčič U., *Competition law and standard essential patents. A transatlantic perspective*, Kluwer Law International, 2014.

Piszcz A., *Practical private enforcement: Perspectives from Poland*, [in:] M. Bergström, M.C. Iacovides, M. Strand (eds.), *Harmonising EU competition litigation. The new Directive and beyond*, Swedish Studies in European Law, Vol. 8, Oxford and Portland, Oregon, 2016.

Piszcz A., Wolski D., *Poland*, [in:] A. Piszcz (ed.), *Implementation of the EU Damages Directive in Central and Eastern European countries*, Warsaw 2017.

Podrecki P., *Civil law actions in the context of competition restricting practices under Polish law*, Yearbook of Antitrust and Regulatory Studies No. 2(2), Vol. 2009.

Priddis S., Constantine S., *The pharmaceutical sector, intellectual property rights, and competition law in Europe*, [in:] S. Anderman, A. Ezrahi (eds.), *Intellectual property rights and competition law. New frontiers*, Oxford 2011.

Prosperetti L., *Estimating damages to competitors from exclusionary practices in Europe: a review of the main issues in the light of national courts' experience*, [in:] G. Caggiano, G. Muscolo, M. Tavassi (eds.), *Competition law and intellectual property: A European perspective*, Alphen aan den Rijn 2012.

Reich N., *The "courage" doctrine: encouraging or discouraging compensation for antitrust injuries?*, Common Market Law Review Vol. 42, 2005.

Roox K. (ed.), *Bariery związane z patentami, utrudniające wprowadzenie leków generycznych na rynek Unii Europejskiej* [Barriers related to patents hampering introduction of generic drugs onto the EU market], Centrala Europejskiego Biura Patentowego, Munich 2008.

Rubinfield D.L., Maness R., *The strategic use of patents: implications for antitrust*, [in:] F. Lévêque, H. Shelanski (eds.), *Antitrust, patents and copyright. EU and US perspectives*, Elgar, Northampton 2005.

Schnichels D., Sule S., *The pharmaceutical sector inquiry and its impact on competition law enforcement*, Journal of European Competition Law & Practice Vol. 1, No. 2, 2010.

Schöller K., *Patents and standards: The antitrust objection as a defense in patent infringement proceedings*, [in:] W.P. zu Waldeck und Pyrmont, M.J. Adelman, R. Brauneis, J. Drexl, R. Nack (eds.), *Patents and technological progress in a globalized world. Liber Amicorum Joseph Straus*, Springer, Berlin Heidelberg 2009.

Shapiro C., *Navigating the patent thicket: Cross licenses, patent pools, and standard setting*, [in:] A.B. Jaffe , J. Lerner, S. Stern (eds.), *Innovation policy and the economy*, Vol. 1, Cambridge 2001.

Sikorski R., *Wyłączność korzystania z praw własności przemysłowej* [Exclusive right to exercise intellectual property rights], [in:] E. Nowińska, K. Szczepanowska-Kozłowska (eds.), *System prawa handlowego. Tom 3 – Prawo własności przemysłowej* [Commercial Law system. Vol. 3: Intellectual property law], Warsaw 2015.

Siragusa M., *The EU pharmaceutical sector inquiry. New forms of abuse and Article 102 TFEU*, [in:] G. Caggiano, G. Muscolo, M. Tavassi (eds.), *Competition law and intellectual property: A European perspective,* Alphen aan den Rijn 2012.

Spillman A., *Transparency obligation for holders of EU IP assets in the pharmaceutical industry,* Journal of Intellectual Property Law & Practice Vol. 9, No. 2, 2014.

Strand M., *Beyond the Competition Damages Directive: What room for competition law restitution?*, [in:] M. Bergström, M.C. Iacovides, M. Strand (eds.), *Harmonising EU competition litigation. The new Directive and beyond*, Swedish Studies in European Law, Vol. 8, Oxford and Portland, Oregon, 2016.

Subiotto R., Little D.R., *The application of Article 102 TFEU by the European Commission and the European courts,* Journal of European Competition Law & Practice Vol. 4, No. 3, 2014.

Szczepanowska-Kozłowska K., *Naruszenie praw własności przemysłowej* [Infringement of intellectual property rights], [in:] E. Nowińska, K. Szczepanowska-Kozłowska (eds.), *System prawa handlowego. Tom 3 – Prawo własności przemysłowej* [Commercial Law system. Vol. 3: Intellectual property law], Warsaw 2015.

Temple Lang J., *European competition law and intellectual property rights – a new analysis,* ERA Forum Vol. 11, 2010.

Truli E., *Will its provisions serve its goals? Directive 2014/104/EU on certain rules governing actions for damages for competition law infringements,* Journal of European Competition Law & Practice April 2016.

Ullrich H., *Strategic patenting by the pharmaceutical industry: towards a concept of abusive practices of protection*, [in:] J. Drexl, N. Lee (eds.), *Pharmaceutical, innovation, competition and patent law,* Cheltenham (Elgar Publishing) 2013.

Vezzoso S., *Towards an EU doctrine of anticompetitive IP – Related litigation*, Journal of European Competition Law & Practice Vol. 3, No. 6, 2012.

Whitehead B., Jackson S., Kempner R., *Managing generic competition and patent strategies in the pharmaceutical industry,* Journal of Intellectual Property Law & Practice Vol. 3, No. 4, 2008.

Zafar O., *Lundbeck, Johnson&Johnson and Novartis: The European Commission's 2013 'pay-for-delay' decisions,* Journal of European Competition Law & Practice Vol. 5, No. 4, 2014.

Legal regulations and other sources

Directive of the European Parliament and of the Council No. 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, adopted on 26 November 2014, OJ L 349, of 5.12.2014.

Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów [Act on competition and consumer protection of 16 February 2007], Journal of Laws [Dz.U.] of 2007 No. 50, item 331, as amended.

Ustawa z dn. 12 maja 2011 r. o refundacji leków, środków spożywczych specjalnego przeznaczenia żywieniowego oraz wyrobów medycznych [Act of 12 May 2011 on reimbursement of drugs, special dietary and other medical products], Journal of Laws [Dz.U.] of 2011, No. 122, item 696, as amended.

Ustawa z dnia 21 kwietnia 2017 r. o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji [Act of 6 April 2017 on damages claims for harm caused by infringement of competition law], Journal of Laws [Dz.U.] of 2017, item 1132.

CJEU judgment of 13 July 2006 in *Manfredi*, C-295/04.

Joined cases C-295/04 and C-298/04 *Manfredi and Others v. Lloyd Adriatico*, [2006] ECR I-6619.

3rd Report on the Monitoring of Patent Settlements (period: January–December 2011) of 25 July 2012.

Competition law as a patent 'safety net' in the biopharmaceutical industry, The Competition Law Review Vol. 1, Issue 2, 2004.
Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C (2013) 3440 of 11.6.2013.

DAMAGES FOR RESTRAINTS ON COMPETITION – A CASE OF PRIVATE ENFORCEMENT IN THE PHARMACEUTICAL SECTOR

Summary

In this article the author analyses the most important issues arising from the interaction between intellectual property law, competition law and the damages law. For almost ten years, the European Commission has been monitoring the various market practices used by participants in this market, which may result in infringement of competition law. In particular, there are some doubts about reverse payment patent settlements aimed at delaying the introduction of generic medicines to the market, as well as other practices intended to disrupt the normal operation of the pharmaceutical market. The analysis of different practices in the pharmaceutical sector (in addition to the aforementioned settlements, they may involve various patent strategies, such as the creation of patent thickets) may bring us to the conclusion that such behaviour can be seen as a form of abuse of patent rights, but also the abuse of a dominant position (or other forms of restraints to competition), simultaneously raising questions about the consequences in the field of law of damages. As such market practices show, they can also influence the position of consumers and others interested in lowering the price of generic drugs (as substitutes for original drugs that can be marketed after the original drug's patent protection expires) but also affect the health policy of the state. Except the consumer, who is the "last link" of the generic supply chain, the economic interest of the public or private co-financiers of patients' access to medicines should also be taken into account. In Poland, commercialization of generic drugs undoubtedly remains in the interest of the National Health Fund and the state budget. The author discusses different legal instruments which aim to delay introduction of generic drugs to the market and indicates their legal consequences.

Keywords: generic medicines, pharmaceutical law, competition law, infringement of competition, damages, harm

ROSZCZENIA ODSZKODOWAWCZE Z TYTUŁU NARUSZENIA PRAWA KONKURENCJI – ZASTOSOWANIE W INDYWIDUALNYCH PRZYPADKACH W SEKTORZE FARMACEUTYCZNYM

Streszczenie

Celem niniejszego opracowania jest przybliżenie najistotniejszych zagadnień powstających na styku prawa własności intelektualnej, prawa konkurencji i prawa odszkodowawczego. Od niemal dziesięciu lat Komisja Europejska monitoruje rozmaite praktyki rynkowe stosowane przez uczestników tego rynku, których skutkiem może być naruszenie prawa konkurencji. W szczególności pewne wątpliwości budzą ugody patentowe o odwróconej płatności, których

celem jest opóźnienie wprowadzenia na rynek leków generycznych, a także inne praktyki, prowadzące do zakłócenia normalnego funkcjonowania rynku farmaceutycznego. Analizowane w artykule zachowania (oprócz wspomnianych ugód może chodzić o rozmaite strategie patentowe, jak tworzenie gąszczy patentów) mogą być jedną z form nadużywania patentu, ale i pozycji dominującej, rodząc jednocześnie pytania o konsekwencje natury odszkodowawczej. Jak się bowiem okazuje tego typu praktyki rynkowe mogą także wpływać na pozycję konsumentów oraz innych podmiotów, zainteresowanych niższą ceną leku generycznego (substytutu leku oryginalnego, który może być wprowadzony do obrotu po upływie ochrony patentowej leku oryginalnego), ale także wpływać na politykę zdrowotną państwa. Oprócz konsumenta, stanowiącego „ostatnie ogniwo" łańcucha nabywców generyków, na względzie należy mieć także interes ekonomiczny podmiotu publicznego czy prywatnego współfinansującego dostęp do leków przez pacjentów. W Polsce wprowadzenie na rynek generyków niewątpliwie pozostaje w interesie Narodowego Funduszu Zdrowia i budżetu państwa, jako podmiotów istotnych z punktu widzenia refundacji. Autorka analizuje różne instrumenty prawne mające na celu opóźnienie wprowadzenia na rynek leków generycznych, wskazując na ich konsekwencje prawne.

Słowa kluczowe: leki generyczne, prawo farmaceutyczne, prawo konkurencji, naruszenie konkurencji, odszkodowanie, szkoda

RIGHT TO COMPLAIN ABOUT EXCESSIVE LENGTH OF PROCEEDINGS AND TO CLAIM COMPENSATION

DOMINIKA CZERNIAK*

1. INTRODUCTION

Since the judgement in the case of *Kudła v. Poland*, the ECtHR judgements have assumed that the right to effective protection of the rights and freedoms (Article 13 ECHR) is applicable also when the right to a hearing within a reasonable time (Article 6 §1 ECHR) has been violated.[1] Therefore, before a complaint about excessively long proceedings is filed to the ECtHR, a State should have an opportunity to prevent it or find an effective remedy on its own,[2] and an individual should be able to claim a remedy before a national authority first.

Affording States some discretion, the ECtHR did not decide in what manner the States should organise their domestic appeal mechanism concerning excessive length of proceedings but indicated what it must meet the requirement of being "effective" (Article 13 ECHR). Legal solutions adopted by the Contracting States cannot constitute only a formal barrier resulting in the potential postponement of an application to the ECtHR, but should guarantee real protection of a person's rights. They must be effective from the legal and practical perspective, play a preventive

* MA, doctoral fellow at the Department of Criminal Procedure, Faculty of Law, Administration and Economics of the University of Wrocław; dominika.czerniak@onet.pl

1 As far as the right to a hearing in a reasonable time is concerned, the Court initially held that if in the same case it had already recognised the violation of Article 6 §1 ECHR, it was not necessary to issue a separate judgement on a State's entities' actions from the perspective of Article 13 ECHR. In the judgement in the case *Kudła v. Poland*, the Court held that "in the light of the continuing accumulation of applications before it", in which the principal allegation is a failure to ensure a hearing in a reasonable time, the time has come to review its case-law in this matter. The ECtHR judgement of 26 October 2000 in the case *Kudła v. Poland*, application No. 30210/96, §148.

2 Compare, M. Sykulska, *Prawo do skutecznego środka odwoławczego na przewlekłość postępowania – skutki wyroku Kudła przeciwko Polsce dla polskiego prawa i praktyki* [Right to effective complaint about excessive length of proceedings – impact of the judgement in the case *Kudła v. Poland* on the Polish law and legal practice], Gdańskie Studia Prawnicze Vol. XIII, 2005, p. 393.

function, i.e. prevent lengthiness, and a compensatory one.[3] Their main task should be to prevent lengthiness of proceedings by accelerating decisions made by a particular entity (preventive function).[4] However, the Court does not recognise the measures designed to ensure only a compensatory remedy as ineffective.[5] The Court prefers those solutions that prevent unjustified delays in the issue of a judgement because it is more important for the parties to proceedings to have the proceedings concluded in a reasonable time than to be afforded compensation.

The Act of 17 June 2004 on complaints about violation of the right to a hearing without unjustified delay in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings[6] (hereinafter: ACLP – the Act on complaints about lengthiness of proceedings) introduced a complaint about lengthiness,[7] which formally matches all the features of an effective measure of safeguarding an individual's rights and freedoms under Article 13 ECHR.[8] Initially, after ACLP entered into force, the ECtHR did not hear complaints concerning excessive length of proceedings if an applicant had not claimed his rights to a hearing in a reasonable time before a Polish court.[9] The Court even indicated that Poland "perfectly" implemented the Strasbourg requirements concerning the introduction of an effective measure of preventing

---

[3] M. Kłopocka, *Skarga na przewlekłość w postępowaniu sądowym (ze szczególnym uwzględnieniem przepisów postępowania karnego)* [Complaint about excessive length in court proceedings (with particular focus on criminal procedure law)], Nowa Kodyfikacja Prawa Karnego Vol. XIX, 2006, p. 150.

[4] F. Edel, *The length of civil and criminal proceedings in the case-law of the European Court of Human Rights*, Strasbourg 2007, p. 75, http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-16(2007).pdf [accessed on: 4.11.2016].

[5] ECtHR judgement of 29 March 2006 in the case *Scordino v. Italy*, application No. 36813/97, §§184–187, http://hudoc.echr.coe.int/ [accessed on: 4.11.2016].

[6] Journal of Laws [Dz.U.] of 2009, No. 61, item 498. At the beginning ACLP was applicable only to court proceedings. The Act of 20 February 2009 amending the Act on complaints about violation of the right to a hearing without unjustified delay (Journal of Laws [Dz.U.] of 2009, No. 61, item 498) introduced provisions applicable also to preparatory proceedings.

[7] M. Sykulska, *Prawo do skutecznego…* [Right to effective…], pp. 393–397; M. Kłopocka, *Skarga na przewlekłość…* [Complaint about excessive length…], pp. 150–151.

[8] For more, see inter alia: M. Zbrojewska, *Skarga na przewlekłość postępowania* [Complaint about excessive length of proceedings], Palestra No. 11–12, 2004, pp. 24–26; C.P. Kłak, *Wymogi formalne skargi na przewlekłość* [Formal requirements for a complaint about excessive length of proceedings], Prokuratura i Prawo No. 3, 2010, pp. 37–61; M. Śladkowski, *Skarga na przewlekłość postępowania sądowego w świetle orzecznictwa sądów polskich oraz Europejskiego Trybunału Praw Człowieka* [Complaint about excessive length of court proceedings in the light of the judgements of Polish courts and of the European Court of Human Rights], Monitor Prawniczy No. 2, 2016, p. 85; C.P. Kłak, *Temporalna niedopuszczalność złożenia nowej skargi na przewlekłość postępowania* [Temporal inadmissibility of filing a new complaint about excessive length of proceedings], Prokuratura i Prawo No. 3, 2011; M. Romańska, *Skarga na przewlekłość postępowania sądowego* [Complaint about excessive length of court proceedings], Przegląd Sądowy No. 11–12, 2005, p. 56; C.P. Kłak, *Rozpatrzenie sprawy bez nieuzasadnionej zwłoki i skarga na przewlekłość postępowania: zagadnienia wybrane* [Examination of the case without unjustified delay and complaint about excessive length of proceedings: selected issues], Ius Novum No. 2, 2011; C.P. Kłak, *Skarga na przewlekłość – zagadnienia proceduralne* [Complaint about excessive length – procedural issues], Ius Novum No. 2, 2010.

[9] Also see, inter alia, the ECtHR decision of 1 March 2005 in the case *Charzyński v. Poland*, application No. 15212/03, §§41–42, http://hudoc.echr.coe.int [accessed on: 4.11.2016].

lengthiness of proceedings.[10] However, the practice of ACLP application showed low effectiveness.[11] The ECtHR heard and acknowledged the complaints against Poland that were also connected with excessive length of the proceedings, in which Polish courts had formerly not recognised the violation of the right to a hearing in a reasonable time.[12] In the judgement in the case *Grzona v. Poland*, in connection with the change of the adjudicating practice, the ECtHR recognised a suit for compensation under Article 417 Civil Code[13] as an effective appeal measure in the meaning of Article 13 ECHR. Analysing the above-mentioned judgement, the representatives of the doctrine noticed that the ECtHR stand undermines the sense of the introduction of ACLP to the Polish legal system.[14] In the judgement in the case of *Rutkowski and others v. Poland*[15], ECtHR held that the complaint about excessive length of the proceedings under Polish law failed to play its role of an effective measure of the protection of an individual's rights and freedoms ensuring that a party can claim the right to a hearing in a reasonable time, and obliged Poland to undertake adequate steps to solve the problem.[16]

It is worth looking for the reasons why ACLP does not function properly and checking whether, and if so, what measures the legislator has which make it possible to implement the ECtHR recommendations and let ACLP effectively exercise the right to a hearing in a reasonable time. Leaving the analysis of the criteria for the

---

[10] ECtHR judgement of 29 March 2006 in the case *Scordino v. Italy*, application No. 36813/97, §§184–187, http://hudoc.echr.coe.int [accessed on: 4.11.2016].

[11] Compare, E. Holewińska-Łapińska, *Postępowania ze skargi na naruszenie prawa strony do rozpoznania sprawy cywilnej w postępowaniu rozpoznawczym przed sądami rejonowymi i okręgowymi bez nieuzasadnionej zwłoki, zakończone orzeczeniem merytorycznym* [Proceedings resulting from a complaint about violation of the party's right to have the civil case heard in preparatory proceedings in district and regional courts without unjustified delay, ending with a substantive judgement], [in:] E. Holewińska-Łapińska, A. Siemaszko (ed.), *Prawo w działaniu, t. 2, Przewlekłość postępowania sądowego* [Law in action. Vol. 2: Excessive length of court proceedings], Oficyna Naukowa, Warsaw 2007, pp. 162–201; E. Holewińska-Łapińska, *Praktyka zasądzania „odpowiedniej sumy pieniężnej" w przypadku stwierdzenia przewlekłości postępowania* [The practice of adjudicating "appropriate amount of money" in case excessive length of proceedings is recognized], [in:] E. Holewińska-Łapińska (ed.), *Prawo w działaniu, t. 6* [Law in action. Vol. 6], Oficyna Naukowa, Warsaw 2008, pp. 146–173.

[12] Compare, inter alia, the ECtHR judgement of 7 February 2012 in the case *Gut v. Poland*, application No. 32440/08; §§17–19, 31–34; the ECtHR judgement of 22 April 2010 in the case *Flieger v. Poland*, application No. 36262/08; §§23–24, 30–32, http://hudoc.echr.coe.int [accessed on: 4.11.2016].

[13] ECtHR judgement of 24 April 2014 in the case *Grzona v. Poland*, application No. 3206/09, §§34–36, http://hudoc.echr.coe.int [accessed on: 4.11.2016].

[14] Sic: T. Zembrzuski, *Skuteczny środek odwoławczy przed organami krajowymi a prawo do rozpoznania sprawy sądowej w rozsądnym terminie – rozważania na tle wyroku Europejskiego Trybunału Praw Człowieka z 24.06.2014 r. w sprawie Grzona p. Polsce (skarga nr 3206/09)* [Effective appeal measure before local bodies and the right to a hearing within a reasonable time – considerations in the light of the judgement of the European Court of Human Rights of 24 June 2014 in the case *Grzona v. Poland* (application No. 3206/09)], Europejski Przegląd Sądowy No. 3, 2015, p. 18.

[15] ECtHR judgement of 7 July 2015 in the case *Rutkowski and others v. Poland*, applications No. 72287/10, 13927/11, 46187/11; §§174–175, 179–186, http://hudoc.echr.coe.int [accessed on: 4.11.2016].

[16] More in: M. Mrowicki, *Glosa do wyroku ETPC z dnia 7 lipca 2015 r., 72287/10, 13927/11 i 46187/11* [Gloss on the ECtHR judgement of 7 July 2015, 72287/10, 13927/11 and 46187/11], el/LEX 2016.

assessment of lengthiness of proceedings aside,[17] it is necessary to focus on the issue of accessibility of a complaint about lengthiness and its compensatory function. It seems that for a person who is going to complain about excessive length of proceedings, it is first of all important when and under what conditions he may make use of ACLP, what compensation he is entitled to in case his complaint is recognised as justified and what factors are taken into consideration in establishing the compensation amount.

2. ADMISSIBILITY OF A COMPLAINT ABOUT EXCESSIVE LENGTH OF CRIMINAL PROCEEDINGS

Admissibility of a complaint about excessive length is essential for a person who intends to exercise that right. Before a court assesses a case of lengthiness, a complaint must be filed. The issue of admissibility of a complaint about excessive length of proceedings may be analysed based on four criteria: which entity may file a complaint about lengthiness, when and in what types of proceedings, and what formal requirements must be met; only the objective scope of ACLP does not raise doubts.[18]

In accordance with Article 1(1) ACLP, a complaint about lengthiness may be filed by entities referred to in Article 3(1) ACLP, whose right to a hearing without unjustified delay was infringed as a result of action or inaction of a court or a prosecutor conducting or supervising preparatory proceedings.[19] However, in this context, it is controversial to leave outside the objective scope of ACLP criminal cases *sensu largo*[20] that were not conducted or supervised by a prosecutor, which

---

[17] There is no doubt that because of the wording of Article 2(2) ACLP, which concerns the criteria for the assessment of lengthiness of proceedings worked out in the ECtHR case law (compare, F. Edel, *The length of civil…*, p. 40), the conflict with the ECtHR expectations results from inappropriate interpretation of this provision by Polish courts, and the legislator has little chance of effective influencing the judicature. Moreover, the criteria of the assessment of lengthiness of proceedings are mainly addressed to adjudicating bodies and from the perspective of a complainant they are of minor importance.

[18] The right to complain about lengthiness is the right of the party to the proceedings at the given stage of it and of the aggrieved even if he has not the rights of a party to judicial proceedings. However, it is worth noticing that what raises doubts is a public prosecutor's right to lodge a complaint about lengthiness. M. Zbrojewska is against such a possibility (compare, M. Zbrojewska, *Skarga na przewlekłość…* [Complaint about excessive length…], pp. 24–26). Differently, M. Śladkowski, *Skarga na przewlekłość…* [Complaint about excessive length…], p. 85.

[19] The right to complain about lengthiness is applicable only in relation to the main proceedings and does not apply to interlocutory ones. Compare, the ruling of the Appellate Court in Katowice of 11 December 2007, II S 16/07, KZS 2007, No. 12, item 66. The provision of Article 3 ACLP indicating entities entitled to complain also determines the proceedings in which the appeal measure can be used, inter alia, in cases concerning misdemeanours, collective entities' liability for punishable acts or in executory penal proceedings, unless the case concerns redress, compensation or reparation of harm ruled in favour of the aggrieved (Article 2(1a) ACLP).

[20] In relation to broadly understood criminal cases, it is worth drawing attention to doubts concerning the possibility of complaining about lengthiness, inter alia, in the proceedings involving minors (Act of 26 October 1982 on proceedings concerning minors, Journal of Laws [Dz.U.] 2016, item 1654), as well as in screening proceedings (compare, the Act of 18 October

is in particular applicable to fiscal penal proceedings. A *de lege lata* complaint about lengthiness does not apply to investigations[21] conducted by financial entities running preparatory proceedings under the supervision bodies superior to them.[22] The length of the proceedings in fiscal crime cases, which are not included within the objective scope of a complaint about lengthiness, are relatively short and account for six months at the most.[23] However, in a situation when a case is subject to obligatory defence (Article 79 §1 CPC), when it is necessary to appoint expert psychiatrists to assess actual state of psychical health of the accused or if a court rules temporary detention, a prosecutor must supervise the proceedings *ex officio*. He may also supervise investigations conducted by fiscal entities because of special significance or particularly complicated case but the dominant form of preparatory proceedings in cases concerning fiscal crimes is an investigation conducted without a prosecutor's supervision at the initial stage.[24] There is an opinion in case law that a prosecutor's decision to prolong an investigation is the first supervisory activity "because refusal to prolong an investigation would finish the stage of preparatory proceedings, and the decision to prolong them has an impact on the efficiency of the proceedings, makes them long, and as a result, on the right to a hearing without unjustified delay"; and the content of Article 298 §1 CPC is for such interpretation of Article 153 §1 FPC.[25] Approving of the opinion that prolonging an investigation for a period exceeding six months is the first supervisory activity, provided that cases referred to in Article 151c §2 FPC do not take place, the Supreme Court, in the

---

2006 on revealing information about documents issued by the state security entities in the period 1944–1990 and the content of those documents; i.e. Journal of Laws [Dz.U.] of 2016, item 1721). Although ACLP does not directly stipulate a admissibility of a complaint about lengthiness and Article 3 does not indicate entities entitled to file a complaint, it seems that, due to the criminal aspect of those proceedings, it should be assumed that such a possibility exists (compare, W. Jasiński, [in:] J. Skorupka (ed.), *Skarga na naruszenie prawa strony do rozpoznania sprawy bez nieuzasadnionej zwłoki. Komantarz* [Complaint about violation of the party's right to a hearing without unjustified delay. Commentary], C.H. Beck, Warsaw 2010, pp. 116–118). In relation to proceedings concerning minors, it is sometimes indicated that they are included in the scope of "criminal proceedings" under Article 3(4) ACLP (compare, A. Piaseczny, *Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i w postępowaniu sądowym bez nieuzasadnionej zwłoki. Komentarz* [Act on complaints about violation of the right to a hearing without unjustified delay in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings. Commentary], thesis 10 to Article 3 ACLP, Warsaw 2013, el/LEX.

[21] A prosecutor supervises investigations regardless of the fact whether a fiscal or a non-fiscal body for preparatory proceedings conducts them (Article 151c §1 FPC).

[22] Sic, G. Łabuda, T. Razowski, *Zakres przedmiotowy skargi na przewlekłość postępowania* [Objective scope of the complaint about excessive length of proceedings], Prokuratura i Prawo No. 1, 2012, pp. 75–76.

[23] In accordance with Article 153 §1 FPC, if a fiscal body for preparatory proceedings conducts an investigation or an inquiry and it is not concluded within the period of six months, a competent prosecutor can prolong it for another fixed period.

[24] Compare, M. Świetlicka, *Metodyka pracy prokuratora w postępowaniu w sprawach o przestępstwa skarbowe i wykroczenia skarbowe* [Methodology of a prosecutor's work in cases of fiscal crimes and misdemeanours], Krajowa Szkoła Sądownictwa i Prokuratury, Kraków 2014, pp. 7–9.

[25] Ruling of the Appellate Court in Katowice of 27 November 2013, II AKz 717/13, LEX No. 1488978.

resolution of seven judges of 28 January 2016, held that since a case is conducted or supervised by a prosecutor from the moment of undertaking steps referred to in Article 153 §1 FPC, a complaint about its lengthiness may concern activities performed after a prosecutor started supervising an investigation. Thus, the Court excluded a possibility of filing complaints about inappropriate way of conducting an investigation during the first six months.[26]

However, it is hard to agree with the Supreme Court's stand, which deprives a party to the proceedings of a possibility of claiming lengthiness of proceedings until a prosecutor starts supervising it, and postpones the moment of assessment of delays pursuant to Article 2 ACLP. At the same time, the proposal of the interpretation of Article 153 §1 FPC in conjunction with Article 122§1 FPC that admits the possibility of filing a complaint about lengthiness also when a prosecutor does not know about an investigation, has not contributed to delays, but is responsible for them, i.e. in the period of six months of the fiscal penal proceedings, seems to be controversial.[27] Taking into account the present objective scope of ACLP,[28] one can accept the limitation of the possibility of filing a complaint about lengthiness until a prosecutor starts supervising an investigation concerning a fiscal crime, provided that a party can effectively question the way in which preparatory proceedings are conducted by fiscal authorities at the moment a prosecutor starts supervising it. Treating the first six months of penal fiscal proceedings as a typical temporal limitation of the right to complain about lengthiness seems to be an acceptable compromise between the two presented earlier diverse stands of the doctrine and the judicature. On the one hand, a prosecutor is not responsible for lengthiness that he did not know about, and on the other hand, there is a possibility of efficient exercising the right to a hearing in a reasonable time from the moment of an actual initiation of fiscal penal proceedings. A prosecutor is responsible for lengthiness, which is not his fault in fact, but which he knew about and did not undertake efficient steps to remedy and accelerate. Prolonging an investigation, he must get acquainted with the material collected so far. Thus, he is aware of deficiencies of the proceedings and, due to relatively short time when an investigation is conducted

---

[26] Supreme Court resolution (7) of 28 January 2016, I KZP 13/15, www.sn.pl [accessed on: 4.11.2016].

[27] More in: W. Jasiński [in:] J. Skorupka (ed.), *Skarga na naruszenie…* [Complaint about violation…], pp. 103–106. The stand is based on the assumption that since a prosecutor may supervise all preparatory proceedings at every stage, including investigations in fiscal penal cases from the moment of their initiation, and the interpretation of Articles 3 and 5(4) ACLP depriving a party of the right to make use of ACLP until a prosecutor informs about the proceedings would be in conflict with ECHR; applying a pro-ECHR interpretation, it is necessary to assume that a complaint about lengthiness is also admissible in case a prosecutor does not supervise proceedings. Supervision of a fiscal penal investigation does not mean effective exercise of the rights under Article 326 CPC in conjunction with Article 113 §1 FPC, and a potential possibility of supervising the proceedings in the first six months is sufficient.

[28] It is noted in the doctrine that ACLP does not meet the aim for which it was enacted and it is proposed to amend it: first of all, changing the title by deleting the phrase "conducted or supervised by a prosecutor", and remodelling the mode of lodging a complaint and hearing a complaint about lengthiness. Sic, G. Łabuda, T. Razowski, *Zakres przedmiotowy…* [Objective scope…]…, pp. 76–77.

without his knowledge, should undertake appropriate supervisory activities.[29] In practice, the period of investigation in fiscal penal cases without a prosecutor's supervision, which a party may accuse of being groundlessly lengthy, is shorter than six months. For the accused, the time of proceedings is essential from the moment when an entity starts prosecution activities, e.g. detains him or conducts searches. Before an investigation changes a few weeks may pass from a stage "into a case" to a stage "against a person". Moreover, there is no aggrieved party in fiscal cases so the right to a hearing in a reasonable time cannot be infringed in the stage of proceedings *in rem*. However, after a prosecutor gets acquainted with the materials of the proceedings and the way in which it was conducted, he has a real possibility of improving the proceedings and issuing adequate requests or instructions concerning the continuation of the proceedings and preventing lengthiness.

The ECtHR does not indicate at which stage of proceedings and when it is possible to file a complaint in order to have the right to a hearing without unjustified delay respected and leaves detailed regulations at the discretion of the legislative of the Council of Europe Member States. However, it emphasises in its judgements that the assessment of lengthiness of proceedings should cover the period from the moment when a person is officially informed that the proceedings are conducted against him[30] till the issue of a final adjudication, including all the instances in which a case was heard.[31] As it was indicated above, it also believes that a complaint about lengthiness should serve the improvement of the proceedings rather than compensation for loss or harm caused.[32] As a result, if a complaint is to force entities conducting proceedings to respect the right to a hearing without an unjustified delay, there is no doubt that it should be admissible mainly in the course of proceedings: from the moment of criminal proceedings initiation until a definite adjudication on the rights and obligations of a party to the proceedings. This does not mean, however, that the domestic legislative cannot introduce limits to admissibility of legal measures aimed at improving proceedings provided it does not influence the modification of the period that is subject to assessment of potential lengthiness.[33]

---

[29] He may, in accordance with Article 326 §3(2) and (5) CPC in conjunction with Article 113 §1 FPC, get acquainted with the intentions of the bodies conducting the proceedings, indicate directions of an investigation, instruct and make decisions and orders, and in case the bodies conducting the proceedings do not comply with them, inform a superior body. Moreover, if, analysing the material collected in the proceedings, he notices irregularities resulting in lengthiness of the proceedings, he may apply Article 19 §1 CPC in conjunction with Article 113 §1 FPC.

[30] ECtHR judgement of 2 November 2000 in the case *Philippe Bertin-Mourot v. France*, application No. 36343/97; §52, http://hudoc.echr.coe.int [accessed on: 4.11.2016]. Official information about the proceedings conducted means, inter alia, presenting charges, detention, conducting an interrogation and a search. For more, see: F. Edel, *The length of civil…*, p. 23 and case law referred to therein.

[31] Compare, inter alia, the ECtHR judgement of 26 October 2000 in the case *Kudła v. Poland*, application No. 30210/96; §122, http://hudoc.echr.coe.int [accessed on: 4.11.2016].

[32] ECtHR judgement of 29 March 2006 in the case *Scordino v. Italy*, application No. 36813/97, §§184-187, http://hudoc.echr.coe.int [accessed on: 4.11.2016].

[33] Compare, e.g. Article 7 of the Finnish Act on Compensation for the Excessive Length of Judicial Proceedings; http://www.finlex.fi/fi/laki/kaannokset/2009/en20090362.pdf [accessed on: 4.11.2016]. Also compare, Article 14 ACLP.

Based on ACLP, when it is admissible to file a complaint about lengthiness, on the one hand, it is determined in Article 5(1) ACLP and on the other hand, in Article 14(1) ACLP.[34]

In accordance with Article 5(1) ACLP, a complaint about lengthiness may be filed "in the course of the proceedings into a case" in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings. In case law, the concept was initially referred to the currently conducted stage of proceedings and treated as a temporary measure aimed at immediate improvement of a trial, which "in a direct way is to serve the enforcement of the right to a hearing in a case, in which the right to a hearing in a reasonable time was infringed",[35] and the phrase "in the course of the proceedings into a case" was identified with conducting proceedings at one of its stages (in preparatory proceedings, before a court of first instance, before a court of second instance) and not as a whole. Thus in practice, filing a complaint, a petitioner had to assess whether the proceedings or one of their stages may be finished in the foreseeable future because only then his request to recognise lengthiness or to award him compensation had a chance to be examined by a court, and the accusation of the infringement of the right to a hearing without unjustified delay had to concern the stage of the proceedings at which the case currently was. Otherwise, the proceedings initiated by a complaint was discontinued as groundless.[36]

The Supreme Court, standardising the former adjudication policy in its resolution of 9 January 2008, emphasised that the conclusion of a given part of the proceedings, and even a valid judgement in a case before a hearing of a complaint about lengthiness, does not exclude the possibility of adjudicating whether a complaint is justified and executing the repressive-compensatory function.[37] On the other hand, in a later judgement, the Court held that the legislator's use of the phrase "in the course of the proceedings conducted" does not mean that the complaint "must be limited to the current stage of the proceedings as it refers to a complaint filed in the course of the proceedings into a case and not in the course of the proceedings in a given instance".[38] As a result, a complaint about lengthiness may be filed regardless of the stage of the proceedings at which a case is, and an accusation may refer to all, also those completed, stages of the proceedings. A complainant has a guarantee that the complaint will be heard even if a valid judgement in the case is issued within this period. The only limitation concerning the possibility of filing a complaint about

---

[34] The provision introduces limitation in the form of inadmissibility of re-lodging a complaint about lengthiness of proceedings in the same case for a period of 12 months (or six months in cases where the accused is detained), if the former complaint had been rejected. For more on this issue, C.P. Kłak, *Temporalna niedopuszczalność…* [Temporal inadmissibility…], p. 45.

[35] Compare, the Supreme Court resolution of 23 March 2006, III SPZP 3/05, OSNP 2006, No. 21–22, item 341.

[36] Compare, inter alia, the ruling of the Appellate court in Kraków of 22 November 2007, II S 6/07, KZS 2007, issue 12, item 65; the Supreme Court ruling of 10 May 2006, III SPP 19/06, OSNP 2007, No. 11–12, item 179.

[37] Supreme Court resolution of 9 January 2008, III SPZP 1/07, OSNP 2008, No. 13–14, item 205.

[38] Supreme Court ruling of 24 September 2013, III SPP 188/13, LEX No. 1448755; also compare, in particular, Supreme Court resolution of 28 March 2013, III SPZP 1/13, OSNP 2013, No. 23–24, item 292.

lengthiness is the issue of a valid judgement in the case. Once the case was heard in accordance with Article 5(1) ACLP and a petitioner filed a complaint after the issue of a valid judgement, his aim was not to accelerate the proceedings but to obtain a compensation. The latest aim may be with no obstacles fulfilled in a civil lawsuit, although it is more difficult than under ACLP. It will be necessary to point out all the requirements for the State Treasury compensatory liability (occurrence of lengthiness, loss and a causative relation between them), and a civil law court has a total discretion to award a compensation that in its assessment will be adequate with respect to the circumstances of a given case. These are considerable obstacles in comparison to a simplified way of claiming a compensation in connection with lengthiness of the proceedings laid down in ACLP, and a complainant has not been guaranteed a minimum amount of compensation.[39]

Based on the literal wording of Article 6 ACLP, formal terms of a complaint about lengthiness are not troublesome, even if one takes into consideration the fact that the applicant is not requested to supplement formal deficiencies referred to in Article 6(2) ACLP.[40] Apart from general rules of a procedural document (Article 119 CPC), PLN 100[41] is charged accompanied by a request to recognise lengthiness in a particular case and a list of circumstances justifying this request (Article 6(2) ACLP). However, in the doctrine and case law, listing circumstances justifying a request to recognise lengthiness is interpreted[42] as an obligation to indicate particular procedural activities a court or a prosecutor failed to undertake or undertook inappropriately "causing this way an unjustified delay in the proceedings", and "the necessity to assess punctuality of actions undertaken at the current as well as the former stages of the proceedings takes place only when a complainant states charges concerning those stages of the proceeding".[43] The indication of the period of proceedings alone does not meet the requirements laid down in Article 6(2) ACLP.[44]

---

[39] Nota bene, it should be noticed that the lack of a guarantee of compensation or redress for lengthiness in civil proceedings causes that a lawsuit under Article 417 Civil Code cannot be treated as a measure of protection of an individual's rights in compliance with the ECtHR's requirements. The ECtHR emphasises that it is necessary to ensure a base amount for every year of unjustified delay in hearing a case. Compare, the ECtHR judgement of 10 November 2004 in the case *Apicella v. Italy*, application No. 64890/01, §26, http://hudoc.echr.coe.int [accessed on: 4.11.2016].

[40] Compare, however, Article 6(2a) of the governmental Bill amending the Act on complaints about violation of the right to a hearing without unjustified delay in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings and some other acts – the Sejm paper no. 851, where it is proposed to summon a complainant to correct formal errors in a complaint about lengthiness.

[41] The necessity to pay a fee is not an excessive requirement – the charge is not high and a complainant may apply for exemption, and in case a complaint is rejected, the fee is subject to a refund (Article 17(3) ACLP).

[42] C.P. Kłak, *Szczególne wymogi skargi na przewlekłość postępowania* [Special requirements for the complaint about excessive length of proceedings], Prokuratura i Prawo No. 6, 2012, pp. 9–21 and case law referred to therein.

[43] Supreme Court ruling of 24 September 2013, III SPP 188/13, LEX No. 1448755.

[44] P. Górecki, S. Stachowiak, P. Wiliński, *Skarga na przewlekłość postępowania przygotowawczego i sądowego. Komentarz* [Complaint about excessive length of preparatory and court proceedings. Commentary], Wolters Kluwer, Warsaw 2010, p. 84.

Failure to meet those requirements is an irremovable deficiency resulting in the rejection of a complaint without summons to remedy deficiencies of a complaint.[45]

The way of interpreting the concept of "circumstances justifying a request to recognise lengthiness of the proceedings" is in conflict with the ECtHR stand and too rigorous in relation to the literal wording of Article 6(2.2) ACLP. In the judgement in the case of *Wende and Kukówka v. Poland*, the Court emphasised that formal requirements for measures of human rights protection cannot be too formalistic because they limit a complainant's right to them and jeopardise the achievement of their aims. The Court also noted that finding a complaint about lengthiness inadmissible on the grounds that the complainant failed to indicate circumstances justifying the request without summoning to remedy the deficiencies should be found to be disproportionate to the aim of ensuring legal certainty and the proper administration of justice.[46] Thus, the proper and pro-Convention interpretation of Article 6(2.2) ACLP should ease formal requirements in order to make access to the discussed measure easier.[47] Now that the provision stipulates only "indication of circumstances" and not charges, like for example Article 427 §1 CPC, the level of their precision may be lower.[48] Thus, complainants should justify their request of lengthiness recognition expressing the proceedings deficiencies causing unjustified delays in their own words. They cannot be required to provide a detailed analysis of punctuality and appropriateness of undertaken procedural activities because the obligation to indicate circumstances justifying a complaint does not impose on them an obligation to prove lengthiness.[49] It is a procedural entity that is to prove that the course of the proceedings was proper and a complainant's claims groundless. Moreover, depending on the circumstances of a particular case, the period of the

---

[45] Supreme Administrative Court ruling of 13 August 2014, II FPP 5/14, LEX No. 1494964; Also, P. Górecki, S. Stachowiak, P. Wiliński, *Skarga na przewlekłość…* [Complaint about excessive length…], pp. 82–87. However, a complainant may lodge a new complaint about lengthiness of proceedings in the same case, regardless of the temporal limitations laid down in Article 14(1) ACLP.

[46] ECtHR judgement of 10 May 2007 in the case *Wende and Kukówka v. Poland,* application No. 56026/00, §§53–54, http://hudoc.echr.coe.int [accessed on: 4.11.2016].

[47] It is worth approving of the proposal to amend ACLP (the governmental Bill amending the Act on complaints about violation of the right to a hearing without unjustified delay in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings and some other acts – the Sejm paper No. 851) and acknowledging that a complaint should include a claim for recognition of lengthiness of proceedings and can contain a description of circumstances justifying this claim (compare Article 6(2) and (2a)). It is also proposed in the Bill that a court should be obliged to summon a complainant to correct formal errors in the complaint (compare Article 9(1)). However, the above proposal was not adopted in the course of legislative procedure in the Sejm. Thus, Article 14(2) ACLP is the only change easing the formalism connected with lodging a complaint about lengthiness of proceedings.

[48] The opinion that is essentially equalising "circumstances justifying a request for recognition of lengthiness" and charges stated in appeal measures hampers access to a complaint about lengthiness also because of lack of possibility of correcting errors referred to in Article 6(1) ACLP. If a party to proceedings does not indicate allegations in a complaint or any other procedural document, the authorised body is obliged to return it to the complainant to correct formal errors in seven days or else the complaint will not be dealt with (Article 120 CPC).

[49] Sic, ruling of the Appellate Court in Wrocław of 13 November 2013, II S 31/13, LEX No. 1392152.

proceedings alone may speak for recognition of a complaint as justified, especially when cases uncomplicated as to their legal state and merits take a disproportionally long time.[50]

3. COMPENSATORY FUNCTION OF A COMPLAINT ABOUT EXCESSIVE LENGTH OF PROCEEDINGS

The compensatory function of ACLP is not less important than preventing lengthiness. The provision of Article 12(4) ACLP, in case of recognition of a complaint about lengthiness and a complainant's claim admissible, obliges a court to rule an adequate amount of compensation (PLN 2,000-20,000).[51] The legal nature of the measure under Article 12(4) ACLP is a controversial issue in the doctrine and case law.[52] It is due to the fact that it is not classical damages for loss or injury sustained.[53] On the other hand, it is indicated that it "plays the role of damages for pain and suffering caused by lengthiness of court proceedings"[54] and in accordance with the dominant stand, it is recognised as a special form of redress for the infringement of the right to a hearing in a reasonable time.[55]

However, it is worth noting that the amount of money under Article 12(4) ACLP is sometimes thought to be "a specific form of a lump sum awarded just for the

---

[50] Ruling of the Appellate Court in Wrocław of 13 November 2013, II S 31/13, LEX No. 1392152.

[51] The provision of Article 12(4) ACLP also indicates how the sum of compensation should be calculated: "Having recognised a complaint as justified, a court on a complainant's request awards him a compensation from the State Treasury, and in case of a complaint about lengthiness of proceedings conducted by a bailiff – from a bailiff, as the amount of money from PLN 2,000 to PLN 20,000. The amount within the indicated limit accounts for PLN 500 for each year of the proceedings so far, regardless of the number of stages which were recognised as excessively long. A court may award a sum higher than PLN 500 per year if a case is especially significant for a complainant who did not contribute to this lengthening of proceedings. Amounts already awarded to a complainant in the same case are treated as paid towards the compensation. A sum of money is not awarded in case a complaint is lodged by the State Treasury or state bodies for public finance".

[52] A sum of money is treated as a substitute for compensation, redress or a lump sum of reparation. For more on those concepts, see: W. Jasiński, *Charakter odpowiedniej sumy pieniężnej orzekanej na podstawie ustawy o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki* [Nature of the appropriate amount of money awarded based on the Act on complaints about violation of the right to a hearing without unjustified delay in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings], Gdańskie Studia Prawnicze-Przegląd Orzecznictwa No. 2, 2011, pp. 121–131 and literature and case law referred to therein; Z. Cichoń, *Glosa do pkt 8 i 9 uzasadnienia postanowienia Sądu Najwyższego z 6 lutego 2006 r.* [Gloss on para. 8 and 9 of the justification for the Supreme Court decision of 6 February 2006], Palestra No. 9–10, 2007, pp. 325–328.

[53] A. Piaseczny, *Ustawa o skardze…* [Act on complaints…], theses No. 9 and 10 to Article 12 ACLP, el/LEX.

[54] Supreme Court ruling of 28 May 2015, III SPP 10/15, LEX No. 1740741.

[55] W. Jasiński, W. Szydło, [in:] J. Skorupka (ed.), *Skarga na naruszenie…* [Complaint about violation…], p. 223. M. Romańska, *Skarga na przewlekłość…* [Complaint about excessive length…], p. 72.

fact of lengthiness of the proceedings",[56] and it is emphasised that it is partially independent of compensation[57] and is sometimes called lump sum reparation. Although it is emphasised that excessively long waiting for adjudication, as a rule, results in harming a complainant,[58] and in criminal cases, it may additionally infringe personality rights of the accused, *in concreto* it is not possible to eliminate a situation in which he will not suffer the negative consequences of proceedings conducted excessively long.[59] Thus, it is not possible to share the opinion that the compensation under Article 12(4) ACLP is similar to reparation in nature.[60] It is to compensate the lengthened period of waiting for the final adjudication in a case and it should be associated not with financial or moral loss but mainly with lengthiness of the proceedings.[61] A complainant may claim compensation in a civil lawsuit.[62] Assuming that the measure under Article 12(4) ACLP is a form of a compensation,[63] this creates a possibility of reducing the settlement under Article 417 Civil Code or Articles 445 and 448 Civil Code. However, it seems that such action is inadmissible.[64] Both measures, a compensation or redress under Article 417 Civil Code (or Articles 445 and 448 Civil Code) and a lump sum under

---

[56] Judgement of the Appellate Court in Warsaw of 5 December 2014, I ACa 230/14, LEX No. 1661263.

[57] Sic, M. Kłopocka, *Skarga na przewlekłość…* [Complaint about excessive length…], p. 165; A. Góra-Błaszczykowska, *Skarga na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki* [Complaint about violation of the party's right to a hearing in court proceedings without unjustified delay], Monitor Prawniczy No. 11, 2005, p. 538.

[58] The harm results from uncertainty concerning the legal situation resulting from excessively long waiting for adjudication. Compare, inter alia, the ECtHR judgement of 21 February 1997 in the case *Guillemin v. France,* application No. 19632/92; § 63; the ECtHR judgement of 29 March 2006 in the case *Scordino v. Italy*, application No. 36813/97 §204, http://hudoc.echr.coe.int [accessed on: 4.11.2016].

[59] For example, in cases in which, due to lengthiness of proceedings, a negative procedural premise under Article 17 §1(6) CPC is updated and the proceedings are discontinued, and the accused, as a result of lengthiness, may avoid liability for a crime committed.

[60] As it has already been indicated, the legal nature of a measure under Article 12(4) ACLP is disputable.

[61] Sic, also, T. Zembrzuski, *Skuteczny środek odwoławczy…* [Effective appeal measure…], p. 17; M. Kłopocka, *Skarga na przewlekłość…* [Complaint about excessive length…], p. 165.

[62] Compare, the judgement of the Appellate Court in Kraków of 22 May 2015, I ACa 330/15, orzeczenia.ms.gov.pl; judgement of the Appellate Court in Warsaw of 5 December 2014, I ACa 230/14, LEX No. 1661263. Compensation under ACLP applies to the infringement of the right to a hearing without unjustified delay and not to other potential negative consequences of lengthiness such as harm or material loss sustained by a complainant. A complainant may claim compensation for the latter in a civil lawsuit.

[63] W. Jasiński, W. Szydło, [in:] J. Skorupka (ed.), *Skarga na naruszenie…* [Complaint about violation…], p. 221.

[64] E. Bagińska, *Odpowiedzialność odszkodowawcza za wykonywanie władzy publicznej* [Compensatory liability for performing public authority function], C.H. Beck, Warsaw 2006, p. 373; T. Zembrzuski, *Skuteczny środek odwoławczy…* [Effective appeal measure…], p. 17. Sic, also, J. Kuźmicka-Sulikowska, *Suma pieniężna przyznawana z tytułu przewlekłości postępowania* [Amount of money awarded due to excessive length of proceedings], [in:] E. Marszałkowska-Krześ (ed.), *Aktualne zagadnienia prawa prywatnego* [Current issues in private law], Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wrocław 2012, pp. 105–106, http://www.bibliotekacyfrowa.pl/Content/40582/04_Joanna_Kuzmicka-Sulikowska.pdf [accessed on: 4.11.2016]. A different opinion in: A. Góra-Błaszczykowska, *Skarga na naruszenie…* [Complaint about violation…], p. 538.

Article 12(4) ACLP fulfil different aims. In the former case, a complainant pursues a compensation for moral or financial loss, which is in a casual relation with the recognised lengthiness of the proceedings. On the other hand, with the use of the measure under ACLP, he claims compensation for lengthiness of the proceedings unjustified by the circumstances of the case, which might, although it do not have to, expose him to negative consequences. Although it is necessary to agree with the statement that excessive length of proceedings is connected with the presumption of loss or harm to the complainant, refutation of the presumption does not result in depriving him of a compensation under Article 12(4) ACLP. It can only influence the amount of money awarded which cannot be lower than the minimum laid down in Article 12(4) ACLP. If a complainant sustained harm in connection with lengthiness of the proceedings, only bringing a lawsuit under Article 417 Civil Code will make it possible to obtain a compensation for financial loss in full amount.[65] Claims against the State Treasury resulting from the infringement of the right to a hearing without unjustified delay are admissible for two independent reasons: lengthiness of proceedings alone (Article 12(4) ACLP) and harm or violation of personality rights resulting from that lengthiness (Article 417 and Article 455 or 448 Civil Code).

A court cannot assess grounds for claiming to rule an appropriate sum of money and in case a complainant lodges such a claim, it may only award it. However, a court has considerable discretion over the amount of money awarded. Taking decisions within the statutory limits, it can freely adjust the sum. The legislator did not indicate the criteria that an entity should follow awarding an appropriate amount of a compensation. However, it should be established in relation to a period of proceedings in a case and take into consideration the level of its complexity and inconvenience for a complainant and then other negative consequences. In its judgement in the case of *Apicella v. Italy*, the ECtHR made recommendations for establishing the amount of a compensation for lengthiness of proceedings.[66] It is necessary to establish a basic amount for each year of the proceedings conducted and, based on it, calculate the total amount. The basic amount should be enlarged in especially sensitive cases, e.g. those involving pre-trial detention. Another factor influencing the amount of a compensation may be, e.g. the number of instances hearing a case and whether a complainant contributed to lengthiness. In such cases, an amount finally awarded may be respectively reduced. The ECtHR also emphasises that the amount of a compensation cannot result from the fact that the case was adjudicated in favour of a complainant or not.

An analysis of Polish courts' rulings seems to suggest that financial or non-economic loss, and not a long time of waiting for a final judgement, is the main factor taken into account in establishing the amount of a lump sum of a compensation. Justification of awarding an appropriate sum of money indicates, e.g. the fact that

---

[65] A civil court is not bound by the limit of a sum of money. The limitation of the compensation in proceedings concerning a complaint about lengthiness results from Article 12(4) ACLP.

[66] ECtHR judgement of 10 November 2004 in the case *Apicella v. Italy*, application No. 64890/01, §26, http://hudoc.echr.coe.int [accessed on: 4.11.2016].

a complainant "did not sustain any calculable financial loss" [67] or that he did not present reliable circumstances confirming that as a result of lengthiness he sustained "classified harm consisting in negative psychical and moral experiences caused by uncertainty concerning the adjudication in his case".[68] Those factors to a great extent decide about awarding the amount of a compensation higher than the statutory minimum, although, as research shows, its amount usually fluctuates close to the minimum level and it is rarely awarded at the maximum level.[69]

Looking for the reasons of the defective adjudication practice, one can draw a conclusion that it results from misunderstanding of the function that a sum of money awarded for lengthiness of proceedings is to play. A compensatory function should be the most important one, i.e. a complainant should be paid for defective conducting of the proceedings by procedural entities, which resulted in the infringement of his right to a hearing without an unjustified delay. However, case law indicates that the dominant function is attributed to the punishment imposed on the law enforcement body for inappropriately conducted proceedings.[70] It is emphasised that "it is a certain type of sanction for inappropriate functioning of the institution of justice",[71] and a compensatory aim is taken into account as a secondary one. Such an approach in connection with understanding the attitude to lengthiness of proceedings resulting from defective organisation of the bodies instituting justice[72] explain why courts award a compensation close to the lowest statutory level.[73] In case a complainant did not sustain any calculable financial or non-economic loss, a procedural entity is not guilty of law infringement under

---

[67] Compare, e.g. the ruling of the Appellate Court in Kraków of 4 December 2013, II S 30/13, LEX No. 1402864.

[68] Supreme Court ruling of 6 February 2006, III SPP 163/05, OSNP 2007, No. 5–6, item 87. Also compare, the judgement of the Appellate Court in Kraków of 22 May 2015, I ACa 330/15, LEX No. 1761977.

[69] A. Rutkowska, [in:] O.M. Piaskowska, K. Sadowski (ed.), *Przewlekłość postępowania w sprawach cywilnych* [Excessive length of proceedings in civil lawsuits], Wolters Kluwer, Warsaw 2015, pp. 179–182.

[70] Compare, especially: W. Jasiński, *Charakter odpowiedniej sumy…* [Nature of the appropriate amount…], p. 126; Z. Cichoń, *Glosa do pkt 8 i 9…* [Gloss on para. 8 and 9…], pp. 325–328.

[71] Judgement of the Voivodeship Administrative Court in Krakow of 12 February 2015, I SA/Kr 1705/14, LEX No. 1649610; also compare, the Supreme Court ruling of 6 January 2006, III SPP 154/05.

[72] For example, it is assumed that there are no grounds for recognition of lengthiness of proceedings in a situation where a complainant was waiting for an appeal hearing appointment for six months because the "level of workload" in a particular court must be taken into account, i.e. the number of cases that were filed and an average time required for an appointment of a hearing (compare, the Supreme Court ruling of 9 September 2015, III SPP 20/15, LEX No. 1794319). The Supreme Court holds that the features of lengthiness are recognised in case of several months' or longer inactiveness of a court of second instance concerning the appointment of an appeal hearing, and a few (e.g. six or eight) months' period matches the term of a reasonable time, in which a case may wait for a hearing (compare, the Supreme Court ruling of 22 July 2014, III SPP 123/14, LEX No. 1515457; Supreme Court ruling of 15 December 2015, III SPP 26/15, LEX No. 1962535).

[73] Research in the doctrine indicates that the sums awarded based on Article 12(4) ACLP are close to the minimum values indicated by the legislator, i.e. PLN 2,000-3,000 (E. Holewińska-Łapińska, *Postępowania ze skargi…* [Proceedings resulting from a complaint…], pp. 163, 167–169, 174, 194 and 199), and according to the data of the Ministry of Justice, an average awarded

Article 6(1) ECHR. In case a delay in a hearing resulted from organisational difficulties, the expectation that in every case a court of a higher instance, from "inside" the system of instituting justice, knowing the reality of the functioning of courts in Poland, would rule a "penalty" higher than the statutory minimum seems to be idealistic.

It is also doubtful that it would be possible to charge a court or a prosecutor's office where a case is under examination for the amount under Article 12(4) ACLP.[74] After the amendment to ACLP of 30 November 2016,[75] in accordance with Article 12(7) ACLP, recognising a complaint as admissible, a court indicates the share of compensation that a given entity should pay in case lengthiness occurred in the proceedings conducted by more than one entity. This way, the cost of a compensation under Article 12(4) ACLP can be proportionally divided, but whatever the burden is for an entity that, although did not contribute to lengthiness, hears the case at this stage and is obliged to participate in the cost of the compensation, it may raise understandable resistance for a few reasons. Firstly, it inspires the treatment of the amount under Article 12(4) ACLP as a penalty (moreover, often a groundless one) for an entity that currently hears the case and to which a complaint about lengthiness has been lodged. Thus, the issue of a compensation for a complainant for excessively long waiting for the final adjudication on his rights and obligations becomes less important, and the protection of financial interests of entities of justice institution becomes more important. Secondly, the entity that has contributed to lengthiness most not always faces financial consequences of inappropriate acting. In adjudication practice, it is assumed that the lump sum compensation is a sanction imposed on an entity of justice institution. Thus, the imposition of that sanction on a court of second instance may cause justified objections because the source of lengthiness lies in the defective proceedings conducted by a court of first instance.[76] Therefore, the stand of the Supreme Court seems understandable. It held that lengthiness should be assessed (and compensation awarded under Article 12(4) ACLP) in connection with the proceedings before a current court instance and the

---

amount is PLN 2,839 (statistical data available on the website: https://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2012 [accessed on: 4.11.2016]).

[74] In accordance with Article 12(5) ACLP, a court in which lengthiness occurred or a district prosecutor's office where excessively long proceedings were conducted shall pay the amount of money from its own budget. In a situation where a complainant challenges the method of conducting preparatory proceedings and proceedings before a court of first instance, a regional or a district court is obliged to pay the lump sum compensation. If a complaint concerns the violation of the right to a hearing without unjustified delay before a regional and a district court or a district court and an appellate court, a court of second instance, i.e. a district or an appellate court, respectively, is obliged to pay compensation under Article 12(4) ACLP (Article 12(6) ACLP).

[75] Act of 30 November 2016 amending the Act: Common courts system and some other acts, Journal of Laws [Dz.U.] of 2016, item 2103.

[76] Compare the ruling of the Appellate Court in Wrocław of 20 November 2013, II S 32/13, orzeczenia.ms.gov.pl, where it is indicated that conducting preparatory proceedings, even in a complicated and difficult case, a prosecutor must always remember that "an investigation is the first stage of proceedings, after which court proceedings usually take place, which also require an adequate period".

length of former stages of the proceedings may only play an auxiliary role.[77] Thirdly, it is unlikely that judges or prosecutors conduct lengthy proceedings on purpose,[78] and delays, as a rule and mostly, result from organisational difficulties.[79] This is the State, not a court or a prosecutor's office, that is responsible for the organisation of the justice institution system and it seems that it should not transfer the costs of lengthiness on courts and prosecutor's offices. It is not a court president's or a regional or district prosecutor's responsibility to determine the number of posts in a given entity, and the number of cases that one person is to conduct.[80] It also seems that the necessity to cover the costs of the lump sum compensation may also result in inability to increase employment and this makes it more difficult to solve the problem of excessively long proceedings before a court or a prosecutor's office.

4. CONCLUSIONS

Inappropriate functioning of ACLP in the practice of justice institution in general does not result from the wrong construction of regulations but is a consequence of their erroneous interpretation by courts. They do not sufficiently refer to the judgements of the ECtHR and do not meet standards of the protection of the right to a hearing without an unjustified delay that were worked out there, which can be easily noticed in the course of an analysis of the issue of accessibility to a complaint about lengthiness and compensation for it. Instead of adjusting the domestic level of protection of the right under Article 6(1) ECHR in order to prevent lodging applications to the ECtHR, the legislator develops alternative conceptions that are in conflict with the ECtHR's requirements, e.g. concerning formal requirements or limitation of a possibility of lodging a complaint about lengthiness in the course of criminal proceedings to the currently examined stage of a trial. It also seems that the legislator's intentions as to the fulfilment of the compensatory function of a complaint about lengthiness have not been well understood. A sum of money awarded pursuant to Article 12(4) ACLP is treated as a penalty imposed on a given entity and not a form of compensation for a person who, as a result of defective acting of the justice institution system, must wait excessively long for the final adjudication on his rights and obligations. One can also get an impression that,

---

[77] Supreme Court ruling of 22 July 2014, III SPP 123/14, LEX No. 1515457.

[78] Compare, A. Machnikowska, *Sprawność postępowania sądowego w kontekście etosu sędziowskiego* [Effective court proceedings with respect to the judge's ethos], Gdańskie Studia Prawnicze Vol. XXXIII, 2015, pp. 245–247.

[79] Empiric research has not been conducted in the field so far. It is only a hypothesis that needs verification. However, it seems doubtful that judges or prosecutors are interested in purposeful lengthening of proceedings, especially as punctuality is taken into consideration in judges' appraisal.

[80] Motions to increase the number of judges' appointments in a district or the provision of funds for a new court building sent to the Ministry of Justice by court presidents are not always accepted. Moreover, the procedure of appointing judges is long and it is difficult to state why. Compare, the announcement of the National Council of the Judiciary of Poland of 15 November 2012: http://www.inpris.pl/fileadmin/user_upload/documents/Biblioteka_MWS/39.pdf [accessed on: 4.11.2016].

although lengthiness of proceedings is often noticed and discussed in Poland, it is silently accepted. Courts know that they are not able, mainly for organisational reasons, to hear cases at an appropriate pace and they try, on the one hand, to limit the possibility of filing complaints about lengthiness by adequate interpretation of ACLP and, on the other hand, to reduce the burdens for the budget by ruling the payment of a compensation at the minimum level.

However, the legislator has, at least partially, adequate measures that make it possible to implement the ECtHR recommendations and make ACLP an effective remedy in the meaning of Article 13 ECHR. An amendment to ACLP seems to be necessary because of the expansion of the objective scope of a complaint about lengthiness and definite abandonment of the division of criminal proceedings into separate, independent, from the point of view of the assessment of lengthiness of a proceedings and a possibility of lodging a complaint, stages.[81] As far as the compensatory function is concerned, the legislator's intervention will be effective if the basic amount is increased or the method of calculating the sum of money is determined.[82] Statutory determination of the criteria to be considered in order to establish the amount of a compensation would not only eliminate differences in case law but also would be a valuable directive for a complainant. He would know what circumstances he must indicate to be awarded a compensation higher than the minimum. All the same, what is most important is to expose the significance of the compensation for a complainant and to stop treating it as a penalty imposed on the justice system. It is also worth considering a possibility of making the compensation settlement independent of the financial resources of a given entity, e.g. by establishing a dedicated fund in the state budget to cover the cost of a compensation awarded

---

[81] As far as this is concerned, the proposal to amend ACLP deserves approval (the governmental Bill amending the Act on complaints about violation of the right to a hearing without unjustified delay in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings and some other acts – the Sejm paper No. 851), where the legislator, introducing to Article 2(4) ACLP a principle that "the total period of proceedings so far" is assessed, tries to definitely solve the problem of proceeding fragmentation. However, the change was not included in the final version of the Act of 30 November 2016 amending Act: Law on common courts system and some other acts, Journal of Laws [Dz.U.] of 2016, item 2103.

[82] A similar situation was with the amendment of ACLP, i.e. the Act of 20 February 2009 amending the Act on complaints about violation of the right to a hearing before a court without unjustified delay (Journal of Laws [Dz.U.] of 2009, No. 61, item 498). In the event a compensation had been awarded, the amounts used to be symbolic, e.g. PLN 100. The amendment to ACLP and the introduction of obligatory compensation for a complainant claiming it resulted in awarding compensation, but as a rule it accounts for PLN 2,000. Thus, the introduction of the new regulations contributed to the implementation of the ECtHR recommendations to a small extent (compare, inter alia, the judgement of 23 October 2007 in the case *Tur v. Poland*, application No. 21695/05, §§62–68, http://hudoc.echr.coe.int [accessed on: 4.11.2016]) concerning the effectiveness of a complaint about lengthiness in the context of its compensatory function; the Court repeated the objections in the judgement in the case *Rutkowski and others v. Poland*. More in: O.M. Piaskowska, [in:] O.M. Piaskowska, K. Sadowski (ed.), *Przewlekłość postępowania…* [Excessive length…], pp. 158–163. Changes proposed in the governmental Bill to amend ACLP do not fully implement the ECtHR's recommendations. The proposed amount of PLN 1,000 for each year of excessively long proceedings is much lower than that awarded by the ECtHR. Compare, the objections of the Helsinki Foundation for Human Rights: http://www.hfhr.pl/wp-content/uploads/2016/10/HFPC_opinia_druk-851_27102916.pdf [accessed on: 4.11.2016].

because of lengthiness. It would contribute to emphasising the major aim of ACLP, i.e. the protection of an individual's right to a hearing without unjustified delay and not a penalty to a given court or a prosecutor's office. At the same time, it would prevent bringing a judge or a prosecutor to disciplinary liability for defective conducting of proceedings, which results in lengthiness.[83]

However, the legislator cannot change the attitude of courts to a complaint about lengthiness and the right to a hearing without unjustified delay with the use of an amendment to ACLP. The complainant-friendly interpretation of formal requirements for a complaint about lengthiness and awarding a compensation amounts higher than the minimum and appropriate to the level of the infringement of the right laid down in Article 6(1) ECHR mainly depends on the adjudicating bench hearing a particular case and, in the face of a lack of domestic patterns, on taking into consideration Strasbourg case law. In this context, it seems that the ECtHR judgements should be made available and the number of those translated into Polish should be increased. The Court's requirements concerning means of protection of an individual's rights and freedoms keep evolving. Thus, it is necessary to constantly update knowledge about them. At present, judgements issued in cases against Poland and, in accordance with the agreement on translation and making the ECtHR judgements available, 20 other leading judgements in cases against other states are being translated.[84] Relatively, it is a small number if one takes into consideration the ECtHR adjudication activity, and the amount and significance of issues it deals with (e.g. the right to life, prohibition of torture or the right to privacy). Knowledge of the Court's current stand, inter alia, in the field of the assessment of effectiveness of measures aimed at preventing lengthiness of proceedings, and awareness that it will certainly notice our domestic adjudication conceptions that are in conflict with ECHR would help in the harmonisation of the Polish and Strasbourg case law.

BIBLIOGRAPHY

Bagińska E., *Odpowiedzialność odszkodowawcza za wykonywanie władzy publicznej* [Compensatory liability for performing public authority function], C.H. Beck, Warsaw 2006.

Cichoń Z., *Glosa do pkt 8 i 9 uzasadnienia postanowienia Sądu Najwyższego z 6 lutego 2006 r.* [Gloss on para. 8 and 9 of the justification for the Supreme Court decision of 6 February 2006], Palestra No. 9–10, 2007.

[83] Compare, Article 10 of the Act on the common courts system in conjunction with §§8 and 12 Resolution No. 16/2003 of the National Council of the Judiciary of Poland of 19 February 2003 concerning adoption of the principles of the judges' ethical code and Article 137 of the Act of 28 January 2016 (Journal of Laws [Dz.U.] 2016, item 177): Law on the public prosecution office in conjunction with §7(2) resolution No. 468/2012 of the National Council of the Public Prosecution of Poland of 19 September 2012 concerning adopting the principles of prosecutors' ethical code.

[84] See, the agreement of 24 March 2014 implementing the recommendations of the Brighton Declaration of 20 February 2012 on the Future of the European Court of Human Rights: http://trybunal.gov.pl/fileadmin/content/dokumenty/orzeczenia-etpc/Porozumienie_ws_tlumaczenia_i_udostepniania_wyrokow_etpcz.pdf [accessed on: 15.11.2017].

Edel F., *The length of civil and criminal proceedings in the case-law of the European Court of Human Rights,* Strasbourg 2007, http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-16(2007).pdf [accessed on: 04.11.2016].

Góra-Błaszczykowska A., *Skarga na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki* [Complaint about violation of the party's right to a hearing in court proceedings without unjustified delay], Monitor Prawniczy No. 11, 2005.

Górecki P., Stachowiak S., Wiliński P., *Skarga na przewlekłość postępowania przygotowawczego i sądowego. Komentarz* [Complaint about excessive length of preparatory and court proceedings. Commentary], Wolters Kluwer, Warsaw 2010.

Holewińska-Łapińska E., *Postępowania ze skargi na naruszenie prawa strony do rozpoznania sprawy cywilnej w postępowaniu rozpoznawczym przed sądami rejonowymi i okręgowymi bez nieuzasadnionej zwłoki, zakończone orzeczeniem merytorycznym* [Proceedings resulting from a complaint about violation of the party's right to have the civil case heard in preparatory proceedings in district and regional courts without unjustified delay, ending with a substantive judgement], [in:] E. Holewińska-Łapińska, A. Siemaszko (ed.), *Prawo w działaniu, t. 2, Przewlekłość postępowania sądowego* [Law in action. Vol. 2: Excessive length of court proceedings], Oficyna Naukowa, Warsaw 2007.

Holewińska-Łapińska E., *Praktyka zasądzania „odpowiedniej sumy pieniężnej" w przypadku stwierdzenia przewlekłości postępowania* [The practice of adjudicating "appropriate amount of money" in case excessive length of proceedings is recognized], [in:] E. Holewińska-Łapińska (ed.), *Prawo w działaniu, t. 6* [Law in action. Vol. 6], Oficyna Naukowa, Warsaw 2008.

Jasiński W., *Charakter odpowiedniej sumy pieniężnej orzekanej na podstawie ustawy o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki* [Nature of the appropriate amount of money awarded based on the Act on complaints about violation of the right to a hearing without unjustified delay in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings], Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 2, 2011.

Kłak C.P., *Skarga na przewlekłość – zagadnienia proceduralne* [Complaint about excessive length – procedural issues], Ius Novum No. 2, 2010.

Kłak C.P., *Wymogi formalne skargi na przewlekłość* [Formal requirements for a complaint against excessive length of proceedings], Prokuratura i Prawo No. 3, 2010.

Kłak C.P., *Rozpatrzenie sprawy bez nieuzasadnionej zwłoki i skarga na przewlekłość postępowania: zagadnienia wybrane* [Examination of the case without unjustified delay and complaint about excessive length of proceedings: selected issues], Ius Novum No. 2, 2011.

Kłak C.P., *Temporalna niedopuszczalność złożenia nowej skargi na przewlekłość postępowania* [Temporal inadmissibility of filing a new complaint about excessive length of proceedings], Prokuratura i Prawo No. 3, 2011.

Kłak C.P., *Szczególne wymogi skargi na przewlekłość postępowania* [Special requirements for the complaint about excessive length of proceedings], Prokuratura i Prawo No. 6, 2012.

Kłopocka M., *Skarga na przewlekłość w postępowaniu sądowym (ze szczególnym uwzględnieniem przepisów postępowania karnego)* [Complaint against excessive length in court proceedings (with particular focus on criminal procedure law)], Nowa Kodyfikacja Prawa Karnego Vol. XIX, 2006.

Kuźmicka-Sulikowska J., *Suma pieniężna przyznawana z tytułu przewlekłości postępowania* [Amount of money awarded due to excessive length of proceedings], [in:] E. Marszałkowska-Krześ (ed.), *Aktualne zagadnienia prawa prywatnego* [Current issues in private law], Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wrocław 2012, http://www.bibliotekacyfrowa.pl/Content/40582/04_Joanna_Kuzmicka-Sulikowska.pdf [accessed on: 04.11.2016].

Łabuda G., Razowski T., *Zakres przedmiotowy skargi na przewlekłość postępowania* [Objective scope of the complaint about excessive length of proceedings], Prokuratura i Prawo No. 1, 2012.

Machnikowska A., *Sprawność postępowania sądowego w kontekście etosu sędziowskiego* [Effective court proceedings with respect to the judge's ethos], Gdańskie Studia Prawnicze Vol. XXXIII, 2015.

Mrowicki M., *Glosa do wyroku ETPC z dnia 7 lipca 2015 r., 72287/10, 13927/11 i 46187/11* [Gloss on the ECtHR judgement of 7 July 2015, 72287/10, 13927/11 and 46187/11], el/LEX 2016.

Piaseczny A., *Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i w postępowaniu sądowym bez nieuzasadnionej zwłoki* [Act on complaints about violation of the right to a hearing without unjustified delay in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings. Commentary], Lex Polonica, Warsaw 2013.

Piaskowska O.M., Sadowski K. (ed.), *Przewlekłość postępowania w sprawach cywilnych* [Excessive length of proceedings in civil lawsuits], Wolters Kluwer, Warsaw 2015.

Romańska M., *Skarga na przewlekłość postępowania sądowego* [Complaint about excessive length of court proceedings], Przegląd Sądowy No. 11–12, 2005.

Skorupka J. (ed.), *Skarga na naruszenie prawa strony do rozpoznania sprawy bez nieuzasadnionej zwłoki. Komentarz* [Complaint about violation of the party's right to a hearing without unjustified delay. Commentary], C.H. Beck, Warszaw 2010.

Sykulska M., *Prawo do skutecznego środka odwoławczego na przewlekłość postępowania – skutki wyroku Kudła przeciwko Polsce dla polskiego prawa i praktyki* [Right to effective complaint against excessive length of proceedings – impact of the judgement in the case *Kudła v. Poland* on the Polish law and legal practice], Gdańskie Studia Prawnicze Vol. XIII, 2005.

Śladkowski M., *Skarga na przewlekłość postępowania sądowego w świetle orzecznictwa sądów polskich oraz Europejskiego Trybunału Praw Człowieka* [Complaint about excessive length of court proceedings in the light of the judgements of Polish courts and of the European Court of Human Rights], Monitor Prawniczy No. 2, 2016.

Świetlicka M., *Metodyka pracy prokuratora w postępowaniu w sprawach o przestępstwa skarbowe i wykroczenia skarbowe* [Methodology of a prosecutor's work in cases of fiscal crimes and misdemeanours], Krajowa Szkoła Sądownictwa i Prokuratury, Kraków 2014.

Zbrojewska M., *Skarga na przewlekłość postępowania* [Complaint against excessive length of proceedings], Palestra No. 11–12, 2004.

Zembrzuski T., *Skuteczny środek odwoławczy przed organami krajowymi a prawo do rozpoznania sprawy sądowej w rozsądnym terminie – rozważania na tle wyroku Europejskiego Trybunału Praw Człowieka z 24.06.2014 r. w sprawie Grzona przeciwko Polsce (skarga nr 3206/09)* [Effective appeal measure before local bodies and the right to a hearing within a reasonable time – considerations in the light of the judgement of the European Court of Human Rights of 24 June 2014 in the case *Grzona v. Poland* (application No. 3206/09)], Europejski Przegląd Sądowy No. 3, 2015.

Court rulings

Supreme Court ruling of 6 January 2006, III SPP 154/05.

Supreme Court ruling of 6 February 2006, III SPP 163/05, OSNP 2007, No. 5–6, item 87.

Supreme Court resolution of 23 March 2006, III SPZP 3/05, OSNP 2006, No. 21–22, item 341.

Supreme Court ruling of 10 May 2006, III SPP 19/06, OSNP 2007, No. 11–12, item 179.

Ruling of the Appellate Court in Kraków of 22 November 2007, II S 6/07, KZS 2007, issue 12, item 65.

Ruling of the Appellate Court in Katowice of 11 December 2007, II S 16/07, KZS 2007, No. 12, item 66.

Supreme Court resolution of 9 January 2008, III SPZP 1/07, OSNP 2008, No. 13–14, item 205.
Supreme Court resolution of 28 March 2013, III SPZP 1/13, OSNP 2013, No. 23–24, item 292.
Supreme Court ruling of 24 September 2013, III SPP 188/13, LEX No. 1448755.
Ruling of the Appellate Court in Wrocław of 13 November 2013, II S 31/13, LEX No. 1392152.
Ruling of the Appellate Court in Wrocław of 20 November 2013, II S 32/13, orzeczenia.ms.gov.pl [accessed on: 04.11.2016].
Ruling of the Appellate Court in Katowice of 27 November 2013, II AKz 717/13, LEX No. 1488978.
Ruling of the Appellate Court in Kraków of 4 December 2013, II S 30/13, LEX No. 1402864.
Supreme Court ruling of 22 July 2014, III SPP 123/14, LEX No. 1515457.
Ruling of the Supreme Administrative Court of 13 August 2014, II FPP 5/14, LEX No. 1494964.
Judgement of the Appellate Court in Warszawa of 5 December 2014, I ACa 230/14, LEX No. 1661263.
Judgement of the Voivodeship Administrative Court in Kraków of 12 February 2015, I SA/Kr 1705/14, LEX No. 1649610.
Judgement of the Appellate Court in Kraków of 22 May 2015, I ACa 330/15, LEX No. 1761977.
Supreme Court ruling of 28 May 2015, III SPP 10/15, LEX No. 1740741.
Supreme Court ruling of 9 September 2015, III SPP 20/15, LEX No. 1794319.
Supreme Court ruling of 15 December 2015, III SPP 26/15, LEX No. 1962535.
Supreme Court resolution (7) of 28 January 2016, I KZP 13/15, www.sn.pl [accessed on: 04.11.2016].

ECtHR judgement of 21 February 1997 in the case *Guillemin v. France*, application No. 19632/92; http://hudoc.echr.coe.int [accessed on: 04.11.2016].
ECtHR judgement of 26 October 2000 in the case *Kudła v. Poland*, application No. 30210/96; http://hudoc.echr.coe.int [accessed on: 04.11.2016].
ECtHR judgement of 2 November 2000 in the case *Philippe Bertin-Mourot v. France*, application No. 36343/97; http://hudoc.echr.coe.int [accessed on: 04.11.2016].
ECtHR judgement of 10 November 2004 in the case *Apicella v. Italy*, application No. 64890/01; http://hudoc.echr.coe.int [accessed on: 04.11.2016].
ECtHR judgement of 1 March 2005 in the case *Charzyński v. Poland*, application No. 15212/03, http://hudoc.echr.coe.int [accessed on: 04.11.2016].
ECtHR judgement of 29 March 2006 in the case *Scordino v. Italy*, application No. 36813/97; http://hudoc.echr.coe.int [accessed on: 04.11.2016].
ECtHR judgement of 10 May 2007 in the case *Wende i Kukówka v. Poland*, application No. 56026/00; http://hudoc.echr.coe.int [accessed on: 04.11.2016].
ECtHR judgement of 23 October 2007 in the case *Tur v. Poland*, application No. 21695/05; http://hudoc.echr.coe.int [accessed on: 04.11.2016].
ECtHR judgement of 22 June 2010 in the case *Flieger v. Poland*, application No. 36262/08; http://hudoc.echr.coe.int [accessed on: 04.11.2016].
ECThR judgement of 7 February 2012 in the case *Gut v. Poland*, application No. 32440/08; http://hudoc.echr.coe.int [accessed on: 04.11.2016].
ECtHR judgement of 24 June 2014 in the case *Grzona v. Poland*, application No. 3206/09; http://hudoc.echr.coe.int [accessed on: 4.11.2016].
ECtHR judgement of 7 July 2015 in the case *Rutkowski and others v. Poland*, applications No. 72287/10, 13927/11, 46187/11; http://hudoc.echr.coe.int [accessed on: 04.11.2016].

Legal regulations and other sources

Act of 20 February 2009 amending the Act on complaints about violation of the right to a hearing before a court without unjustified delay (Journal of Laws [Dz.U.] of 2009, No. 61, item 498).

Bill amending the Act on complaints about violation of the right to a hearing without unjustified delay in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings and some other acts – the Sejm paper No. 851.

Act of 30 November 2016 amending Act: Law on common courts system and some other acts, Journal of Laws [Dz.U.] of 2016, item 2103.

Act on Compensation for the Excessive Length of Judicial Proceedings, http://www.finlex.fi/fi/laki/kaannokset/2009/en20090362.pdf [accessed on: 04.11.2016].

Agreement of 24 March 2014 implementing the Brighton Declaration of 20 February 2012 on the Future of the European Court of Human Rights, http://trybunal.gov.pl/fileadmin/content/dokumenty/orzeczenia-etpc/Porozumienie_ws_tlumaczenia_i_udostepniania_wyrokow_etpcz.pdf [accessed on: 04.11.2016].

Announcement of the National Council of the Judiciary of Poland of 15 November 2012 on the report on judiciary, http://www.inpris.pl/fileadmin/user_upload/documents/Biblioteka_MWS/39.pdf [accessed on: 04.11.2016].

Opinion of the Helsinki Foundation for Human Rights on the government bill emending the Act on complaints about violation of the right to a hearing without unjustified delay in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings and some other acts – the Sejm paper No. 851, http://www.hfhr.pl/wp-content/uploads/2016/10/HFPC_opinia_druk-851_27102916.pdf [accessed on: 04.11.2016].

Statistical data of the Ministry of Justice concerning average amount of compensation awarded based on Article 12(4) ACEP, https://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2012 [accessed on: 04.11.2016].

RIGHT TO COMPLAIN ABOUT EXCESSIVE LENGTH OF PROCEEDINGS AND TO CLAIM COMPENSATION

Summary

The aim of the article is to identify the causes of defective functioning of the Act on complaints about violation of the right to a hearing without unjustified delay in preparatory proceedings conducted or supervised by a prosecutor and in court proceedings (hereinafter: ACLP). It also examines whether the legislator has adequate measures to implement the recommendations of the ECtHR laid down in the judgment of 7 July 2015 in the case *Rutkowski and others v. Poland* and make it an effective remedy for the violation of the rights and freedoms in the meaning of the Article 13 ECHR. Leaving aside the assessment of lengthiness of proceedings, the article analyses two issues which are essential for the complainant: accessibility to a complaint about the excessive length of proceedings and the possibility of being awarded an appropriate amount of money laid down in Article 12(4) ACLP. Before the court examines a complaint on its merits, a complainant should know when and on what grounds he can lodge a complaint, and under what conditions he may receive a compensation for excessive length of the proceedings. Due to the fact that the legislator did not lay down the criteria that a court should take into account when hearing a complaint about excessive length of proceedings, it is necessary to examine national case law and find out what factors affect the amount of compensation under

Article 12(4) ACLP, and whether these are consistent with the ECtHR case law. In conclusion, it is emphasised that defective functioning of ACLP in the judicial practice mainly results from the inappropriate interpretation of the provisions by courts. An amendment to ACLP can partly help the legislator implement the recommendations of the ECtHR. However, a change in courts' approach to a complaint about lengthiness of proceedings and consideration of the ECtHR case law are crucial for proper functioning of a complaint about lengthiness of proceedings.

Keywords: right to a hearing without unjustified delay, criminal proceedings, complaint about lengthiness of proceedings, right to an effective remedy for the violation of rights and freedoms

PRAWO DO ZASKARŻENIA PRZEWLEKŁOŚCI POSTĘPOWANIA I OTRZYMANIA ODPOWIEDNIEJ SUMY PIENIĘŻNEJ

Streszczenie

Celem artykułu jest ustalenie przyczyn wadliwego funkcjonowania u.s.p.p. oraz zbadanie, czy a jeżeli tak, to jakimi środkami dysponuje ustawodawca, które umożliwią wykonanie zaleceń ETPC wynikających z wyroku z 7 dnia lipca 2015 r. w sprawie *Rutkowski i inni p. Polsce* i sprawią, że będzie ona skutecznym środkiem ochrony praw i wolności w rozumieniu art. 13 EKPC. Pozostawiając poza zakresem rozważań kryteria oceny przewlekłości postępowania, analizie poddano dwa zagadnienia mające zasadnicze znaczenie z perspektywy skarżącego – kwestię dostępu do omawianego środka zaskarżenia oraz możliwości otrzymania przez niego odpowiedniej sumy pieniężnej określonej w art. 12 ust. 4 u.s.p.p. Zanim skarga zostanie merytorycznie rozpoznana, skarżący musi wiedzieć, kiedy i na jakich zasadach, może on wystąpić z omawianym środkiem zaskarżenia, a także pod jakimi warunkami może otrzymać rekompensatę z tytułu przewlekłości. Z uwagi na fakt, że ustawodawca nie sformułował kryteriów, które powinien wziąć pod uwagę sąd rozpoznający skargę na przewlekłość, analizując orzecznictwo, zbadano, jakie czynniki mają wpływ na wysokość sumy z art. 12 ust. 4 u.s.p.p. i czy są zbieżne z orzecznictwem ETPC. W konkluzji podkreślono, że niewłaściwe funkcjonowanie u.s.p.p. w praktyce wymiaru sprawiedliwości w zasadniczej części jest konsekwencją wadliwej interpretacji przepisów ustawy przez sądy. Ustawodawca poprzez nowelizację u.s.p.p. jedynie częściowo może zrealizować zalecenia ETPC, a decydujące znaczenie dla prawidłowego funkcjonowania skargi na przewlekłość ma zmiana podejścia judykatury do omawianego środka zaskarżenia oraz w większym stopniu uwzględnianie orzecznictwa strasburskiego.

Słowa kluczowe: prawo do rozpoznania sprawy bez nieuzasadnionej zwłoki, postępowanie karne, skarga na przewlekłość postępowania, prawo do skutecznego środka ochrony praw i wolności

Ius Novum
4/2017

LIST OF THE KNF'S PUBLIC WARNINGS AS THE FINANCIAL MARKET PROTECTION INSTRUMENT

PIOTR OCHMAN*

1. INTRODUCTION

The multi-plane implications of the financial market[1] constitute the reason for differentiated approach towards its protection.[2] The presence of the "contagion effect" causes that the violation of the rules of functioning of one of the sectors of this market may result in other segments' contagion and, finally, pose a risk to the functioning of national or even global economy.[3] Economically, the financial market can be defined as a platform of capital allocation of different maturity time limits.[4] Although the term is used in the legal literature,[5] it does not have a legal definition. It is rightly indicated that the lability of this market scope and the dynamics of its

* PhD, Assistant Professor, Department of Criminology and Safety Studies of the Faculty of Law, Administration and Economics, University of Wrocław; piotr.ochman@uwr.edu.pl

1 See, H. Davies, D. Green, *Globalny nadzór i regulacja sektora finansowego* [Global supervision and regulation of the financial sector], Warsaw 2010, pp. 47–51; P. Wajda, *Rola decyzji administracyjnej w nadzorze nad polskim systemem finansowym* [Role of the administrative decision in the supervision of the Polish financial system], Warsaw 2009, pp. 31–32.

2 See, M. Dyl, *Środki nadzoru nad rynkiem kapitałowym* [Supervisory measures in the capital market], Warsaw 2012, pp. 200–203.

3 A. Jurkowska-Zeidler, *Bezpieczeństwo rynku finansowego w świetle prawa Unii Europejskiej* [Security of the financial market in the light of the European Union law], Warsaw 2008, pp. 179–180; P. Wajda, *Charakter prawny wpisu na listę ostrzeżeń publicznych KNF* [Legal consequences of entry in the KNF public warnings list], Monitor Prawa Bankowego No. 6, 2013, p. 78.

4 See, I. Pyka, *Funkcjonowanie i organizacja rynku finansowego* [Operation and organization of the financial market], [in:] I. Pyka (ed.), *Rynek finansowy* [Financial market], Katowice 2010, p. 9; A. Jurkowska-Zeidler, *Bezpieczeństwo rynku finansowego…* [Security of the financial market...], pp. 25–26; M. Lemmonier, *Europejskie modele instrumentów finansowych. Wybrane zagadnienia* [European models of financial instruments. Selected issues], Warsaw 2011, p. 219; P. Zawadzka, *Pojęcie i zakres rynku finansowego* [Concept and scope of the financial market], [in:] R. Mastalski, E. Fojcik-Mastalska (eds.), *Prawo finansowe* [Financial law], Warsaw 2011, pp. 476–477.

5 See, the review of the financial market definitions [in:] P. Wajda, *Rola decyzji administracyjnej…* [Role of the administrative decision...], pp. 11–19.

development are obstacles to determining a statutory binding definition.[6] From the perspective of the financial market supervision,[7] in order to determine the concept of the financial market, it may be useful to consider the provision of Article 1(2) Act of 21 July 2006 on financial market supervision (hereinafter: AFMS),[8] which stipulates that financial supervision applies to the entities of the banking sector, pension market, insurance market, capital market, payment institutions, payment service bureaus, electronic money institutions, branches of foreign electronic money institutions, rating agencies, as well as cooperative savings and credit unions, and Krajowa Spółdzielcza Kasa Oszczędnościowo-Kredytowa.

The present model of the financial market protection is based on many pillars, which include civil, institutional (administrative) and penal legal measures.[9] Due to the fact that penal instruments of the financial market protection belong to those that most strongly interfere into the sphere of citizens' rights and freedoms, in accordance with the principle of subsidiarity of penal business law, the protection of legal interests with the use of its instruments cannot be absolute and unlimited.[10] Although, in relation to legal interests that are of special social significance, the legislator is obliged to criminalise the behaviour that infringes them or exposes them to risk,[11] it is indicated that, especially in the sphere of economic transactions,

---

[6] P. Wajda, *Rola decyzji administracyjnej…* [Role of the administrative decision...], p. 19; B. Wojno, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego. Komentarz* [Capital market law. Commentary], Warsaw 2014, p. 1369. The rules of developing legal definitions are laid down in §146(1) Zasady Techniki Prawodawczej (annex to the Regulation of the President of the Council of Ministers *Zasady Techniki Prawodawczej* of 20 June 2002, Journal of Laws [Dz.U.] of 2016, item 283). What may constitute the reason for introducing a statutory definition is the ambiguity, lack of clarity, lack of common understanding, or the need to reinterpret a given term. It must be emphasised that the requirement determining the reason for forming a definition of a term lacking clarity is the desire to limit this ambiguity (§146(1)2) *Zasady Techniki Prawodawczej*).

[7] B. Wojno, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego…* [Capital market law...], pp. 1369–1370.

[8] Journal of Laws [Dz.U.] of 2017, item 196, as amended.

[9] M. Dyl, *Środki nadzoru…* [Supervisory measures...], pp. 122–203. Also see, R. Kuciński, *Przestępstwa giełdowe* [Stock exchange offences], Warsaw 2010, p. 47. Compare, S. Żółtek, *Prawo karne gospodarcze w aspekcie zasady subsydiarności* [Penal business law in terms of subsidiarity principle], Warsaw 2009, p. 229; P. Ochman, *Ochrona działalności bankowej w prawie karnym gospodarczym. Przepisy karne ustaw bankowych* [Protection of banking activity in the penal business law. Penal provisions in the acts on banking], Warsaw 2011, pp. 115–128; by the same author, *Rola Komisji Nadzoru Finansowego w karnej ochronie rynku finansowego* [Role of the KNF in the penal protection of the financial market], Ius Novum No. 4, 2016, pp. 325–327.

[10] R. Zawłocki, *Prawo karne gospodarcze* [Penal business law], Warsawa 2007, pp. 8–9; by the same author, *Istota prawa karnego gospodarczego* [The essence of penal business law], [in:] R. Zawłocki (ed.), *Prawo karne gospodarcze* [Penal business law], Warsaw 2012, p. 36; S. Żółtek, *Prawo karne gospodarcze…* [Penal business law...], pp. 94–135; O. Górniok, *Istota karnego prawa gospodarczego* [The essence of penal business law], [in:] O. Górniok (ed.), *Prawo karne gospodarcze* [Penal business law], Warsaw 2003, pp. 6–12; by the same author, *Rola karania w przeciwdziałaniu patologicznym zachowaniom gospodarczym* [Role of punishment in prevention of pathological business behaviour], Przegląd Ustawodawstwa Gospodarczego No. 5, 1999, pp. 12–15.

[11] See, L. Gardocki, *Zagadnienia teorii kryminalizacji* [Issues in penalisation theory], Warsaw 1990, p. 98.

it is necessary to use non-penal instruments of combating economic pathologies.[12] They may include: specific capital requirements for business activity or other requirements for setting up a business, establishment of supervision over those entities as well as promotion of non-legal measures strengthening ethical awareness of business operations participants.

The Polish Financial Supervision Authority (KNF) undoubtedly is an expression of the financial market protection.[13] It is indicated in the literature that the entity is a body of integrated supervision over the financial market,[14] which constitutes one of the elements of the financial safety net, i.e. a group of institutions and legal regulations that aim to protect the financial system against its destabilisation.[15] In accordance with Article 3(2) AFMS, the Polish Financial Market Authority is a body competent to supervise the financial market. The supervision aims to ensure the proper functioning of the financial market (i.e. stability, safety, transparency, trust in it and the protection of its participants' interests via reliable information concerning the functioning of the market) as well as to implement detailed supervision tasks laid down in special legal acts concerning particular sectors.[16]

The article aims to analyse one of the KNF's competences, i.e. the development of a list of public warnings (Article 6b(1) first sentence AFMS). The introduction of clear statutory grounds for this entitlement took place quite recently,[17] namely on 17 January 2014. This does not mean, however, that the list had not been developed before,[18] but the scope of information provided by the KNF had been regulated by special acts. For example, in accordance with Article 25(1)2 of the Act of 29 July 2005 on capital market supervision (hereinafter: ACMS),[19] the KNF was entitled

---

[12] Council of Europe Committee of Ministers, Recommendation No. R (81) 12 of 25 June 1981. On the same topic, see O. Górniok, *Problemy przestępczości gospodarczej w zaleceniach Rady Europy* [Problems of business crime in the recommendations of the Council of Europe], Państwo i Prawo No. 9, 1991, pp. 45–54; by the author, *Środki zapobiegania przestępczości gospodarczej w zaleceniach Rady Europy* [Measures preventing business crime in the recommendations of the Council of Europe], Państwo i Prawo No. 10, 1992, pp. 24–31; *Przestępczość gospodarcza i jej zwalczanie* [Business crime and its combating], Warsaw 1994, pp. 163–167; *Pojęcie karnego prawa gospodarczego i jego szczególne problemy* [The concept of penal business law and its specific issues], [in:] O. Górniok (ed.), *Prawo karne gospodarcze…* [Penal business law...], pp. 27–30.

[13] For more on the status of the KNF, see M. Dyl, *Środki nadzoru…* [Supervisory measures...], pp. 95–101; A. Nadolska, *Komisja Nadzoru Finansowego w nowej instytucjonalnej architekturze europejskiego nadzoru finansowego* [Financial Supervision Authority in the new institutional structure of the European system of financial supervision], Warsaw 2014, pp. 245–260.

[14] B. Wojno, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego…* [Capital market law...], pp. 1372–1373; M. Dyl, *Środki nadzoru…* [Supervisory measures...], p. 71.

[15] For more, see A. Nadolska, *Komisja Nadzoru Finansowego…* [Financial Supervision Authority...], pp. 335–394.

[16] For more, see B. Wojno, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego…* [Capital market law...], p. 1376.

[17] The provision of Article 6b AFMS was added based on the provision of Article 1(3) of the Act of 23 October 2013 amending the Act on financial market supervision and some other acts (Journal of Laws [Dz.U.] of 2013, item 1567).

[18] See, P. Wajda, *Charakter prawny wpisu…* [Legal consequences...], p. 82; B. Wojno, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego…* [Capital market law...], p. 1405.

[19] Journal of Laws [Dz.U.] of 2016, item 1289 as amended.

to promulgate information concerning notices on crime under the Act on trading in financial instruments, the Act on investment funds or the Act on commodity exchanges. However, the provision of Article 6b AFMS, unlike other legal grounds for disseminating information by the KNF, constitutes an instrument consisting in an obligation to inform public opinion about financial crime of violation of the statutory exclusive right of entities operating on this market. The importance of this particular issue is demonstrated in preventive activities aimed at informing the public about entities that do not guarantee appropriate operations on the financial market[20] (ensuring information effectiveness[21]), which are suspected of committing economic offences consisting in the violation of the statutory exclusive right to perform regulated business activity on the financial market or its designations[22]. As a result, in relation to information about economic crime committed on the financial market, the development of the list of public warnings constitutes one of the instruments that let the KNF fulfil tasks concerning penal protection of the financial market.[23] It makes it possible to publish information concerning a probability of specific financial crime commission and the course of action undertaken. Due to the fact that the information is provided by a competent entity (a supervision authority), having specialist knowledge and data concerning a supervised entity's compliance with the regulatory requirements, it constitutes an extremely important preventive instrument (transparency of violations of criminal legislation concerning the financial market), a cautionary one (possibility of preventing the infliction of harm upon unaware investors) as well as one supporting law enforcement bodies and the institution of justice.

2. DETAILED DESCRIPTION

Information asymmetry of particular participants of the financial market and, as a result, the lack of overall knowledge of details concerning its functioning, as well as a desire to obtain extraordinary profit are just some of the factors generating a high risk on this market. That is why, the development of the list of public warnings by the KFN constitutes a very important instrument, especially because of its informative, educational and cautionary value for the members of the financial market. The entry into force of the Act of 23 October 2013 amending the Act on financial market supervision and some other acts[24] meant the creation of an explicit statutory regula-

---

[20] P. Wajda, *Charakter prawny wpisu…* [Legal consequences...], pp. 81–82.

[21] Compare, P. Wajda, *Efektywność informacyjna rynku giełdowego* [Information effectiveness of the stock exchange market], Warsaw 2011, p. 311; M. Dyl, *Środki nadzoru…* [Supervisory measures...], p. 281.

[22] The list of public warnings may also contain information concerning pecuniary penalties imposed for the violation of some obligations laid down in APS (Article 6b(1) second sentence AFMS). The legal grounds were introduced in Article 8 of the Act of 30 November 2016 amending the Act on payment services and some other acts (Journal of Laws [Dz.U.] of 2016, item 1997), which entered into force on 8 February 2017.

[23] See, P. Ochman, *Rola Komisji Nadzoru Finansowego…* [Role of the KNF...], pp. 331–332.

[24] Journal of Laws [Dz.U.] of 2013, item 1567.

tion applicable to the financial market and determining the subjective and temporal scope of information revealed to the public. It is necessary to draw attention to the fact that continuous development of the list of public warnings reflects the KFN's activities in the informative and educational sphere (Article 4(1)4 AFMS), but *de lege lata* it constitutes the body's responsibility laid down in the provision of Article 6b AFMS. Before the above-mentioned amendment entered into force, particular acts regulating the capital market determined specific rules of promulgating information (e.g. the Act of 29 July 2005 on capital market supervision[25] and the Act of 29 July 2005 on public offerings and conditions for introduction of financial instruments to the organised system of transactions and public companies[26]).[27] However, they are limited to particular segments of the financial market and, moreover, promulgation of particular information based on them is optional.[28] In addition, at present, the name: List of the KNF's public warnings can be used only for information provided under Article 6b AFMS.[29]

In essence, the list of KNF's public warnings is to reveal information about the fact that a crime was reported (Article 6b(1) first sentence AFMS) or the criminal proceedings are in progress, provided that the KNF Chairman exercises his rights of the aggrieved party (Article 6b second sentence in conjunction with Article 6(2) AFMS).[30] The information that the list of public warnings should include does not

---

[25] Journal of Laws [Dz.U.] of 2017, item 724, as amended, hereinafter: ACMS. The provision of Article 25(1) of the Act stipulates, inter alia, the grounds for promulgating by the KNF of the information about: (1) cases of infringement of the provisions of the Act on trading in financial instruments, the Act on public offerings, the Act on investment funds and the Act on commodity exchanges; (2) legal measures undertaken in order to counteract the violation of regulations of the Acts referred to in (1), including sanctions imposed and reporting the suspicion of crime commission as well as initiation of result of an administrative or civil proceedings; (3) circumstances indicating the manipulation referred to in the Act on trading in financial instruments or the commission of a crime or a misdemeanour referred to in the Acts listed in (1). There is a negative result of promulgating the information: the possibility of endangering capital market or causing disproportionate loss for the persons involved.

[26] Journal of Laws [Dz.U.] of 2016, item 1639 as amended, hereinafter: APO. The provisions of Article 16(1)3) and Article 17(1)3) of the Act constitute, inter alia, grounds for publishing by the KNF, at the issuer's expense, information on illegal operations concerning public offerings, subscription or sale or illegal operations connected with the application for admission to or introduction of trade in securities on the regulated market.

[27] It must be emphasised that the subjective grounds for promulgation of some information are still in force.

[28] For more, see P. Wajda, *Efektywność informacyjna…* [Information effectiveness...], pp. 310–314; M. Dyl, *Środki nadzoru…* [Supervisory measures...], pp. 281–284; T. Nieborak, [in:] T. Nieborak, T. Sójka (ed.), *Ustawa o nadzorze nad rynkiem kapitałowym. Komentarz* [Act on capital market supervision. Commentary], Warsaw 2011, pp. 153–154; M. Wędrychowski, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego…* [Capital market law...], p. 1510.

[29] See, Article 6b(4) AFMS.

[30] As a result of the amendment to AFMS, the scope of the list of the KNF's public warnings has been broadened by the addition of a possibility to promulgate information about imposing a pecuniary penalty on the provider of payment services in connection with failure to fulfil some obligations laid down in APS. It must be indicated, however, that the provision of information about a pecuniary penalty is optional. Moreover, there is a negative consequence (revealing the information may endanger the financial market or cause disproportionate loss). The

apply to all offences but only those laid down in the provision of Article 6b(1) AFMS. In general, they consist in illegal performance of regulated business on the financial market or illegal use of designations dedicated to institutional participants of that market (the infringement of statutory exclusive rights of the entities of this market). The catalogue of those offences includes:

– illegal use of the term "pension scheme", "public pension association" or "workers' pension association" (Article 215 Act of 28 August 1997 on the organisation and operation of pension schemes[31]);
– illegal involvement in a pension scheme or a pension association activities (Article 216 AOOPS);
– illegal banking activities (Article 171(1) and (3) Act of 29 August 1997: Banking law[32]);
– illegal use of terms: "bank" or "savings bank" (Article 171(2) and (3) BL);
– illegal purchase or proposal to buy stock exchange products (Article 56a Act of 26 October 2000 on commodity exchanges[33]);
– illegal involvement in commodity exchange institutions' activities (Article 57 ACE);
– illegal involvement in insurance and reinsurance activity (Article 430 Act of 11 September 2015 on insurance and reinsurance activities[34]);
– illegal involvement in insurance intermediation (Article 47 Act of 22 May 2003 on insurance intermediation[35]);
– illegal use of terms indicating performance of agency-related or brokers' activities in the field of insurance and reinsurance (Article 48 AII);
– illegal use of the term "pension scheme" (Article 50(1) and (2) Act of 20 April 2004 on workers' pension schemes[36]);
– illegal use of the terms "personal pension account" or "personal pension protection account", and their respective abbreviations "IKE" or "IKZE" (Article 40 Act of 20 April 2004 on personal pension accounts and personal pension protection accounts[37]);
– illegal involvement in investment activities (Article 287 Act of 27 May 2004 on investment funds and alternative investment funds management[38]);
– illegal sale of shares in investment funds (Articles 290 to 291 AIF);

---

above-mentioned optional mode and negative consequence make the mechanism of providing information about pecuniary penalties imposed similar to the regulations for the capital market (e.g. Article 25 (1) AFMS). Thus, a question arises whether it would not be more purposeful to include the provision in the Act on payment services, especially as the provision of Article 6b AFMS does not contain any regulations concerning further proceedings in connection with once communicated information (its verification or updating), in particular the period of making it available.

31 Journal of Laws [Dz.U.] of 2017, item 870, as amended, hereinafter: AOOPS.
32 Journal of Laws [Dz.U.] of 2016, item 1988, as amended, hereinafter: BL.
33 Journal of Laws [Dz.U.] of 2017, item 1127, as amended, hereinafter: ACE.
34 Journal of Laws [Dz.U.] of 2017, item 1170, as amended, hereinafter: AIRA.
35 Journal of Laws [Dz.U.] of 2016, item 2077, as amended, hereinafter: AII.
36 Journal of Laws [Dz.U.] of 2016, item 1449, as amended.
37 Journal of Laws [Dz.U.] of 2016, item 1776, as amended.
38 Journal of Laws [Dz.U.] of 2016, item 1896, as amended, hereinafter: AIF.

– illegal establishment of investment management companies' branches (Article 292 AIF);
– illegal involvement in activities of investment management companies (Article 293 AIF);
– illegal introduction of an investment fund or an alternative investment fund to the EU system (Article 294a AIF);
– illegal involvement in activities of an EU investment management company into the territory of the Republic of Poland (Article 294b AIF);
– illegal involvement in investment fund associations' activities (Article 295 AIF);
– illegal use of the terms: "alternative investment company", "investment fund", "investment fund association" and their abbreviations "EuVECA" or "EuSEF" (Article 296 AIF);
– illegal involvement in financial instruments trade activities (Article 99 APO);
– illegal public offering (Article 99a APO);
– illegal involvement in payment services or electronic currency supply (Article 150(1) Act of 19 August 2011 on payment services[39]);
– illegal use of the terms: "payment services", "electronic currency supply", "payment institution", "payment services office", "electronic currency institution" or "branch of foreign payment institution" (Article 150(2) APS),
– illegal conclusion of contracts to provide payment services (Article 151 APS).

What draws attention in the presented catalogue is the lack of an offence classified in Article 437 AIRA, consisting in the illegal use of terms indicating involvement in insurance and reinsurance activities. In the light of the relatively coherent subjective scope of the list of public warnings, its lack is entirely incomprehensible. Moreover, the subjective scope of the list of public warnings is imperfect because there is no obligation to include in it information about proceedings concerning collective entities' liability for prohibited acts carrying a penalty. Most economic crimes that are grounds for entry onto the list, in case the fact of committing a prohibited act is confirmed by a valid conviction, a judgement conditionally discontinuing the criminal proceedings or a court ruling of the proceeding discontinuation because of circumstances excluding the punishment of a perpetrator, constitute grounds for a collective entity's liability in accordance with the Act of 28 October 2002 on collective entities' liability for prohibited acts carrying a penalty[40].

From the technical point of view, the implementation of the subjective obligation consists in promulgation of the above-mentioned information by the KNF on a dedicated website called *List of the KNF's public warnings*[41]. A company name

[39] Journal of Laws [Dz.U.] of 2016, item 1572, as amended, hereinafter: APS.

[40] Journal of Laws [Dz.U.] of 2016, item 1541, as amended, hereinafter: ACEL. The catalogue of prohibited acts that are grounds for a collective entities' liability (Article 16 ACEL), because of unknown reasons, does not contain crimes classified in ATFI (see, P. Ochman, *Karnoprawna ochrona rynku kapitałowego. Przepisy karne ustaw polskiego rynku kapitałowego* [Penal and legal protection of the capital market. Penal provisions of the Polish acts on the capital market], London 2014, p. 346).

[41] Available at: https://www.knf.gov.pl/dla_konsumenta/ostrzezenia_publiczne.

is also published in the list in the event it has been reported that it might have committed a crime or in case preparatory proceedings are conducted against that company. If a company operates under a different designation, the other designation is also revealed. The information provided by the KNF cannot contain any personal data, however, publication of the name of a natural person's company does not infringe this ban. In the literature, still before Article 6b AFMS entered into force, the entry on the list of public warnings was classified as the substantial-technical action,[42] and the standpoint has remained the same up to now.[43]

The information in the list of public warnings is verified and updated. The verification may result from the findings in the course of criminal proceedings or due to the time that has passed from the moment of the last entry. Updating may concern submitting adequate remarks or deleting the information. Information that the KNF reported suspicion of crime commission under Article 6b(1) AFMS must be each time supplemented with information about a valid ruling on refusal to initiate preparatory proceedings or a valid ruling to discontinue preparatory proceedings, and in case of indictment filed – about a valid court judgement. Due to the fact that preparatory proceedings concerning the above-mentioned offences may be initiated as a result of suspicion reported by other entities or *ex officio*, the provision of Article 6b(6) AFMS obliges a prosecutor to inform the KNF about the event. In such a case, information about the criminal proceedings and additional remarks are published only if the KNF Chairman exercises his right of the aggrieved party. Updating and verification of the information provided in the list of public warnings play an important role, especially because of the necessity and need to promulgate data reflecting the actual state (for example, about the negative verification of the KNF's suspicions concerning the commission of crime and the ruling to discontinue criminal proceedings). In this context, it is necessary to draw attention to the lack of any deadlines to be met by a prosecutor concerning information about events laid down in Article 6b(6) AFMS to be passed to the KNF or concerning information available to the KNF *ex officio*.

AFMS also determines the rules of deleting information from the list of public warnings.[44] It may take place *ex officio* or on a motion. However, regardless of the mode, the requirement of deleting information and any additional remarks from the list is the conclusion of all criminal proceedings initiated as a result of the KNF's reports or conducted *ex officio*, or resulting from other entities' reports provided that the KNF Chairman exercises his right to act as a subsidiary prosecutor. This means that in case more than single proceedings were initiated and when single criminal proceedings were initiated, while other motions to initiate preparatory

---

[42] P. Wajda, *Charakter prawny wpisu…* [Legal consequences...], p. 85.

[43] B. Wojno, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego…* [Financial market law...], p. 1404.

[44] It is indicated in the specialist literature that an entity entered in the list of public warnings does not have a possibility of challenging the grounds for the decision and taking action before court (B. Wojno, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego…* [Capital market law...], p. 1404; also compare, M. Wędrychowski, [in:] M. Wierzbowski, L. Sobolewski, P. Wajda (ed.), *Prawo rynku kapitałowego…* [Capital market law...], p. 1510).

proceedings in one or more cases were rejected, only the conclusion of the "last" criminal proceedings makes it possible to delete the information and all the remarks concerning the given entity. However, it is important to draw attention to the legislator's use of a phrase "after the conclusion of all the proceedings" without the statement that it applies to "valid conclusion of all initiated proceedings".[45] In case of the "motion-based" mode, the requirement of deleting information from the list of public warnings is the submission of a written motion by the entity that was reported or against which the KNF Chairman acted as a subsidiary prosecutor. The right to file a motion to delete the information is only limited to cases in which, after publishing information by the KNF, there was a valid ruling issued concerning the refusal to initiate preparatory proceedings, discontinuation of preparatory proceedings or a court judgement concluding the criminal proceedings other than conviction or conditional discontinuation of criminal proceedings. The *sine qua non* requirement of accepting the motion by the KNF is the notification of the KNF by a prosecutor about the further course of the proceedings. Otherwise, the motion cannot be dealt with and the petitioner is informed about that. Attention may also be drawn to some doubts that can be an obstacle to accept an entity's legitimate motion in the event the procedure of entering the entity in the list of public warnings was groundless. Due to the lack of any deadlines laid down that would bind a prosecutor to update and pass information to the KNF, his inaction will actually make it impossible for the KNF to accept the motion.

Deleting the information and all the remarks from the list of public warnings, concerning a given entity, as a rule, should take place not later than 10 years after a crime commission was reported or the KNF Chairman filed a motion to exercise his right to act as a subsidiary prosecutor. In the event the criminal proceedings have not been concluded within the 10-year period, and after a year from the day of valid conclusion of the criminal proceedings, the information and all the remarks must be deleted from the list *ex officio*.

As it was indicated above, the development of the list of public warnings undoubtedly increases availability of information concerning entities involved in illegal operations on the financial market. On 12 July 2017, the list contained 171 entries of which 68 concern crimes under Article 171(1) to (3) BL, 66 – crimes under Article 178 ATFI, 2 – crimes under Article 178 in conjunction with Article 79 ATFI, 7 – crimes under Articles 287 and 290 to 296 AIF, 13 – crimes under Articles 99 and 99a APO, 1 – crime under Articles 56a and 57 ACE, 4 – crimes under Article 430 AIRA (ex Article 225 Act on insurance activities), 3 – crimes under Articles 47 and 48 AII, and 7 – crimes under Articles 150 and 151 APS. As it can be observed, the list contains a relatively big number of entities, of which only four were subject to additional information about conditional discontinuation of criminal proceedings, one ended in a valid acquittal, one ended in a penal judgement in the form of an order, and eight ended in a valid conviction.

[45] There is also a lack of a mode for deleting information about the imposition of pecuniary penalties on payment services providers.

3. CONCLUSIONS

Although the amount of information published does not correspond to the number of convictions and conditionally discontinued criminal proceedings,[46] this cannot constitute an argument for the statement that the list of public warnings is ineffective. Their role is undoubtedly appropriate to the aim they serve. The KNF, as a specialist body supervising the financial market, has first-hand information enabling it to verify whether the financial market entities' activity complies with legal regulations. This lets this body outrun law enforcement agencies and justice institution bodies, which are more active in the field of penalising economic pathologies. In this context, the KNF activity makes it possible to prevent harming investors by entities that do not guarantee appropriate operations on the financial market. The list of public warnings is one of such instruments. However, it is very important for the instrument to be used by investors as well as law enforcement or justice institution bodies. Moreover, the clear regulation concerning the list is the indication of significance of the instrument stipulated by the legislator. However, this does not mean that the present regulation does not have any drawbacks. One can point out the following diagnosed issues:

– omission of the crime of illegal use of names indicating insurance and reinsurance activities in the catalogue of crimes revealed on the list of public warnings (Article 437 DUU);
– imprecise use of the term "conclusion of criminal proceedings" instead of a more appropriate term "valid conclusion of criminal proceedings";
– lack of a set deadline in the provision of Article 6b that the KNF as well as a prosecutor should meet when performing their duties;
– lack of explicit obligation imposed on a prosecutor to inform the KNF about the issue of a valid ruling of refusal to initiate preparatory proceedings or discontinuation of preparatory proceedings, and in case of an indictment filed to court, about a valid judgement;
– lack of the KNF's obligation to publish information concerning collective entities' liability for prohibited acts carrying a penalty.

Consideration of changes in the proposed scope would undoubtedly increase safety, stability and trust in the financial market as well as the protection of investors. It should be hoped that information published in the list of the KNF's public warnings will be used by their addressees and other state bodies and will constitute a real instrument eliminating entities that do not comply with law when operating on the financial market.

---

[46] See, P. Ochman, *Karnoprawna ochrona rynku...* [Penal and legal protection...], pp. 298–299; A. Kawulski, *Prawo bankowe. Komentarz* [Banking law. Commentary], Warsaw 2013, thesis 4 to Article 171.

BIBLIOGRAPHY

Davies H., Green D., *Globalny nadzór i regulacja sektora finansowego* [Global supervision and regulation of the financial sector], Warsaw 2010.

Dyl M., *Środki nadzoru nad rynkiem kapitałowym* [Supervisory measures in the capital market], Warsaw 2012.

Gardocki L., *Zagadnienia teorii kryminalizacji* [Issues in penalisation theory], Warsaw 1990.

Górniok O., *Problemy przestępczości gospodarczej w zaleceniach Rady Europy* [Problems of business crime in the recommendations of the Council of Europe], Państwo i Prawo No. 9, 1991.

Górniok O., *Środki zapobiegania przestępczości gospodarczej w zaleceniach Rady Europy* [Measures preventing business crime in the recommendations of the Council of Europe], Państwo i Prawo No. 10, 1992.

Górniok O., *Przestępczość gospodarcza i jej zwalczanie* [Business crime and its combating], Warsaw 1994.

Górniok O., *Rola karania w przeciwdziałaniu patologicznym zachowaniom gospodarczym* [Role of punishment in prevention of pathological business behaviour], Przegląd Ustawodawstwa Gospodarczego, 1999.

Górniok O. (ed.), *Prawo karne gospodarcze* [Penal business law], Warsaw 2003.

Jurkowska-Zeidler A., *Bezpieczeństwo rynku finansowego w świetle prawa Unii Europejskiej* [Security of the financial market in the light of the European Union law], Warsaw 2008.

Kawulski A., *Prawo bankowe. Komentarz* [Banking law. Commentary], Warsaw 2013.

Kuciński R., *Przestępstwa giełdowe* [Stock exchange offences], Warsaw 2010.

Lemmonier M., *Europejskie modele instrumentów finansowych. Wybrane zagadnienia* [European models of financial instruments. Selected issues], Warsaw 2011.

Nadolska A., *Komisja Nadzoru Finansowego w nowej instytucjonalnej architekturze europejskiego nadzoru finansowego* [Financial Supervision Authority in the new institutional structure of the European system of financial supervision], Warsaw 2014.

Nieborak T., Sójka T. (ed.), *Ustawa o nadzorze nad rynkiem kapitałowym. Komentarz* [Act on capital market supervision. Commentary], Warsaw 2011.

Ochman P., *Ochrona działalności bankowej w prawie karnym gospodarczym. Przepisy karne ustaw bankowych* [Protection of banking activity in the penal business law. Penal provisions in the acts on banking], Warsaw 2011.

Ochman P., *Karnoprawna ochrona rynku kapitałowego. Przepisy karne ustaw polskiego rynku kapitałowego* [Penal and legal protection of the capital market. Penal provisions of the Polish acts on the capital market], London 2014.

Ochman P., *Rola Komisji Nadzoru Finansowego w karnej ochronie rynku finansowego* [Role of the KNF in the penal protection of the financial market], Ius Novum No. 4, 2016.

Pyka I., *Funkcjonowanie i organizacja rynku finansowego* [Operation and organization of the financial market], [in:] I. Pyka (ed.), *Rynek finansowy* [Financial market], Katowice 2010.

Wajda P., *Rola decyzji administracyjnej w nadzorze nad polskim systemem finansowym* [Role of the administrative decision in the supervision of the Polish financial system], Warsaw 2009.

Wajda P., *Efektywność informacyjna rynku giełdowego* [Information effectiveness of the stock exchange market], Warsaw 2011.

Wajda P., *Charakter prawny wpisu na listę ostrzeżeń publicznych KNF* [Legal consequences of entry in the KNF public warnings list], Monitor Prawa Bankowego No. 6, 2013.

Wierzbowski M., Sobolewski L., Wajda P. (ed.), *Prawo rynku kapitałowego. Komentarz* [Capital market law. Commentary], Warsaw 2014.

Zawadzka P., *Pojęcie i zakres rynku finansowego* [Concept and scope of the financial market], [in:] R. Mastalski, E. Fojcik-Mastalska (eds.), *Prawo finansowe* [Financial law], Warsaw 2011.

Zawłocki R., *Prawo karne gospodarcze* [Penal business law], Warsaw 2007.
Zawłocki R. (ed.), *Prawo karne gospodarcze* [Penal business law], Warsaw 2012.
Żółtek S., *Prawo karne gospodarcze w aspekcie zasady subsydiarności* [Penal business law in terms of subsidiarity principle], Warsaw 2009.

LIST OF THE KNF'S PUBLIC WARNINGS AS THE FINANCIAL MARKET PROTECTION INSTRUMENT

Summary

The article is an attempt to present the role of the List of the Financial Market Supervision Authority's public warnings in the system of the financial market protection. The introduction of explicit statutory grounds for the entitlement to perform it took place relatively not long ago, which does not mean, though, that the body did not develop such a list before. The regulation of the provision of Article 6b AFMS, as this is the act discussed, constitutes an instrument consisting in the obligation to inform public opinion about crimes on the financial market which violate the exclusive rights of entities operating on this market. Due to the fact that the information is provided by a specialist and professional body, the list of public warnings constitutes an extremely important preventive and cautionary instrument as well as one supporting the activities of law enforcement agencies and justice institution bodies. The Financial Market Supervision Authority's competences presented in the article constitute a significant element of the system of ensuring security, stability and trust in the financial market, as well as the protection of its participants.

Keywords: KNF, list of public warnings, business crimes, penal business law, financial market

LISTA OSTRZEŻEŃ PUBLICZNYCH KNF JAKO INSTRUMENT OCHRONY RYNKU FINANSOWEGO

Streszczenie

Celem niniejszego artykułu jest próba przedstawienia roli, jaką spełnia Lista ostrzeżeń publicznych Komisji Nadzoru Finansowego w systemie ochrony rynku finansowego. Wprowadzenie wyraźnej ustawowej podstawy uprawnienia do jej prowadzenia nastąpiło stosunkowo niedawno, co jednak nie oznacza, że taka lista nie była wcześniej prowadzona przez ten organ. Regulacja przepisu art. 6b NRFU – bo o niej będzie mowa – stanowi jednak instrument polegający na obligatoryjnym poinformowaniu opinii publicznej w sprawach przestępstw rynku finansowego, polegających na naruszeniu ustawowego prawa wyłączności podmiotów działających na tym rynku. Ze względu na fakt, że informacja taka podawana jest przez podmiot profesjonalny i specjalistyczny, lista ostrzeżeń publicznych stanowi niezwykle istotny instrument prewencyjny, ostrzegawczy, a także nawet wspomagający działania organów ścigania oraz organów wymiaru sprawiedliwości. Zaprezentowana w artykule kompetencja Komisji Nadzoru Finansowego stanowi istotny element systemu ochrony bezpieczeństwa, stabilności i zaufania do tego rynku finansowego, a także ochrony jego uczestników.

Słowa kluczowe: KNF, lista ostrzeżeń publicznych, przestępstwa gospodarcze, prawo karne gospodarcze, rynek finansowy

Ius Novum
4/2017

CONSUMPTION AND SALE OF ALCOHOLIC BEVERAGES: SELECTED LEGAL AND HEALTH-RELATED ISSUES

IRENEUSZ NOWAK*, ADRIANA NOWAK**

1. INTRODUCTION

The main aim of the article is to establish selected legal, social and health-related aspects connected with the presently binding Act of 26 October 1982 on upbringing in sobriety and counteracting alcoholism[1] (hereinafter: AUSCA). The research also covered, to some extent, the negative effects of alcoholic beverages consumption and abuse[2] for consumers and the whole system of public health in Poland.

The considerations presented in the article justify a thesis that the Act on upbringing in sobriety and counteracting alcoholism needs amending, which is also confirmed in numerous scientific publications as well as the reports of organisations for the prevention of alcoholism. The article also presents the opinion that this legal act is ineffective in preventing alcohol abuse.

2. SOCIAL AND HEALTH-RELATED ASPECTS OF THE CONSUMPTION OF ALCOHOLIC BEVERAGES

Alcohol (ethanol or ethyl alcohol) is an ingredient of beer, wine and spirits, which may be addictive. The harmful effects of the consumption of alcoholic drinks have been well documented in recent years. In small amounts, alcohol is a stimulant

* PhD, Assistant Professor, Faculty of Law and Administration of the University of Łódź; irnowak@uni.lodz.pl

** PhD hab., Assistant Professor, Faculty of Biotechnology and Food Sciences of Łódź University of Technology; adriana.nowak@p.lodz.pl

1 Ustawa z dnia 26 października 1982 r. o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi (uniform text: Journal of Laws [Dz.U.] of 2016, item 487, as amended).

2 An alcoholic beverage is a consumer product containing ethyl alcohol of agricultural origin in 0.5% ABV solution, Article 46(1) AUSCA.

producing euphoria and talkativeness. The consumption of a bigger amount causes drowsiness, breathing problems (consisting in shortness of breath, shallow breathing and breathlessness), comma and even death.[3] Apart from heavy intoxication resulting from drinking big amounts of alcohol, it has an impact on every human organ depending on blood alcohol concentration in a given time unit. After being swallowed, alcohol is quickly absorbed into the bloodstream (20% through the stomach, 80% through the small intestine), which can be observed already 5 to 10 minutes after the consumption and reaches the highest level after 30 to 90 minutes when it passes to all organs.[4] 90% of ethanol undergoes the process of detoxification in the liver (however, it concerns a given amount per hour), where it is metabolised into water and carbon dioxide;[5] the reminder is exhaled (through lungs), excreted in urine (through kidneys) and in the process of perspiration.[6]

In the process of metabolism, alcohol is converted into toxic intermediates, inter alia acetaldehyde, which is more toxic than ethanol and passes in the organism in the bloodstream until excretion.[7] Apart from immediate effects, i.e. those occurring in the short time (referred to as the drunkenness), the consumption of alcohol results in many long-term health problems.[8] Alcohol affects the following body organs and systems: cardiovascular and immune systems, muscular and skeletal systems, brain and nervous system, breasts (women), eyes, blood pressure, intestines, liver, lungs, kidneys, pancreas and digestion of sugars, mouth and pharynx, psychical health, skin, reproductive system and foetus development.[9]

Some research suggests that moderate consumption of alcohol (up to one drink a day) reduces the risk of heart diseases,[10] however, it has not been established so far what the "one standard drink" means, especially as every country uses its own definition of "safe" drinking.[11] People consuming alcohol regularly rarely limit the

---

[3] *Alcohol – the body and health effects. A brief overview*, Health Promotion Agency, Alcohol Advisory Council of New Zealand, http://www.hpa.org.nz/sites/default/files/documents/HealthEffects.pdf [accessed on 28.06.2017].

[4] R.H. Lohr, *Acute alcohol intoxication and alcohol withdrawal*, [in:] R.M. Wachter, L. Goldman, H. Hollander (eds.), *Hospital medicine* (2nd ed.), Philadelphia: Lippincott Williams & Wilkins, 2005.

[5] *Ibid*.

[6] M.A. Schuckit, *Alcohol-related disorders*, [in:] B.J. Sadock, V.A. Sadock (eds.), *Kaplan and Sadock's comprehensive textbook of psychiatry* (7th ed.), Philadelphia: Lippincott Williams & Wilkins, 2005.

[7] P. Anderson, L. Møller, G. Galea, *Alcohol in the European Union. Consumption, harm and policy approaches,* World Health Organization, 2012, http://www.euro.who.int/__data/assets/pdf_file/0003/160680/e96457.pdf [accessed on 25.06.2017].

[8] *Alcohol drug facts,* NSW Government, https://www.google.pl/?gws_rd=ssl#q=Alcohol+drug+facts+ nsw+ government [accessed on 24.06.2017].

[9] *Alcohol – the body*… [accessed on 27.06.2017]; J. Rehm, D. Baliunas, G.L. Borges, K. Graham, H. Irving, T. Kehoe, et al., *The relation between different dimensions of alcohol consumption and burden of disease: An overview. Addiction*, 105(5), 2010, pp. 817–843. S. Andréasson, T. Chikritzhs, F. Dangardt, H. Holder, T. Naimi, T. Stockwell, *Evidence about health effects of "moderate" alcohol consumption: reasons for scepticism and public health implications*, http://iogt.se/wp-content/uploads/Alkoholrapp-2014_ENG-s%C3%A4rtryck.pdf [accessed on 26.06.2017].

[10] S. Andréasson et al., *Evidence about health effects...*

[11] *Alcohol: balancing risks and benefits*, https://www.hsph.harvard.edu/nutritionsource/alcohol-full-story [accessed on 22.06.2017].

consumption to one drink a day, and the borderline between moderate drinking and a problem (addiction) is often hard to notice and leads to chronic and heavy alcohol consumption. The seeming healthy effects of drinking alcohol in small amounts are only supported by observations and not reliable medical research with the use of randomisation and double-blind trials,[12] which confirm a diverse effect. Ethanol is a toxic compound for microorganisms, used for disinfecting in many branches of industry and laboratories, also harmful to human cells.[13]

Long-term consumption of alcohol contributes to anaemia and immunodeficiency, which is related to higher exposure to bacterial or viral infections and more frequent morbidity of such diseases as tuberculosis, pneumonia and meningitis.[14] As far as the spinal system is concerned, it contributes to osteoporosis because it reduces the absorption of calcium and, as a result, bone formation, as well as to death of bone tissue[15] and arthritis[16]. It may cause congestive cardiomyopathy, which weakens the functioning of heart, arrhythmia and high blood pressure, especially among men.[17] Moreover, alcohol reduces absorption of vitamins, minerals and many other nutrients from food and contributes to inappropriate functioning of intestines.[18]

Long-term effects of excessive consumption of alcohol contribute to serious liver diseases such as hepatitis, cirrhosis and cancer.[19] 10 to 35% alcoholics suffer from alcoholic hepatitis and 5 to 15% from cirrhosis.[20] According to the National Cancer Institute, drinking alcohol contributes to some specific types of cancer.[21] And the International Agency for Research on Cancer (IARC) placed ethanol and alcoholic beverages on the list of human carcinogens.[22] Cancer related to drinking alcohol concerns such human body parts as: mouth cavity, pharynx, larynx, oesophagus, liver, large intestine and female breasts.[23] The increased risk of breast cancer occurs even as a result of moderate consumption of alcohol and is proportional to this consumption. According to the findings of epidemiological research, every 10 grams of alcohol a day (i.e. less than one standard drink in most countries) increases the risk of breast cancer by 7 to 10%.[24] The mechanisms of molecular and biochemical

---

12 S. Andréasson, et al., *Evidence about health*....

13 https://www.theguardian.com/science/2011/mar/07/safe-level-alcohol-consumption [accessed on 22.06.2017].

14 *Alcohol – the body*… [accessed on 28.06.2017].

15 C.T. Derk, R.J. De Horatius, *Osteonecrosis*, [in:] W.J. Koopman, L.W. Moreland (eds.), *Arthritis and allied conditions: A textbook of rheumatology* (15th ed.), Philadelphia: Lippincott Williams & Wilkins, 2005.

16 M.I. Fingerhood, *Alcoholism and associated problems*, [in:] N.H. Fiebach, L.R. Barker, J.R. Burton, P.D. Zieve (eds.), *Principles of ambulatory medicine* (7th ed.), Philadelphia: Lippincott Williams & Wilkins, 2007.

17 R.A. Kloner, S.H. Rezkalla, S*ubstance abuse and the heart*, [in:] *Textbook of cardiovascular medicine* (3rd ed.), Philadelphia: Lippincott Williams & Wilkins, 2007.

18 J. Rehm et al., *The relation between*…, pp. 817–843.

19 *Alcohol – the body*… [accessed on 21.06.2017].

20 *Ibid*.

21 https://www.cancer.gov/about-cancer/causes-prevention/risk/alcohol/alcohol-fact-sheet [accessed on 28.06.2017].

22 J. Rehm et al., *The relation between*…, pp. 817–843.

23 *Ibid*.

24 *Ibid*.

induction of cancer caused by ethanol are not fully recognised but they may include polymorphism of genes responsible for ethanol metabolism (dehydrogenase and cytochrome P450), increased level of oestrogen, changes in folate metabolism and poor DNA repair.[25] In case of large intestine cancer, genotoxicity of acetaldehyde, the above-mentioned product of ethanol metabolism, plays an essential role.[26] It is worth emphasising that alcohol consumption builds a synergistic relationship with smoking, increasing the risk of head and neck cancer.[27]

Here, it is hard not to ask a question whether, in Poland, a definitely Catholic country,[28] worshippers have not forgotten the words from the Bible describing the negative effects of drinking alcohol: "Who has woe? Who has sorrow? Who has strife? Who has complaints? Who has needless bruises? Who has bloodshot eyes? Those who linger over wine, who go to sample bowls of mixed wine. Do not gaze at wine when it is red, when it sparkles in the cup, when it goes down smoothly! In the end it bites like a snake and poisons like a viper. Your eyes will see strange sights, and your mind will imagine confusing things. You will be like one sleeping on the high seas, lying on top of the rigging. 'They hit me,' you will say, 'but I'm not hurt! They beat me, but I don't feel it! When will I wake up so I can find another drink?'"[29].

3. AIM OF THE ACT ON UPBRINGING IN SOBRIETY AND COUNTERACTING ALCOHOLISM

In the Preamble to the Act of 26 October 1982 on upbringing in sobriety and counteracting alcoholism, the legislator *expressis verbis* states that the citizens' life in sobriety is an indispensible condition of the moral and financial welfare of the Nation. Thus, the legislator indicates *ratio legis* of the legal solution introduced.[30] In other words, the provisions of the AUSCA are preceded by a ceremonious introduction, called Preamble, which is not an obligatory element of every normative act but one only used in a situation when the legislator wants to clearly determine the aims of legal regulations.[31] Therefore, there is no doubt that the content of the Preamble lays down guidelines concerning the interpretation of particular Articles of the analysed Act and has binding power for its interpretation, but first of all, it

---

[25] *Ibid*.

[26] *Ibid*.

[27] *Measuring the health risks and benefits of alcohol*, https://pubs.niaaa.nih.gov/publications/10report /chap01a.pdf [accessed on 26.06.2017].

[28] http://www.pope2016.com/polska/o-kraju/news,452566,kosciol-w-polsce-w-liczbach.html [accessed on 28.06.2017].

[29] *Księga Przypowieści Salomona 23, 29–35* [The Wisdom of Solomon, 23, 29–35], [in:] *Pismo Święte Starego i Nowego Testamentu* [Holy Bible, the Old and New Testament], Towarzystwo Biblijne w Polsce, Warsaw 2004, pp. 724–725.

[30] Judgement of the Voivodeship Administrative Court in Lublin: Wyrok WSA w Lublinie z dnia 6 grudnia 2016 r., III SA/Lu 757/16, http://orzeczenia.nsa.gov.pl/doc/FA9CDA58B5 [accessed on 20.06.2017].

[31] Supreme Administrative Court judgement: Wyrok NSA z dnia 21 grudnia 2016 r., I GSK 336/15, http://orzeczenia.nsa.gov.pl/doc/DC0ACFE6DC [accessed on 22.06.2017].

explains the aim and "spirit" of the Act.[32] It is worth pointing out that, as is indicated in the literature, the Preamble of the AUSCA has a normative character with respect to the part determining the aims, which the public administration bodies should strive to meet in the area that is subject to the Act, i.e. in the meaning of an axiological element, decoded norms of the remaining part of the Act.[33]

In accordance with Article 1 AUSCA, state administration bodies and local self-government units are obliged to undertake activities aimed at limiting the consumption of alcoholic beverages and changing the structure of their consumption, initiating and supporting initiatives to change drinking habits, acting for sobriety at the workplace, preventing alcohol abuse and eliminating its consequences as well as supporting social organisations and businesses' activities in this area.[34] Moreover, the above-mentioned bodies should also support the establishment and development of social organisations that aim to promote sobriety and abstinence, influence people abusing alcohol and assist their families as well as they should ensure conditions conducive to these organisations' activities, inter alia, cooperating with the Catholic Church and other Churches and religious organisations in the field of upbringing in sobriety and counteracting alcoholism.[35] The opinion that the legislator's intention unambiguously is to limit access to alcohol and "profile" social strategy so that it would make it possible to efficiently combat alcoholism and teach planned and conscious use of alcoholic drinks by the society is quite well known in jurisprudence.[36] The stand is commonly approved of in case law, where it is emphasised that the legislator indicates that the aim of AUSCA is, inter alia, to limit access to alcohol and motivate citizens to refrain from its consumption[37] and, in addition, to ensure safety, orderliness and public order,[38] the violation of which is directly connected with alcohol consumption, such as violence, hooliganism, crime, domestic problems, social exclusion, problems at the workplace or drink driving.

---

[32] I. Nowak, A. Nowak, *Zakaz palenia wyrobów tytoniowych – wybrane aspekty prawne i społeczne* [Ban on smoking tobacco products: selected legal and social issues], Humanities and Social Sciences No. 1, 2016, and the literature referred to therein.

[33] I. Skrzydło-Niżnik, G. Zalas, *Ustawa o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi. Komentarz* [Act on upbringing in sobriety and counteracting alcoholism. Commentary], 2012, Lex/el; judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski: wyrok WSA w Gorzowie Wielkopolskim z dnia 3 kwietnia 2014 r., II SA/Go 148/14, http://orzeczenia.nsa.gov.pl/doc/4A35FD49A4 [accessed on 24.06.2017].

[34] R. Pruszkowski, *Obowiązki jednostek samorządu terytorialnego w zakresie przeciwdziałania alkoholizmowi* [Responsibilities of local government units in counteracting alcoholism], Finanse Komunalne No. 2, 2002, pp. 50–54.

[35] Article 1(2) to (3) AUSCA.

[36] A. Kubik, *Sprzedaż alkoholu przez Internet* [Online sale of alcohol], Przegląd Ustawodawstwa Gospodarczego No. 3, 2015, pp. 2–8.

[37] Judgement of the Voivodeship Administrative Court in Wrocław: Wyrok WSA we Wrocławiu z dnia 12 marca 2015 r., III SA/Wr 826/14, http://orzeczenia.nsa.gov.pl/doc/792F4982C8 [accessed on 27.06.2017].

[38] Judgement of the Voivodeship Administrative Court in Wrocław: Wyrok WSA we Wrocławiu z dnia 19 grudnia 2011 r., III SA/Wr 568/11, http://orzeczenia.nsa.gov.pl/doc/371EC0C063 [accessed on 21.06.2017].

4. LICENCE TO SELL ALCOHOLIC BEVERAGES VERSUS FREEDOM TO CONDUCT A BUSINESS

The Constitutional Tribunal repeatedly indicated that the freedom to conduct a business is not absolute in nature and may be subject to limitations in accordance with Article 22 of the Constitution of the Republic of Poland,[39] which stipulates that limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons.[40] In other words, the sale of alcoholic beverages cannot be treated in the same way as other common business activities in the light of the protection of health and public morality, and public safety.[41]

Limitation of the freedom of economic activity in the area of alcoholic beverages sale, inter alia, laid down in Article 18(1) AUSCA, should be assessed through the prism of the special aim of the Act, included in the Preamble: the recognition of the citizens' life in sobriety as an indispensible condition for the moral and financial welfare of the Nation.[42] The above unambiguously means that combating pathological social phenomena, such as alcoholism, is the superior objective of the Act, which cannot be treated as relative to the interests of business entities involved in selling alcoholic beverages.[43] Moreover, trade in alcoholic beverages cannot be perceived as ordinary business activity in the light of the necessity of health and public morality protection as well as public safety.[44] The Constitutional Tribunal, in the judgement of 24 November 1998, presents the same stand and states that values related to the protection of health, the welfare of the family, public order and the citizens' safety are reflected in a series of provisions of the Constitution of the Republic of Poland, because of which the legislator based the system of alcohol sale on the principle of controlled distribution and introduced legal instruments limiting its excessive consumption.[45]

The sale of alcoholic beverages for consumption off and at the point of sale may be done based on a licence granted by a rural commune mayor (town mayor or city president),[46] i.e. the licensing body having jurisdiction over the area where the

---

[39] Ustawa z dnia 2 kwietnia 1997 r. [Act of 2 April 1997: the Constitution of the Republic of Poland], Journal of Laws [Dz.U.] of 1997, No. 78, item 483, as amended; hereinafter: the Constitution of the Republic of Poland.

[40] Constitutional Tribunal judgement: Wyrok TK z dnia 26 kwietnia 1999 r., 33/98, http://isap.sejm.gov.pl/DetailsServlet?id=WDU19990860963&min=1 [accessed on 27.06.2017].

[41] Constitutional Tribunal judgement: Wyrok TK z dnia 5 kwietnia 2011 r., P 26/09, http://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&dokument=6464&sprawa=5222 [accessed on 28.06.2017].

[42] Judgement of the Voivodeship Administrative Court in Łódź: Wyrok WSA w Łodzi z dnia 24 listopada 2014 r., III SA/Łd 855/14, http://orzeczenia.nsa.gov.pl/doc/BDB25ECC95 [accessed on 20.06.2017].

[43] Judgement of the Voivodeship Administrative Court in Warsaw: Wyrok WSA w Warszawie z dnia 13 czerwca 2011 r., VI SA/Wa 79/11, http://orzeczenia.nsa.gov.pl/doc/8B48B55285 [accessed on 26.06.2017].

[44] Judgement of the Voivodeship Administrative Court in Kraków: Wyrok WSA w Krakowie z dnia 18 października 2011 r., III SA/Kr 1344/10, http://orzeczenia.nsa.gov.pl/doc/A2AA7BCEC1 [accessed on 25.06.2017].

[45] Constitutional Tribunal judgement: Wyrok TK z dnia 24 listopada 1998 r., K 22/98, Lex/el.

[46] In accordance with Article 18^2 AUSCA, income from the issue of permits based on Article 18 or Article 18^1 and income from fees referred to in Article 11^1 shall be used to implement:

point of sale is located.[47] The decision is a partially binding administrative act based on limited discretion of an administrative body because the conditions of issuing such an act are laid down in legal acts and if an applicant meets the statutory requirements, a licence must be granted.[48]

The licensing body issues a separate administrative decision (a permit) based on a business' application for selling each of the following alcoholic beverages types:
a) containing up to 4.5% of alcohol and beer;
b) containing over 4.5% up to 18% of alcohol (except beer);
c) containing over 18% of alcohol.

A rural commune mayor (town mayor/city president) issues a permit for a fixed period of at least four years in case of on-licence and for two years in case of off-licence sale,[49] after receiving a positive opinion of the commune committee for solving alcoholism problems on the compatibility of the point of sale placement with the resolutions of the commune council,[50] which are referred to in Article 12(1) and (2) AUSCA. It should be highlighted that the role of the commune committee for solving alcoholism problems is limited to adjudicating on compatibility or incompatibility of the point of sale placement with the commune resolutions concerning the issue because the commune council resolutions are binding for the committee and it cannot verify their compliance with law.[51] However, it is worth mentioning that the

1) commune programmes of preventing and solving problems of alcoholism and Commune Programmes referred to in Article 10(2) Act of 29 July 2005 on preventing drug addiction;
2) tasks of daily support units referred to in the provisions concerning support for families and systems of substitute care within a commune programme of preventing and solving problems of alcoholism and Commune Programmes referred to in Article 10(2) Act of 29 July 2005 on preventing drug addiction;

and cannot be allocated for other purposes. As the Constitutional Tribunal rightly holds, strict conjunction of spending with the sources of their funding certainly serves disciplining commune bodies in the course of licensing companies to sell alcoholic beverages and, as a result, implementing aims determined by the legislator; and awareness that the income from the issue of licences may only be used for the implementation of commune programmes of preventing and solving alcoholism problems should be conducive to carefulness and prudence in issuing licences – Constitutional Tribunal judgement of 24 November 1998, K 22/98, Lex/el; also see, information by the Supreme Audit Office of 25 March 2013, no. 27/2013/P/12/165/LPO on use and assignment by voivodeship and commune self-governments of revenues from granted licences for sale of alcoholic beverages], https://www.nik.gov.pl/szukaj/?event=&formname=wyszukiwarka-mini&fraza=27%2F2013%2FP%2F12%2F165%2FLPO&typ%5B%5D=wszystkie&sort=mix_date_modyfikacji&sort_order=0 [accessed on 28.10.2017].

47 Article 18(1) AUSCA.

48 Judgement of the Voivodeship Administrative Court in Białystok: Wyrok WSA w Białymstoku z dnia 15 kwietnia 2015 r., I SA/Bk 19/15, Legalis No. 1258682; W. Czerwiński, *Postępowanie administracyjne w sprawie zezwolenia na sprzedaż alkoholu – analiza rozbieżności i propozycje zmian* [Administrative procedure in case of permit for alcohol sale – analysis of discrepancies and proposals of changes], Radca Prawny Zeszyty Naukowe No. 2, 2016, pp. 81–99.

49 Article 18(9) AUSCA.

50 For more, see D. Lebowa, W. Maciejko, *Gminna komisja rozwiązywania problemów alkoholowych* [Commune committee for solving alcohol-related problems], Wyd. LexisNexis, Warsaw 2011, passim.

51 Decision of the Local Government Appeal Court in Gdańsk: Postanowienie SKO w Gdańsku z dnia 30 kwietnia 2012 r., 5113/11, Lex/el.

commune committee for solving alcoholism problems, when issuing its opinion, must express its opinion on the very essence of the matter, i.e. assess whether the point of sale placement meets the requirements laid down in the commune council resolution, because it is the sole competence of the committee to assess the compatibility of the point of sale placement with the commune council resolution.[52]

A commune mayor (town mayor/city president) issuing a decision concerning a permit for alcohol sale must take into consideration, apart from the provisions of AUSCA, the resolutions of other bodies of local self-government issued based on Article 12(1), (2), (3) and (4) AUSCA concerning the number of points of sale of alcoholic beverages containing over 4.5% of alcohol (except beer), rules of their placement and form of sale because a commune council resolutions concerning this matter are bylaws binding for both a business and a public authority body.[53] It is inadmissible to apply additional criteria that would result in the exclusion of businesses meeting basic requirements and obtaining licences by businesses that do not meet those basic requirements.[54]

A licensing body or, based on its authorisation, municipal police or members of a commune committee for solving alcoholism problems check whether the rules and conditions of the licence are complied with.[55] It should be pointed out that the legislator, empowering a commune legislative body to adopt resolutions on a commune programme of preventing and solving alcoholism problems,[56] did not stipulate that regulations concerning supervision of alcoholic beverages sale should be one of its elements, because AUSCA clearly authorises a commune executive body to perform that task.[57] It is obvious that the competence norm cannot be presumed and constructed via law interpretation; it must be clearly determined in statute and it is necessary to remember that in case of administrative bodies, not the principle that "what is not prohibited is allowed" is applicable but the principle "only what has explicit legal grounds is allowed".[58]

The statutory supervisory entitlement of the members of a commune committee for solving alcoholism problems is laid down in Article 18 AUSCA. However, this empowerment is not addressed to a commune legislative body and does not concern

---

[52] Judgement of the Voivodeship Administrative Court in Kraków: Wyrok WSA w Krakowie z dnia 8 czerwca 2011 r., III SA/Kr 368/11, http://orzeczenia.nsa.gov.pl/doc/2E8916B86D [accessed on 25.06.2017].

[53] Judgements of the Supreme Administrative Court: Wyroki NSA z dnia 18 września 2014 r., II GSK 1158-1159/13, http://orzeczenia.nsa.gov.pl/doc/BF557E292A; http://orzeczenia.nsa.gov.pl/doc/620C183EFC [accessed on 28.06.2017].

[54] Judgement of the Supreme Administrative Court: Wyrok NSA z dnia 24 lipca 2013 r., II GSK 605/12, http://orzeczenia.nsa.gov.pl/doc/32EFA9B7EA [accessed on 27.06.2017].

[55] Article 18(9) AUSCA.

[56] K. Grobicka-Madej, *Gminny Program Profilaktyki i Rozwiązywania Problemów Alkoholowych – możliwość pozyskania dodatkowych środków finansowych dla gmin* [Commune Programme of Prevention and Solving of Alcohol-Related Problems – possibilities of obtaining additional financial resources for the communes], Przegląd Podatków Lokalnych i Finansów Samorządowych No. 11, 2015, pp. 29–33.

[57] Declaratory act of the Opolskie Voivode: Rozstrzygnięcie nadzorcze Wojewody Opolskiego z dnia 7 kwietnia 2011 r., NK.III.4131.1.53.2011.KK, Lex/el.

[58] Judgement of the Voivodeship Administrative Court in Kraków: Wyrok WSA w Krakowie z dnia 24 października 2013 r., III SA/Kr 407/13, Legalis No. 794596.

the institution of public order in a point of sale of alcoholic beverages and the closest surrounding area.[59] It should be emphasised that, in Article 18(8) AUSCA, the legislator regulated a licensing body's entitlements to supervise the compliance with the rules and conditions of a permit, which means that the legislator granted the same entitlements to a commune committee for solving alcoholism problems but based on the authorisation given by a licensing body. This means that the provision referred to above indicates two independent entities entitled to supervise, i.e. a licensing body (mayor) and a commune committee for solving alcoholism problems.[60]

5. COMMUNE COUNCIL RESOLUTIONS DETERMINING THE NUMBER OF POINTS OF SALE AND CONSUMPTION OF ALCOHOLIC BEVERAGES AND RULES CONCERNING THEIR PLACEMENT

In accordance with Article 12(1) AUSCA, a commune council adopts a resolution determining the number of on- and off-licence points of sale of alcoholic beverages containing more than 4.5% of alcohol (except beer). Moreover, a commune council adopts a resolution determining the placement of those points of sale of alcoholic beverages.[61] It is worth noting that the legislator regulated a commune council's two different statutory entitlements in the Act, i.e. Article 12(1) AUSCA lays down the competence to adopt a resolution concerning the number of on- and off-licence points of sale of alcoholic beverages containing above 4.5% of alcohol (except beer), and Article 12(2) AUSCA lays down another entitlement to adopt a resolution concerning the placement of points of sale in the commune.[62] Thus, it seems that a commune council's resolutions adopted in accordance with the entitlement laid down in Article 12(1) and (2) AUSCA, which are bylaws[63] determining the number of points of sale and their placement, should be subordinate to the aims of statute, i.e. they should limit availability of alcohol and create conditions motivating to refrain from its consumption.[64]

---

[59] Judgement of the Voivodeship Administrative Court in Lublin: Wyrok WSA w Lublinie z dnia 15 listopada 2005 r., III SA/Lu 532/05, http://orzeczenia.nsa.gov.pl/doc/CE94D2CAF7 [accessed on 23.06.2017].

[60] Judgement of the Voivodeship Administrative Court in Kraków: Wyrok WSA w Krakowie z dnia 8 lipca 2010 r., III SA/Kr 84/10, http://orzeczenia.nsa.gov.pl/doc/71AB8CC6D6 [accessed on 21.06.2017].

[61] Article 12(2) AUSCA.

[62] R. Sawuła, *Stosowanie ustawy o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi. Wybrane problemy* [Application of the Act on upbringing in sobriety and counteracting alcoholism. Selected issues], Samorząd Terytorialny No. 10, 1993, pp. 31–37; judgement of the Voivodeship Administrative Court in Kraków: wyrok WSA w Krakowie z dnia 11 marca 2016 r., III SA/Kr 1557/15, http://orzeczenia.nsa.gov.pl/doc/90689729B5 [accessed on 20.06.2017].

[63] A bylaw is any legal act laying down norms binding locally (i.e. not applicable to an individually specified entity but a certain category of potential addressees) and abstract in nature, issued by a statutory administrative body – declaratory act of the Lubelskie Voivode: rozstrzygnięcie nadzorcze Wojewody Lubelskiego z dnia 8 kwietnia 2013 r., PN-II.4131.127.2013, Lex/el.

[64] Declaratory act of the Podkarpackie Voivode: Rozstrzygnięcie nadzorcze Wojewody Podkarpackiego z dnia 22 czerwca 2016 r., P-II.4131.2.92.2016, Lex/el.

In accordance with the provision of Article 40(1) Act of 8 March 1990 on commune self-governments,[65] based on statutory authorisation, a commune is entitled to enact bylaws binding in the area of the commune. The provision empowers a commune council to enact executive bylaws, which aim to exercise the entitlement laid down in special statute, in the scope and within the limits determined taking into consideration the specificity and needs of a given commune. Therefore, a commune (or town) council has no power to determine legal grounds for its action independently, i.e. without grounds laid down in a statutory norm.[66] For example, Article 12(1) AUSCA in conjunction with successive provisions of this Act does not stipulate a possibility of determining the number of points of sale of alcoholic beverages in particular parts of a commune, including particular subsidiary units of a commune, and every resolution of a commune council concerning this should be classified as a groundless action, i.e. significantly violating law, which results in the necessity of recognising it as invalid.[67] Moreover, a commune council resolutions, adopted based on the above-mentioned authorisation, cannot include a repetition of the normative content of the Act because, infringing the rules of legislative technique, they constitute, first of all, "a local legislator's" entry into the sphere of competence reserved exclusively to the national legislator (the creator of commonly binding law), which can result in the addressees' wrong conviction that the commonly binding laws transposed to the local area are only bylaws, which are binding solely in the area under the local legislator's jurisdiction.[68]

The number of the points of sale and consumption of alcoholic beverages and their placement should be adjusted to the need of limiting availability of alcohol determined in a commune programme of preventing and solving alcoholism problems.[69] This is the only criterion that can influence the determination of the number of permits to sell alcohol and applies only to the total number of points of sale in the whole area of a commune (or a town) and not its particular parts.[70] A similar stand, which we approve of, was expressed in the rulings of public administration bodies, which indicate that Article 12(4) AUSCA introduces a significant limitation on a commune council's discretion to decide in this field,

---

[65] Ustawa z dnia 8 marca 1990 r. o samorządzie gminnym (uniform text: Journal of Laws [Dz.U.] of 2017, item 1875, as amended).

[66] Judgement of the Voivodeship Administrative Court in Łódź: Wyrok WSA w Łodzi z dnia 11 stycznia 2017 r., I SA/Łd 910/16, http://orzeczenia.nsa.gov.pl/doc/540EA2FC5B [accessed on 25.06.2017].

[67] Judgement of the Voivodeship Administrative Court in Kraków: Wyrok WSA w Krakowie z dnia 11 marca 2016 r., III SA/Kr 1557/15, http://orzeczenia.nsa.gov.pl/doc/90689729B5 [accessed on 26.06.2017].

[68] Judgement of the Voivodeship Administrative Court in Szczecin: Wyrok WSA w Szczecinie z dnia 12 stycznia 2012 r., II SA/Sz 1135/11, http://orzeczenia.nsa.gov.pl/doc/A311A8AC69 [accessed on 26.06.2017]; declaratory act of the Lubelskie Voivode: rozstrzygnięcie nadzorcze Wojewody Lubelskiego z dnia 8 kwietnia 2013 r., PN-II.4131.127.2013, Lex/el.

[69] Article 12(4) AUSCA; M. Mincer-Jaśkowska, *Glosa do wyroku NSA z dnia 3 stycznia 1995 r., SA/Kr 2937/94* [Gloss on the Supreme Administrative Court judgement of 3 January 1995, SA/Kr 2937/94], Orzecznictwo Sądów Polskich No. 2, 1996, p. 25 ff.

[70] Judgement of the Voivodeship Administrative Court in Kraków: Wyrok WSA w Krakowie z dnia 11 marca 2016 r., III SA/Kr 1557/15, http://orzeczenia.nsa.gov.pl/doc/90689729B5 [accessed on 20.06.2017].

stipulating that placement of points of sale of alcohol should be adjusted to the need to limit availability of alcohol determined in a commune programme of preventing and solving alcoholism problems.[71] Therefore, the legislator's stand expressed in this provision is also for the limitation of availability of alcohol and not for a total ban on its sale because the provisions of AUSCA authorise a commune body[72] solely to take actions aimed at limiting the sale of alcoholic beverages but do not give power to introduce prohibition.[73]

The number of points of sale determined cannot be too big in order to avoid a situation making the statutory assumptions aimed at limiting the consumption of alcohol fictitious. At the same time, it cannot be too small in order to avoid the creation of alcohol sale monopoly.[74] According to the Kraków Voivode declaratory act of 19 December 1996, which still maintains validity, abolishing the determined number of the points of sale of alcoholic beverages and introducing an unlimited number of such points of sale, first of all, results in easier availability of alcohol and this unavoidably leads to the increase in the consumption of alcoholic beverages.[75] However, determining the "nil" number of points of sale of alcoholic beverages by a commune council is inadmissible.[76]

The provision of Article 12(2) AUSCA empowers a commune council only to determine the rules of on- and off-licence points of sale placement in the area of a commune, which should be understood as their location in the area, especially in relation to protected places such as schools, kindergartens, other educational and childcare institutions, places of religious worship, etc.[77] Thus, the empowerment to determine "the rules of place location", laid down in Article 12(2) AUSCA, must be subject to strict linguistic interpretation, so that the addressees of an act have no problems with the interpretation of the determined law.[78] It must be remembered,

---

[71] Declaratory act of the Kujawsko-Pomorskie Voivode: Rozstrzygnięcie nadzorcze Wojewody Kujawsko-Pomorskiego z dnia 7 kwietnia 2008 r., WNK/DW.IV.BP.0911-11/08, Lex/el.

[72] R. Budzisz, B. Jaworska-Dębska, K. Wlaźlak, *Rola samorządu terytorialnego w zakresie wychowania w trzeźwości i przeciwdziałania alkoholizmowi* [Role of local self-governments in education in sobriety and counteracting alcoholism], Studia Prawno-Ekonomiczne No. 79, 2009, p. 53 ff.

[73] Declaratory act of the Lubelskie Voivode: Rozstrzygnięcie nadzorcze Wojewody Lubelskiego z dnia 19 lipca 2011 r., NK-II.4131.261.2011, Lex/el.

[74] B. Jaworska-Dębska, *Glosa do wyroku NSA z dnia 8 listopada 1993 r., II SA 1967/93* [Gloss on the Supreme Administrative Court judgement of 8 November 1993, II SA 1967/93], Samorząd Terytorialny No. 3, 1996, pp. 74–77; R. Skwarło, *Ustalenie liczby punktów sprzedaży napojów alkoholowych na terenie gminy/miasta* [Determining the number of points of sale of alcoholic beverages in the area of the commune/town], Lex/el.

[75] Declaratory act of Kraków Voivode: Rozstrzygnięcie nadzorcze Wojewody Krakowskiego z dnia 16 grudnia 1996 r., ON.III-0903-12-46/96, Lex/el.

[76] Supreme Administrative Court judgement: Wyrok NSA z dnia 21 maja 1997 r., SA/Rz 145/97, http://orzeczenia.nsa.gov.pl/doc/8B03CFC291 [accessed on 22.06.2017]; judgement of the Voivodeship Administrative Court in Rzeszów: wyrok WSA w Rzeszowie z dnia 2 kwietnia 2009 r., II SA/Rz 160/09, http://orzeczenia.nsa.gov.pl/doc/E999B7F89E [accessed on 28.06.2017].

[77] Judgement of the Voivodeship Administrative Court in Szczecin: Wyrok WSA w Szczecinie z dnia 12 stycznia 2012 r., II SA/Sz 1135/11, http://orzeczenia.nsa.gov.pl/doc/A311A8AC69 [accessed on 27.06.2017].

[78] Declaratory act of the Lubelskie Voivode: Rozstrzygnięcie nadzorcze Wojewody Lubelskiego z dnia 2 kwietnia 2015 r., PN-II.4131.143.2015, Legalis No. 1206349; judgement

however, that the aim of determining the rules of on- and off-licence points of sale location is only the special protection of some places and facilities against risks posed by alcohol.[79]

The doctrine, public administration bodies' decisions and the judicature express a uniform stand in the above-discussed issue and indicate that the empowerment laid down in Article 12(2) AUSCA does not give competence to introduce a ban on sale of alcoholic beverages but only to determine the rules of placement of the points of sale.[80] It should be added that the concept of the rules of placement of points of sale of alcoholic beverages in the commune area does not contain the determination of hours of sale.[81] Moreover, the empowerment laid down in Article 12(2) AUSCA does not cover a commune council's competence to determine the conditions of sale in on- and off-licence points of sale and the requirement for building such points.[82]

The legislator's empowerment under Article 12(2) AUSCA properly instituted by a commune council should be done by means of determination of the distance between the points of sale and protected places with the use of an unambiguous measure of a "metre" used in the Polish system of units.[83] For example, the determined by a commune council distance of five metres from protected places and facilities, i.e. kindergartens, schools, special educational and childcare institutions, youth volunteer work associations (*ochotnicze hufce pracy*), churches, chapels and houses of prayer, means close, direct neighbourhood of those facilities,[84] which is obviously in conflict with the necessity of meeting an obligation to limit availability of alcohol, especially in relation to minors, because the distance does not limit the availability of alcohol in any way and does not create conditions motivating to refrain from its consumption.[85]

---

of the Voivodeship Administrative Court in Gorzów Wielkopolski: wyrok WSA w Gorzowie Wielkopolskim z dnia 3 września 2014 r., II SA/Go 554/14, http://orzeczenia.nsa.gov.pl/doc/89C7B2425E [accessed on 19.06.2017].

[79] Judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski: Wyrok WSA w Gorzowie Wielkopolskim z dnia 12 stycznia 2017 r., II SA/Go 967/16, http://orzeczenia.nsa.gov.pl/doc/4F79113AB4 [accessed on 28.06.2017]; judgement of the Voivodeship Administrative Court in Kraków: wyrok WSA w Krakowie z dnia 24 września 2013 r., III SA/Kr 96/13, http://orzeczenia.nsa.gov.pl/doc/534B5A341F [accessed on 21.06.2017].

[80] Declaratory act of the Lubelskie Voivode: Rozstrzygnięcie nadzorcze Wojewody Lubelskiego z dnia 8 kwietnia 2013 r., PN-II.4131.127.2013, Lex/el.

[81] Judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski: Wyrok WSA w Gorzowie Wielkopolskim z dnia 26 października 2016 r., II SA/Go 689/16, http://orzeczenia.nsa.gov.pl/doc/6666185949 [accessed on 25.06.2017].

[82] Judgement of the Voivodeship Administrative Court in Szczecin: Wyrok WSA w Szczecinie z dnia 12 stycznia 2012 r., II SA/Sz 1135/11, http://orzeczenia.nsa.gov.pl/doc/A311A8AC69 [accessed on 24.06.2017]; judgement of the Voivodeship Administrative Court in Kraków: wyrok WSA w Krakowie z dnia 24 września 2013 r., III SA/Kr 96/13, http://orzeczenia.nsa.gov.pl/doc/534B5A341F [accessed on 20.06.2017].

[83] Declaratory act of the Łódzkie Voivode: Rozstrzygnięcie nadzorcze Wojewody Łódzkiego z dnia 14 stycznia 2014 r., PNK-I.4131.1340.2013, Lex/el.

[84] J. Wilk, *Glosa do wyroku WSA z dnia 19 grudnia 2011 r., III SA/Wr 568/11* [Gloss on the judgment of the Voivodeship Administrative Court in Wrocław of 19 December 2011, III SA/Wr 568/11], Lex/el.

[85] Judgement of the Voivodeship Administrative Court in Wrocław: Wyrok WSA we Wrocławiu z dnia 12 marca 2015 r., III SA/Wr 826/14, http://orzeczenia.nsa.gov.pl/doc/792F4982C8 [accessed on 22.06.2017].

This is reflected in case law, where it is stated that "while adopting resolutions concerning location of points of sale of alcoholic beverages, a commune council should take into account precise determination of the points of placement from the geometrical perspective, between which the measurement of the distance between the points of sale and protected places is to be made. Imprecise determination of the rule (the method) of measurement determines relativity of the obtained results of measurements checking whether a point of sale is located in conformity with the rules concerning its location or not".[86] Thus, "even the determination of just the distance between the points of sale and places protected without precise determination of the method of measurement of the distance (from which point to which point) constitutes a risk of inappropriate fulfilment of aims laid down in Articles 1 and 2 AUSCA, constitutes a risk of unequal treatment of entities applying for a permit. (…) The role of a commune body enacting law is in such a situation to determine not only the distance between the points of sale of alcoholic beverages but also the method of this measurement: from which point to which point and along what line".[87]

In the Act of 26 October 1982 on upbringing in sobriety and counteracting alcoholism, the legislator does not grant headmasters of schools and educational and childcare institutions or heads of religious worship facilities any competence whatsoever to determine the rules of placing points of sale of alcoholic beverages in the commune area.[88] In other words, a commune council cannot delegate its statutory competence to determine the distance between the points of sale to other unauthorised entities.[89]

Summing up the above considerations, it is necessary to notice that a commune council resolution adopted based on Article 12(2) AUSCA cannot indicate facilities where a point of sale can be located because it would enter the area of bans, which is laid down in Article 14(1) to (5) AUSCA, in accordance with which the legislator determined places where sale and consumption of alcoholic beverages is prohibited (the protected places). The catalogue of such places is a closed one, which means that based on Article 12(2) AUSCA, a commune council cannot extend it.[90] Although, as Article 14(6) AUSCA stipulates, a commune council may introduce a temporary or permanent ban on the sale, consumption and bringing in alcoholic beverages to some places, facilities or areas of a commune that are not listed, however, the determination of those places and areas cannot be arbitrary because it is required that their special

---

[86] Supreme Administrative Court judgement: Wyrok NSA z dnia 10 maja 2012 r., II GSK 497/11, http://orzeczenia.nsa.gov.pl/doc/F58C11ACC4 [accessed on 27.06.2017].

[87] Judgement of the Voivodeship Administrative Court in Łódź: Wyrok WSA w Łodzi z dnia 11 stycznia 2017 r., III SA/Łd 910/16, http://orzeczenia.nsa.gov.pl/doc/5A51376257 [accessed on 27.06.2017].

[88] Declaratory act of the Małopolskie Voivode: Rozstrzygnięcie nadzorcze Wojewody Małopolskiego z dnia 2 lutego 2017 r., WN-II.4131.1.5.2017, Lex/el.

[89] Judgement of the Voivodeship Administrative Court in Kielce: Wyrok WSA w Kielcach z dnia 18 sierpnia 2016 r., II SA/Ke 450/16, http://orzeczenia.nsa.gov.pl/doc/A4FFB626F4 [accessed on 23.06.2017].

[90] Judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski: Wyrok WSA w Gorzowie Wielkopolskim z dnia 12 stycznia 2017 r., II SA/Go 967/16, http://orzeczenia.nsa.gov.pl/doc/4F79113AB4 [accessed on 28.06.2017].

nature should be determined, with the use of particular names (individual or group ones) making it possible to differentiate them from other similar places, facilities or areas.[91] In other words, commonly binding statutory bans laid down in Article 14(1) to (5) AUSCA may be supplemented by local bans introduced by communes in their areas. Thus, this special nature should be unambiguously and unquestionably determined in the context of aims resulting from the content of Articles 1, 2 and 14 AUSCA.[92] The same stand results from case law, according to which "based on Article 14(1) AUSCA, a commonly binding (*ex lege*) ban on selling, serving and consuming alcoholic beverages was introduced in relation to strictly determined categories of places, facilities and areas, which were enumerated in statute with the use of linguistic forms that allow their differentiation form remaining public places, facilities and areas. In this situation, the wording of Article 14(6) AUSCA indicates that the empowerment of a commune council to introduce appropriate bans is not to serve generalisation but enlargement of the scope of the existing bans onto other places, facilities or areas that are not included in Article 14(1) AUSCA, and only to the extent that is justified because of their nature. Commune bylaws enacted based on Article 14(6) AUSCA in order to determine places, facilities or areas of a commune subject to a temporary or permanent ban on selling, serving, consuming or bringing in alcoholic beverages cannot use phrases playing the semantic role of the common names and general ones at the same time (e.g. streets, squares, green areas, sports facilities, recreational facilities, shops, playgrounds, apartment block interiors, staircases, cemeteries), which are names of all designated objects of the type without a possibility of individualising them and taking into consideration their nature. The bylaws enacted based on Article 14(6) AUSCA, in order to determine places, facilities, points or areas other than enumerated in Article 14(1) to (5) of the Act, which are additionally subject to a (temporary or permanent) ban on selling, serving, consuming or bringing in alcoholic beverages, should use such linguistic phrases that play the semantic roles of individual or group names of specific places, facilities or areas and make it possible to individualise and differentiate them (also because of their nature) from other public places, facilities or areas of the same type in the area of a commune".[93]

---

[91] Supreme Administrative Court judgement: Wyrok NSA z dnia 14 grudnia 2006 r., II GSK 236/06, http://orzeczenia.nsa.gov.pl/doc/B7844486DA [accessed on 27.06.2017].

[92] Judgement of the Voivodeship Administrative Court in Szczecin: Wyrok WSA w Szczecinie z dnia 16 czerwca 2016 r., II SA/Sz 426/16, http://orzeczenia.nsa.gov.pl/doc/397080D08A [accessed on 27.06.2017].

[93] Supreme Court judgement: Wyrok SN z dnia 17 kwietnia 1997 r., III RN 11/97, http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/III%20RN%2011-97.pdf [accessed on 27.06.2017]; judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski: wyrok WSA w Gorzowie Wielkopolskim z dnia 15 czerwca 2016 r., II SA/Go 367/16, http://orzeczenia.nsa.gov.pl/doc/5F2090F34B [accessed on 27.06.2017]; judgement of the Voivodeship Administrative Court in Gdańsk: wyrok WSA w Gdańsku z dnia 13 maja 2004 r., II SA/Gd 3499/01, http://orzeczenia.nsa.gov.pl/doc/A9A69D0D45 [accessed on 25.06.2017].

6. CONCLUSIONS

According to the World Health Organisation, alcohol is the third biggest risk factor for the health of human population. Over 200 types of diseases and injuries are connected with its consumption.[94] Europe is the continent where the consumption of alcohol per capita is the highest in the world.[95] Over 80% of adult inhabitants of the Republic of Poland consume alcohol[96] and, unfortunately, this shows a rising tendency. In 2015, according to the Central Statistical Office of Poland, the consumption of 100% alcohol per capita reached 9.4 l (excluding illegally and informally produced alcohol).[97] However, it must be emphasised that "an attempt to extrapolate the findings of epidemiological research to the population of Poland in the age between 18 and 64 gives a number of 3 million people who suffer from various psychical or behavioural disorders resulting from the consumption of alcohol. Over 0.6 million people within this group are addicted to alcohol".[98]

The legislator, having in mind the negative consequences of alcohol abuse and the need to prevent this social pathology, focusing not only on prevention activities,[99] already in the Preamble to Act on upbringing in sobriety and counteracting alcoholism, indicated the main aim and the subject of protection as well as the leading directive for the interpretation of this legal act, stating that the citizens' life in sobriety is an indispensible condition of moral and financial welfare of the Nation.[100] However, *prima vista*, the Act on upbringing in sobriety and counteracting alcoholism, passed over 35 years ago, does not currently constitute a legal act representing an idea covering the entirety and requires urgent amendment.[101] *In fine*, let us make some comments *de lege ferenda*.

First of all, the legislator should substitute the term "public administration bodies" for the term "government administration bodies and self-government units"

---

[94] World Health Organisation, http://www.who.int/mediacentre/factsheets/fs349/en/index.html.

[95] *Postawy wobec alkoholu. Raport 2006-2007* [Attitudes towards alcohol. Report for 2006–2007], http://www.parpa.pl/index.php/alkohol-w-europie/najnowsze-dokumenty-eu [accessed on 28.06.2017].

[96] *Sprawozdanie z wykonania ustawy z dnia 26 października 1982 r. o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi w okresie od dnia 1 stycznia 2015 r. do dnia 31 grudnia 2015 r.* [Report on the implementation of the Act of 26 October 1982 on upbringing in sobriety and counteracting alcoholism in the period 1 January 2015–31 December 2015], https://bip.kprm.gov.pl/kpr/bip-rady-ministrow/informacje-i-sprawozda/4093,informacje.html [accessed on 28.06.2017].

[97] *Ibid*.

[98] *Ibid*.

[99] For more, see D. Fleszer, *Reglamentacja działalności gospodarczej w zakresie sprzedaży detalicznej alkoholu* [Restriction of business activities in retail alcohol sale], Przegląd Prawa Handlowego No. 6, 2015, p. 43 ff.

[100] Judgement of the Voivodeship Administrative Court in Lublin: Wyrok WSA w Lublin z dnia 24 września 2013 r., III SA/Lu 335/13, http://orzeczenia.nsa.gov.pl/doc/DAA4F83BF5 [accessed on 28.06.2017].

[101] B. Jaworska-Dębska, *Rozwój cywilizacyjny w Polsce przełomu XX i XXI w. a sytuacja prawna osób uzależnionych od alkoholu* [Civilisation development in Poland at the turn of the 20th and 21st centuries vs. legal situation of persons addicted to alcohol], [in:] P.J. Suwaj, J. Zimmermann (eds.), *Wpływ przemian cywilizacyjnych na prawo administracyjne i administrację publiczną* [Impact of civilisation changes on the administrative law and public administration], 2013, Lex/el.

used in Article 1(1) AUSCA, in accordance with the dictionary-based meaning under Article 5 §2(3) of the Act of 14 June 1960: Code of Administrative Procedure.[102]

Secondly, the legislator, granting specific competences to commune bodies in Article 12(1) to (2) AUSCA, aimed only to limit the sale of alcoholic beverages. Thus, the provisions of the Act on upbringing in sobriety and counteracting alcoholism empower a commune body only to undertake actions aimed at limiting the sale of alcoholic beverages, however, they do not give power to introduce prohibition in a commune area.[103] As it is rightly emphasised in the literature, the Act lacks norms that are purely prohibitive in nature[104] and focuses only on regulations strictly controlling distribution, including limiting consumption and supervision as well as the elimination of the negative health-related and social consequences.[105] What is important, the aims expressed in the Act concerning excessive availability of alcohol,[106] especially to youth,[107] are not only political appeals but are binding legal norms.[108]

Thirdly, it is necessary to implement systematic and efficient institution of the provisions of the Act on upbringing in sobriety and counteracting alcoholism, inter alia, by better legal education of entities involved, e.g. the police, municipal police, and trade inspection. It is obvious that "it is hard to speak about consistent policy in the field of alcohol if bans are not complied with".[109]

---

[102] Ustawa z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego (uniform text: Journal of Laws [Dz.U.] of 2017, item 1257, as amended).

[103] Supreme Administrative Court judgement: Wyrok NSA z dnia 21 maja 1997 r., SA/Rz 145/97, http://orzeczenia.nsa.gov.pl/doc/8B03CFC291 [accessed on 28.06.2017]; judgement of the Voivodeship Administrative Court in Rzeszów: wyrok WSA w Rzeszowie z dnia 2 kwietnia 2009 r., II SA/Rz 160/09, http://orzeczenia.nsa.gov.pl/doc/E999B7F89E [accessed on 28.06.2017].

[104] B. Jaworska-Dębska, *Spór wokół modelu polskiej regulacji alkoholowej – zagadnienia administracyjnoprawne* [Dispute over the Polish model of the alcohol regulation – administrative law issues], Wyd. UŁ, Łódź 1995, p. 36.

[105] M. Koszowski, *Tak zwana polska prohibicja w odniesieniu do przeciwdziałania uzależnieniu od wyrobów alkoholowych i tytoniowych* [The so-called Polish prohibition with reference to counteracting addiction to alcoholic and tobacco products], [in:] A. Błaś (ed.), *Antywartości w prawie administracyjnym* [Anti-values in the administrative law], 2016, Lex/el.

[106] Availability of off-licence where one can buy alcohol in Poland is very high – in 2015, there were 336,476 valid permits of which 125,737 were issued by communes, including 90,665 off-licence and 35,072 in-licence (gastronomic) points of sale. In other words, in 2015, there was one point of sale for 274 people, and there was one point of sale of alcoholic beverages containing above 18% of alcohol for 374 people. However, what is worth mentioning, the World Health Organisation advises that the rate should be 1,000 people for one point of sale. See, W.S. Zgliczyński, *Alkohol w Polsce* [Alcohol in Poland], Biuro Analiz Sejmowych No. 11, 2016, p. 2; Sprawozdanie z wykonania… [Report on the implementation...], pp. 51–52.

[107] E. Bieńkowska, L. Mazowiecka, *Prawa ofiar przestępstw* [Rights of crime victims], 2009, Lex/el.

[108] R. Sawuła, *Administracyjnoprawne środki ograniczenia dostępności do alkoholu. Uwagi na tle nowelizacji ustawy o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi* [Administrative law measures of limiting access to alcohol. Comments in the light of amendment of the Act on upbringing in sobriety and counteracting alcoholism], Samorząd Terytorialny No. 3, 1997, pp. 47–60; Supreme Administrative Court judgement: wyrok NSA z dnia 3 stycznia 1995 r., SA/KR 2937/94, Orzecznictwo Sądów Polskich No. 2, 1996, p. 25.

[109] J. Osiecka, *Reklama alkoholu w Polsce i w wybranych krajach europejskich* [Advertising of alcohol in Poland and selected European states], Informacja BSE No. 515, http://biurose.sejm.gov.pl/teksty_pdf_97/i-515.pdf [accessed on 28.06.2017]; D. Fleszer, *Zakaz sprzedaży, podawania i spożywania napojów alkoholowych na gruncie orzecznictwa sądowoadministracyjnego* [Ban on sale,

Fourthly, it is necessary to introduce an absolute ban on advertising, promotion, sponsorship, etc. of alcoholic beverages (including beer) because it is in irremovable conflict with the protection of human interests such as health, which should be protected in accordance with Article 68(1) of the Constitution of the Republic of Poland.[110] Unfortunately, corporations producing alcohol aim to develop undesired pro-alcoholic behaviour, disposing young people towards a positive attitude to alcohol from the youngest age.[111] As K. Liczmańska proved in her empirical research, special offers substantially influence people's decisions concerning the choice of vodka brand in a shop because the chosen brands ideally match those that were on special offer.[112] Therefore, perhaps it is high time we stopped companies circumventing restrictions concerning advertising, promotion and sponsorship of alcoholic beverages, which is their key to success,[113] in the sale of substances harmful to health and life and obtaining economic benefits.[114] We should quote the words of a Catholic priest B. Markiewicz, who pointed out that: "one who would like to bring up children and youth with a glass of beer or wine in his hand is a traitor to his nation and faith".[115]

Fifthly, it is necessary to limit, and the best thing would be to eliminate, the "aggressive" lobbying of the representatives and quasi-representatives of the "spirit industry" in a statutory way and this way ensure the transparency of legislative processes in this area of social health, remembering that the superior aim of the Act on upbringing in sobriety and counteracting alcoholism is to protect the proper physical, psychical and social development of the community.[116]

The above-presented remarks make us state that the proposals for amendments to the Act on upbringing in sobriety and counteracting alcoholism should be implemented with full consistency in order to develop a complex legal act stipulating limited availability of alcohol. Moreover, the scale of negative consequences of

---

serving and consumption of alcoholic beverages based on administrative courts' rulings], Samorząd Terytorialny No. 6, 2015, pp. 78–87.

[110] Compare, M. Balwicka-Szczyrba, Ł. Balwicki, *Zakaz sponsorowania przez podmioty branży tytoniowej* [Ban on sponsoring by entities from the tobacco sector], Kwartalnik Prawa Publicznego No. 1, 2013, p. 65 ff.

[111] Compare, M. Uliasz, *Reklama i promocja wyrobów tytoniowych* [Advertising and promotion of tobacco products], Przegląd Sądowy No. 7–8, 2001, p. 55.

[112] K. Liczmańska, *Promocja konsumencka w warunkach zakazu reklamy publicznej* [Consumer promotion in the light of ban of public advertising], Acta Universitatis Nicolai Copernici No. 404, 2011, p. 91 ff.

[113] M. Du Vall, E. Nowińska, *Nie bujaj, łódko Bols*, Rzeczpospolita PCD 2001/6/15, Lex/el.

[114] For example, breweries spend nearly PLN 400 million on advertising annually: *Rozwiązywanie problemów alkoholowych w gminie. Informator dla radnych* [Solving alcohol-related problems in communes. Information guide for deputies], Państwowa Agencja Rozwiązywania Problemów Alkoholowych, Warsaw 2015.

[115] *Apel Zespołu KEP ds. Apostolstwa Trzeźwości z dnia 11 listopada 2014 r. o zaprzestanie działań prowadzących do złagodzenia prawa dotyczącego reklamy alkoholu w Polsce* [Appeal of the Team for Alcohol Abstinence of the Polish Episcopal Conference of 11 November 2014 to stop activities leading to more lenient law on alcohol advertising in Poland], http://episkopat.pl/apel-zespolu-kep-ds-apostolstwa-trzezwosci-o-zaprzestanie-dzialan-prowadzacych-do-zlagodzenia-prawa-dotyczacego-reklamy-alkoholu-w-polsce.

[116] Supreme Administrative Court judgement: Wyrok NSA z dnia 11 stycznia 2011 r., II GSK 15/10, http://orzeczenia.nsa.gov.pl/doc/FE28D6676F [accessed on 28.06.2017].

alcohol consumption, inter alia, health-related, moral and social dysfunctions, does not let the legislator remain passive. On the contrary, it is necessary to strengthen the interference of the state in this field.[117] Even the transformation of the social, political and economic system did not influence the significance of the problem of alcohol abuse by the community, thus the necessity of undertaking active measures of preventing those pathologies cannot be questioned even at present.[118] Unfortunately, revenue to the State Treasury from the sale of alcohol has been rising over many years now and was a considerable and foreseeable income in every successive year, e.g. in the period 2003-2013 excise duty increased by 64% (PLN 11,812.23 million in 2013).[119] Unfortunately, it illustrates the constant duality of the state's policy (also at the self-government level) that results in high expenses incurred by the state in connection with the consumption of alcoholic beverages that exceed the income from taxes from the sale of alcohol, e.g. treating alcoholics and clinical consequences of alcoholism accounted for PLN 514.6 million in 2013.[120]

BIBLIOGRAPHY

Anderson P., Møller L., Galea G., *Alcohol in the European Union. Consumption, harm and policy approaches. World Health Organization*, 2012, http://www.euro.who.int/__data/assets/pdf_file/0003/160680/ e96457.pdf [accessed on 25.06.2017].

Andréasson S., Chikritzhs T., Dangardt F., Holder H., Naimi T., Stockwell T., *Evidence about health effects of "moderate" alcohol consumption: reasons for scepticism and public health implications*, http://iogt.se/wp-content/uploads/Alkoholrapp-2014_ENG-s%C3%A4rtryck.pdf [accessed on 26.06.2017].

Balwicka-Szczyrba M., Balwicki Ł., *Zakaz sponsorowania przez podmioty branży tytoniowej* [Ban on sponsoring by entities from the tobacco sector], Kwartalnik Prawa Publicznego No. 1, 2013.

Bieńkowska E., Mazowiecka L., *Prawa ofiar przestępstw 2009* [Rights of crime victims], Lex/el.

Budzisz R., Jaworska-Dębska B., Wlaźlak K., *Rola samorządu terytorialnego w zakresie wychowania w trzeźwości i przeciwdziałania alkoholizmowi* [Role of local self-governments in education in sobriety and counteracting alcoholism], Studia Prawno-Ekonomiczne No. 79, 2009.

Czerwiński W., *Postępowanie administracyjne w sprawie zezwolenia na sprzedaż alkoholu – analiza rozbieżności i propozycje zmian* [Administrative procedure in case of permit for alcohol sale – analysis of discrepancies and proposals of changes], Radca Prawny Zeszyty Naukowe No. 2, 2016.

---

[117] B. Jaworska-Dębska, *Spór wokół modelu...* [Dispute over the Polish model...], p. 184 ff.

[118] Judgement of the Voivodeship Administrative Court: Wyrok WSA w Lublinie z dnia 26 listopada 2009 r., III SA/Lu 337/09, http://orzeczenia.nsa.gov.pl/cbo/search [accessed on 28.06.2017].

[119] Following D. Gałązka-Sobotka, *Koszty ekonomiczno-społeczne związane z leczeniem uzależnienia od alkoholu i jego konsekwencji zdrowotnych z perspektywy NFZ i ZUS* [Social and economic costs related to treatment of alcohol addiction and its health-related consequences from the perspective of the National Health Fund and Social Insurance Institution], http://orka.sejm.gov.pl/WydBAS.nsf/0/16ca3bc940d9cf61c1257d50003663c8/$FILE/Koszty%20ekonomiczno-spo%C5%82eczne.pdf [accessed on 28.06.2017].

[120] W.S. Zgliczyński, *Alkohol w Polsce...* [Alcohol in Poland...], pp. 3–4.

Derk, C.T., De Horatius, R.J., *Osteonecrosis*, [in:] W.J. Koopman, L.W. Moreland (eds.), *Arthritis and allied conditions: A textbook of rheumatology* (15th ed.), Philadelphia: Lippincott Williams & Wilkins, 2005.

Du Vall M., Nowińska E., *Nie bujaj, łódko Bols*, Rzeczpospolita PCD 2001/6/15, Lex/el.

Fingerhood, M.I., *Alcoholism and associated problems*, [in:] N.H. Fiebach, L.R. Barker, J.R. Burton, P.D. Zieve (eds.), *Principles of ambulatory medicine* (7th ed.), Philadelphia: Lippincott Williams & Wilkins, 2007.

Fleszer D., *Zakaz sprzedaży, podawania i spożywania napojów alkoholowych na gruncie orzecznictwa sądowoadministracyjnego* [Ban on sale, serving and consumption of alcoholic beverages based on administrative courts' rulings], Samorząd Terytorialny No. 6, 2015.

Fleszer D., *Reglamentacja działalności gospodarczej w zakresie sprzedaży detalicznej alkoholu* [Restriction of business activities in retail alcohol sale], Przegląd Prawa Handlowego No. 6, 2015.

Gałązka-Sobotka D., *Koszty ekonomiczno-społeczne związane z leczeniem uzależnienia od alkoholu i jego konsekwencji zdrowotnych z perspektywy NFZ i ZUS* [Social and economic costs related to treatment of alcohol addiction and its health-related consequences from the perspective of the National Health Fund and Social Insurance Institution], http://orka.sejm.gov.pl/WydBAS.nsf/0/16ca3bc940d9cf61c1257d50003663c8/$FILE/Koszty%20ekonomiczno-spo-%C5%82eczne.pdf [accessed on 28.06.2017].

Grobicka-Madej K., *Gminny Program Profilaktyki i Rozwiązywania Problemów Alkoholowych – możliwość pozyskania dodatkowych środków finansowych dla gmin* [Commune Programme of Prevention and Solving of Alcohol-Related Problems – possibilities of obtaining additional financial resources for the communes], Przegląd Podatków Lokalnych i Finansów Samorządowych No. 11, 2015.

Jaworska-Dębska B., *Spór wokół modelu polskiej regulacji alkoholowej – zagadnienia administracyjnoprawne* [Dispute over the Polish model of the alcohol regulation – administrative law issues], Wyd. UŁ, Łódź 1995.

Jaworska-Dębska B., *Glosa do wyroku NSA z dnia 8 listopada 1993 r., II SA 1967/93* [Gloss on the Supreme Administrative Court judgement of 8 November 1993, II SA 1967/93], Samorząd Terytorialny No. 3, 1996.

Jaworska-Dębska B., *Rozwój cywilizacyjny w Polsce przełomu XX i XXI w. a sytuacja prawna osób uzależnionych od alkoholu* [Civilisation development in Poland at the turn of the 20th and 21st centuries vs. legal situation of persons addicted to alcohol], [in:] P.J. Suwaj, J. Zimmermann (eds.), *Wpływ przemian cywilizacyjnych na prawo administracyjne i administrację publiczną* [Impact of civilisation changes on the administrative law and public administration], 2013, Lex/el.

Kloner, R.A., Rezkalla, S.H., *Substance abuse and the heart*, [in:] *Textbook of cardiovascular medicine* (3rd ed.), Philadelphia: Lippincott Williams & Wilkins, 2007.

Koszowski M., *Tak zwana polska prohibicja w odniesieniu do przeciwdziałania uzależnieniu od wyrobów alkoholowych i tytoniowych* [The so-called Polish prohibition with reference to counteracting addiction to alcoholic and tobacco products], [in:] A. Błaś (ed.), *Antywartości w prawie administracyjnym* [Anti-values in the administrative law], 2016, Lex/el.

Księga Przypowieści Salomona 23, 29–35 [The Wisdom of Solomon, 23, 29–35], [in:] *Pismo Święte Starego i Nowego Testamentu* [Holy Bible, the Old and New Testament], Towarzystwo Biblijne w Polsce, Warsaw 2004.

Kubik A., *Sprzedaż alkoholu przez Internet* [Online sale of alcohol], Przegląd Ustawodawstwa Gospodarczego No. 3, 2015.

Lebowa D., Maciejko W., *Gminna komisja rozwiązywania problemów alkoholowych* [Commune committee for solving alcohol-related problems], Wyd. LexisNexis, Warsaw 2011.

Liczmańska K., *Promocja konsumencka w warunkach zakazu reklamy publicznej* [Consumer promotion in the light of ban of public advertising], Acta Universitatis Nicolai Copernici No. 404, 2011.

Lohr R.H., *Acute alcohol intoxication and alcohol withdrawal*, [in:] R.M. Wachter, L. Goldman, H. Hollander (eds.), *Hospital medicine* (2nd ed.), Philadelphia: Lippincott Williams & Wilkins, 2005.

Mincer-Jaśkowska M., *Glosa do wyroku NSA z dnia 3 stycznia 1995 r., SA/Kr 2937/94* [Gloss on the Supreme Administrative Court judgement of 3 January 1995, SA/Kr 2937/94], Orzecznictwo Sądów Polskich No. 2, 1996.

Nowak I., Nowak A., *Zakaz palenia wyrobów tytoniowych – wybrane aspekty prawne i społeczne* [Ban on smoking tobacco products: selected legal and social issues], Humanities and Social Sciences No. 1, 2016.

Osiecka J., *Reklama alkoholu w Polsce i w wybranych krajach europejskich* [Advertising of alcohol in Poland and selected European states], Informacja BSE No. 515, http://biurose.sejm.gov.pl/teksty_pdf_97/i-515.pdf [accessed on 28.06.2017].

Pruszkowski R., *Obowiązki jednostek samorządu terytorialnego w zakresie przeciwdziałania alkoholizmowi* [Responsibilities of local government units in counteracting alcoholism], Finanse Komunalne No. 2, 2002.

Rehm J., Baliunas D., Borges G.L., Graham K., Irving H., Kehoe T. et al., *The relation between different dimensions of alcohol consumption and burden of disease: An overview. Addiction*, 105(5), 2010.

Sawuła R., *Stosowanie ustawy o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi. Wybrane problemy* [Application of the Act on upbringing in sobriety and counteracting alcoholism. Selected issues], Samorząd Terytorialny No. 10, 1993.

Sawuła R., *Administracyjnoprawne środki ograniczenia dostępności do alkoholu. Uwagi na tle nowelizacji ustawy o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi* [Administrative law measures of limiting access to alcohol. Comments in the light of amendment of the Act on upbringing in sobriety and counteracting alcoholism], Samorząd Terytorialny No. 3, 1997.

Schuckit M.A., *Alcohol-related disorders*, [in:] B.J. Sadock, V.A. Sadock (eds.), *Kaplan and Sadock's comprehensive textbook of psychiatry* (7th ed.), Philadephia: Lippincott Williams & Wilkins, 2005.

Skrzydło-Niżnik I., Zalas G., *Ustawa o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi. Komentarz* [Act on upbringing in sobriety and counteracting alcoholism. Commentary], 2012, Lex/el.

Skwarło R., *Ustalenie liczby punktów sprzedaży napojów alkoholowych na terenie gminy/miasta* [Determining the number of points of sale of alcoholic beverages in the area of the commune/town], Lex/el.

Uliasz M., *Reklama i promocja wyrobów tytoniowych* [Advertising and promotion of tobacco products], Przegląd Sądowy No. 7–8, 2001.

Wilk J., *Glosa do wyroku WSA z dnia 19 grudnia 2011 r., III SA/Wr 568/11* [Gloss on the judgment of the Voivodeship Administrative Court in Wrocław of 19 December 2011, III SA/Wr 568/11], Lex/el.

Zgliczyński W.S., *Alkohol w Polsce* [Alcohol in Poland], Biuro Analiz Sejmowych No. 11, 2016.

Legal regulations

Ustawa z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego [Act of 14 June 1960: Code of Administrative Procedure], uniform text: Journal of Laws [Dz.U.] of 2017, item 1257, as amended.

Ustawa z dnia 26 października 1982 r. o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi [Act of 26 October 1982 on upbringing in sobriety and counteracting alcoholism], uniform text: Journal of Laws [Dz.U.] of 2016, item 487, as amended.

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

Ustawa z dnia 2 kwietnia 1997 r. Konstytucja Rzeczypospolitej Polskiej [Act of 2 April 1997: the Constitution of the Republic of Poland], Journal of Laws [Dz.U.] of 1997, No. 78, item 483, as amended.

Administrative decisions and local authorities' declaratory acts

Decision of the Local Government Appeal Court in Gdańsk: Postanowienie SKO w Gdańsku z dnia 30 kwietnia 2012 r., 5113/11, Lex/el.

Declaratory act of Kraków Voivode of 16 December 1996, ON.III-0903-12-46/96, Lex/el.

Declaratory act of Kujawsko-Pomorskie Voivode of 7 April 2008, WNK/DW.IV.BP.0911-11/08, Lex/el.

Declaratory act of Opolskie Voivode of 7 April 2011, NK.III.4131.1.53.2011.KK, Lex/el.

Declaratory act of Lubelskie Voivode of 19 July 2011, NK-II.4131.261.2011, Lex/el.

Declaratory act of Lubelskie Voivode of 8 April 2013, PN-II.4131.127.2013, Lex/el.

Declaratory act of Łódzkie Voivode of 14 January 2014, PNK-I.4131.1340.2013, Lex/el.

Declaratory act of Lubelskie Voivode of 2 April 2015, PN-II.4131.143.2015, Legalis No. 1206349.

Declaratory act of Podkarpackie Voivode of 22 June 2016, P-II.4131.2.92.2016, Lex/el.

Declaratory act of Małopolskie Voivode of 2 February 2017, WN-II.4131.1.5.2017, Lex/el.

Court judgements

Supreme Administrative Court judgement of 3 January 1995, SA/KR 2937/94, Orzecznictwo Sądów Polskich No. 2, 1996.

Supreme Court ruling of 17 April 1997, III RN 11/97, http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/III%20RN%2011-97.pdf [accessed on 27.06.2017].

Supreme Administrative Court judgement of 21 May 1997, SA/Rz 145/97, http://orzeczenia.nsa.gov.pl/doc/8B03CFC291 [accessed on 28.06.2017].

Constitutional Tribunal judgement of 24 November 1998, K 22/98, Lex/el.

Constitutional Tribunal judgement of 26 April 1999, 33/98, http://isap.sejm.gov.pl/DetailsServlet?id=WDU19990860963&min=1 [accessed on 28.06.2017].

Judgement of the Voivodeship Administrative Court in Gdańsk of 13 May 2004, II SA/Gd 3499/01, http://orzeczenia.nsa.gov.pl/doc/A9A69D0D45 [accessed on 25.06.2017].

Judgement of the Voivodeship Administrative Court in Lublin of 15 November 2005, III SA/Lu 532/05, http://orzeczenia.nsa.gov.pl/doc/CE94D2CAF7 [accessed on 23.06.2017].

Supreme Administrative Court judgement of 14 December 2006, II GSK 236/06, http://orzeczenia.nsa.gov.pl/doc/B7844486DA [accessed on 28.06.2017].

Judgement of the Voivodeship Administrative Court in Rzeszowie of 2 April 2009, II SA/Rz 160/09, http://orzeczenia.nsa.gov.pl/doc/E999B7F89E [accessed on 28.06.2017].

Judgement of the Voivodeship Administrative Court in Lublin of 26 November 2009, III SA/Lu 337/09, http://orzeczenia.nsa.gov.pl/cbo/search [accessed on 28.06.2017].

Judgement of the Voivodeship Administrative Court in Kraków of 8 July 2010, III SA/Kr 84/10, http://orzeczenia.nsa.gov.pl/doc/71AB8CC6D6 [accessed on 21.06.2017].

Supreme Administrative Court judgement of 11 January 2011, II GSK 15/10, http://orzeczenia.nsa.gov.pl/doc/FE28D6676F [accessed on 28.06.2017].

Constitutional Tribunal ruling of 5 April 2011, P 26/09, http://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&dokument=6464&sprawa=5222 [accessed on 28.06.2017].

Judgement of the Voivodeship Administrative Court in Kraków of 8 June 2011, III SA/Kr 368/11, http://orzeczenia.nsa.gov.pl/doc/2E8916B86D [accessed on 25.06.2017].

Judgement of the Voivodeship Administrative Court in Warsaw of 13 June 2011, VI SA/Wa 79/11, http://orzeczenia.nsa.gov.pl/doc/8B48B55285 [accessed on 26.06.2017].

Judgement of the Voivodeship Administrative Court in Kraków of 18 October 2011, III SA/Kr 1344/10, http://orzeczenia.nsa.gov.pl/doc/A2AA7BCEC1 [accessed on 25.06.2017].
Judgement of the Voivodeship Administrative Court in Wrocław of 19 December 2011, III SA/Wr 568/11, http://orzeczenia.nsa.gov.pl/doc/371EC0C063 [accessed on 21.06.2017].
Judgement of the Voivodeship Administrative Court in Szczecin of 12 January 2012, II SA/Sz 1135/11, http://orzeczenia.nsa.gov.pl/doc/A311A8AC69 [accessed on 27.06.2017].
Supreme Administrative Court judgement of 10 May 2012, II GSK 497/11, http://orzeczenia.nsa.gov.pl/doc/F58C11ACC4 [accessed on 27.06.2017].
Supreme Administrative Court judgement of 24 July 2013, II GSK 605/12, http://orzeczenia.nsa.gov.pl/doc/32EFA9B7EA [accessed on 27.06.2017].
Judgement of the Voivodeship Administrative Court in Lublin of 24 September 2013, III SA/Lu 335/13, http://orzeczenia.nsa.gov.pl/doc/DAA4F83BF5 [accessed on 28.06.2017].
Judgement of the Voivodeship Administrative Court in Kraków of 24 September 2013, III SA/Kr 96/13, http://orzeczenia.nsa.gov.pl/doc/534B5A341F [accessed on 21.06.2017].
Judgement of the Voivodeship Administrative Court in Kraków of 24 October 2013, III SA/Kr 407/13, Legalis No. 794596.
Judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski of 3 April 2014, II SA/Go 148/14, http://orzeczenia.nsa.gov.pl/doc/4A35FD49A4 [accessed on 24.06.2017].
Judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski of 3 September 2014, II SA/Go 554/14, http://orzeczenia.nsa.gov.pl/doc/89C7B2425E [accessed on 19.06.2017].
Supreme Administrative Court judgements of 18 September 2014, II GSK 1158-1159/13, http://orzeczenia.nsa.gov.pl/doc/BF557E292A; http://orzeczenia.nsa.gov.pl/doc/620C183EFC [accessed on 28.06.2017].
Judgement of the Voivodeship Administrative Court in Łódź of 24 November 2014, III SA/Łd 855/14, http://orzeczenia.nsa.gov.pl/doc/BDB25ECC95 [accessed on 20.06.2017].
Judgement of the Voivodeship Administrative Court in Wrocław of 12 March 2015, III SA/Wr 826/14, http://orzeczenia.nsa.gov.pl/doc/792F4982C8 [accessed on 27.06.2017].
Judgement of the Voivodeship Administrative Court in Białystok of 15 April 2015, I SA/Bk 19/15, Legalis No. 1258682.
Supreme Administrative Court judgement of 23 June 2015, II GSK 1053/14, http://orzeczenia.nsa.gov.pl/doc/892A33CA02 [accessed on 25.06.2017].
Judgement of the Voivodeship Administrative Court in Kraków of 11 March 2016, III SA/Kr 1557/15, http://orzeczenia.nsa.gov.pl/doc/90689729B5 [accessed on 20.06.2017].
Judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski of 15 June 2016, II SA/Go 367/16, http://orzeczenia.nsa.gov.pl/doc/5F2090F34B [accessed on 27.06.2017].
Judgement of the Voivodeship Administrative Court in Szczecin of 16 June 2016, II SA/Sz 426/16, http://orzeczenia.nsa.gov.pl/doc/397080D08A [accessed on 27.06.2017].
Judgement of the Voivodeship Administrative Court in Kielce of 18 August 2016, II SA/Ke 450/16, http://orzeczenia.nsa.gov.pl/doc/A4FFB626F4 [accessed on 23.06.2017].
Judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski of 26 October 2016, II SA/Go 689/16, http://orzeczenia.nsa.gov.pl/doc/6666185949 [accessed on 25.06.2017].
Judgement of the Voivodeship Administrative Court in Lublin of 6 December 2016, III SA/Lu 757/16, http://orzeczenia.nsa.gov.pl/doc/FA9CDA58B5 [accessed on 20.06.2017].
Supreme Administrative Court judgement of 21 December 2016, I GSK 336/15, http://orzeczenia.nsa.gov.pl/doc/DC0ACFE6DC [accessed on 22.06.2017].
Judgement of the Voivodeship Administrative Court in Łódź of 11 January 2017, I SA/Łd 910/16, http://orzeczenia.nsa.gov.pl/doc/540EA2FC5B [accessed on 25.06.2017].

Judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski of 12 January 2017, II SA/Go 967/16, http://orzeczenia.nsa.gov.pl/doc/4F79113AB4 [accessed on 28.06.2017].

Websites and other sources

https://www.cancer.gov/about-cancer/causes-prevention/risk/alcohol/alcohol-fact-sheet [accessed on 28.06.2017].

http://www.pope2016.com/polska/o-kraju/news,452566,kosciol-w-polsce-w-liczbach.html [accessed on 28.06.2017].

https://www.theguardian.com/science/2011/mar/07/safe-level-alcohol-consumption [accessed on 22.06.2017].

World Health Organisation, http://www.who.int/mediacentre/factsheets/fs349/en/index.html.

Alcohol – the body & health effects. A brief overview. Health Promotion Agency, Alcohol Advisory Council of New Zealand, http://www.hpa.org.nz/sites/default/files/documents/HealthEffects.pdf [accessed on 27.06.2017].

Alcohol: balancing risks and benefits, https://www.hsph.harvard.edu/nutritionsource/alcohol-full-story/ [accessed on 22.06.2017].

Alcohol drug facts, NSW Government, https://www.google.pl/?gws_rd=ssl#q=Alcohol+drug+facts+ nsw+ government [accessed on 24.06.2017].

Apel Zespołu KEP ds. Apostolstwa Trzeźwości z dnia 11 listopada 2014 r. o zaprzestanie działań prowadzących do złagodzenia prawa dotyczącego reklamy alkoholu w Polsce [Appeal of the Team for Alcohol Abstinence of the Polish Episcopal Conference of 11 November 2014 to stop activities leading to more lenient law on alcohol advertising in Poland], http://episkopat.pl/apel-zespolu-kep-ds-apostolstwa-trzezwosci-o-zaprzestanie-dzialan-prowadzacych-do-zlagodzenia-prawa-dotyczacego-reklamy-alkoholu-w-polsce.

Informacja Najwyższej Izby Kontroli z dnia 25 marca 2013 r., no. 27/2013/P/12/165/LPO o realizacji i wykorzystaniu przez samorządy województw i gmin dochodów z opłat za korzystanie z zezwoleń na sprzedaż napojów alkoholowych [Information of the Supreme Audit Office of 25 March 2013, no. 27/2013/P/12/165/LPO, on use and assignment by voivodeship and commune self-governments of revenues from granted licences for sale of alcoholic beverages], https://www.nik.gov.pl/szukaj/?event=&formname=wyszukiwarka-mini&fraza=27%2F2013%2FP%2F12%2F165%2FLPO&typ%5B%5D=wszystkie&sort=mix_date_modyfikacji-&sort_order=0 [accessed on 28.10.2017].

Rozwiązywanie problemów alkoholowych w gminie. Informator dla radnych [Solving alcohol-related problems in communes. Information guide for commune deputies], Państwowa Agencja Rozwiązywania Problemów Alkoholowych, Warsaw 2015.

Measuring the health risks and benefits of alcohol, https://pubs.niaaa.nih.gov/publications/10report /chap01a.pdf [accessed on 02.06.2017].

Postawy wobec alkoholu. Raport 2006–2007 [Attitudes towards alcohol. Report for 2006–2007], http://www.parpa.pl/index.php/alkohol-w-europie/najnowsze-dokumenty-eu [accessed on 28.06.2017].

Sprawozdanie z wykonania ustawy z dnia 26 października 1982 r. o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi w okresie od dnia 1 stycznia 2015 r. do dnia 31 grudnia 2015 r. [Report on the implementation of the Act of 26 October 1982 on upbringing in sobriety and counteracting alcoholism in the period 1 January 2015–31 December 2015], https://bip.kprm.gov.pl/kpr/bip-rady-ministrow/informacje-i-sprawozda/4093,informacje.html [accessed on 28.06.2017].

CONSUMPTION AND SALE OF ALCOHOLIC BEVERAGES: SELECTED LEGAL AND HEALTH-RELATED ISSUES

Summary

This paper is devoted to the issues of consumption and sale of alcoholic beverages viewed through the prism of selected legal, social and health-related aspects of the currently binding law on upbringing in sobriety and counteracting alcoholism. Undoubtedly, legal regulations in this area require immediate "legal amendment", because the Act on upbringing in sobriety and counteracting alcoholism, adopted almost 35 years ago, does not currently constitute a legal act reflecting a decisive idea, stemming from, inter alia, its Preamble, according to which the legislator *expressis verbis* recognizes citizens' life in sobriety as an indispensable condition of moral and financial welfare. The authors pointed out *de lege ferenda* proposals which show, among others, that the legislator should limit the excessive availability of alcohol, especially to young people, by reducing the number of points of sale, implement systematic and effective enforcement of the provisions of the Act on upbringing in sobriety and counteracting alcoholism, introduce an absolute ban on advertising, promotion, sponsorship, etc., of alcoholic beverages, or limit, and, what would be best, eliminate the "aggressive lobbying" of representatives and quasi-representatives of the "spirit industry" in a statutory form to ensure the transparency of legislative processes in this sphere of public health.

Keywords: sobriety, alcoholic beverages, alcohol, health, addiction

SPOŻYCIE I SPRZEDAŻ NAPOJÓW ALKOHOLOWYCH – WYBRANE ASPEKTY PRAWNE I ZDROWOTNE

Streszczenie

Artykuł poświęcony jest problematyce spożywania i sprzedaży napojów alkoholowych analizowanej przez pryzmat wybranych aspektów prawnych, społecznych i zdrowotnych obowiązującej ustawy o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi. Bez wątpienia przepisy prawne w tym zakresie wymagają bezzwłocznej „korekty prawnej", ponieważ ustawa o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi, uchwalona prawie 35 lat temu, nie przedstawia obecnie aktu prawnego będącego odzwierciedleniem zdecydowanej idei, wypływającej m.in. z jej preambuły, zgodnie z którą prawodawca *expressis verbis* uznaje życie obywateli w trzeźwości za niezbędny warunek moralnego i materialnego dobra. Autorzy wskazali postulaty *de lege ferenda*, z których wynika m.in., że ustawodawca powinien ograniczyć nadmierną dostępności alkoholu, zwłaszcza dla młodzieży, poprzez zmniejszenie liczby punktów sprzedaży; wdrożyć systematyczną i skuteczną egzekucję przepisów ustawy o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi; wprowadzić bezwzględny zakaz reklamowania, promocji i sponsoringu, etc. napojów alkoholowych; czy też ograniczyć, a najlepiej wyeliminować „agresywną" aktywność lobbingową przedstawicieli i quasi-przedstawicieli „przemysłu spirytusowego" mającą wpływ na kształt ustawy, aby zapewnić transparentność procesów legislacyjnych w tym obszarze zdrowia publicznego.

Słowa kluczowe: trzeźwość, napoje alkoholowe, alkohol, zdrowie, uzależnienie

NOTES ON THE AUTHORS

Florian Lempa	Professor, PhD hab., Head of the Department of Roman Law, Logic and Theory and History of Law, Faculty of Law and Administration of Łazarski University in Warsaw
Sławomir Kursa	PhD, Assistant Professor, Faculty of Law of SWPS University of Social Sciences and Humanities in Warsaw
Artur Kotowski	PhD, Assistant Professor, the European University of Law and Administration in Warsaw, Assistant-Specialist of the Supreme Court Research and Analysis Office
Izabela Jankowska-Prochot	PhD, lecturer at the Cardinal Wyszyński University in Warsaw and the Academy of Computer Science, Management and Administration in Warsaw, employee of the General Police Headquarters in Warsaw
Katarzyna Nazar	PhD, Assistant Professor, Department of Criminal Law and Criminology, Faculty of Law and Administration of Maria Curie-Skłodowska University in Lublin
Anna Cybulko	MA, doctoral fellow at the School of Social Sciences at the Institute of Philosophy and Sociology of the Polish Academy of Science, Ombudsman at the University of Warsaw
Monika Wałachowska	PhD hab., Assistant Professor, Faculty of Law and Administration of Nicolaus Copernicus University in Toruń
Dominika Czerniak	MA, doctoral fellow at the Department of Criminal Procedure, Faculty of Law, Administration and Economics of the University of Wrocław

Piotr Ochman — PhD, Assistant Professor, Department of Criminology and Safety Studies of the Faculty of Law, Administration and Economics, University of Wrocław

Ireneusz Nowak — PhD, Assistant Professor, Faculty of Law and Administration of the University of Łódź

Adriana Nowak — PhD hab., Assistant Professor, Faculty of Biotechnology and Food Sciences of Łódź University of Technology

NOTY O AUTORACH

Florian Lempa	prof. dr hab., Kierownik Katedry Prawa Rzymskiego, Logiki oraz Teorii i Historii Prawa na Wydziale Prawa i Administracji Uczelni Łazarskiego w Warszawie
Sławomir Kursa	dr, adiunkt na Wydziale Prawa SWPS Uniwersytetu Humanistycznospołecznego w Warszawie
Artur Kotowski	dr, adiunkt w Europejskiej Wyższej Szkole Prawa i Administracji w Warszawie, Asystent-Specjalista, członek Biura Studiów i Analiz Sądu Najwyższego
Izabela Jankowska-Prochot	dr, wykładowca Uniwersytetu Kardynała Stefana Wyszyńskiego w Warszawie oraz Wyższej Szkoły Informatyki, Zarządzania i Administracji w Warszawie, pracownik Komendy Głównej Policji w Warszawie
Katarzyna Nazar	dr, adiunkt w Katedrze Prawa Karnego i Kryminologii na Wydziale Prawa i Administracji Uniwersytetu Marii Curie-Skłodowskiej w Lublinie
Anna Cybulko	mgr, doktorantka Szkoły Nauk Społecznych przy Instytucie Filozofii i Socjologii Polskiej Akademii Nauk, Rzecznik Akademicki Uniwersytetu Warszawskiego
Monika Wałachowska	dr hab., adiunkt na Wydziale Prawa i Administracji Uniwersytetu Mikołaja Kopernika w Toruniu
Dominika Czerniak	mgr, doktorantka w Katedrze Postępowania Karnego na Wydziale Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego
Piotr Ochman	dr, adiunkt w Katedrze Kryminologii i Nauk o Bezpieczeństwie na Wydziale Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego

Ireneusz Nowak — dr, adiunkt na Wydziale Prawa i Administracji Uniwersytetu Łódzkiego

Adriana Nowak — dr hab., adiunkt na Wydziale Biotechnologii i Nauk o Żywności Politechniki Łódzkiej

INFORMATION FOR AUTHORS

1. The quarterly publishes scientific articles devoted to issues within a broad field of law as well as reviews and reports on scholarly life in higher education institutions. Articles are subject to evaluation by two reviewers and their positive opinion is a condition for their publication.
2. Manuscripts should be submitted in one copy of a standard typescript (30 lines of 60 characters each, i.e. ca. 1,800 characters per page) together with a digital version saved on a data storage device and emailed to: wydawnictwo@lazarski.edu.pl.
3. Footnotes should be placed at the bottom of a page providing the initials of the author's given name(s), surname, the title (printed in italics), the name of a journal or a publisher, the place of publication (in case of books), the year of publication, and a page number. In case of books with multiple authors, the first name and surname of their editor with additional information: (ed.) shall be provided.
4. An article should be accompanied by its abstract informing about its aim, methodology, work findings and conclusions. The abstract should not exceed 20 lines of standard typescript. If the abstract contains specialist, scientific or technical terms, their English equivalents should be provided.
5. An article should not exceed 22 pages of a standard typescript and a review, scientific news or information: 12 pages.
6. The editor reserves the right to introduce changes in the manuscript submitted for publication, e.g. to shorten it, change the title and subheadings as well as correct the style.
7. Detailed guidelines for authors are available on Lazarski University Press website: http://www.lazarski.pl/pl/badania-i-rozwoj/oficyna-wydawnicza/dla-autorow/. Authors are obliged to provide bibliography.
8. A manuscript shall contain the author's full given name and surname, their residence address with the telephone/fax number, their email address, scientific degree or title and the name of the scientific institution the author works for.

IUS NOVUM PUBLICATIONS REVIEW PROCEDURE

1. The thematic editors shall take preliminary decisions on accepting articles for review.
2. The Editor-in-Chief shall take the final decision to refer an article to a reviewer, having checked that an article meets all formal requirements, i.e. the author has provided all necessary information: affiliation, correspondence address, email address, telephone number, co-authors' confirmation of cooperation and their input to the article, an abstract in the Polish language and key words.
3. A review should take into consideration the type of work (original, experimental, reviewing, casuistic, methodological), its scientific level, whether the work matches the subject matter suggested in its title, whether it meets the requirements of a scientific publication, whether it contains essential elements of novelty, the appropriate terminology use, reliability of findings and conclusions, layout, size, cognitive value and language, and provide recommendation to accept the article after necessary changes or decline it. The review shall be developed on a special review form.
4. Reviews shall be provided by standing reviewers and reviewers selected at random. Those shall be scientists with considerable scientific achievements in the given discipline. The list of standing reviewers is published on the quarterly website. Each issue of the quarterly publishes a list of reviewers of articles and glosses published in the issue.
5. Two independent reviewers shall review each publication.
6. Reviewers shall not be affiliated to the same scientific institution as authors.
7. Reviewers and authors shall not know their identity.
8. Reviewers appointed to review an article must not reveal the fact.
9. A review shall be developed in writing, following a special template (the review form) and provide recommendation to accept a manuscript for publication or decline it.
10. Reviewers shall submit their reviews in two formats: electronic and a hard copy with a handwritten signature. Such review is archived for two years.
11. An author is provided with a reviewer's comments and he/she is obliged to respond to them. The reviewer shall verify the text after changes introduced to it.
12. In the event of a negative assessment of an article by a reviewer, the Editor-in-Chief, after consulting a thematic editor, shall take a final decision whether to accept the article for publication or decline it.

ARTICLES PUBLISHED IN 2017 WERE REVIEWED BY:

Zbigniew Czarnik
Tomasz Demendecki
Katarzyna Dudka
Ryszard Grupiński
Jolanta Jakubowska-Hara
Izabela Jankowska-Prochot
Jerzy Jaskiernia
Maria Jeż-Ludwichowska
Monika Klejnowska
Czesław Kłak
Marek Kolasiński
Violetta Konarska-Wrzosek
Anna Konert
Jacek Kosonoga
Julia Kosonoga-Zygmunt
Wojciech Kotowski
Edyta Krzysztofik
Artur Kuś
Zbigniew Kwiatkowski
Jerzy Lachowski
Florian Lempa
Maciej Małolepszy
Mirosława Melezini
Marek Mozgawa
Bartłomiej Opaliński
Hanna Paluszkiewicz
Ewa Podgórska-Rakiel
Maria Rogacka-Rzewnicka
Maciej Rogalski
Mieczysław Różański
Jacek Sobczak
Sławomir Steinborn
Ryszard Strzelczyk
Ilona Szczepańska
Krzysztof Szczygielski
Przemysław Szustakiewicz
Marek Świerczyński
Przemysław Telenga
Marta Tużnik
Krzysztof Walczak
Monika Wałachowska

DODATKOWE INFORMACJE / ADDITIONAL INFORMATION

Redakcja uprzejmie informuje, że czasopismo „Ius Novum":

– zostało zamieszczone w części B. wykazu czasopism naukowych Ministra Nauki i Szkolnictwa Wyższego, pod pozycją 1136, a za publikację na jego łamach przyznano **11 punktów.**
  Dalsze informacje w tym zakresie: http://www.nauka.gov.pl/ujednolicony-wykaz-czasopism-naukowych/wykaz-czasopism-naukowych-zawierajacy-historie-czasopisma-z-publikowanych-wykazow-za-lata-2013-2016.html;
– poddane zostało procesowi ewaluacji ICI Journals Master List 2016, której wynikiem jest przyznanie wskaźnika ICV (*Index Copernicus Value*) w wysokości **58,16 pkt.**
  Dalsze informacje w tym zakresie: https://journals.indexcopernicus.com.

The Editorial Board informs that the *Ius Novum* quarterly:

– has been listed in section B of the register of scientific journals kept by the Ministry of Science and Higher Education, under entry 1136, with **11 points** awarded for a publication in the quarterly.
  Further particulars in this respect are available at: http://www.nauka.gov.pl/ujednolicony-wykaz-czasopism-naukowych/wykaz-czasopism-naukowych-zawierajacy-historie-czasopisma-z-publikowanych-wykazow-za-lata-2013-2016.html;
– underwent the ICI Journals Master List 2016 evaluation process, as a result of which the periodical was awarded an ICV (*Index Copernicus Value*) of **58.16 points**.
  Further information on this topic can be found at: https://journals.indexcopernicus.com.

LISTA STAŁYCH RECENZENTÓW / REGULAR REVIEWERS

1. Prof. dr hab. Zbigniew Czarnik, Wyższa Szkoła Prawa i Administracji w Rzeszowie
2. Prof. dr hab. Katarzyna Dudka, Wydział Prawa i Administracji Uniwersytetu Marii Curie-Skłodowskiej w Lublinie
3. Prof. dr hab. Jolanta Jakubowska-Hara, Zakład Prawa Karnego Instytutu Nauk Prawnych Polskiej Akademii Nauk
4. Prof. dr hab. Grzegorz Jędrejek, Wydział Prawa i Administracji Uniwersytetu Kardynała Stefana Wyszyńskiego w Warszawie
5. Prof. dr hab. Katarzyna Kaczmarczyk-Kłak, Wydział Prawa i Administracji WSPiA Rzeszowskiej Szkoły Wyższej w Rzeszowie
6. Dr Dariusz Kala, Wydział Prawa i Administracji Uniwersytetu im. Mikołaja Kopernika w Toruniu
7. Prof. dr hab. Tomasz Kalisz, Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego we Wrocławiu
8. Prof. dr hab. Czesław Kłak, Wydział Prawa i Administracji WSPiA Rzeszowskiej Szkoły Wyższej w Rzeszowie
9. Prof. dr hab. Violetta Konarska-Wrzosek, Wydział Prawa i Administracji Uniwersytetu im. Mikołaja Kopernika w Toruniu
10. Prof. dr hab. Zbigniew Kwiatkowski, Wydział Prawa i Administracji Uniwersytetu Opolskiego
11. Dr Maria Jeż-Ludwichowska, Wydział Prawa i Administracji Uniwersytetu im. Mikołaja Kopernika w Toruniu
12. Dr Aneta Łazarska, Wydział Prawa i Administracji Uczelni Łazarskiego w Warszawie
13. Prof. dr hab. Mirosława Melezini, Wydział Prawa i Administracji Uniwersytetu w Białymstoku
14. Prof. dr hab. Marek Mozgawa, Wydział Prawa i Administracji Uniwersytetu Marii Curie-Skłodowskiej w Lublinie
15. Prof. dr hab. Hanna Paluszkiewicz, Wydział Prawa i Administracji Uniwersytetu Zielonogórskiego
16. Dr hab. Mateusz Pilich, Wydział Prawa i Administracji Uniwersytetu Warszawskiego
17. Prof. dr hab. Maciej Rogalski, Wydział Prawa i Administracji Uczelni Łazarskiego w Warszawie
18. Prof. dr hab. Jerzy Skorupka, Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego we Wrocławiu
19. Prof. dr hab. Jacek Sobczak, Wydział Prawa Uniwersytetu SWPS w Warszawie
20. Prof. dr hab. Sławomir Steinborn, Wydział Prawa i Administracji Uniwersytetu Gdańskiego
21. Prof. dr hab. Krzysztof Ślebzak, Wydział Prawa i Administracji Uniwersytetu im. Adama Mickiewicza w Poznaniu
22. Prof. dr hab. Małgorzata Wąsek-Wiaderek, Wydział Prawa i Administracji Katolickiego Uniwersytetu Lubelskiego Jana Pawła II
23. Dr Sławomir Żółtek, Wydział Prawa i Administracji Uniwersytetu Warszawskiego

RECENZENCI ZAGRANICZNI / FOREIGN REVIEWERS

1. Prof. Regina Hučková, Wydział Prawa Uniwersytetu Pavla Jozefa Šafárika w Koszycach, Słowacja
2. Prof. dr hab. Maciej Małolepszy, Wydział Prawa Europejskiego Uniwersytetu Viadrina we Frankfurcie nad Odrą, Niemcy
3. Prof. Rodrigo Ochoa Figueroa, adwokat, Katedra Prawa Administracyjnego, Uniwersytet Michoacana San Nicolas de Hidalgo, Meksyk
4. Prof. Alembert Vera Rivera, Universidad Católica de Santiago de Guayaquil, Ekwador, adwokat Prezydenta Republiki Ekwador
5. Dr Katarzyna Krzysztyniak, adwokat, Czechy
6. Dr Miguel Bustos Rubio, Wydział Prawa Uniwersytetu w Salamance, Hiszpania

ETHICAL STANDARDS

IUS NOVUM Editorial Board strives to ensure high ethical standards. Articles submitted for publication in *IUS NOVUM* are assessed for their integrity, compliance with ethical standards and contribution to the development of scholarship.
The principles listed below are based on the COPE's Best Practice Guidelines for Journal Editors.

STANDARDS FOR AUTHORS

Authorship should reflect individuals' contribution to the work concept, project, implementation or interpretation. All co-authors who contributed to the publication should be listed. Persons who are not authors but made substantial contributions to the article, should be listed in the acknowledgements section. The author should make sure that all co-authors have been listed, are familiar with and have accepted the final version of the article, and have given their consent for submitting the article for publication. Authors who publish the findings of their research should present the research methodology used, an objective discussion of the results and their importance for academic purposes and practice. The work should provide reference to all the sources used. Publishing false or intentionally untrue statements is unethical.

Conflict of interests and its disclosure
Authors should disclose all sources of their projects funding, contribution of research institutions, societies and other entities as well as all other conflicts of interests that might affect the findings and their interpretation.

Standards for reporting
Authors of articles based on their own research should present detail of performed work and discuss its importance. Data the work is based on should be presented in details. Statements that are not true or intentionally inaccurate will be treated as unethical and prohibited conduct.

Access to data and their retention
Authors should provide unprocessed data regarding the work submitted for reviewing or should be prepared to ensure access to such data. Authors should retain the data for at least a year's time from the publication.

Multiple, unnecessary or competing publications
In general, authors should not publish materials describing the same research in more than one journal or primary publication. Submitting the same work to more than one editor concurrently is unethical and forbidden.

Confirming sources
Authors must provide acknowledgement and references for all publications that affected the submitted work and must acknowledge each instance of using other authors' work.

Substantial errors in the published work
If authors find substantial errors or inaccuracies in their work, they will be obliged to notify the Editorial Board Secretary without delay. In case the article has already been published, the author should cooperate with the Editor in order to retract the article or publish an adequate erratum.

Originality and plagiarism
Authors must only submit original works. They should make sure that the names of authors cited in the work and/or cited fragments of their works are properly acknowledged or referenced.

Ghost/guest authorship
Ghost authorship is when someone makes a substantial contribution to a work but he/she is not listed as an author or his/her role in the publication is not acknowledged. Guest authorship takes place when someone's contribution is very small or inexistent but his/her name is listed as an author.

Ghost and guest authorship are manifestations of a lack of scientific integrity and all such cases will be disclosed, involving a notification of component entities (institutions employing the authors, scientific societies, associations of editors, etc.). The Editorial Board will document every instance of scientific dishonesty, especially the violation of the ethical principles binding in science.

In order to prevent ghost or guest authorship, authors are requested to provide declarations of authorship.

STANDARDS FOR REVIEWERS

Editorial decisions
Reviewers should support the Editor-in-Chief in decision-making and authors in correcting errors.

Feedback
Reviewers who cannot review a work or know they will not be able to submit a review within an agreed time limit should inform the Editorial Board Secretary about that.

Confidentiality
All reviewed works should be treated as confidential documents. They cannot be shown to or discussed with third parties who are not authorised members of the Editorial Board.

Anonymity
All reviews are made anonymously and the Editor does not reveal information on authors to reviewers.

Objectivity standards
Reviews should be objective. Derogatory personal remarks are inappropriate. Reviewers should clearly express their opinions and provide adequate arguments. All doubts as well as critical and polemical comments should be included in the review.

Conflict of interests and its disclosure
Confidential information and ideas arising as a result of a review must be kept secret and cannot be used for personal benefits. Reviewers should not review works of authors if there is a conflict of interests resulting from their close relationship.

Confirmation of sources
Reviewers should enumerate publications that an author has not referred to. Whatever statements are made about observations, sources or arguments that have previously been discussed should be supported by an adequate citation. Reviewers should also inform the Editorial Board Secretary about any substantial similarities or partial overlaps noticed.

Oficyna Wydawnicza Uczelni Łazarskiego
offers the follwing publications:

1. Krystyna Regina Bąk (red.), *Statystyka wspomagana Excelem 2007*, Warszawa 2010.
2. Wojciech Bieńkowski, Krzysztof Szczygielski, *Rozważania o rozwoju gospodarczym Polski*, Warszawa 2009.
3. Wojciech Bieńkowski, Adam K. Prokopowicz, Anna Dąbrowska, *The Transatlantic Trade and Investment Partnership. The 21st Century Agreement*, Warsaw 2015.
4. Remigiusz Bierzanek, *Przez wiek XX. Wspomnienia i refleksje*, Warszawa 2006.
5. Jacek Brdulak, Ewelina Florczak, *Uwarunkowania działalności przedsiębiorstw społecznych w Polsce*, Warszawa 2016.
6. Piotr Brzeziński, Zbigniew Czarnik, Zuzanna Łaganowska, Arwid Mednis, Stanisław Piątek, Maciej Rogalski, Marlena Wach, *Nowela listopadowa prawa telekomunikacyjnego*, Warszawa 2014.
7. Hans Ephraimson-Abt, Anna Konert, *New Progress and Challenges in The Air Law*, Warszawa 2014.
8. Janusz Filipczuk, *Adaptacyjność polskich przedsiębiorstw w warunkach transformacji systemowej*, wyd. II, Warszawa 2007.
9. Jerzy A. Gawinecki (red. nauk.), *Ekonometria w zadaniach*, praca zbiorowa, Warszawa 2008.
10. Jerzy A. Gawinecki, *Matematyka dla ekonomistów*, Warszawa 2010.
11. Grażyna Gierszewska, Jerzy Kisielnicki (red. nauk.), *Zarządzanie międzynarodowe. Konkurencyjność polskich przedsiębiorstw*, Warszawa 2010.
12. Tomasz G. Grosse (red. nauk.), *Między polityką a rynkiem. Kryzys Unii Europejskiej w analizie ekonomistów i politologów*, praca zbiorowa, Warszawa 2013.
13. Jan Grzymski, *Powrót do Europy – polski dyskurs. Wyznaczanie perspektywy krytycznej*, Warszawa 2016.
14. Marian Guzek, *Makroekonomia i polityka po neoliberalizmie. Eseje i polemiki*, Warszawa 2011.
15. Marian Guzek (red. nauk.), *Ekonomia i polityka w kryzysie. Kierunki zmian w teoriach*, praca zbiorowa, Warszawa 2012.
16. Marian Guzek, *Teorie ekonomii a instrumenty antykryzysowe*, Warszawa 2013.
17. Marian Guzek, *Kapitalizm na krawędzi*, Warszawa 2014.
18. Marian Guzek, *Doktryny ustrojowe. Od liberalizmu do libertarianizmu*, Warszawa 2015.
19. Marian Guzek, *Przyszłość Kapitalizmu – cesjonizm*, Warszawa 2016.
20. Anna Harasiewicz-Mordasewicz, *Word 2007*, Warszawa 2009.
21. Anna Harasiewicz-Mordasewicz, *Excel 2007*, Warszawa 2010.
22. Dominika E. Harasimiuk, Marcin Olszówka, Andrzej Zinkiewicz (red. nauk.), *Prawo UE i porządek konstytucyjny państw członkowskich. Problem konkurencji i wzajemnych relacji*, Warszawa 2014.
23. Stanisław Hoc, *Prawo administracyjne gospodarcze. Wybrane zagadnienia*, Warszawa 2013.
24. „Ius Novum", Ryszard A. Stefański (red. nacz.), kwartalnik, Uczelnia Łazarskiego, numery: 1/2007, 2–3/2007, 4/2007, 1/2008, 2/2008, 3/2008, 4/2008, 1/2009, 2/2009,

3/2009, 4/2009, 1/2010, 2/2010, 3/2010, 4/2010, 1/2011, 2/2011, 3/2011, 4/2011, 1/2012, 2/2012, 3/2012, 4/2012, 1/2013, 2/2013, 3/2013, 4/2013, Numer specjalny 2014, 1/2014, 2/2014, 3/2014, 4/2014, 1/2015, 2/2015, 3/2015, 4/2015, 1/2016, 2/2016, 3/2016, 4/2016, 1/2017, 2/2017, 3/2017.

25. Andrzej Jagiełło, *Polityka akcyzowa w odniesieniu do wyrobów tytoniowych w Polsce w latach 2000–2010 i jej skutki ekonomiczne*, Warszawa 2012.
26. Sylwia Kaczyńska, Anna Konert, Katarzyna Łuczak, *Regulacje hiszpańskie na tle obowiązujących przepisów międzynarodowego i europejskiego prawa lotniczego*, Warszawa 2016.
27. Anna Konert (red.), *Aspekty prawne badania zdarzeń lotniczych w świetle Rozporządzenia 996/2010*, Warszawa 2013.
28. Anna Konert, *A European Vision for Air Passengers*, Warszawa 2014.
29. Łukasz Konopielko, Michał Wołoszyn, Jacek Wytrębowicz, *Handel elektroniczny. Ewolucja i perspektywy*, Warszawa 2016
30. Jerzy Kowalski, *Państwo prawa. Demokratyczne państwo prawne. Antologia*, Warszawa 2008.
31. Stanisław Koziej, *Rozmowy o bezpieczeństwie. O bezpieczeństwie narodowym Polski w latach 2010–2015 w wywiadach i komentarzach Szefa Biura Bezpieczeństwa Narodowego*, Warszawa 2016.
32. Stanisław Koziej, *Rozważania o bezpieczeństwie. O bezpieczeństwie narodowym Polski w latach 2010–2015 w wystąpieniach i referatach Szefa Biura Bezpieczeństwa Narodowego*, Warszawa 2016.
33. Rafał Krawczyk, *Podstawy cywilizacji europejskiej*, Warszawa 2006.
34. Rafał Krawczyk, *Islam jako system społeczno-gospodarczy*, Warszawa 2013.
35. Maria Kruk-Jarosz (red. nauk.), *System organów ochrony prawnej w Polsce. Podstawowe instytucje*, wyd. II zm. i popr., Warszawa 2008.
36. Maciej Krzak, *Kontrowersje wokół antycyklicznej polityki fiskalnej a niedawny kryzys globalny*, Warszawa 2012.
37. Michał Kuź, *Alexis de Tocqueville's Theory of Democracy and Revolutions*, Warsaw 2016.
38. Jerzy Menkes (red. nauk.), *Prawo międzynarodowe w XXI wieku. Księga pamiątkowa profesor Renaty Szafarz*, Warszawa 2007.
39. Jerzy Menkes (red. nauk.), *Prawo międzynarodowe – problemy i wyzwania. Księga pamiątkowa profesor Renaty Sonnenfeld-Tomporek*, Warszawa 2006.
40. Jerzy Menkes (red. nauk.), *Wybór kazusów z prawa międzynarodowego. Zagadnienia ogólne*, zeszyt 1, Warszawa 2008.
41. Aleksandra Mężykowska, *Interwencja humanitarna w świetle prawa międzynarodowego*, Warszawa 2008.
42. Mariusz Muszyński (red. nauk.), Dominika E. Harasimiuk, Małgorzata Kozak, *Unia Europejska. Instytucje, polityki, prawo*, Warszawa 2012.
43. „Myśl Ekonomiczna i Polityczna", Józef M. Fiszer (red. nacz.), kwartalnik, Uczelnia Łazarskiego, numery: 1(28)2010, 2(29)2010, 3(30)2010, 4(31)2010, 1–2(32–33)2011, 3(34)2011, 4(35)2011, 1(36)2012, 2(37)2012, 3(38)2012, 4(39)2012, 1(40)2013, 2(41)2013, 3(42)2013, 4(43)2013, 1(44)2014, 2(45)2014, 3(46)2014, 4(47)2014, 1(48)2015, 2(49)2015, 3(50)2015, 4(51)2015, 1(52)2016, 2(53)2016, 3(54)2016, 4(55)2016, 1(56)2017, 2(57)2017, 3(58)2017.

44. Edward Nieznański, *Logika dla prawników*, Warszawa 2006.
45. Bartłomiej Opaliński, Przemysław Szustakiewicz, *Policja. Studium administracyjno-prawne*, Warszawa 2013.
46. Bartłomiej Opaliński, *Rola Prezydenta Rzeczypospolitej Polskiej w procesie stanowienia ustaw na tle praktyki ustrojowej Konstytucji III RP*, Warszawa 2014.
47. Leokadia Oręziak, *Konkurencja podatkowa i harmonizacja podatków w ramach Unii Europejskiej*, Warszawa 2007.
48. Leokadia Oręziak (red. nauk.), *Finansowanie rozwoju regionalnego w Polsce*, Warszawa 2008.
49. Leokadia Oręziak, Dariusz K. Rosati (red. nauk.), *Kryzys finansów publicznych*, Warszawa 2013.
50. Maciej Rogalski, *Świadczenie usług telekomunikacyjnych*, Warszawa 2014.
51. Dariusz Rosati (red. nauk.), *Gospodarka oparta na wiedzy. Aspekty międzynarodowe*, Warszawa 2007.
52. Dariusz Rosati (red. nauk.), *Euro – ekonomia i polityka*, Warszawa 2009.
53. Grzegorz Rydlewski, Przemysław Szustakiewicz, Katarzyna Golat, *Udzielanie informacji przez administrację publiczną – teoria i praktyka*, Warszawa 2012.
54. Jacek Szymanderski, *Schyłek komunizmu i polskie przemiany w odbiorze społecznym*, Warszawa 2011.
55. Jacek Sierak, Kamila Lubańska, Paweł Wielądek, Marcin Sienicki, Tetiana Kononenko, Ryma Alsharabi, Malwina Kupska, Bartłomiej Rutkowski, Bogdan Olesiński, Remigiusz Górniak, *Efekty wykorzystania dotacji unijnych w ramach Regionalnych Programów Operacyjnych w latach 2007–2013. Cz. 1: Województwa Polski Północnej, Zachodniej i Południowej*, Warszawa 2016.
56. Jacek Sierak, Anna Karasek, Angelika Kucyk, Oleksandr Kornijenko, Marcin Sienicki, Anna Godlewska, Agnieszka Boczkowska, Albina Łubian, *Efekty wykorzystania dotacji unijnych w ramach Regionalnych Programów Operacyjnych w latach 2007–2013. Cz. 2: Województwa Polski Wschodniej i Centralnej*, Warszawa 2016.
57. Jerzy Wojtczak-Szyszkowski, *O obowiązkach osób świeckich i ich sprawach. Część szesnasta Dekretu przypisywanego Iwonowi z Chartres* (tłum. z jęz. łac.), Warszawa 2009.
58. Janusz Żarnowski, *Współczesne systemy polityczne. Zarys problematyki*, Warszawa 2012.

Oficyna Wydawnicza
Uczelni Łazarskiego
02-662 Warszawa, ul. Świeradowska 43
tel.: (22) 54 35 450
fax: (22) 54 35 392
e-mail: wydawnictwo@lazarski.edu.pl
www.lazarski.pl